

VIRTUAL REALITY: PMBR Past, Present and Future
2021 NOBC Midyear Meeting
February 12, 2021
2:30 p.m. – 3:45 p.m.

Table of Contents of Materials

(organized by length and year, with pdf bookmarks)

Prepared by Professor Laurel S. Terry (LTerry@psu.edu)
Penn State Dickinson Law

1. PMBR Resource List (with urls) [pdf. p.2]
2. PDFs of selected PMBR Pages
 - a. Colorado [pdf. p.4]
 - b. Illinois [pdf. p.6]
 - c. Iowa [pdf. p.8]
 - d. Nova Scotia [pdf. p.10]
 - e. ABA Center for Professional Responsibility PMBR Portal [pdf. p.12]
3. 3-page JOTWELL PMBR overview (Laurel Terry, *When it Comes to Lawyers... Is an Ounce of Prevention Worth a Pound of Cure?*, JOTWELL (July 13, 2016)(reviewing a Susan Fortney article about Australian PMBR results) [pdf. p.13]
4. Appendix showing PMBR “Self-Assessment” topics & other Terry article excerpts [pdf. p.16]
5. ABA PMBR Resolution #107 and Report (Adopted Aug. 2019) [pdf. p.27]
6. NOBC FAQ on Proactive Regulation, App. B: Examples of Proactive Regulation [pdf. p.46]
7. NOBC Proactive Regulation Subcommittee FAQ document (2017)[pdf. p.63]
8. Iowa Attorney Self-Assessment (March 2020) [pdf. p.78]

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Resource List

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Jurisdiction PMBR Pages (all of which contains a wealth of resources):

Colorado PMBP: <https://perma.cc/N2Q7-S585> links to
<http://www.coloradosupremecourt.us/AboutUs/PMBRMinutes.asp>

Illinois PMBR: <https://perma.cc/TP4M-J936> links to
https://registration.iardc.org/attysreg/LMS_Link/pathlms_prelogin?pathPage=%2Fiarde%2Fcourses%2F15664

Iowa PMBR: <https://perma.cc/RE3P-7XVM> and <https://perma.cc/2TV5-67SA> link to
<https://www.iowacourts.gov/opr/attorneys/attorney-practice/practice-information/pmbr-in-iowa/> &
https://www.iowacourts.gov/static/media/cms/Iowa_PMBR_Comprehensive_SelfAssessm_565AA639DF4FA.pdf

Nova Scotia Self-Assessing your Law Firm [MSLEP]: <https://perma.cc/DUT7-X9CK> links to
<https://nsbs.org/legal-profession/your-practice/practice-support-resources/mselp/>

Additional Canadian & Australian resources: *see* the ABA CPR's International PMBR
Resources page: <https://perma.cc/4EH9-ER3D> links to
https://www.americanbar.org/groups/professional_responsibility/scpd_cpr_pmbr_web_resource/international_resources/

NOBC and ABA Resources:

ABA PMBR Resolution #107 and Report (Adopted Aug. 2019): <https://perma.cc/Z7AS-ERTT>
links to https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/107-annual-2019-adopted.pdf

ABA Center for Professional Responsibility PMBR Portal: <https://perma.cc/8D6Y-YED7>
links to https://www.americanbar.org/groups/professional_responsibility/scpd_cpr_pmbr_web_resource/

NOBC Proactive Regulation Subcommittee & FAQ document, including Appendices A & B:
<https://perma.cc/DP27-XC8M> (NOBC 2017 Proactive Regulation FAQ document) and
<https://perma.cc/3LZT-J5UF> (Appendix A- resources), and <https://perma.cc/VW9F-FEST>
(Appendix B, a 17-page list of examples)

See also this ~2017 NOBC Entity Regulation FAQ document: <https://perma.cc/SP5V-TW2H>

Selected Additional PMBR Articles, CLE, and Workshop Materials:

Mark Weber (NE), PMBR slides in a CLE session (Sept. 2020): <https://perma.cc/WT4T-N9GZ>

VT Bar Counsel Unofficial Blog, *The Future of Attorney Regulation is Proactive*. (Aug. 2019), <https://perma.cc/B9NU-CNX7>

Concluding Session of PMBR Workshop #1: <https://perma.cc/8H6W-VHZF>

Minutes from PMBR Workshop #1 (May 2015): <https://perma.cc/46A8-K52V>

Minutes from a PMBR Workshop #2 (June 2016): <https://perma.cc/GK3C-ACZ4>

Minutes from an ABA-sponsored PMBR Discussion (Oct. 2016): <https://perma.cc/XKU3-E2EA>

Minutes from PMBR Workshop #3 (June 2017): <https://perma.cc/YN4U-VV2X>

Agenda from Feb. 2020 NOBC PMBR Roundtable: <https://perma.cc/A87F-T2WC>

Selected Articles:

3-page Overview:

Laurel Terry, *When it Comes to Lawyers... Is an Ounce of Prevention Worth a Pound of Cure?*, JOTWELL (July 13, 2016) (reviewing 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)), <https://perma.cc/P5TT-FU9L>

Longer articles:

Susan Saab Fortney, *Keeping Lawyers' Houses Clean: Global Innovations to Advance Public Protection and the Integrity of the Legal Profession*, 33 Georgetown J. Legal Ethics 891 (2020), <https://perma.cc/3Q45-SWFQ> (includes additional Fortney citations)

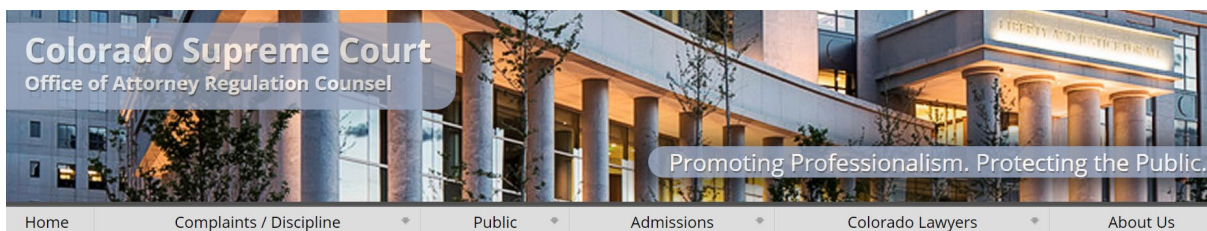
Annie Simkus, *Preventing Data Breaches at Law Firms: Adapting Proactive, Management-Based Regulation To Law-Firm Technology*, 59 Az. L. Rev. 1111 (2017), <https://perma.cc/5SZ9-QNM2>

Laurel 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), <https://perma.cc/J3B2-JK9G> (Appendix 2 lists the topics in various Self-Assessments)

See also:

ABA Model Regulatory Objectives for the Provision of Legal Services, Resolution 105 (Feb. 2016): <https://perma.cc/QP3E-CAFD> linked from https://www.americanbar.org/content/dam/aba/directories/policy/midyear-2016/2016_hod_midyear_105.docx (Adopted resolution, as amended, and report)

Laurel S. Terry, *Examples of Regulatory Objectives for the Legal Profession* (Updated 2019), https://works.bepress.com/laurel_terry/89/ (Compilation of examples of regulatory objectives)



Colorado Lawyer Self-Assessment Program Checklists

[Small Firm Business Manual and Risk Management Checklist](#)

[Small Firm Client Engagement Checklist](#)

[Small Firm Staff Procedures Checklist](#)

[Sole Practitioner Business Manual and Risk Management Checklist](#)

[Sole Practitioner Client Engagement Checklist](#)

[Sole Practitioner Staff Procedures Checklist](#)

[Employee Termination or Resignation Checklist](#)

Proactive Management-Based Program (PMBP) Materials

Colorado

[Colorado Lawyer Self-Assessment Program Resource Bibliography](#)

Karen Hammer, [Proactively Manage the Financial Risks of Ethics Violations](#), Boulder County Bar Ass'n E-Newsletter (Boulder, CO), February 2018, at 1.

Cecil Morris, [Colorado's New Lawyer Self-Assessment Program](#), Trial Talk (Dec./Jan. 2018).

Jonathan White, [Self-Assessment Program Aims to Enhance Lawyer Competency and Client Satisfaction](#), 46:9 Colo. Law. 10 (2017).

["Subcommittee Turns to Proactive Regulation," OARC Update, Winter 2016](#)

Proactive Management-Based Programs: Other Jurisdictions

[National Organization of Bar Counsel \(NOBC\) Proactive Regulation FAQs](#)

- This document includes the FAQs, [Appendix A](#), which lists PMBR resources, and [Appendix B](#), which lists "Innovative Programs used in U.S. and Canadian Jurisdictions".

[National Organization of Bar Counsel Entity Regulation FAQs](#)

The NOBC has a [Global Resources page](#); the ["Entity Regulation" link](#) on that page provides more information about proactive management-based regulation (PMBR) and the related concepts of proactive regulation and entity regulation.

International regulator webpages relevant to PMBP

- [Nova Scotia](#)
- [New South Wales](#)
- [Law Society of Ontario](#)
- [Law Society of British Columbia](#)

PMBP Law Journal Articles

Susan S. Fortney, [Designing and Improving a Systems of Proactive Management-Based Regulation to Help Lawyers and Protect the Public](#), J. Prof'l Law (2016).

Susan S. Fortney, [Promoting Public Protection through an "Attorney Integrity" System: Lessons from the Australian Experience with Proactive Regulation System](#), 23 Prof. Law. 16 (2015).

Susan S. Fortney, [Preventing Legal Malpractice and Disciplinary Complaints: Ethics Audits as a Risk-Management Tool](#), Bus. Law Today, March 2015 (ethics column).

Susan S. Fortney, [The Role of Ethics Audits in Improving Ethical Conduct in Law Firms: An Empirical Examination](#), 4 St. Mary's J. Legal Mal. & Ethics 112 (2014).

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).

Amy Salyzyn, [From Colleague to Cop to Coach: Contemporary Regulation of Lawyer Competence](#), 94 Can. Bar Rev. ____ (2017) (forthcoming).

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).

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).

Laurel S. Terry, [When it Comes to Lawyers... Is an Ounce of Prevention Worth a Pound of Cure?](#), JOTWELL (July 13, 2016).

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) (this note discusses using Rule 5.1 to encourage proactive management programs).

Laurel S. Terry, [Why Your Jurisdiction Should Consider Jumping On The Regulatory Objectives Bandwagon](#), 22(1) Prof. L. 28 (2013).

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).

Laurel S. Terry, [Trends in Global and Canadian Lawyer Regulation](#), 76 Saskatchewan L. Rev. 145 (2013).

Laurel S. Terry, Steve Mark, Tahlia Gordon, [Adopting Regulatory Objectives for the Legal Profession](#), 80 Fordham L. Rev. 2685 (2012).

Colorado PMBP webpage: <https://perma.cc/N2Q7-S585> links to
<http://www.coloradosupremecourt.us/AboutUs/PMBRMinutes.asp>

Illinois PMBR: <https://perma.cc/TP4M-J936> links to

https://registration.iardc.org/attyreg/LMS_Link/pathlms_prelogin?pathPage=%2Fiardc%2Fcourses%2F15664



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ARDC HOME ARDC REGISTRATION DEPARTMENT [ONLINE LEARNING PORTAL](#) CLE PMBR SUPPORT

PMBR Rule - Illinois Supreme Court Rule 756(e)

PMBR FAQs

Proactive Management Based ...

Proactive Management Based Regulation (PMBR) Self-Assessment Program



PMBR (2020-2021) Modules:

[Social Media & the Practice of Law](#)

[Civility](#)

[Record Retention](#)

[Conflicts of Interest: Informed Consent](#)

[Practice Management Software Alternatives](#)

[Time & Billing](#)

[Securing Communications](#)

To learn more about PMBR in Illinois, watch the introductory video.

Program Requirement

In accordance with [Illinois Supreme Court Rule 756\(e\)](#) (Disclosure of Malpractice Insurance), every two years, Illinois lawyers who represent at least one private client and do not report that they maintain malpractice insurance are required to complete the Proactive Management Based Regulation (PMBR) Self-Assessment Program or obtain malpractice insurance and report that fact, as a requirement of registering in the year following.

Questions? Send questions regarding the content of this Program to the ARDC Education Department at education@iardc.org. For guidance on the Rules of Professional Conduct, call the ARDC Ethics Inquiry Program at (312) 565-2600 (Chicago) or (217) 546-3523 (Springfield).

Accessibility - The ARDC is committed to facilitating digital accessibility for people with disabilities. We are continually improving the user experience for everyone, and applying the relevant accessibility standards. For blind or visually impaired lawyers, we have the PMBR (2020-2021) Program in a format compatible with screen reader technology. Please contact the ARDC Education Department at education@iardc.org to receive this format of the Program.

REQUIRED TO TAKE PMBR?

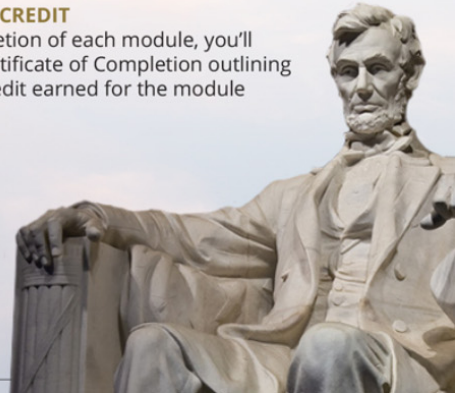
Follow these 6 simple steps:

- 1 COMPLETE PMBR MODULE**
PMBR (2020-2021) is made up of 7 e-learning modules. Complete all 7 modules and earn a total of four-hours of free MCLE credit.
- 2 TAKE ASSESSMENT**
Our assessments are short, no more than 5 questions, and help reinforce what you just learned.
- 3 FILL OUT MODULE SURVEY**
We value your feedback! Complete a short survey so we can improve our PMBR offerings.
- 4 EARN MCLE CREDIT**
Upon completion of each module, you'll receive a Certificate of Completion outlining the MCLE credit earned for the module completed.
- 5 FILL OUT PMBR SURVEY**
Share your thoughts about the PMBR Program, so we can learn how the Program can better assist you in practicing law.
- 6 PMBR PROGRAM CERTIFICATE**
Upon completion of all 7 modules, you'll receive a PMBR Program Certificate representing fulfillment of your PMBR (2020-2021) requirement.

NOT REQUIRED TO TAKE PMBR, BUT WANT FREE CLE?

Follow these 4 simple steps:

- 1 COMPLETE PMBR MODULE**
PMBR (2020-2021) is made up of 7 e-learning modules. All Illinois lawyers can complete each module for free MCLE credit.
- 2 TAKE ASSESSMENT**
Our assessments are short, no more than 5 questions, and help reinforce what you just learned.
- 3 FILL OUT SURVEY**
We value your feedback! Complete a short survey so we can improve our online CLE offerings.
- 4 EARN MCLE CREDIT**
Upon completion of each module, you'll receive a Certificate of Completion outlining the MCLE credit earned for the module completed.



Social Media & the Practice of Law

Section: 1 Assessment 3 SCORMs 1 Certificate 1 Survey



Civility

Section: 1 Assessment 4 SCORMs 1 Certificate 1 Survey



Record Retention

Section: 1 Assessment 1 SCORM 1 Certificate 1 Survey



Conflicts of Interest: Informed Consent

Section: 1 Assessment 2 SCORMs 1 Certificate 1 Survey



Practice Management Software Alternatives

Section: 1 Assessment 1 SCORM 1 Certificate 1 Survey



Time & Billing

Section: 1 Assessment 4 SCORMs 1 Certificate 1 Survey



Securing Communications

Section: 1 Assessment 1 SCORM 1 Certificate 1 Survey

Attorney Registration Number**:

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Password***:

[Reset My Password](#) ?

[Sign In](#)

IMPORTANT: Your credentials to the Online Learning Portal have changed. Your credentials are now the same as the credentials used annually to access the ARDC Online Registration Program.

** Illinois Attorneys: You can find your Attorney Registration Number on your ID card.

Non-Illinois Attorneys: Use the ID number provided to you for accessing the ARDC Online Learning Portal. To receive an ID number for accessing the ARDC Online Learning Portal contact the Education Department at education@iardc.org or (312) 565-2600.

*** If you don't know your password, please click the 'Reset My Password' link above.

Iowa PMBR: <https://perma.cc/RE3P-7XVM> and <https://perma.cc/2TV5-67SA> link to <https://www.iowacourts.gov/opr/attorneys/attorney-practice/practice-information/pmbr-in-iowa/> & https://www.iowacourts.gov/static/media/cms/Iowa_PMBR_Comprehensive_SelfAssessm_565AA639DF4FA.pdf

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OPR PMBR

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Thank you to take the time to share with us your thoughts on the [Iowa Attorney Self-Assessment](#). Please note that this is not a formal request by the Iowa Supreme Court for public comment on a rule change adopting the self-assessment or making it mandatory upon Iowa's attorneys. Rather it is an attempt to get feedback from Iowa's lawyers on the questions set forth in the self-assessment to ensure that they are as comprehensive as possible.

Attorney Self-Assessment



Iowa Supreme Court
Attorney Disciplinary Board
March 2020

Comprehensive Attorney Self-Assessment Questionnaire¹

This self-assessment questionnaire lists objectives with indicative criteria to assist the attorney in addressing each objective and/or implementing appropriate measures in the attorney's practice. It is a tool to help attorneys with their professional development both by giving attorneys an opportunity to engage in self-examination and by providing resources to assist attorneys in developing workable solutions to common challenges. The questionnaire is designed to increase competence and efficiency, mitigate risk, and enhance the quality of legal services provided to clients by focusing on preventing problems before they arise.²

Not every question applies to every law practice, so it is acceptable to skip a question if it is not applicable. Please note that this questionnaire references some educational resources more than once because they address a variety of professionalism topics.

I.	COMPETENCE.....	2
II.	COMMUNICATION	6
III.	CONFIDENTIALITY	9
IV.	CONFLICTS OF INTEREST.....	12
V.	RECORDS MANAGEMENT.....	15
VI.	STAFF & OFFICE MANAGEMENT.....	18
VII.	FINANCIAL MANAGEMENT	22
VIII.	ACCESS TO JUSTICE & CLIENT DEVELOPMENT	28
IX.	WELLNESS & INCLUSIVITY.....	31

¹ This questionnaire is adapted with permission from “Colorado Consolidated Lawyer Self-Assessment,” published by the Proactive Management-Based Program Subcommittee of the Colorado Supreme Court Office of Attorney Regulation Counsel.

² The Attorney Disciplinary Board will attempt to keep this document current at all times, but attorneys should ensure that they consult the latest versions of all Court Rules and review recent caselaw. This document is not intended to be an “advisory opinion” under Court Rule 34.7 and is not legal advice. Attorneys may ensure that they are using the latest version of the self-assessment tool by contacting the Board directly at 515-348-4680.

I. COMPETENCE

Iowa Rule of Professional Conduct 32:1.1 requires lawyers to provide competent representation to clients. Competence encompasses the requisite legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A lawyer should consider issues of competence when (1) accepting a new matter or (2) substantively or procedurally expanding an existing matter.

Question	Yes	No	Ethical Implications	Additional Resources
When taking on a new matter, do you assess whether you have the legal knowledge and education to handle the matter?				
Does your assessment include:				
1. Whether you are familiar with the applicable governing law?			A lawyer cannot delegate the duty of competence to the client. See <i>In re Shipley</i> , 135 S. Ct. 1589, 1589–90 (2015).	Alan Gutterman, Practical Challenges of Meeting Your Duties of Competence and Diligence to Your Clients , LEGAL SOLUTIONS BLOG (THOMSON REUTERS) (July 18, 2016).
2. Whether you are familiar with the governing procedural rules?				
3. Whether you are familiar with any recent changes in applicable substantive or procedural law?			A lawyer must not charge a client fees for excessive time spent achieving competence. See IRPC 32:1.5; see also <i>In re Estate of Larson</i> , 694 P.2d 1051, 1059 (Wash. 1985) (en banc).	Christopher Sabis & Daniel Webert, <i>Understanding the “Knowledge” Requirement of Attorney Competence: A</i>
4. Whether you are familiar with the factual context and subject matter?				
5. Whether you are familiar with the governing Rules of Professional Conduct?				



NOVA SCOTIA BARRISTERS' SOCIETY

Self-Assessing your Law Firm (MSELP)

Approximately every three years, law firms (including sole practices) review and assess their Management Systems for Ethical Legal Practice (MSELP).

The **self-assessment program** is a central feature of the Society's '**Triple P**' (**proactive, principled and proportionate**) approach to regulating law firms. The primary goal of the self-assessment is educational.

It asks you to examine your practice management systems and evaluate the extent to which your practices (i.e. policies, processes, and ways of doing things – both written and unwritten) support core areas of professional, ethical firm practice.

There are three main components:

1. **The online Self-Assessment Tool ("SAT"):** The mandatory portion of the self-assessment program, which sole practitioners and lawyers complete every three years (Regulations 4.6 & 8.3)
2. **The MSELP Workbook:** An additional and optional tool designed to assist lawyers and firms who want to engage more deeply in the self-assessment exercise. **The workbook is not submitted to the Society – it is for your use only and can be a useful practice tool outside of the self-assessment process.** It includes direct links to many online practice tools and resources.
3. **Follow up and Legal Services Support:** After completing your self-assessment, Legal Services Support will follow up and direct you to tools and resources that might help in addressing any identified priority areas for development.

MSELP Documents & Resources

[MSELP Workbook](#)

[MSELP FAQs](#)

[MSELP Instructions](#)

Resource Portal

One of the benefits of the self-assessment program is the Society's **Resource Portal**. This portal is a growing, shared community of practice resources.



Resource Portal

These resources, compiled from the Management System for Ethical Legal Practice (MSELP) Self-Assessment Tool and the MSELP Workbook, will help as you reflect upon and improve your processes and the systems that impact the quality of your legal services delivery.

Element 1: Maintaining appropriate file and records management systems

+

Element 2: Communicating in an effective, timely and civil manner

+

Element 3: Ensuring confidentiality

+

Element 4: Avoiding conflicts of interest

+

Element 5: Developing competent practices

+

Element 6: Ensuring effective management of the legal entity and staff

+

Element 7: Charging appropriate fees and disbursements

+

Element 8: Sustaining effective and respectful relationships with clients, colleagues, courts, regulators and the community

+

Element 9: Working to improve diversity, inclusion and substantive equality

+

Element 10: Working to improve the administration of justice and access to legal services

+

Questions & Support?

Contact the Society's **Legal Services Support** at any time to discuss **MSELP** and your practice support needs at LSS@nsbs.org.



SCPR CPR PMBR Web Resource

The world of lawyer regulation is changing. The ABA Standing Committee on Professional Regulation and Center for Professional Responsibility are keeping their “fingers on the pulse” of these changes and educating the profession about them.

One of these developments is Proactive Management-Based Regulation (PMBR). PMBR generally refers to regulatory measures or other programs that seek to assist lawyers and law firms develop ethical infrastructures that will help improve the delivery of legal services and help prevent misconduct and malpractice. To provide information and guidance about this subject, the Standing Committee on Professional Regulation compiled these resources that include information about domestic and international PMBR developments. As these resources suggest, PMBR is not a “one-size-fits-all” proposition. Some PMBR programs involve entity regulation and others do not. In the U.S., Colorado and Illinois have adopted PMBR programs, and a number of other jurisdictions are actively studying whether and how to do so. We hope these resources help you better understand the developments and the possibilities for implementing proactive measures.

If you have any questions regarding the information on these pages, please contact [Ellyn S. Rosen](#), Regulation and Global Initiatives Counsel.

Policies

- [ABA Policies Relevant to PMBR](#)

Workshops

- [PMBR Workshops for Regulators](#)

To date, three one-of-a-kind PMBR Workshops have been held to educate and energize lawyer regulators about this subject, with future events directed at broader audiences being planned. Stay tuned for additional information under this tab about those events.

Thank you to the Planning Committee for these successful Workshops and upcoming events: James C. Coyle, Attorney Regulation Counsel Colorado Supreme Court; Margaret Drent, Policy Counsel for the Law Society of Upper Canada; Susan Saab Fortney, Professor at the Texas A&M University School of Law; Tracy L. Kepler, Director of the ABA Center for Professional Responsibility; Darrel I. Pink, Immediate Past Executive Director of the Nova Scotia Barristers’ Society; Ellyn S. Rosen, Regulation and Global Initiatives Counsel for the ABA Center for Professional Responsibility, and Laurel S. Terry, Professor at Penn State Dickinson Law.

U.S. PMBR Programs

- [U.S. Jurisdictions with PMBR](#)

More U.S. Resources

- Click [here](#) to learn more about what is happening in the U.S. regarding PMBR.

International Resources

- [International PMBR Resources](#)

Articles

- [Law Journal Articles About PMBR](#)

When it Comes to Lawyers... Is an Ounce of Prevention Worth a Pound of Cure?

<http://legalpro.jotwell.com/when-it-comes-to-lawyers-is-an-ounce-of-prevention-worth-a-pound-of-cure/>

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).



[Laurel Terry](#)

Ben Franklin is famous for saying “an ounce of prevention is worth a pound of cure,” but there are lots of similar messages. We are told to “measure twice and cut once” and to “look before you leap” and that “a stitch in time saves nine.” But what about lawyer regulation? Does this same message hold true? Until recently, the answer in the United States might have been no. Most of those who regulate U.S. lawyers have traditionally focused on responding – with discipline or another sanction – *after* a problem arose.

This situation is finally starting to change in the United States. Because I consider proactive lawyer regulation to be a very positive development, Professor Susan Fortney’s recent article entitled *Promoting Public Protection* is one of the articles that I now regularly cite and recommend to those with whom I speak. Although *Promoting Public Protection* is a condensed version of a [longer article](#) coauthored by Professor Fortney, I often recommend the *Promoting Public Protection* article because it is succinct, yet does a wonderful job of conveying information about the important empirical and theoretical work that has been done about proactive management-based regulation, or PMBR. ([PMBR](#) is a term that originally was coined by Professor Ted Schneyer.)

Professor Fortney’s article begins by describing developments in New South Wales, Australia that led one of its regulators to develop a regulatory system that included proactive regulation for law firms that chose to practice as incorporated law practices (ILPs). Her article explains that the heart of New South Wales’ proactive approach was a self-assessment form that the legal practice director in each ILP was required to complete.

In the second part of her article, Professor Fortney describes an empirical study that has generated worldwide attention. After the New South Wales regulator created the ILP self-assessment form and process, the regulator collaborated with Professor Christine Parker to allow her to study the results of the ILP self-assessment process. The resulting [study](#) found that there had been a dramatic reduction in client complaints, including the finding that the complaints rate for practitioners in incorporated firms went down by two thirds after the firms completed their initial self-assessment forms and the finding that the complaints rate for firms that completed the self-assessment process was one third of the number of complaints registered against non-incorporated legal practices that had never completed the self-assessment process.

These Australian developments, which Professor Fortney describes in the first two sections of *Promoting Public Protection*, provided the backdrop for her own empirical study that is described in detail in her longer article

and that is summarized in her *Promoting Public Protection* article. Professor Fortney’s study explored the issue of *why* there had been such a dramatic reduction in client complaints among the Australian ILP firms that had used the self-assessment process. As *Promoting Public Protection* reports, Professor Fortney found that almost three quarters of the firms that conducted 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 taken by the firms, there was no significant difference related to firm size and steps taken.”

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	06%

One additional finding that is noteworthy but is not included in this table 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.’” The article also reports that in their text entries, seventy-eight percent of the respondents described positive changes in their impressions of the self-assessment process.

The third section of *Promoting Public Protection* identifies a number of specific steps that regulators and bars could take in order to encourage firms to develop systems as part of a risk-management and practice-improvement program. For example, Professor Fortney recommends that regulators revise their procedural rules to allow for more diversion referrals if the facts suggest that the complaint involves minor misconduct related to practice management concerns. She also recommends that bar leaders create incentives for lawyers to devote time and resources to serious examination of their practices. The concluding section of her article urges the

adoption of a proactive management-based approach to regulation – which Fortney calls an attorney integrity system – in order to transform the relationship between lawyers and regulators.

One of the reasons why I recommend this article whenever I can is my belief that the United States may be close to a tipping point on the issue of proactive lawyer regulation. There is growing momentum in the United States to move to a more proactive system of lawyer regulation. For example, on June 4, 2016, regulators and others from Canada and the United States attended the Second Workshop on Proactive, Management-Based [Lawyer] Regulation. This second workshop built on the [work done](#) in 2015 at the first such workshop and included discussions of the proactive efforts of regulators such as those in [Nova Scotia](#) and the Colorado Supreme Court's [Office of Attorney Regulation Counsel](#). To provide one small but important example, when a Colorado lawyer leaves a large firm or government practice to go into a solo or small firm practice, he or she receives an email from Attorney Regulation Counsel Jim Coyle congratulating that lawyer on the move and advising that the lawyer will now be encountering issues that he or she did not previously have to handle. The email offers help and also includes links to resources such as Colorado's Trust Account School and its Self-Audit Checklist. Developments such as these are discussed in a regularly-updated [FAQ document](#) prepared by the National Organization of Bar Counsel ([NOBC](#)).

Although I agree with Professor Fortney's thesis that a PMBR regulatory approach, which she describes in the latter sections of her article, is useful, I am willing to settle for the "P," or proactive, part of PMBR regulation. As my [forthcoming](#) article on proactive regulation argues and as the Colorado email example cited above illustrates, proactive regulation can have a significant positive impact, even in the absence of a PMBR system that regulates entities. I hope that the U.S. will move away from its current system in which proactive lawyer regulation seems to happen on an ad hoc basis, rather than as a result of a deliberate decision, such as Nova Scotia's decision to adopt a ["Triple P" approach to regulation](#) in which proactive regulation is an integral part of its system of lawyer regulation. I hope that *Promoting Public Protection*, along with other work by [Professor Fortney](#) and [others](#), will lead jurisdictions to make a commitment to develop a systematic approach to proactive lawyer regulation. Jurisdictions might want to follow the lead of the Colorado Supreme Court, which added a [preamble](#) to its rules governing the practice of law that identified Colorado's regulatory goals. These goals explicitly refer to proactive regulation and include, *inter alia*, "Enhancing client protection and promoting consumer confidence through [specified programs] *and other proactive programs*; Assisting providers of legal services in maintaining competence and professionalism through [specified programs] *and other proactive programs*; [and] Helping lawyers throughout the stages of their careers successfully navigate the practice of law and thus better serve their clients [through specified programs] *and other proactive programs*" (emphasis added).

In sum, I think that if U.S. jurisdictions decided that the time had come to adopt a comprehensive and systematic approach to lawyer regulation, everyone – lawyers, clients, and the public – would be better off. I recommend Susan Fortney's *Promoting Public Protection* article because I believe that the research she conducted shows *why* proactive regulation is effective and because I think that her article can help the U.S. realize that, in lawyer regulation as elsewhere, an ounce of prevention is worth a pound of cure.

Cite as: Laurel Terry, *When it Comes to Lawyers... Is an Ounce of Prevention Worth a Pound of Cure?*, JOTWELL (July 13, 2016) (reviewing 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)), <http://legalpro.jotwell.com/when-it-comes-to-lawyers-is-an-ounce-of-prevention-worth-a-pound-of-cure/>.

APPENDIX 3: A COMPARISON OF THE TOPIC HEADINGS IN
SELECTED SELF-ASSESSMENT TOOLS²⁶⁸

	New South Wales	Nova Scotia	CBA	Colorado	Relevant ABA Model Rule
Competence	Yes (#1)	Yes (#1)	Yes (#1)	Yes (#1)	1.1
Communication	Yes (#2)	Yes (#2)	Yes (#2)	Yes (#2)	1.3
Diligence/Delay	Yes (#3)	Yes (#1 & 2) [competent, timely]	Not explicitly	Yes (#1 & 2) [competent, timely]	1.4
Confidentiality	Not explicitly	Yes (#3)	Yes (#3)	Yes (#3)	1.6, 1.9, 1.18
Conflicts	Yes (#6)	Yes (#4)	Yes (#4)	Yes (#4)	1.7–1.13
Billing/Fees	Yes (#5)	Yes (#7)	Yes (#6)	Yes (#7)	1.5
Money Handling– Trust Accounts	Yes (#10)	Not explicitly (but see ##1, 5, & 7)	Yes (#5)	Yes (#8)	1.15
Staff Supervision	Yes (#9)	Yes (#6)	Yes (#8)	Yes (#6)	5.1–5.3
Access to Justice– legal services	Not explicitly	Yes (#10)	Yes (##9– 10)	Yes (#9)	6.1 & 6.2
File management– Liens-transfers	Yes (##4&6)	Yes (#5)	Yes (#5, pt. 2)	Yes (#5)	Not explicitly; <i>cf.</i> Rule 1.1, 1.15
Other	Compliance with Undertakings #8	Effective and respectful relationships, etc. (#8); Working to improve diversity, inclusion and substantive equality (#10)	Hiring (#7)	Wellness and Inclusivity (#10)	<i>Cf.</i> Rule 4.4 regarding relationships

Excerpts from 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), available at https://works.bepress.com/laurel_terry/64/

²⁶⁸ Where a topic is listed as “not explicitly,” it does not mean that the topic does not appear at all in a self-assessment. Some of the issues listed as “not explicitly” appear in the form of subheadings or questions under the main topic. This list identifies whether this subtopic is one of the first-level categories of issues addressed.

This article can be cited as 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). It is available on my Selected Works page at https://works.bepress.com/laurel_terry/64/

ARTICLES

THE POWER OF LAWYER REGULATORS TO INCREASE CLIENT & PUBLIC PROTECTION THROUGH ADOPTION OF A PROACTIVE REGULATION SYSTEM

by
Laurel S. Terry*

This Article focuses on those who regulate U.S. lawyers. The Article argues that the lawyers who head regulatory bodies in the United States have the ability to adjust the focus of the regulator for which they work in a way that will increase client and public protection. The Article further argues that it is appropriate for lawyers in these positions to exercise this power and that they should do so. The Article concludes by offering two concrete recommendations.

The first recommendation is that those who are in charge should, upon reflection, adopt a mindset in which they recognize that the regulator should be systematically trying to prevent problematic behavior by lawyers, as well as responding to such behavior after it occurs. The second recommendation is that regulators should take advantage of a tool they already have at their disposal, which is their state's equivalent to ABA Model Rule of Professional Conduct 5.1. If jurisdictions added two ques-

* Harvey A. Feldman Distinguished Faculty Scholar and Professor of Law, Pennsylvania State University—Dickinson Law. The author would like to thank Deb Armour, Jim Coyle, Margaret Drent, Susan Fortney, Cori Gitter, Tahlia Gordon, Alison Hook, Darrel Pink, Crispin Passmore, Victoria Rees, Ellyn Rosen, and Ted Schneyer for their assistance with this Article; all views, however, are solely those of the author. She would also like to thank research assistants Mingjie Gan and Ellen McCleneghan, and the participants of the First Annual Proactive Risk-Based Workshop held in Denver in May 2015. The author can be reached at LTerry@psu.edu. The URLs in this Article were accurate as of June 30, 2016.

tions about Rule 5.1 to lawyers' annual bar dues statement, along with a link to additional online resources, they would be able to emulate actions that have been taken in Australia and Canada. The data suggest that such steps could dramatically reduce client complaints, lead to improved client service, and change the ways in which lawyers operate their law practices.

INTRODUCTION	718
I. BACKGROUND INFORMATION ABOUT LAWYER REGULATORY BODIES IN THE UNITED STATES.....	719
II. GLOBAL EXAMPLES OF PROACTIVE LAWYER REGULATION.....	724
III. DEVELOPING A MORE SYSTEMATIC AND COMPREHENSIVE APPROACH TO PROACTIVE U.S. LAWYER REGULATION	754
A. <i>The Underdeveloped Middle Stage of Lawyer Regulation</i>	754
B. <i>U.S. Examples of Ad Hoc Proactive Middle Stage Lawyer Regulation</i>	756
C. <i>The Need to Develop a More Comprehensive Approach to Proactive Regulation</i>	762
IV. TWO SUGGESTIONS FOR LAWYERS WHO LEAD LAWYER REGULATORY BODIES	763
A. <i>Include Proactive Middle Stage Regulation as Part of the Regulator's Mission</i>	763
B. <i>Use Ethics Rule 5.1 to Create a More Proactive Regulatory System</i>	765
V. RESPONDING TO ANTICIPATED CRITIQUES	770
VI. OTHER CONTEXTS IN WHICH PREVENTATIVE ACTION HAS BEEN EFFECTIVE	777
CONCLUSION	781
APPENDIX 1: SUMMARY OF ABA DATA REGARDING STATE IMPLEMENTATION OF MODEL RULE 5.1(a) AND SAMPLE BAR DUES QUESTIONS	783
APPENDIX 2: ISSUES IDENTIFIED IN SELECTED SELF-ASSESSMENT TOOLS	784
APPENDIX 3: A COMPARISON OF THE TOPIC HEADINGS IN SELECTED SELF-ASSESSMENT TOOLS	786
APPENDIX 4: EXCERPTS FROM SELECTED SELF-ASSESSMENT TOOLS	787
APPENDIX 5: A SUMMARY OF INFORMATION PREPARED BY THE ABA REGARDING LAWYER REGULATORS	798

INTRODUCTION

This Article is directed toward those who regulate the U.S. legal profession. The thesis of this Article is that those who lead these types of regulatory bodies can have a profound impact on the ways in which the regulators function. This Article suggests that these individuals should use their influence to steer the regulatory body they oversee towards a more comprehensive approach to proactive lawyer regulation. The Arti-

cle argues that a proactive approach to lawyer regulation is desirable because it would increase client and public protection by preventing problematic lawyer behavior before it occurs, in addition to responding to such behavior after it occurs.

Section I begins by providing background information about the lawyer regulatory bodies that are the subject of this Article. Section II reviews examples of proactive lawyer regulation outside of the United States and data that suggests that this type of proactive regulation has had a positive impact on clients and the public. Section III argues for a more systematic and comprehensive U.S. approach to proactive lawyer regulation. It begins by providing a structure that one can use to think about lawyer regulation. It continues by identifying U.S. examples of proactive lawyer regulation, but suggests that the U.S. approach has generally been ad hoc rather than systematic. This Section argues that it is appropriate for regulatory bodies—and those who are in charge of them—to adopt a comprehensive approach to proactive lawyer regulation. Section IV recommends that those who lead lawyer regulatory bodies take the necessary steps to develop a commitment to proactive regulation in which the regulator's mission is defined to include preventing problematic behavior by lawyers, as well as responding to such behavior after it arises. This Section also explains how regulators that want to employ a more proactive approach could—without any additional rule changes—adopt a more proactive approach to lawyer regulation. This Section suggests that regulators use ethics Rule 5.1 more creatively than they currently are doing. Section V responds to anticipated criticisms. Section VI offers examples of other contexts in which preventive work has been shown to produce results and be cost-effective.

I. BACKGROUND INFORMATION ABOUT LAWYER REGULATORY BODIES IN THE UNITED STATES

¹ *About Us*, LEGAL SERVICES BOARD, http://www.legalservicesboard.org.uk/about_us/index.htm. See generally 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) (addressing trends regarding “who” regulates lawyers).

B. U.S. Examples of Ad Hoc Proactive Middle Stage Lawyer Regulation

After reading the prior paragraph, NOBC members might respond by noting that they do more than impose penalty-based, reactive, end stage regulation. There are many ways in which state lawyer regulators *already* act proactively in an effort to prevent future problems and thus better protect clients and the public. Regulators might point to the items listed below as examples of practices that might be characterized as pro-active regulation since these practices are intended to prevent problematic lawyer behavior rather than responding to problematic behavior after it arises:

- Ethics hotlines;¹⁶⁰

migrated/cpr/reports/impl_plan.authcheckdam.pdf.

¹⁵⁸ See *Links to Other Legal Ethics and Professional Responsibility Pages*, *supra* note 150; *State-by-State Jurisdiction Information*, NAT'L ORG. BAR COUNSEL, <http://nobc.org/index.php/jurisdiction-info/jurisdiction-info> (includes links to state rules on admission, ethics, and discipline). The term "front-line" regulator has become more common in the lawyer regulatory context as a result of the 2007 U.K. Legal Services Act which created the Legal Services Board, which was a new body created by the Act that is responsible for overseeing legal regulators in England and Wales including "front-line" regulators such as the Solicitors Regulation Authority. See Legal Services Act 2007, *supra* note 2.

¹⁵⁹ See *supra* notes 154 and 155 (citing materials from these organizations' webpages); see also Appendix 5 for information about U.S. regulators.

¹⁶⁰ See, e.g., *Ethics and Professionalism*, STATE BAR OF GA., <https://www.gabar.org/barrules/ethicsandprofessionalism/> ("Lawyers who would like to discuss an ethics dilemma with a member of the Office of the General Counsel

- Law practice management assistance;¹⁶¹
- Continuing legal education requirements;¹⁶²
- Bridge the gap, mentoring, professionalism, or other programs for newly admitted attorneys;¹⁶³
- Practice standards for specific subject matter or practice areas;¹⁶⁴
- Monitoring discipline data to determine topics for future proactive regulation;¹⁶⁵
- Using registration data or discipline data to determine type of outreach for particular kinds of lawyers;¹⁶⁶
- Emailed newsletters that contain proactive tips;¹⁶⁷ 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.¹⁶⁸

This is just a sample of things that “discipline” regulators already are doing in order to prevent problematic behavior by lawyers.¹⁶⁹ There un-

staff should contact the Ethics Helpline at [phone number]. . .”).

¹⁶¹ See, e.g., *Practice Management Advisory Service*, D.C. BAR, <https://www.dcbbar.org/bar-resources/practice-management-advisory-service/>.

¹⁶² See, e.g., *CLE Planner*, ST. BAR OF N.M. BAR BULL., Dec. 9, 2015, at 2, <http://www.nmbar.org/NmbarDocs/PubRes/BB/2015/BB120915.pdf> (listing the “Ethicspalooza Redux” CLE); *Minimum Continuing Legal Education*, OR. STATE BAR, <https://www.osbar.org/mcle>.

¹⁶³ See, e.g., STATE BAR OF GA., STATE BAR GOVERNANCE RULES HANDBOOK r. 8-104, <https://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=227>; *Information about TILPP for Other Bars*, STATE BAR OF GA., <http://www.gabar.org/membership/tilpp/other-bars.cfm>.

¹⁶⁴ See, e.g., *Resources*, OR. PROF’L LIABILITY FUND, <https://www.osbplf.org/services/resources.html> (includes links to “Checklists and practice aids for many areas of law” for members).

¹⁶⁵ See, e.g., Email from Wallace E. Shipp, Jr., Disciplinary Counsel, D.C. Office of Disciplinary Counsel, to the author (Jan. 25, 2016) (on file with the Lewis & Clark Law Review).

¹⁶⁶ See, e.g., Email from James Coyle, Attorney Regulation Counsel, Colo. Supreme Court, to the author (Jan. 19, 2016) (on file with the Lewis & Clark Law Review); Email from Maret Vessella, Chief Bar Counsel, State Bar of Ariz., to the author (Jan. 28, 2016) (on file with the author).

¹⁶⁷ See, e.g., *Attorney E-Newsletter*, DISCIPLINARY BD. SUP. CT. PA. (Jan. 2016), <http://www.padisciplinaryboard.org/attorneys/newsletter/>.

¹⁶⁸ See, e.g., Email from James Coyle, *supra* note 166. Excerpts from this email are reprinted in Appendix 4(d).

¹⁶⁹ In addition to the items discussed in notes 160–168 and accompanying text, jurisdictions are involved in activities that might be described as involving a combination of proactive and reactive steps. For example, some jurisdictions have a Central Intake or Consumer Assistance Programs that attempts to respond to concerns about lawyer behavior, even where discipline is not warranted. See, e.g., Email from James Coyle, *supra* note 166. Some jurisdictions have alternative resolution of fee disputes (i.e., fee arbitration or mediation), random trust account

doubtedly are many more examples. The ABA also has taken steps to promote proactive lawyer regulation. These include, *inter alia*, articles, websites, model rules, and benchmarking.¹⁷⁰

One noteworthy example of proactive regulation comes from Colorado. Lawyers who are licensed to practice law in Colorado are required to update their registration information within 30 days of a change in practice or physical address.¹⁷¹ When the Colorado Supreme Court Office of Attorney Regulation Counsel learns that a lawyer has moved from a government position or a position in a large law firm to a small firm or solo practice, the Colorado regulator sends an email to that former government or large firm lawyer to make that lawyer aware of resources that might help the transition.¹⁷² The Colorado regulator sends this email with resources and advice because lawyers who make these kinds of transitions likely will “face challenges in managing a private practice they likely did not face while working as government or large law firm attorneys.”¹⁷³ The resources that are referenced in this standard email include the Colorado self-audit checklist, Colorado’s trust account school, its “Hanging Your Shingle” seminar, a Lawyer Assistance Program, an Attorney Mentoring Program, and a list of online resources.¹⁷⁴

The examples listed above are proactive steps that undoubtedly may help some lawyers avoid problems. Despite these examples, my sense is that U.S. lawyer regulators have developed these types of proactive steps on a rather ad hoc basis. In my view, most U.S. regulators have not seen themselves as responsible for developing a *comprehensive* and *systematic*

audits, or monitoring of financial dealings (e.g., trust accounts, attorneys filing bankruptcy). *See generally* *Directories, Surveys and Resources*, A.B.A. CTR. PROF. RESP., http://www.americanbar.org/groups/professional_responsibility/committees_commissions/standingcommitteeonclientprotection/directoriesandsurveys.html (includes links to model rules and many state rules). Some states have diversion programs. *See* Fortney, *supra* note 38, at 131 (noting that 25 jurisdictions have diversion programs). For a discussion of Canadian actions that might be described as proactive, see Salyzyn, *supra* note 38, at 533–36.

¹⁷⁰ *See, e.g.*, THERESA M. GRONKIEWICZ, AM. BAR ASS’N, TWELVE TIPS TO HELP YOU AVOID DISCIPLINARY PROCEEDINGS 1 (2013), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/12_tips_avoid_disciplinary_proceedings_scpd_2013.authcheckdam.pdf; *Directories, Surveys and Resources* *supra* note 169; *Law Practice Division*, A.B.A., http://www.americanbar.org/groups/law_practice.html; *Solo and Small Firm Resource Center*, A.B.A., http://www.americanbar.org/portals/solo_home/solo_home.html.

¹⁷¹ *See* Email from James Coyle, Attorney Regulation Counsel, Colo. Supreme Court, to the author (July 22, 2015) (sample email and self-audit checklist attached) (on file with the Lewis & Clark Law Review). An excerpt from this email is reproduced in Appendix 4(d) to this Article, *infra*.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

approach to proactive regulatory systems in the same way that regulators in Australia and Canada have done or are contemplating.

Although most U.S. regulators have not yet embraced a comprehensive approach to proactive lawyer regulation, there is data to suggest that this situation might be starting to change. During her term as NOBC President, Tracy Kepler created four committees that were asked to examine global developments and share what they learned with NOBC members.¹⁷⁵ The documents prepared by these committees are now found on the public part of the NOBC's website under a new tab labelled "Global Resources."¹⁷⁶ The NOBC was sufficiently interested in proactive management based regulation (PMBR) that it created an "Entity Regulation" committee.¹⁷⁷ This committee is chaired by James Coyle, who is the Attorney Regulation Counsel for the Colorado Supreme Court.¹⁷⁸ The Entity Regulation committee not only has produced an FAQ document for NOBC members (and others), but it has made a commitment to keep that document updated.¹⁷⁹ While I believe that it is preferable to distinguish between proactive regulation and entity regulation,¹⁸⁰ the NOBC Entity Regulation FAQ document has a strong "proactive regulation" orientation. This document suggests that there might be growing interest in moving from an ad hoc approach to proactive regulation to a more comprehensive approach.

[article continues until Appendix 1 on p. 783]

¹⁷⁵ See *Global Resources*, NAT'L ORG. BAR COUNSEL, <http://www.nobc.org/index.php/jurisdiction-info/global-resources>.

¹⁷⁶ *Id.*

¹⁷⁷ See *Information for Entity Regulation*, NAT'L ORG. BAR COUNSEL, <http://www.nobc.org/index.php/jurisdiction-info/global-resources/entity-regulation>.

¹⁷⁸ See *id.*; COLO. SUP. CT., OFFICE OF ATTORNEY REGULATION COUNSEL ANNUAL REPORT 3 (2015), <https://www.coloradosupremecourt.com/pdf/aboutus/annual%20reports/2015%20annual%20report.pdf> [hereinafter Colorado Office of Attorney Regulation Counsel 2015 Annual Report]; James C. Coyle, *Attorney Regulation Counsel*, COLO. CONTINUING LEGAL EDUC., <http://cle.cobar.org/About/Faculty-Authors/Info/CUSTOMERCD/1864>.

¹⁷⁹ The author is a member of the NOBC Entity Regulation Committee and has personal knowledge of these facts.

¹⁸⁰ See *supra* note 66 and *infra* note 230 and accompanying text for a lengthier discussion of my reasons. While it is true that the issue of proactive regulation often is intimately intertwined with the topic of entity regulation, it is useful to recognize that the issues can be separated. The reason why this is useful is because some U.S. jurisdictions might be willing to contemplate proactive regulation even if they are not ready to engage in entity regulation. For this reason, I regret that the NOBC Global Resources page does not include a separate link to information about proactive regulation.

APPENDIX 1: SUMMARY OF ABA DATA REGARDING
STATE IMPLEMENTATION OF ABA MODEL RULE 5.1(a)
AND SAMPLE BAR DUES QUESTIONS²⁶⁰

	Have Adopted Rule 5.1(a) Verbatim ²⁶¹	Have Adopted Rule 5.1(a) partner responsibility with minor changes ²⁶²	Have Adopted Rule 5.1(a) with major changes	Do Not Have a Rule Equivalent to Rule 5.1(a) <i>re</i> partner responsibility
	33	12	2	4
Jurisdiction	AK, AZ, AR, CO, CT, DE, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MN, MO, MT, NE, NV, OK, PA, RI, SC, SD, TN, UT, WA, WV, WI, WY	AL, DC, FL, GA, MI, MS, NH, NM, NC, ND, VT, VA	NJ (the entity, rather than individual lawyers, has the responsibility), NY (applies to a firm and to a "lawyer with management responsibility in a law firm")	CA, OH, OR, TX

Sample Bar Dues Questions that Might Be Used By Jurisdictions That Have Adopted ABA Model Rule of Professional Conduct 5.1(a) verbatim or with minor changes:

I recommend that jurisdictions add the two questions listed below to each lawyer's annual bar dues statement. I further recommend that the bar dues statement include a citation to a webpage that would provide a self-assessment tool and resources analogous to those described in this Article and referenced in Appendices 2–4. The questions are:

- 1) *Are you subject to Rule of Professional Conduct 5.1(a)?*
- 2) *If so, are you in compliance with this Rule? See [citation to the regulator's proactive regulation resources page].*

²⁶⁰ VARIATIONS OF THE MODEL RULES OF PROF. CONDUCT r. 5.1 (AM. BAR ASS'N CTR. PROF. RESP. POLICY IMPLEMENTATION C'EE., Mar. 29, 2016).

²⁶¹ I have included a jurisdiction in the first "verbatim" column if that jurisdiction has a paragraph in its rule that is identical to ABA Model Rule 5.1(a), even if the title of the rule is different in the jurisdiction or the jurisdiction has omitted or changed parts of ABA Model Rule 5.1 other than Model Rule 5.1(a).

²⁶² The characterization of changes as "minor" or "major" represents my evaluation of the differences described in the ABA's comparison charts. For example, I have treated as a minor change rules that apply Rule 5.1(a) to partners but do not apply the rule to those with "comparable managerial authority." While one might characterize this as a major change, for purposes of this Article, if a jurisdiction has a version of Rule 5.1(a) that applies to partners, then that jurisdiction is in a position to add to its bar dues statement the two questions this Article recommends. Similarly, if a Rule adds responsibilities to entities such as law firms or government lawyers, as the District of Columbia has done, I have treated that as a minor change. One might argue that for purposes of this Article, New York's change is minor since it extends Rule 5.1 to lawyers with "management responsibility in a law firm." I have erred, however, on the side of a conservative interpretation.

APPENDIX 2: ISSUES IDENTIFIED IN SELECTED SELF-ASSESSMENT TOOLS

New South Wales ²⁶³ and Queensland ²⁶⁴	Nova Scotia Barristers' Society: A Management System for Ethical Legal Practice (MSELP) ²⁶⁵
1. Negligence	1. Developing Competent Practices [To Avoid Negligence]
2. Communication	2. Communicating in an effective, timely and civil manner
3. Delay	3. Ensuring confidentiality
4. Liens/file transfer	4. Avoiding conflicts of interest
5. Cost disclosure/billing practices/termination of retainer	5. Maintaining appropriate file and records management systems
6. Conflicts of interest	6. Ensuring effective management of the legal entity and staff
7. Records management	7. Charging appropriate fees and disbursements
8. [Authorising and monitoring compliance with] Undertakings	8. Sustaining effective and respectful relationships with clients, colleagues, courts, regulators and the community
9. Supervision of practice and staff	9. Working to improve diversity, inclusion and substantive equality; and
10. Trust account requirements [& accounting procedures]	10. Working to improve the administration of justice and access to legal services

²⁶³ This list of issues is taken from the summary previously provided on the webpage of the New South Wales Office of the Legal Services Commissioner. These issues were the focus of the New South Wales Self-Assessment Form. Although the system has changed in New South Wales as a result of the adoption of the Uniform National Legal Profession Act, this same list of ten issues appears on the current "Practice Management" page of the Office of the Legal Services Commissioner. *See NSW OLSC Practice Management Webpage*, *supra* note 35.

²⁶⁴ This list of issues in Queensland is included in Briton, *Changing Face of Regulation*, *supra* note 43, at 11. The bracketed language in this list comes from Queensland's articulation of the issue.

²⁶⁵ *See supra* note 110 and accompanying text for a discussion of the ten MSELP elements Nova Scotia approved in March 2016.

2016]

THE POWER OF LAWYER REGULATORS

785

Canadian Bar Association ²⁶⁶	Colorado ²⁶⁷
I. Relationship to Clients	1. Developing competent practices
1. Competence	2. Communicating in an effective, timely, professional manner and maintaining professional relations
2. Client Communication	3. Ensuring that confidentiality requirements are met
3. Confidentiality	4. Avoiding conflicts of interest
4. Conflicts	5. Maintaining appropriate file and records management systems
5. Preservation of Clients' Property/Trust Accounting/File Transfers	6. Managing the law firm/legal entity and staff appropriately
6. Fees and disbursements	7. Charging appropriate fees and making appropriate disbursements
II. Relationship to Firm Members	8. Ensuring that reliable trust account practices are in use
7. Hiring	9. Working to improve the administration of justice and access to legal services
8. Supervision/Retention/Lawyer and Staff Well-being	10. Wellness and Inclusivity
III. Relationship to Regulator, Third Parties, and the Public Generally	
9. Rule of Law and the Administration of Justice	
10. Access to Justice	

²⁶⁶ See *supra* note 45 and accompanying text for a discussion of the CBA Self-Assessment tool.

²⁶⁷ This list of “ten common principles” are available on the Colorado Office of Attorney Regulation Counsel PMBR webpage. See *supra* note 187. See also *supra* notes 185–191 and accompanying text for more information about Colorado’s initiatives.

available at <https://perma.cc/AY2H-YRG7>

links to https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/107-annual-2019-adopted.pdf

AMERICAN BAR ASSOCIATION

HOUSE OF DELEGATES

ADOPTED AUGUST 12-13, 2019

RESOLUTION

RESOLVED: That the American Bar Association urges each state's highest court, and those of each territory and tribe, to study and adopt proactive management-based regulatory programs appropriate for their jurisdiction, as a way to enhance compliance with applicable rules of professional conduct and supplement existing disciplinary enforcement mechanisms, and to:

- a. assist lawyers, law firms, and other entities in which lawyers practice law in the development and maintenance of ethical infrastructures that help to prevent violations of applicable rules of professional conduct;
- b. reduce complaints to lawyer disciplinary authorities;
- c. enhance lawyers' provision of competent and cost-effective legal services; and
- d. encourage professionalism and civility in the profession.

REPORT

Benjamin Franklin once advised that “an ounce of prevention is worth a pound of cure.”¹ That is what this Resolution is about – encouraging state supreme courts to consider Proactive Management-Based Regulation (“PMBR”) programs tailored to their interests and needs, to enhance compliance with applicable rules of professional conduct and supplement existing disciplinary enforcement mechanisms, with the ultimate goal of helping lawyers avoid disciplinary and malpractice complaints. Such programs have already been implemented with good results. They are good for lawyers, good for clients, and good for regulators who must continue to successfully perform their disciplinary enforcement duties in the public’s interest with limited resources. Illinois and Colorado have adopted PMBR initiatives; other U.S. jurisdictions are studying them. This Report explains the background and rationale behind PMBR programs, the positive results and feedback experienced to date, and how PMBR initiatives are consistent with existing ABA policy, including the ABA Model Regulatory Objectives for the Provision of Legal Services.

Based on the collaborative work of the Standing Committee on Professional Regulation (“Professional Regulation Committee”) and Young Lawyers Division (“YLD”), and as a predicate to this proposal, the YLD Assembly approved an almost identical Resolution at its 2019 Midyear Meeting in Las Vegas.² These two entities now request that the House of Delegates approve this Resolution urging jurisdictions’ highest courts to study and adopt jurisdictionally appropriate PMBR programs.

Realizing the potential of PMBR to enhance lawyer practice and help prevent misconduct, the Professional Regulation Committee and Center for Professional Responsibility (“the Center”) have been educating and providing resources about PMBR programs to regulators, state supreme courts, bar associations, and others for several years. They have done so through PMBR Workshops and roundtables, and discussions with and presentations to the Conference of Chief Justices and National Conference of Bar Presidents. The Professional Regulation Committee joined the National Organization of Bar Counsel to educate regulators, the profession, and the public about PMBR through the development of web resources relating to this subject.³

In 2015, the first of the three PMBR Workshops held to date took place at the Colorado Supreme Court to begin educating and energizing U.S. regulators and bar leaders about PMBR developments and the possibilities for implementing such programs in the U.S. The Colorado Supreme Court Office of Attorney Regulation and the Maurice Deane School of Law at Hofstra University cosponsored it. Regulators from the U.S., Canada,

¹ See, e.g., Benjamin Franklin, *On Protection of Towns From Fire*, THE PENNSYLVANIA GAZETTE, Feb. 4, 1734/5, <https://founders.archives.gov/?q=Project%3A%22Franklin%20Papers%22&s=1511311113&r=120>.

² ABA Young Lawyers Division, *Recommendation and Report to the Assembly of the Young Lawyers Division* (Nov. 15, 2018), [February 2019, YLD PMBR Resolution-Assembly Approved.pdf](#).

³ See SCPR CPR PMBR WEB RESOURCE, https://www.americanbar.org/groups/professional_responsibility/scpd_cpr_pmbp_web_resource/ (last visited Apr. 29, 2019). See also *Information for Entity and Proactive Regulation*, NATIONAL ORGANIZATION OF BAR COUNSEL, <https://nabc.org/page-18164> (last visited Apr. 29, 2019).

and Australia provided participants with opportunities to discuss their experiences, as well as the possibilities and challenges associated with PMBR. Justices from the Colorado Supreme Court attended the Workshop.

The 2016 Workshop was held in Philadelphia, built on the work done at the first PMBR Workshop, and was cosponsored by the Texas A&M University Law School. There were jurisdictional updates and participants engaged in a moderated discussion designed to help them to identify positive aspects of PMBR and specific challenges that have arisen or that may arise from various sectors of the legal profession. Participants discussed next steps to advance the exploration of PMBR and to facilitate continued collaboration.

In 2017, Colorado launched its voluntary PMBR program through the Colorado Supreme Court Advisory Committee. That year, the Illinois Supreme Court adopted its mandatory PMBR mechanism for lawyers without professional liability insurance. Both programs serve as complements to these jurisdictions' rules of professional conduct and effective lawyer disciplinary systems. Both demonstrate how PMBR programs are not one-size-fits-all and can be shaped to meet a jurisdiction's needs. Both programs are discussed below in more detail.

The Professional Regulation Committee and Center held the third PMBR Workshop in 2017. The Chief Justice of the Illinois Supreme Court delivered the opening remarks. He spoke about Illinois' new PMBR program and how the work of the Committee and Center contributed to its adoption. Attendees identified the types of mechanisms and programs that appear to best accomplish the objectives of PMBR, and explored jurisdictions' PMBR self-assessment documents and their contents in depth.

The conversation continued with a 2018 Roundtable discussion focusing on the progress in Illinois and Colorado. Representatives from Illinois and Colorado spoke about the minimal resources necessary to develop and launch their programs, and the positive feedback they had received about the initiatives. The Committee also presented to the National Conference of Bar Presidents on this subject at the 2018 ABA Annual Meeting in Chicago, and has kept the Conference of Chief Justices apprised of its work. Planning is underway for the 4th Workshop, which will focus on development of a PMBR toolkit for jurisdictions to use in their study and consideration of jurisdictionally appropriate PMBR programs for adoption.

The Professional Regulation Committee and YLD believe that the time is ripe for the ABA to continue to lead in this area by adopting this Resolution.

I. The Current U.S. Lawyer Regulatory System is Primarily Complaint Driven

The ABA has long supported state-based judicial regulation of the profession. This Resolution furthers that policy.⁴ The highest courts of appellate jurisdiction possess the

⁴ See, e.g., RECOMMENDATIONS 1 & 2, COMM'N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, LAWYER REGULATION FOR A NEW CENTURY 2 (1992) [hereinafter MCKAY REPORT], *available at* http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.ht

inherent and/or constitutional authority to regulate the legal profession. Each jurisdiction has enforceable rules of professional conduct, based upon the ABA Model Rules of Professional Conduct, that protect the public and regulate lawyer behavior. Each jurisdiction has a lawyer disciplinary entity that is responsible for investigating and prosecuting complaints alleging that lawyers have violated applicable rules of professional conduct. These entities frequently serve other frontline regulatory, as well as educational, and some preventive functions.⁵

Lawyer disciplinary enforcement has evolved over the years into an effective, complex, professionally staffed enterprise that must continue to be appropriately resourced to meet the core purposes of protecting the public and maintaining the integrity of the profession. Each jurisdiction's disciplinary process operates under a sophisticated set of substantive and procedural rules.

In the U.S., much of the lawyer regulatory process remains primarily complaint driven. There are over 1.2 million lawyers with active licenses in the United States.⁶ In 2016, Disciplinary agencies received over 87,000 complaints that necessitated screening, referral to other agencies, investigation, and in some cases, prosecution and the imposition of discipline.⁷ Historically, a majority of complaints against lawyers are about what is characterized as “lesser misconduct,” including lack of communication, neglect, and similar issues.⁸

It is better to prevent problems than to have lawyers have to respond in the disciplinary process or via malpractice lawsuits. However, some lawyers do not have infrastructure or mentoring opportunities available to them. In addition, as noted by the YLD in the Report accompanying its Resolution before the Assembly, more law students are opening their own practices and may lack the necessary practice management and skills, as well as the ability to identify or assess where they need additional skills training and education. PMBR programs are designed to help lawyers make those assessments, obtain that additional training and education, and develop ethical infrastructures, which are generally described as “practice controls, policies and procedures related to the ethical delivery of legal services.”⁹

In the Professional Regulation Committee's experience, complaints about lesser misconduct, typically those involving neglect or lack of communication, are indicative of

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⁵ Some disciplinary offices collect annual licensing fees and maintain the master roll of lawyers. Others act as conservators when lawyers die or abandon their practices.

⁶ See *ABA Survey on Lawyer Discipline Systems 2016 (S.O.L.D.)*, Chart I – Part A (2016), https://www.americanbar.org/groups/professional_responsibility/resources/surveyonlawyerdisciplinesystems2014/.

⁷ *Id.*

⁸ ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G), available at https://www.americanbar.org/groups/professional_responsibility/resources/lawyer_ethics_regulation/model_rules_for_lawyer_disciplinary_enforcement/rule_11/.

⁹ Letter from Professor Susan Saab Fortney dated April 15, 2019, in response to the Professional Regulation Committee's March 6, 2019 Comment Draft Resolution and Report. This letter is on file with the Professional Regulation Committee.

practice management or other skills-related issues that can and should be remediated, and hopefully future complaints will be avoided. Consistent with ABA policy, many jurisdictions now have in place programs that allow the disciplinary counsel, upon receiving a complaint involving lesser misconduct, to refer these lawyers to alternatives to discipline, also known as diversion, programs.¹⁰ These programs are in the lawyer's and public's best interest. They are designed to help lawyers remediate lesser misconduct, the presumptive sanction for which would be no more severe than an admonition or reprimand.¹¹ However, while a necessary part of a continuing effective disciplinary enforcement process, diversion programs are not designed to help lawyers reduce the risk of receiving disciplinary complaints in the first place.

In diversion programs the lawyer and disciplinary agency enter into a contract whereby the lawyer agrees to complete actions to address the alleged violations, such as educational programs or the use of a practice management monitor. It is the lawyer's responsibility to complete the terms of the contract. The contract provides for oversight of the lawyer and reporting to the disciplinary counsel about compliance. Typically, the disciplinary matter is held in abeyance pending successful completion of the contract. If the lawyer does not successfully complete the terms of the contract, disciplinary counsel may resume disciplinary proceedings. If the lawyer does fulfill the contract, the disciplinary agency is barred from taking further action based on the allegations that led to the diversion.

II. Proactive Management-Based Regulatory Programs

A. The PMBR Concept

There are some proactive programs and regulations in the U.S., including Bridge the Gap Programs, ethics hotlines, continuing legal education programs, and other practice management solutions. While these programs can help lawyers provide better services ethically and professionally, they are ad hoc, versus systemic, in nature.¹² PMBR programs offer a different paradigm, a systemic preventive approach that supplements the current lawyer disciplinary enforcement process, and helps lawyers and law firms develop ethical infrastructures to improve the delivery of legal services and client relations. Unlike the alternatives to discipline/diversion concept discussed above, PMBR systems operate separate from the disciplinary process, because the purpose of PMBR is to prevent misconduct and malpractice, and to reduce complaints to lawyer disciplinary agencies and malpractice lawsuits in the courts. PMBR programs are not one-size-fits-all, as described in more detail below, and may be crafted to meet the needs of each jurisdiction.

¹⁰ *Id.* Research conducted by the Professional Regulation Committee indicates that at least 29 jurisdictions (each New York Judicial Department counts as one jurisdiction) have formal alternatives to discipline programs, and a pilot program was launched in 2017 by the U.S. Patent and Trademark Office.

¹¹ *Supra* note 8.

¹² See, e.g., 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), available at <https://ssrn.com/abstract=2865337>.

Regarding the fact that PMBR programs are not one-size-fits all, it is important to make clear at the outset what these programs and this Resolution are not. PMBR programs are not intended to supplant the disciplinary enforcement process, which remains integral and must continue to be adequately resourced. PMBR programs are intended to supplement it and enhance compliance with applicable rules of professional conduct that exist for the public's protection. The imposition of appropriate lawyer discipline is one of the ABA Model Regulatory Objectives for the Provision of Legal Services. PMBR is not about establishing or advocating for alternative business structures or entity regulation. To interpret the PMBR concept and this Resolution as such would be incorrect. Discussion of PMBR models below that are in jurisdictions that permit entity regulation or alternative business structures are illustrative only. They are intended to show the range of PMBR programs and that they are not one-size-fits-all in nature. The examples below are also not exhaustive.

Another beneficial effect of PMBR programs is that they change for the better the relationship between the regulator and the regulated. Historically, the relationship between regulators and the profession has been fraught; the relationship is often perceived and experienced as adversarial, especially by lawyers who are the subject of a disciplinary complaint. Under PMBR programs that have been implemented in other countries and in the U.S., the regulator and regulated have developed a different and more constructive relationship. The relationship is one where the parties work together to help the lawyer come into compliance with the PMBR program, or in jurisdictions with voluntary programs to encourage and help lawyers follow it. Noncompliance in mandatory PMBR jurisdictions is not met with an immediate invocation of the disciplinary process. Involvement of the disciplinary process is a last resort in those jurisdictions. Information shared with the regulator as part of the PMBR process, whether the program is mandatory or voluntary, must not be used by the disciplinary agency. As discussed in more detail below, it should be and is held confidential to support the preventive purpose of the program.

The Report supporting the YLD Resolution that preceded this proposal notes that PMBR's guiding principles of prevention and better client service are particularly important for young lawyers who, in a challenging and competitive legal services marketplace, must optimize these practice management and competency skills as early in their careers as possible. That Report noted that "PMBR can assist young lawyers with learning how to practice good habits at the outset of their careers rather than rehabilitating poor habits later. PMBR programs are also helpful from a business development perspective."¹³

B. PMBR in U.S. Jurisdictions: A Positive Experiment to Date and Growing

¹³ *Supra* note 2, at 2. See also Susan Saab Fortney, *Promoting Public Protection Through and "Attorney Integrity" System: Lessons from the Australian Experience With Proactive Regulation of Lawyers*, 23 THE PROFESSIONAL LAWYER 1, 6 (2015). Professor Fortney notes that a small number of firms in her study exceeded the minimum PMBR regulatory requirements and obtained a Quality Management Certification from the International Organizations for Standardization that they used to distinguish themselves for business development purposes.

As noted above, the Professional Regulation Committee's efforts to educate regulators and the bar about PMBR have contributed to the adoption of PMBR programs by two state supreme courts. Other jurisdictions have formally or informally commenced study of PMBR systems, including Utah, New Mexico, and Wisconsin. The Illinois Supreme Court and the Colorado Supreme Court adopted different types of PMBR programs in 2017 after conducting studies about it and engaging in broad outreach to the profession and public. Illinois' program is mandatory for lawyers without malpractice insurance; Colorado's program is voluntary. Neither involves entity regulation.

The Illinois program requires lawyers without malpractice insurance to complete a four-hour interactive, online self-assessment about their practice.¹⁴ The Chief Justice of the Illinois Supreme Court introduces the program in a video, and there are currently eight interactive modules that comprise the self-assessment program.¹⁵ The program addresses the ethics rules and lawyers' business practices. The modules address: (1) technology and ethics; (2) conflicts of interest; (3) fees, costs, and billing practices; (4) effective client-lawyer relationships; (5) client trust accounts; (6) lawyer well-being; (7) professionalism and civility; and (8) diversity and inclusion.¹⁶ For example, the trust accounting module reinforces the proper ways to handle client funds and avoid practices that could lead to complaints about issues such as comingling, bookkeeping and accounting procedures. Lawyers may also voluntarily take the PMBR programming. CLE credit is available to all who complete it.

To allay fears about the disciplinary agency obtaining information from the self-assessment and using the data in a disciplinary context, the Illinois Supreme Court adopted rules to ensure that "[a]ll information related to the self-assessment shall be confidential, except for the fact of completion of the self-assessment, whether the information is in the possession of the Administrator or the lawyer."¹⁷ That information is also not subject to discovery.¹⁸

Colorado's voluntary PMBR program is called the Colorado Lawyer Self-Assessment Program, and it is also online.¹⁹ That the program is voluntary highlights how the concept of PMBR is not "one-size-fits-all." Colorado's program allows lawyers to earn up to three CLE credits by completing the ten self-assessments. The Colorado Supreme Court amended the Colorado Rules of Civil Procedure in 2018 to include the Self-Assessment Program, stating in Rule 256 that: "The Colorado Supreme Court additionally finds that

¹⁴ See ARDC'S PROACTIVE MANAGEMENT BASED REGULATION LEARNING SITE, <https://iardc.org/pmbr.html> (last visited Apr. 29, 2019).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ ILL. SUP. CT. R. 756(e)(2) states, for example, "[n]either the Administrator nor the lawyer may offer this information into evidence in a disciplinary proceeding."

¹⁸ In addition to this information, answers to other frequently asked questions can be viewed on the ARDC website:

https://registration.iardc.org/attyreg/Registration/Registration_Department/PMBR_FAQs/Registration/regdept/Rule_756e2_Self-Assessment_FAQ_s.aspx.

¹⁹ See *Lawyer Self-Assessment Program*, COLORADO SUPREME COURT OFFICE OF ATTORNEY REGULATION COUNSEL, <http://www.coloradosupremecourt.com/AboutUs/LawyerSelfAssessmentProgram.asp> (last visited Apr. 29, 2019).

maintaining the confidentiality of information prepared, created, or communicated by a lawyer or by a law firm administrator, employee, or consultant acting under the direction of a lawyer, in connection with a lawyer self-assessment will enhance participation in the Colorado Lawyer Self-Assessment Program...”²⁰ Confidential information is defined in the Rule and the parameters for the ways in which that information cannot be used is also set forth.²¹ As of September 6, 2018, 182 Colorado lawyers had completed the program and received CLE credit, and over 400 lawyers had finished at least one part of the program.²² The Colorado Office of Regulation Counsel continues to actively engage in outreach about the program.

Due to the newness of both programs, no formal studies yet exist regarding about them. However, as reported in a 2018 article in the Illinois Bar Journal, “PMBR is part of the ARDC’s effort to focus on prevention over prosecution...” and it has experienced success with participation and received positive feedback on the eight current PMBR modules.²³ As noted in the article, in addition to being asked to rate their own experience with the program, participants “are also asked whether they would recommend the PMBR courses to others. A whopping 93 percent said yes with regard to the technology and conflicts courses; 95 percent said yes about the fees, costs and billing module, as well as the trust accounts and record management module.”²⁴ The program is similarly viewed as a positive development by the profession in Colorado, with supportive articles appearing in bar journals, including the Colorado Trial Lawyers’ Association.²⁵

Like Illinois and Colorado, state supreme courts studying PMBR will need to consider the cost of implementing such programs. The PMBR toolkit that the Professional Regulation Committee is developing, referenced at page three of this Report, will include detailed information about the various PMBR programs in the U.S. and abroad to help courts better understand the range of PMBR options, as well as provide information relating to the costs and resourcing of these programs. The Professional Regulation Committee has found that the costs of developing and implementing PMBR programs is reasonable.

For example, Colorado developed the content for its program through a volunteer

²⁰ COLO. SUP. CT. R. 256. See also Susan Saab Fortney, *The Role of Ethics Audits in Improving Management Systems and Practices: An Empirical Examination of Management-Based Regulation of Law Firms*, 4 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 112, 141-46 (2014) for additional discussion about the importance of maintaining confidentiality of this information.

²¹ *Id.*

²² Minutes of the Colo. Sup. Ct. Attorney Regulation Advisory Comm. (Sept. 7, 2018), available at <http://www.coloradosupremecourt.com/PDF/Advisory%20Committee%20Minutes/Advisory%20Committee%20Minutes%209-7-18.pdf>.

²³ See Matthew Hector, *ARDC Reports Positive Early Reaction to Lawyer Self-Assessment*, ILL. B.J., Apr. 2018, at 10.

²⁴ *Id.*

²⁵ This article states that the program is “an invaluable resource, especially for solo and small firm lawyers, new lawyers, and lawyers practicing in the areas of plaintiffs’ personal injury, family law, criminal law, and bankruptcy.” Cecil Morris, *Colorado’s New Lawyer Self-Assessment Program*, COLORADO TRIAL LAWYERS ASSOCIATION (Dec./Jan.2018), available at <http://www.coloradosupremecourt.us/PDF/AboutUs/PMBR/Morris%20Trial%20Talk%20Colorado%20Lawyer%20Self%20Assessment%20Program.pdf>.

subcommittee of the Colorado Supreme Court Advisory Committee.²⁶ The volunteer nature of these members' service kept the program economical to implement in this jurisdiction. The Colorado Office of Attorney Regulation Counsel engaged an outside vendor at a reasonable cost to work with the subcommittee to create and host the online platform. The experience in Illinois was similar. The Attorney Registration and Disciplinary Commission utilized volunteers and existing staff to develop and implement the program. A team of four staff members worked on this project, with one staff member overseeing the project's development. The bulk of the direct costs related to contracting a multimedia and eLearning services designer who developed the eLearning modules described above and additional ADA accessible formats of these modules (\$40,000).

C. PMBR Works: Models Elsewhere

As noted above, PMBR and this Resolution are distinct and unrelated to the concepts of alternative business structures or entity regulation. Nothing about this Resolution seeks to change existing ABA policy on those subjects. Discussion of PMBR models below that are in jurisdictions that permit entity regulation or alternative business structures are illustrative only, not exhaustive, and intended only to demonstrate the flexibility that PMBR affords in crafting jurisdictionally appropriate programs.

PMBR as a concept grew from a 2001 New South Wales, Australia law permitting Incorporated Legal Practices (ILP) that included lawyer and non-lawyer partners/owners.²⁷ Regulators in that country wanted to maximize public protection in the context of this new construct for delivering legal services, and so each ILP had to have a Legal Practice Director and put into place "appropriate management systems."²⁸

The legislation did not define "appropriate management systems" and so ILPs lacked guidance as to how they should comply. In response, the regulator in New South Wales, the Office of the Legal Services Commissioner (OLSC), consulted with relevant stakeholders including the bar and the professional liability insurer, and developed collaboratively with them the first PMBR program.²⁹ That program consisted of a checklist of ten objectives/areas that "appropriate management systems" should address, and required each ILP to conduct a "self-assessment" to determine the ILP's compliance with these objectives. The ILP was required to rate its level of compliance. The OLSC provided resources to help ILPs determine how to rate themselves and offered onsite

²⁶ See Jonathan White, *Self-Assessment Program Aims to Enhance Lawyer Competency and Client Satisfaction*, 46:9 COLORADO LAWYER (2017) 10, 12, available at <http://coloradosupremecourt.com/PDF/AboutUs/PMBR/Law%20Practice%20Management%20-%20CO%20Lawyer%20Self%20Assessment%20Program.pdf>.

²⁷ See Susan Saab Fortney & Tahlia Gordon, *Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. ST. THOMAS L.J. 152, 153 (2012).

²⁸ *Supra* note 10, at 724-725.

²⁹ See, e.g., TAHLIA GORDON & STEVE MARK, *THE AUSTRALIAN EXPERIMENT: OUT WITH THE OLD, IN WITH THE BOLD*, IN *THE RELEVANT LAWYER, REIMAGINING THE FUTURE OF THE LEGAL PROFESSION* 185, 193 (Paul A. Haskins ed., 2015).

assistance to those who requested such help.³⁰ The OLSC conducted audits of those ILPs that did not complete the self-assessment process.

The areas covered by the self-assessment checklist in New South Wales mirror and are designed to help ILPs implement systems to prevent the same types of issues that frequently give rise to disciplinary complaints and possible referral to diversion programs in the U.S. These issues include neglect, delay, lack of communication, failure to return client files, trust account and record management systems, retainer and billing practices, supervision of staff, and conflicts of interest.³¹

In 2009, a study determined that there was a significant drop in complaints of up to two-thirds against ILPs that completed the initial self-assessment process.³² A second study conducted found that this drop in complaints happened because almost 75% of the firms that completed the self-assessment took steps to improve their processes due to their participation in the program.³³ The majority of lawyers who participated in the program expressed satisfaction with the PMBR program, even those who were skeptical when the program began.³⁴ Queensland, Australia implemented a similar PMBR program with the anecdotal data showing results analogous to those in New South Wales.³⁵

In December 2014, Australia adopted the Uniform National Legal Profession Act, and New South Wales implemented that national law in 2015. Self-assessments are no longer required under the new law. Instead, the designated local regulator may, if it has reasonable grounds (which may include a complaint), conduct an audit of a lawyer or law firm's compliance with the law and any other applicable professional obligations. The regulator can provide "management system direction" to the lawyer or firm if it considers it reasonable to do so after the audit to "ensure that appropriate management systems are in place."³⁶ That direction may include a requirement that the lawyer or firm provide the regulator with periodic reports of compliance.³⁷ Queensland has not yet adopted the Uniform National Law. Its original PMBR program remains in effect.

Regulators in Canada have also undertaken study of and implemented PMBR programs, recognizing their benefits. In 2015 the Law Society of Ontario (formerly the Law Society of Upper Canada) created a Compliance-Based Entity Regulation Task Force to explore PMBR for lawyers and paralegals. That Task Force issued a Report asking the Law Society's Convocation (its Board of Directors) to approve development of a regulatory

³⁰ *Supra* note 12, at 725.

³¹ *Supra* note 12, at 726.

³² Tahlia Gordon, Steve A. Mark & Christine E. Parker, *Regulating Law Firm Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in NSW*, Univ. Melbourne Legal Studies Research Paper No. 453 (2009).

³³ *Supra* note 27, at 156–65.

³⁴ *Id.*

³⁵ See John Briton & Scott McLean, *Lawyer Regulation, Consciousness-Raising and Social Science* 17–18, paper presented at Int'l Legal Ethics Conference IV (July 15–17, 2010), available at http://www.lsc.qld.gov.au/data/assets/pdf_file/0004/106069/lawyer-regconsciousness-raising-and-social-science.pdf.

³⁶ LEGAL PROFESSION UNIFORM LAW (N.S.W.) § 257(1) (2015).

³⁷ *Id.* at § 257(2)(b).

framework based on principles of compliance-based regulation.³⁸ As noted on the Law Society's website, "[c]ompliance-based regulation emphasizes a proactive approach in which the regulator identifies practice management principles and establishes goals and expectations. Lawyers and paralegals report on their compliance with these expectations, and have autonomy in deciding how to meet them."³⁹ The Task Force noted in its Report that compliance-based regulation and entity regulation do not have to be implemented together.⁴⁰ In 2016, the Convocation approved the Task Force's recommendations.⁴¹

In May 2018, the Task Force released another Report to Convocation⁴² and the Law Society released for comment the Task Force's draft Practice Assessment Tool.⁴³ No decision has been made whether this PMBR program will be mandatory or voluntary. As of the time of the filing of this Resolution, the Law Society was accepting comments regarding the Practice Assessment Tool.⁴⁴

The Nova Scotia Barristers' Society (NSBS) has adopted a new professional regulatory approach that it refers to as "Triple P Regulation." "Triple P" stands for principled, proactive, and proportionate regulation.⁴⁵ The PMBR component is called the Management System for Ethical Legal Practice or MSELP. It is designed to help lawyers and law firms avoid disciplinary and malpractice complaints. A pilot project was completed with approximately 50 firms from 2016 – 2017.⁴⁶ Starting in January 2018, lawyers must complete a self-assessment based on the ten MSELP elements.⁴⁷ The NSBS does not dictate to lawyers how to meet the MSELP, but provides guidance, and is developing and curating online resources relating to each of the ten MSELP elements. Lawyers must submit the self-assessment to the Executive Director's Office of the NSBS.⁴⁸ The MSELP elements are akin to the ten objectives for appropriate management systems used in New South Wales.

³⁸ COMPLIANCE-BASED ENTITY REGULATION TASK FORCE, REPORT TO CONVOCATION (May 26, 2016), https://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/c/convocation_may_2016_cber.pdf.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Compliance-Based Entity Regulation*, LAW SOCIETY OF ONTARIO, <https://iso.ca/about-iso/initiatives/compliance-based-entity-regulation> (last visited Apr. 29, 2019).

⁴² COMPLIANCE-BASED ENTITY REGULATION TASK FORCE, REPORT TO CONVOCATION (May 24, 2018), <https://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/c/convocation-compliancebasedentityregulationtaskforcereport.pdf>.

⁴³ *Law Society of Ontario Practice Management Principles Assessment* (Apr. 30, 2018), <https://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/c/cber-practice-assessment.pdf>.

⁴⁴ An earlier, voluntary self-assessment tool was developed by the Canadian Bar Association, which is not a regulator. This tool was made available to its members online and includes hyperlinks to relevant resources. See *Ethical Practices Self-Evaluation Tool*, CBA LEGAL FUTURES INITIATIVE, <http://www.cba.org/CBA-Legal-Futures-Initiative/Resources/Ethical-Practices-Self-Evaluation-Tool> (last visited Apr. 28, 2019).

⁴⁵ NOVA SCOTIA BARRISTERS' SOCIETY GLOSSARY OF TERMS, <https://nsbs.org/glossary-terms#20> (last visited Apr. 28, 2019).

⁴⁶ *Frequently Asked Questions About MSELP*, NOVA SCOTIA BARRISTERS' SOCIETY (Jan. 2019), <https://nsbs.org/sites/default/files/cms/menu-pdf/mselp-faqs.pdf>.

⁴⁷ <https://nsbs.org/bringing-risk-focus-and-triple-p-together>; <https://nsbs.org/management-systems-ethical-legal-practice-mselp>.

⁴⁸ See Regulation 4.9.1 of the Nova Scotia Barristers' Society Regulations Made Pursuant to the Legal

NSBS explains that the MSELP are intended: “To help you and everyone else: (1) be more productive, (2) be less vulnerable to complaints, (3) be less vulnerable to claims, (4) as others do the same, incur less cost over time than would otherwise be the case, (5) be less stressed, (6) be more able to serve your clients through ethical and effective practice, and (7) when the time comes, be more able to leave practice.”⁴⁹ Lawyers will have to do the self-assessment every three years to ensure their management systems remain optimal. Responses to the self-assessment cannot result in a disciplinary investigation.⁵⁰

The Prairie Law Societies (Saskatchewan, Alberta and Manitoba) are also exploring a more proactive approach to regulation. As noted on the Law Society of Saskatchewan website: “To determine the most meaningful way to engage with law firms through proactive regulation, the Prairie Law Societies conducted a pilot project in 2017 to test a new resource which helps firms assess the robustness of their practice management systems and firm culture. . . The content of the Assessment Tool is designed to help firms think about ways to best serve their clients, their lawyers and their employees. This fosters both public protection in terms of ethical, efficient practice as well as good business.”⁵¹ Generally, the Law Societies received positive feedback and made necessary changes.⁵² The Law Society of Saskatchewan intends to implement the program in 2019.

III. PMBR Aligns With and Furthers ABA Policy

This Resolution is consistent with ABA policy supporting state-based judicial regulation of the profession and continued effective and appropriate resourcing of lawyer disciplinary enforcement, including the Recommendations of the ABA Commission on Evaluation of Disciplinary Enforcement (“McKay Commission”). The McKay Commission was created in 1989 to conduct a national evaluation of lawyer disciplinary enforcement and provide a model for responsible regulation in the future. The Commission was named after its original Chair, Robert McKay, who passed away before the Commission completed its work. The Recommendations of the Commission, most of which were adopted by the House of Delegates at the February 1992 Midyear Meeting, were published as “Lawyer Regulation for a New Century.”

The McKay Commission Report recommended that state supreme courts supplement what was then a mostly prosecutorial model of lawyer regulation to one that not only

Profession Act, current through January 18, 2019. NOVA SCOTIA BARRISTERS’ SOCIETY REGULATIONS (amended to Jan. 18, 2019), <https://nsbs.org/sites/default/files/cms/menu-pdf/CurrentRegs.PDF>.

⁴⁹ *Bringing risk focus and ‘Triple P’ together*, NOVA SCOTIA BARRISTERS’ SOCIETY, <https://nsbs.org/sites/default/files/cms/menu-pdf/mselp-faqs.pdf> (last visited Apr. 29, 2019).

⁵⁰ *Id.* See also Regulation 4.9.6 of the Nova Scotia Barristers’ Society Regulations Made Pursuant to the Legal Profession Act, current through January 18, 2019, available at <https://nsbs.org/sites/default/files/cms/menu-pdf/CurrentRegs.PDF>.

⁵¹ *Innovating Regulation*, LAW SOCIETY OF SASKATCHEWAN, <https://www.lawsociety.sk.ca/initiatives/innovating-regulation/> (last visited Apr. 29, 2019).

⁵² *Id.*

protects the public through continued effective lawyer disciplinary enforcement when required, but helps lawyers. That expanded system of regulation called for increased public service and accessibility, as well as the creation of programs designed to help lawyers avoid the disciplinary process.⁵³

PMBR is the logical next step in the evolution of this expanded system of regulation. PMBR is consistent with the letter and spirit of the McKay Recommendations and Model Rule for Lawyer Disciplinary Enforcement 11(G) that sets the parameters for alternatives to discipline programs. The components of PMBR are similar to those in the alternatives to discipline programs; it is the timing of the lawyer's participation that is different. PMBR frontloads the preventive measures which are not part of the existing disciplinary process.

PMBR is also consistent with many of the ABA Model Regulatory Objectives for the Provision of Legal Services, and inconsistent with none. The House of Delegates adopted the Model Regulatory Objectives in February 2016.⁵⁴ In particular, PMBR is consistent with the following Model Regulatory Objectives: protecting the public; advancing the administration of justice and the rule of law; providing transparency about the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections; enhancing the delivery of affordable and accessible legal services; helping lawyers provide efficient, competent, and ethical legal services; protecting confidential and privileged information; advancing appropriate preventive or wellness programs⁵⁵; and advancing diversity and inclusion among legal services providers.⁵⁶ This Resolution is consistent also with ABA Goal II, which encourages the promotion of high quality legal education; competence, ethical conduct and professionalism; and *pro bono* and public service by the legal profession.⁵⁷

IV. Conclusion

The Professional Regulation Committee and YLD respectfully request that the House of Delegates adopt this Resolution urging state supreme courts to study and adopt jurisdictionally appropriate PMBR programs to enhance compliance with applicable rules of professional conduct and supplement existing disciplinary enforcement mechanisms.⁵⁸

⁵³ *Supra* note 4, at 14 - 21.

⁵⁴ ABA RESOLUTION & REPORT 105, *Model Regulatory Objectives for the Provision of Legal Services* (Feb. 8, 2016), https://www.americanbar.org/content/dam/aba/directories/policy/2016_hod_midyear_105.docx.

⁵⁵ Illinois and Colorado PMBR programing includes lawyer well-being.

⁵⁶ Illinois and Colorado PMBR programing includes diversity and inclusion.

⁵⁷ ABA MISSION AND GOALS, https://www.americanbar.org/about_the_aba/aba-mission-goals/ (last visited Apr. 29, 2019).

⁵⁸ In developing this Resolution, the Professional Regulation Committee sought input and incorporated suggestions from individuals and other entities inside and outside the ABA. The Professional Regulation Committee and the YLD thank all who provided the helpful comments and suggestions that helped to shape this Resolution, which is consistent with the PMBR Resolution adopted by the YLD Assembly in January 2019.

Respectfully Submitted,

Paula J. Frederick
Chair, ABA Standing Committee on Professional Regulation
August 2019

Tommy D. Preston
Chair, ABA Young Lawyers Division
August 2019

GENERAL INFORMATION FORM

Submitting Entity: Standing Committee on Professional Regulation

Submitted By: Paula J. Frederick, Chair

1. Summary of Resolution(s).

This collaborative work of the Standing Committee on Professional Regulation and Young Lawyers Division urges each state's highest court, and those of each territory and tribe, to study and adopt jurisdictionally appropriate proactive management-based regulatory (PMBR) programs to enhance compliance with applicable rules of professional conduct and supplement existing disciplinary enforcement mechanisms. PMBR programs offer a systemic preventive approach to help lawyers, and the entities where they practice law, develop ethical infrastructures to improve the delivery of competent and cost-effective legal services. PMBR programs operate separately from the disciplinary process. A goal of PMBR is to reduce complaints to lawyer disciplinary agencies and malpractice actions. PMBR programs encourage professionalism and civility, and change for the better the relationship between the regulator and regulated. PMBR programs are not one-size-fits-all, may be crafted to meet the needs of each jurisdiction, and are reasonable in cost.

PMBR is consistent with longstanding ABA regulatory policies, including the 1992 Report of the Commission on Evaluation of Disciplinary Enforcement (McKay Report) and the 2016 ABA Model Regulatory Objectives for the Provision of Legal Services.

2. Approval by Submitting Entity. April 25, 2019.

3. Has this or a similar resolution been submitted to the House or Board previously?
No.

4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? This Resolution is consistent with ABA Policies including the Model Rules of Professional Conduct, Model Rules for Lawyer Disciplinary Enforcement, Model Regulatory Objectives for the Provision of Legal Services, and the Report of the Commission on Evaluation of Disciplinary Enforcement (McKay Commission Report). These policies would not be otherwise affected by this Resolution.

5. If this is a late report, what urgency exists which requires action at this meeting of the House? N/A

6. Status of Legislation. (If applicable) N/A

7. Brief explanation regarding plans for implementation of the policy, if adopted by the

House of Delegates. The ABA Standing Committee on Professional Regulation would commence implementation by providing notice of the adopted Resolution to state supreme courts and offering the Committee's resources and the toolkit referenced in the Report as assistance to those court's as they study and look to adopt jurisdictionally appropriate PMBR programs. The Committee's longstanding successful disciplinary system consultation program will be utilized as a means of implementing the Resolution. The Committee will continue its PMBR Workshops and engage with the National Organization of Bar Counsel and state bar associations to facilitate implementation. These actions are consistent with the Committee's and Center for Professional Responsibility's longstanding and successful policy implementation initiatives.

8. Cost to the Association. (Both direct and indirect costs) None.
9. Disclosure of Interest. (If applicable) None.
10. Referrals. The Committee circulated a comment draft of the Resolution and Report to all ABA Sections, Divisions, Forums, Standing Committees, and Centers, and to state and local bar associations. The Association of Professional Responsibility Lawyers, Conference of Chief Justices, and National Organization of Bar Counsel received it.
11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address)

 Ellyn S. Rosen
 Regulation and Global Initiatives Counsel
 ABA Center for Professional Responsibility
 321 North Clark Street, 209th Floor
 Chicago, IL 60654
ellyn.rosen@americanbar.org
 312/988-5311
12. Contact Name and Address Information. (Who will present the Resolution with Report to the House? Please include best contact information to use when on-site at the meeting. *Be aware that this information will be available to anyone who views the House of Delegates agenda online.*)

Paula J. Frederick, Chair
 ABA Standing Committee on Professional Regulation
 State Bar of Georgia
 104 Marietta St NW
 Ste 100
 Atlanta, GA 30303-2743
paulaf@gabar.org
 404/441-8730

Tommy D. Preston, Chair
ABA Young Lawyers Division
The Boeing Company
5400 International Blvd.
North Charleston, SC 29418
tommy.d.preston@boeing.com
864/650-4554

EXECUTIVE SUMMARY

1. Summary of the Resolution

This collaborative work of the Standing Committee on Professional Regulation and Young Lawyers Division urges each state's highest court, and those of each territory and tribe, to study and adopt jurisdictionally appropriate proactive management-based regulatory (PMBR) programs to enhance compliance with applicable rules of professional conduct and supplement existing disciplinary enforcement mechanisms. PMBR programs offer a systemic preventive approach to help lawyers, and the entities where they practice law, develop ethical infrastructures to improve the delivery of competent and cost-effective legal services. PMBR programs operate separately from the disciplinary process. A goal of PMBR is to reduce complaints to lawyer disciplinary agencies and malpractice actions. PMBR programs encourage professionalism and civility, and change for the better the relationship between the regulator and regulated. PMBR programs are not one-size-fits-all, may be crafted to meet the needs of each jurisdiction, and are reasonable in cost.

PMBR is consistent with longstanding ABA regulatory policies, including the 1992 Report of the Commission on Evaluation of Disciplinary Enforcement (McKay Report) and the 2016 ABA Model Regulatory Objectives for the Provision of Legal Services.

2. Summary of the Issue that the Resolution Addresses

PMBR programs provide lawyers with an array tools, including self-assessment checklists and online programming, to help them and the entities where they practice law develop ethical infrastructures and identify where they may need additional skills, training, and education. As noted above, PMBR's goals are also to reduce complaints to lawyer disciplinary authorities and encourage professionalism and civility in the profession.

The Professional Regulation Committee has been studying PMBR since 2015 and has watched how it has evolved and succeeded in other countries. Studies relating to those programs are included in the Report. Of note, PMBR programs are not one-size-fits all. Jurisdictions may adopt the PMBR programs that best fit the needs of and circumstances in their jurisdiction.

3. Please Explain How the Proposed Policy Position Will Address the Issue

Adoption of this joint Professional Regulation and Young Lawyers Division Resolution will demonstrate the ABA's leadership role in this arena and its value to the profession and members through its commitment to bettering lawyers' ethical and cost-effective delivery of legal services in a publicly protective way.

This is especially important in today's legal services marketplace where more young lawyers are entering solo or small firm practice immediately upon licensure and need the tools and support that PMBR programs provide.

4. Summary of Minority Views or Opposition Internal and/or External to the ABA Which Have Been Identified

None.

NOBC Proactive Regulation FAQ, Appendix B (As of May 19, 2017)

NOBC's Listing of Current and Available Innovative Programs Used in U.S. and Canadian Jurisdictions

A Collaborative Effort (inspired by the work of Jim Coyle and Jon White, Colorado Supreme Court Office of Attorney Regulation Counsel)

I. REGULATION

Regulation Initiatives	Jurisdictions	Source for information
Regulatory objectives Regulatory objectives provide state supreme court directives on promoting the public interest. They may include protecting the public, promoting confidence in the rule of law and the administration of justice, improving lawyer competence, ensuring lawyer compliance with the RPC, and other priorities. References to well-being as part of an objectives statement sends a message that this, too, is a priority for regulators.	AB, ABA, CO, IL, MA, MT, NE, NS, TX, VA, WI, WA	AB – Law Soc. Strategic Plan: http://www.lawsociety.ab.ca/docs/default-source/unknown/lsa-2017-2019-strategic-plan_dec7.pdf CO – Regulatory Objectives (Preamble to Chapters 18-20, Colorado Rules of Civil Procedure) IL – IARDC Mission Statement: https://www.iardc.org/mission_statement.asp MA – https://www.massbbo.org/Who_We_Are_OBC_ACAP#OBC NE – (Preamble to Nebraska Rules of Professional Conduct) https://supremecourt.nebraska.gov/supreme-court-rules/1825/preamble-lawyer%E2%80%99s-responsibilities NS – http://nsbs.org/nsbs-regulatory-objectives

		<p>TX – (Preamble to Texas Disciplinary Rules of Professional Conduct) TDRPC</p> <p>WA – General Rule (GR) 12.1 (regulatory objectives under consideration by Washington Supreme Court)¹</p>
<p>Mandatory insurance / mandatory disclosure of insurance programs</p> <p>Professional liability insurance protects lawyers and clients in the event a client’s claims suffer harm from the lawyer’s representation.</p>	<p>AZ, CO, ID, MA, MN, NE, NM, PA, VA, all Canadian jurisdictions</p>	<p>AZ – Rule 32(c)(12), Ariz. R. Sup. Ct.</p> <p>NE – Rule § 3-803(B)(6), Mandatory Annual Insurance Disclosure</p> <p>MA—Supreme Judicial Court Rule 4:02, § 2A http://www.mass.gov/courts/case-legal-res/rules-of-court/sjc/sjc402.html</p> <p>NM – Rule 16-104, N.M.R.A.</p> <p>PA – PaRDE 219(d)(1)(viii)</p> <p>WA – Admission and Practice Rule (APR) 26 (mandatory insurance disclosure for lawyers); APR 12(f)(2), Regulation 7 (financial responsibility requirement for limited practice officers); APR 28E(4), Regulation 12 (financial responsibility requirement for limited license legal technicians)</p>

¹ Proposed amendments to General Rule 12.1 that would incorporate the ABA Model Regulatory Objectives are currently under consideration by the Washington Supreme Court.

<p>Citizen participation Citizen participation in all committees and boards ensures that the office promotes the public interest</p>	<p>AZ, AR, CO, DC, IA, IL, FL, GA, HI, KY, LA, MA, MN, MT, NE, NH, NJ, OR, PA, TX, UT, VA, WI, WA, all Canadian jurisdictions</p>	<p>AZ – Rule 32(e)(4)(A), Ariz. R. Sup. Ct., Rule 50, Ariz. R. Sup. Ct., Rule 52, Ariz. R. Sup. Ct.</p> <p>AR – The Arkansas Supreme Court appoints two non-lawyers to each of the four panels</p> <p>FL – Citizen members are required to be on the Board of Governors and circuit Grievance Committees. Rules 1-4.1 and 3-3.4(c)</p> <p>HI – RSCH 2.4(a)(At least one-third of the members [of the Board] shall not be lawyers).</p> <p>IA – Court Rules 34.1, 34.6</p> <p>LA – Supreme Court Rule XIX</p> <p>MA—12 board members of which 4 are nonlawyers. Hearing committee are generally comprised of 3 people, 2 lawyers and 1 nonlawyer.</p> <p>NE – District Committees on Inquiry (COI) Supreme Court Rule §3-306; Disciplinary Review Board (DRB) Supreme Court Rule § 3-307</p> <p>PA – (Board ONLY) PaRDE 205(a)</p>
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		TX – TRDP 2.02
International agency information sharing Each office should have protocols/systems to facilitate information sharing with regulators from international jurisdictions.	CO, DC, GA, IL	
Risk Management		
Risk assessments for practitioners (proactive management-based programs) Bar, disciplinary, or regulation counsel can provide practitioners with self-assessments designed to detect and resolve practice issues before misconduct arises. These assessments help identify, among other things, whether or not the practitioner has policies and procedures in place that address conflicts of interest, actions that must be taken in new and pending matters, proper accounting for client funds and property, and other common ethical issues. Such self-assessments may also provide resources that include template policies and procedures for current ethical issues. These programs may be voluntary or mandatory. They may involve incentives for those practitioners that complete the self-assessments, who institute policies and procedures in all identified deficient circumstances, and who successfully undergo a peer or regulator review of these new policies and procedures	CO, DC (through Practice Management Advisory Service), FL, IL (2018), New South Wales (voluntary or if ordered), NS, TX, VA, WA, WY. The Canadian Bar Association has voluntary self-assessments.	CO – Colorado Supreme Court Proactive Management-Based Program Subcommittee FL – Practice Resource Institute is an on-line resource for members to use in managing their practice. http://pri.floridabar.org/management/ IL – http://www.illinoiscourts.gov/Media/PressRel/2017/012417.pdf TX – Self-Assessment Tool WA – Self-Audit Checklist (for use by practitioners to assess their law office management systems)
Random trust account audit programs and bank trust account notification programs These programs identify problems in specific law firm and lawyer trust accounts, thereby addressing those problems before significant trust fund mishandling occurs.	AZ, AR, BC, FL, GA (rules exist, not used), IL (by title companies, etc.), HI (random audit and overdraft notification), IA, KS, LA (overdraft notification), LSUC,	AZ- Rule 43(f)(3)(D), Ariz. R. Sup. Ct. FL – Lawyers and law firms must authorize banks to provide notice if an account is overdrawn. Rule 5-1.2(d)(4) IA – Court Rules Ch. 39

	MA, MN (overdraft notification), MT, NE, NH, NJ, NM, NS, WA. See ABA charts here (random audits) and here (notification).	MA—SJC Rule 3:07, Mass. R. Prof. C. 1.15 (h), dishonored check notification, https://www.massbbo.org/Rules NE – Supreme Court Rule § 3-906 NH – Supreme Court Rule 50 NM – N.M.R.A. 17-204 (overdraft notification) WA – Title 15 of the Rules for Enforcement of Lawyer Conduct (ELC) (trust account examinations and overdraft notification)
Working relationship with lawyer assistance programs (LAPs) Confidential rules that allow regulators to provide early reporting to LAPs provide faster intervention for attorneys who have mental health or substance use issues that affect their ability to practice law.	AZ, AR, CO, HI, ID, IL, KS, MT, NE, NH, OK, OR, TN, TX, WI, WY	
Collaboration with educational institutions Working with law schools, business analytics departments, etc., keeps regulators apprised of emerging and current issues in the profession. It also allows regulators the opportunity to participate in public policy decisions on such issues	AB, CO, ID, IL, KS, NM, TX, UT, WA	
Close relationship with the Client Protection Fund in the state Working with the client protection fund ensures all potential claimants have access to such funds.	AZ, AR, CO, FL, GA, HI, ID, IL, KS, KY, LA, MA, MN, MT, NE, NH, NJ, OK, OR,	CO – Attorneys’ Fund for Client Protection

	PA, TN, TX (administered by the disciplinary counsel's office), UT, VA, WA, WI, WY, all Canadian jurisdictions	FL – Chapter 7, Client's Security Fund Rules IL – https://www.iardc.org/clientprotection.html MA—Supreme Judicial Court Rules 4:04 through 4:06 (Clients' Security Board rules) PA – PaRDE 205(a), 221(g), (h), (o), 402(c)(4) WA – Lawyers' Fund for Client Protection ; APR 15 (Lawyers' Fund for Client Protection); APR 15P (Lawyers' Fund for Client Protection procedural rules)
Automated emails to lawyers changing from government or large firm practice to small firm or solo practice Automated emails from regulators alert these attorneys to be attentive to developing an ethical infrastructure as they transition practice. The larger volume of complaints against small firm and solo practitioners, and the challenges brought by law office and trust account management, demonstrate the need for such communication.	CO, IL (2017), NM (letter, no email)	
Succession planning Succession planning programs from regulators or the bar ensure client protection in the event of an attorney's disability or death.	AB, AZ, AR (has convened a State Bar task force), BC, CO, GA, ID, IL, IA, ME,	AZ – Rule 41(i), Ariz. R. Sup. Ct. CO – Planning Ahead, A Guide to Protecting Your Clients' Interests in the

	NM, OK, OR, SC, TX, WA, WI, WY, ABA resources	Event of Your Disability or Death (One of Which is Inevitable) IL – https://www.iardc.org/Succession%20Planning.htm ; https://www.iardc.org/Closing_a_Law_Practice.pdf IA – Court Rule 39.18 and Iowa State Bar Ass’n resources NM – http://www.nmbar.org/SuccessionTransition ; TX – Succession Planning WA – Ending Your Practice; Succession Planning
Lawyers assistance programs (CoLAP) Lawyers assistance programs provide confidential help to attorneys, judges, and law students with mental health or substance abuse issues, as well as any other issues that may adversely impact their ability to practice or assist their preparation to enter the legal profession. LAPs also educate attorneys regarding substance abuse and mental health issues.	AZ, AR, CO, DC, FL, GA, HI (separate from regulation), ID, IL, IA, LA, KS, KY, MA, MT, NE, NH, NJ, NM, OK, OR (separate from regulation), TN, TX, UT, VA, WA, WY	CO – http://coloradolap.org/ FL - http://fla-lap.org/ MA— www.lclma.org ; Supreme Judicial Court Rule 4:07 NE - http://www.nebar.com/page/NLAP NM – http://www.nmbar.org/JLAP ; TX – TLAP

		WA – Lawyers’ Assistance Program; APR 19(b) (establishes program)
Attorney mentoring programs <ul style="list-style-type: none"> Peer-to-peer mentoring programs instill core values of professionalism and healthy practice. 	AB, AZ, CO, DC, FL, GA, ID, IL, LA (voluntary), LSUC, KS, NE, OK, NM, NS, OR, TX, WA	CO – Colorado Attorney Mentoring Program FL – Practice Resource Institute and Lawyers Advising Lawyers program IL – https://www.2civility.org/programs/mentoring/ NE – http://inns.innsofcourt.org/members/inns/the-robert-van-pelt-american-inn-of-court.aspx TX – Attorney Mentoring Program WA – Mentor Link
Education towards ‘compliance’		
CLE outreach CLE outreach by regulators can help practitioners understand common ethical dilemmas and how to prevent them, including programs on hanging your shingle and virtual law practice	AB, AZ, AR, CO, DC, GA, ID, IL, KS, LA, MN, NJ, NM, TN, TX, UT, VA, WA, WI	IL – https://www.iardc.org/CLESeminars.html TX – CLE Database WA – WSBA CLE (searchable catalogue of recorded and upcoming live seminars)

Professionalism school for all new attorneys	AZ, AR, CO, DC, FL, GA, LA, MA, TX, UT, VA, WA	<p>AZ – Rule 34(n), Ariz. R. Sup. Ct.</p> <p>CO – C.R.C.P. 203.2(6) and 203.4(6)</p> <p>FL – All new members must complete a Practicing with Professionalism program. Rule 6-12.3</p> <p>MA—Supreme Judicial Court Rule 3:16, https://www.massbbo.org/Rules, establishing Practicing with Professionalism course for new admittees</p> <p>TX – within one year of being licensed must take “A Guide to the Ethics of Law Practice”</p> <p>WA – Preadmission Education Program (PREP) (free program required for all new attorneys)</p>
Ethics school for all attorneys who need refresher instructions	CO, IL, LA, MA, NM, OR, TN, TX, UT, WA	<p>IL – http://www.iardc.org/ethics_profseminar.html</p> <p>MA—full-day course, twice a year</p> <p>OR – BR 6.4</p> <p>TX – multiple ethics courses</p> <p>WA – Washington Law and Practice Refresher 2 Day Course Series: Day 1</p>

		and Day 2 (also available for purchase as a recorded product)
Trust account school/assessment for all attorneys who need specific help on trust account issues	AB, AZ, CO, KS, LA, MA, NJ, NS (assessments), TX, VA (under development), WI	AZ – Trust Account Ethics Enhancement Program, Trust account Manual, Trust Account Hotline CO – Trust Account Manual MA—trust account school, monthly from October through May TX – Trust Account Manual
Practice monitor training Training programs that encourage and assist peer review and monitoring as part of probation/diversion/reinstatement	CO, DC (through PMSC), KS, LA, NE, OK, TX (through grievance referral program), UT	TX – Grievance Referral Program
Automated emails to lawyers changing from government or large firm practice to small firm or solo practice Automated emails from regulators alert these attorneys to be attentive to developing an ethical infrastructure as they transition practice. The larger volume of complaints against small firm and solo practitioners, and the challenges brought by law office and trust account management, demonstrate the need for such communication.	CO, IL (2017), NM (letter, no email)	
Ethics counsel/hotline The state bar or regulatory counsel may offer an ethics counsel or hotline that attorneys can contact to seek assistance with ethical dilemmas.	AB, AZ, BC, CO, DC, FL, GA, HI, ID, IL, IA, KS, KY, MA, MN, NE, NJ, NM, NS, OK, OR, TN, TX, USPTO, UT, VA, WA	FL – Toll free Ethics Hotline for members. IL – https://www.iardc.org/ethics.html IA – State Bar Ethics Committee

		<p>MA—helpline three afternoons a week</p> <p>TX - Attorney Ethics Hotline</p> <p>WA – Professional Responsibility; APR 19(e)(3) (establishes program)</p>
<p>Law office management assistance programs</p> <p>These programs help attorneys, particularly solo and small firm practitioners, implement professional office practices and procedures.</p>	<p>AB, AZ, BC, CO, DC, FL, GA, IL, LA, LSUC, MA, NS, OK, OR, TX (via grievance referral program), WA, WI</p>	<p>CO – Practice Management Resources (Colorado Supreme Court Office of Attorney Regulation Counsel)</p> <p>FL – Practice Resource Institute</p> <p>MA— http://masslomap.org/</p> <p>WA – Law Office Management Assistance Program; APR 19(d) (establishes program)</p>
<p>Bar journal / newsletters articles</p> <p>Bar journals and newsletters offer insight on the importance of an ethical infrastructure and RPC compliance. They serve as an important avenue to communicate with and interact with all lawyers licensed to practice law in the jurisdiction</p>	<p>AZ, CO, DC, FL, GA, IL, IA, KS, KY, MN, MT, NE, NM, OK, PA, TN, TX, VA, WA</p>	<p>FL – <i>The Florida Bar Journal</i> and <i>The Florida Bar News</i></p> <p>IA – Iowa State Bar Association</p> <p>NE - http://www.nebar.com/?TNLMagazine</p> <p>PA – Pa D. Bd. Newsletter: http://www.padisciplinaryboard.org/attorneys/newsletter/</p>

		WA – <i>NW Lawyer</i> , <i>NW Sidebar</i> , WSBA Take Note, Social Media accounts: Facebook, Twitter, and YouTube
Incubator programs These programs have sprung up nationwide to help lawyers, particularly solo practitioners, learn how to practice law and operate a business. Regulators should consider educator outreach to these programs to nurture and ensure RPC compliance	AB, CO, DC (PMSC), GA, IL (Chicago Bar Foundation), NM	AZ – New Lawyer Boot Camp
Complaints and Investigations		
Diversion/alternatives to discipline programs with conditions and monitoring Diversion agreements and probation conditions protect the public while allowing otherwise competent attorneys to continue practicing. The goal of such agreements is to correct minor instances of misconduct through training, monitoring, and/or mentoring in order to rehabilitate the attorney and ensure he or she can safely continue to practice.	AB, AZ, CO, DC, FL, IL, IA, KS, LA, LSUC, MA, NH, NJ, NS, OK, OR, PA, TN, TX, USPTO, UT, VA, WA, WI, WY	AZ – Rule 56, Ariz. R. Sup. Ct. CO – C.R.C.P. 251.13 (Alternatives to Discipline) FL – Diversion to Practice and Professionalism Enhancement Programs. Rule 3-5.4. Proposed new rule 3-5.5, Diversion to Evaluation and Treatment Program For Disruptive Lawyers. IA – Court Rule 35.14 (infrequently used) MA – Supreme Judicial Court Rule 4:01, § 8(1)(b), https://www.massbbo.org/Rules

		<p>PA – Probation, but only as part of discipline, Public or private: PaRDE 204(a)(4), (5) and (6)</p> <p>WA – ELC Title 6 (Diversion)</p>
<p>Centralized telephone intake A centralized telephone intake system expedites receipt of a complaint, investigation of the matter, and ultimately its resolution by eliminating/reducing a written reporting system. This promotes public confidence in the profession, stems further misconduct, and by reducing the amount of time an attorney must await a final action on the matter, shortens the period of uncertainty and anxiety that accompanies receipt of a complaint.</p>	<p>AB, AZ, CO, FL, MA, NE, TX, UT, VA (requests a written follow-up), WA, WI</p>	<p>FL – Attorney Consumer Assistance and Central Intake Programs</p> <p>MA –Attorney and Consumer Assistance Program, https://www.massbbo.org/Who_We_Are_OBC_ACAP#OBC</p>
<p>Improved timing for investigation Expedited investigations benefit the public and attorneys. The public benefits from having a grievance resolved in a timely manner, preventing further harm. Attorneys benefit because quicker timing identifies and hopefully resolves problems before further client harm occurs, thereby improving the chances the attorney can continue to practice law.</p>	<p>AZ, CO, FL, IL, LA, MN, NE, TX, VA, WA</p>	<p>FL – Standing Board Policy 15.56 sets out specific case processing goals</p>
<p>Mediation programs Mediation programs that address minor misconduct issues help disciplinary counsel focus on cases involving more serious misconduct.</p>	<p>AB, CO, FL, IL (through IARDC intake), KS, TN, TX (via Client-Attorney Assistance Program), UT, WA</p>	<p>CO – C.R.C.P. 251.13 (Alternatives to Discipline)</p> <p>FL – Chapter 14, Grievance Mediation and Fee Arbitration</p>

		WA – Request for Assistance Form (Consumer Affairs staff informally resolve disputes)
Pro bono/low cost respondent representation programs These programs ensure all lawyers have an opportunity for competent representation in disciplinary and disability proceedings. Such programs also assist in the administration of justice	CO, DC, IL, KS, MA, UT, WA	AZ –the Arizona Association of Defense Counsel offers a one-time consultation with a lawyer who received a bar charge. Regulation advises respondent lawyers and promote use of the program. MA—The board’s general counsel assists lawyers facing disciplinary complaints in obtaining counsel, often pro bono or low cost. WA – ELC 8.10 (Appointment of counsel in disability proceedings)
Community outreach In order to build public trust, regulators should engage in community outreach. This not only enhances the public’s faith in regulators to address misconduct, but it also promotes the rule of law and confidence in the administration of justice.	CO, IL, TX, WA	

II. ADMISSIONS PROGRAMS

Admissions Programs	Jurisdictions	
Reciprocal admission On motion UBE score transfer and practice pending admission programs facilitate consumer choice and lawyer mobility.	AZ, CO, DC, ID, IL, KS, MT, NJ, NM, TX, UT, VA, WA, WY	AZ- Rule 34(f) and (h), Ariz. R. Sup. Ct. CO – C.R.C.P. 203.3

		<p>TX – Admission without examination AWOX</p> <p>WA – Admission by Motion; APR 3(c)</p>
<p>Conditional admissions</p> <p>Conditional admissions allow talented future lawyers with a sustained period of recovery to enter practice healthy and ready to serve the public. The ABA Model Rule on Conditional Admission states: “[a]n applicant who currently satisfies eligibility requirements for admission to practice law, including fitness requirements, and who possesses the requisite good moral character required for admission, may be conditionally admitted to the practice of law if the applicant demonstrates recent successful rehabilitation from chemical dependency or successful treatment for mental or other illness, or from any other condition this Court deems appropriate, that has caused conduct that would otherwise have rendered the applicant currently unfit to practice law. The [Admissions Authority] shall recommend appropriate conditions that the applicant to the bar must comply with during the period of conditional admission.”</p>	<p>AZ, AR, CO, FL, ID, IL, KY, LA, MN, MT, NE, NM, NJ, OR, TN, TX, WY</p>	<p>AZ – Rule 36(g), Ariz. R. Sup. Ct.</p> <p>FL – Rule 1-3.2(b) Conditionally Admitted Members</p> <p>NE – Supreme Court Rule § 3-120</p>
<p>Automatic referrals to lawyer assistance programs for applicants</p> <p>Does your admissions office work with law schools and prospective applicants to identify individuals who need to be connected with a lawyer assistance program or attorney mentoring program?</p>	<p>AR, CO, ID, KS, KY, LA, NE, TN, WY</p>	

Counseling law students regarding admissions / RPC enforcement Regulators and bar association leadership visiting law schools and engaging first and second year students in conversations on enforcement of the RPC and the admissions process educates students as to character and fitness issues. It also encourages them to think before acting when confronted with an ethical issue.	AB, CO, DC, ID, IL, KS, NE, OK, UT, WA, WY	
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III. OTHER SUPREME COURT / BAR PROGRAMS

Programs	Jurisdictions	
Well-being task force programs Certain state bar associations have created task forces or committees to promote attorney well-being. For example, the Georgia State Bar created a task force called “Lawyers Living Well.” The Maryland State Bar Association’s Wellness Committee hosts a “Be Fit to Practice” website. Additionally, NOBC is working closely with members of CoLAP and APRL on a national task force on lawyer well-being. This is a coalition comprised of representatives from CoLAP, NOBC, APRL, the ABA Center for Professional Responsibility, the ABA Standing Committee on Professionalism, the ABA Young Lawyers Division, the ABA Law Practice Division, the Conference of Chief Justices, and the authors of the ABA CoLAP/Hazelden Betty Ford Foundation study on <i>The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys</i> as well as the authors of the 2014 Survey on Student Well-Being, with findings published in the autumn 2016 edition of the Association of American Law Schools’ Journal of Legal Education, <i>Suffering in</i>	AL, CO, GA, IL (Chicago Bar Ass’n and LAP), MD, IN, MN, NC, SC, TN, TX (through TLAP)	

<i>Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns.</i>		
Inventory counsel/receivership programs	AZ, CO, DC, FL, IL, IA, MN, NE, NM, PA, VA, WA	<p>AZ – Rules 66-69, Ariz. R. Sup. Ct.</p> <p>CO – C.R.C.P. 251.32(h) (Protective Appointment of Counsel)</p> <p>FL – Rule 1-3.8, Right to Inventory</p> <p>NE – Supreme Court Rule § 3-328 (Appointment of a Trustee)</p> <p>PA – “Appointment of Conservator for Interest of Clients, PaRDE 321, <i>et seq.</i></p> <p>WA – ELC 7.7 (Appointment of custodian to protect client interests)</p>

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.¹

¹ 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.

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.²

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.³ 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?

² 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

³ 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.

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.⁴

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.⁵ 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.⁶ 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.⁷

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

⁴ See Terry, *supra* note 2, at 89.

⁵ 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.

⁶ *Id.* at 7.

⁷ *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.⁸ 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*⁹ 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.

⁸ 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.

⁹ 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.¹⁰

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.¹¹ 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

¹⁰ 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).

¹¹ 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.

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

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.

¹² 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 (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).¹³ 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.¹⁴ 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.¹⁵ 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 privilege¹⁶.

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.¹⁷ 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.¹⁸

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?

¹³ 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.

¹⁴ 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

¹⁵ *Id.* at 138-41,

¹⁶ *Id.* at 141-46.

¹⁷ 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);

¹⁸ 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 1st and 2nd 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 1st and 2nd 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*.¹⁹ 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

¹⁹ 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.

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.²⁰

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)?

²⁰ 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*.²¹ 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.²²

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.

²¹ 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.

²² *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

Websites:

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

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

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 (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 (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/ (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.)

Attorney Self-Assessment



Iowa Supreme Court
Attorney Disciplinary Board
March 2020

Comprehensive Attorney Self-Assessment Questionnaire¹

This self-assessment questionnaire lists objectives with indicative criteria to assist the attorney in addressing each objective and/or implementing appropriate measures in the attorney's practice. It is a tool to help attorneys with their professional development both by giving attorneys an opportunity to engage in self-examination and by providing resources to assist attorneys in developing workable solutions to common challenges. The questionnaire is designed to increase competence and efficiency, mitigate risk, and enhance the quality of legal services provided to clients by focusing on preventing problems before they arise.²

Not every question applies to every law practice, so it is acceptable to skip a question if it is not applicable. Please note that this questionnaire references some educational resources more than once because they address a variety of professionalism topics.

I.	COMPETENCE.....	2
II.	COMMUNICATION	6
III.	CONFIDENTIALITY	9
IV.	CONFLICTS OF INTEREST.....	12
V.	RECORDS MANAGEMENT.....	15
VI.	STAFF & OFFICE MANAGEMENT	18
VII.	FINANCIAL MANAGEMENT	22
VIII.	ACCESS TO JUSTICE & CLIENT DEVELOPMENT	28
IX.	WELLNESS & INCLUSIVITY	31

¹ This questionnaire is adapted with permission from “Colorado Consolidated Lawyer Self-Assessment,” published by the Proactive Management-Based Program Subcommittee of the Colorado Supreme Court Office of Attorney Regulation Counsel.

² The Attorney Disciplinary Board will attempt to keep this document current at all times, but attorneys should ensure that they consult the latest versions of all Court Rules and review recent caselaw. This document is not intended to be an “advisory opinion” under Court Rule 34.7 and is not legal advice. Attorneys may ensure that they are using the latest version of the self-assessment tool by contacting the Board directly at 515-348-4680.

I. COMPETENCE

Iowa Rule of Professional Conduct 32:1.1 requires lawyers to provide competent representation to clients. Competence encompasses the requisite legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. A lawyer should consider issues of competence when (1) accepting a new matter or (2) substantively or procedurally expanding an existing matter.

Question	Yes	No	Ethical Implications	Additional Resources
When taking on a new matter, do you assess whether you have the legal knowledge and education to handle the matter?				
Does your assessment include:			A lawyer cannot delegate the duty of competence to the client. <i>See In re Shipley</i> , 135 S. Ct. 1589, 1589–90 (2015).	Alan Gutterman, Practical Challenges of Meeting Your Duties of Competence and Diligence to Your Clients , LEGAL SOLUTIONS BLOG (THOMSON REUTERS) (July 18, 2016).
1. Whether you are familiar with the applicable governing law?				
2. Whether you are familiar with the governing procedural rules?			A lawyer must not charge a client fees for excessive time spent achieving competence. <i>See</i> IRPC 32:1.5; <i>see also In re Estate of Larson</i> , 694 P.2d 1051, 1059 (Wash. 1985) (en banc).	Christopher Sabis & Daniel Webert, <i>Understanding the “Knowledge” Requirement of Attorney Competence: A Roadmap for Novice Attorneys</i> , 15 GEO. J. LEGAL ETHICS 915 (2002).
3. Whether you are familiar with any recent changes in applicable substantive or procedural law?				
4. Whether you are familiar with the factual context and subject matter?				
5. Whether you are familiar with the governing Rules of Professional Conduct?			For more guidance on ethical issues associated with the decision to retain or contract with other lawyers, see IRPC 32:1.1 cmts. 6 & 7 .	Iowa Supreme Ct. Att’y Disciplinary Bd. v. Turner, 918 N.W.2d 130, 149 (Iowa 2018) (finding attorney violated rule 32:1.1 by, inter alia, “present[ing] paper bankruptcy petitions, even though electronic filing has been mandated since 2000”). Helen Hierschbiel, The Ethics of Unbundling , OR. STATE BAR BULL., July 2007.
If you find that you do <u>not</u> have the legal knowledge to handle a matter, do you assess whether you can:			A lawyer does not necessarily need special training or prior experience to handle an unfamiliar legal issue. Depending on the situation, competence may be achieved through application of existing skills, research, or association with another lawyer. <i>See</i> IRPC 32:1.1 cmt. 2 .	
1. Timely acquire the knowledge to handle the case and whether you have resources available to do so?				
2. Learn from or get supervision or mentorship from a lawyer with established knowledge in the relevant field?				
3. Limit the scope of representation to work within your current knowledge base or within the reasonably-expandable scope of your knowledge base?			A lawyer who realizes he or she has a competence problem should immediately seek assistance: a failure to properly address incompetence can quickly lead to other serious acts of misconduct. It is important to understand the form and substance of the disclosure required to be made to the client to obtain informed consent. <i>See</i> IRPC 32:1.4 .	
4. Have the client provide informed consent (preferably in writing after a full explanation of the competencies necessary) to a limited scope of representation?				

Question	Yes	No	Ethical Implications	Additional Resources
When taking on new matters, do you assess whether you have sufficient expertise, training, or access to mentoring or other assistance such that you have the legal skills to handle the cases? (application of skills to black letter law)				
Does your assessment include:			The scope of a matter will affect the competence the lawyer will need to possess. See IRPC 32:1.1 cmt. 5 .	Mark Bassingthwaite, Getting It Right with Client Selection , ALPS BLOG (Aug. 26, 2014).
1. Whether you have handled matters in the same practice area before?				
2. Whether you have handled matters of similar complexity in the past?				
3. Whether the representation involves any special licenses or authorizations?			The duty of competence also requires maintenance—keeping up-to-date about changes in the law as well as technology. See IRPC 32:1.1 cmt. 8 .	
4. Whether you can analyze precedent, issue spot, evaluate evidence, and draft legal documents in the new matters?				
5. Whether you are familiar with and can employ relevant technologies necessary for the representation?			For more guidance on ethical issues associated with the decision to retain or contract with other lawyers, see IRPC 32:1.1 cmts. 6 & 7 .	
6. Whether the new matters involve compliance with different rules or procedures than those with which you have had prior experience?				
If you do <u>not</u> have the skills-based competence to handle a new matter, do you assess whether you can:			For more guidance on ethical issues associated with limiting the scope of representation, see IRPC 32:1.2 .	
1. Timely acquire the skills necessary to handle the matter?				
2. Limit the scope of your representation to work within your current skill set or within the reasonably expandable scope of your skill set?				
3. Learn from or get supervision or mentorship from a lawyer with established skills in this field?				
Before taking on new matters, do you ask whether you have the necessary resources (time, finances, staffing, infrastructure, outside advice, and willingness) available to prepare adequately and offer thorough representation?				
Does your assessment include:			Lawyers may not have or have reasonable access to the documentation necessary to make appropriate factual assertions and legal arguments. Lawyers must devote the time to develop what is necessary to adequately perform the representation.	ABA Comm'n on Ethics & Prof'l Resp., Formal Op. 06-441 (2006) (discussing ethical obligations of lawyers who represent indigent criminal defendants when excessive caseloads interfere with competent and diligent representation).
<u>Time</u>				
1. Whether you have the time to handle new matters without neglecting existing professional or personal obligations? Conversely, whether other obligations might impede providing adequate representation?				
2. Whether you have time to investigate and develop the factual aspects of the new matters?			Failure to spend sufficient time investigating the factual and legal	

Question	Yes	No	Ethical Implications	Additional Resources
3. Whether you have time to investigate and develop all legal aspects of the new matters?			bases for an action could result in an adverse finding that a matter is frivolous or could result in the imposition of sanctions under IRCP 1.413(1) . See also IRPC 32:1.1, 3.1 . Making representations without due diligence or expressing insufficiently qualified opinions may violate duties to third parties under the Rules of Professional Conduct and other sources of legal authority. Lawyers are required to “inform themselves about the facts of their clients’ cases and the applicable law.” IRPC 32:3.1 cmt. 2 .	<i>In re Nunnery</i> , 725 N.W. 2d 613, 625–26 (Wis. 2007) (suspending lawyer for two months because he did not conduct a meaningful inquiry into the veracity of documents presented by his client). Frank T. Lockwood, Reinventing Client Selection and Case Management , GP SOLO, July/Aug. 2014, at 38.
4. Whether the new clients have needs or preferences that require additional time? If so, whether you have the time and patience to handle the cases properly?				
5. Whether, if time is an issue, it would be prudent to refer the matters to a lawyer with the skill set and time to handle the representation?				
<u>Financial Resources and Reserves</u>				
1. Whether your fees will support developing both the factual and legal aspects of the matters you undertake?				Mark Bassingthwaighte, Getting It Right with Client Selection , ALPS BLOG (Aug. 26, 2014).
2. Whether your business model allows you to assume the financial risk involved if problems arise in the representation?				
3. Whether your business model supports access to the professional advice of others who can assist you to understand the technical aspects of the matters you take on (attorneys, accountants, physicians, etc.)?				
4. Whether you have sufficient financial liquidity to support the fee structure or payment timing of the representation?				
5. Whether, if necessary, you can modify your fee structure so that you can provide adequate representation?				
<u>Staffing</u>				
1. Whether your staff has sufficient time to handle the new matters?			Lawyers with supervisory authority over one or more nonlawyers must make reasonable efforts to ensure that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer. IRPC 32:5.3(b) .	David V. Wilson II, Focus on Law Practice Management: Supervising Staff and Technology , AM. BAR ASS’N (Aug. 19, 2019).
2. Whether staff has the knowledge and training to handle the cases?				
3. Whether those staff members have the skills to handle the cases?			In considering the appropriate level of instruction and supervision for nonlawyers, lawyers should take into account that nonlawyers do not have legal training and are not subject to professional discipline. IRPC 32:5.3 cmt. 2 .	
4. If your staff lacks competency to handle a case, whether you can:				
a. Timely hire the necessary staff?				
b. Timely train existing staff?				
c. Appropriately supervise the necessary staff?				

Question	Yes	No	Ethical Implications	Additional Resources
<u>Infrastructure</u>				
1. Whether you have access to research resources to answer legal questions presented by cases?			Lawyers have a duty to “keep abreast of changes in communications and other relevant technologies.” IRPC 32:1.1 cmt. 8.	Daniel Garrie, <i>E-Discovery Incompetence Could Cost You Your Legal License – Part 1 & Part 2</i> , LEGAL SOLUTIONS BLOG (THOMSON REUTERS) (Aug. 25, 2015). Stacey Blaustein et al., Digital Direction for the Analog Attorney-Data Protection, E-Discovery, and the Ethics of Technological Competence in Today’s World of Tomorrow , 22 RICH. J.L. & TECH. 10 (2016). Ellie Margolis, Surfin’ Safari—Why Competent Lawyers Should Research on the Web , 10 YALE J.L. & TECH. 82 (2007).
2. Whether you have systems in place to handle the electronic data involved in the matters you accept?				
3. If you lack the requisite infrastructure to handle a matter, whether you could contract with or retain other lawyers who have adequate infrastructure?				
<u>Advice</u>				
1. Whether you have a relationship with at least one other lawyer whom you could consult for advice about or assistance with substance, procedure, or questions of judgment if needed?			Without a colleague or mentor who can act as a sounding board or offer a different perspective, a lawyer may fall prey to poor judgment and echo-chamber thinking.	For more guidance on the ethical issues that may arise with a mentor relationship, particularly confidentiality concerns, see Iowa Ethics Op. 13-04 (Aug. 27, 2013).
2. Whether you receive regular, honest, and relevant feedback on your work product?				
<u>Willingness</u>				
1. Whether the cases are sufficiently interesting to develop the factual bases and legal theories?			A lack of interest in the facts of a particular case or in an unfamiliar area of law can quickly lead to issues related to both competence and diligence. <i>See Iowa Supreme Ct. Att’y Disciplinary Bd. v. Marks</i> , 831 N.W.2d 194, 198–99 (Iowa 2013) (finding violation of rules 32:1.1 and 1.3 when attorney acknowledged he was not competent to handle probate matters and further testified he found a particular probate matter “‘unpleasant,’ and that he faced ‘some sort of mental block’ that prevented him from completing his responsibilities”).	
2. Whether you are hindered in providing competent representation by your personal circumstances, including medical issues, or your personal feelings about the client or the matter?				
3. Whether the representation creates any peer pressure or image issues with which you are not able to reasonably cope?				
4. If you lack the willingness to take a case, whether it would be prudent to refer the matter to a lawyer with the requisite skill set and interest to handle the matter?				
5. If you lack the willingness to take a case, what form and substance the communication(s) declining the case should take?				

II. COMMUNICATION

Iowa Rule of Professional Conduct 32:1.4 addresses a lawyer's duty to communicate with the client. Lawyers must keep the client reasonably informed about matters related to the representation. The duty of communication requires the lawyer to reasonably consult with the client about the client's objectives and the means to accomplish those objectives, to promptly comply with reasonable requests for information, and to sufficiently explain matters to allow the client to make informed decisions regarding the representation. Regular and clear communication with the client are essential. Lawyers should discuss communication expectations with clients when accepting new matters. Written policies establishing minimum communication standards for the lawyer, the staff, and the client can assist with expectation management and help prevent client misunderstandings.

Question	Yes	No	Ethical Implications	Additional Resources
When taking on new matters, do you discuss communication expectations with the client?				
Do you address:				
1. The appropriate and preferred methods of communication, such as phone, mail, email, and text message?			Regular communication initiated by the lawyer reduces the need for the client to request information but does not eliminate the lawyer's obligation to promptly comply with reasonable requests for information. IRPC 32:1.4(a)(3), (4) & cmt. 4 ; <i>Iowa Supreme Ct. Att'y Disciplinary Bd. v. Johnson</i> , 792 N.W.2d 674, 680 (Iowa 2010) (finding lawyer failed to keep client reasonably informed when did not return client telephone calls).	IOWA SUP. CT. ATT'Y DISCIPLINARY BD., CHOOSING AND WORKING WITH A LAWYER . Mark Bassingthwaighe, Manage Client Relationships in Addition to Client Matters , ALPS BLOG (Jan. 16, 2012).
2. The expected response time for client-initiated phone calls, emails, or text messages?				
3. The expected timing for relaying changes or status updates to clients?				
4. The expected frequency of lawyer-initiated updates on the case when there is no activity?				
5. The expected frequency and form of fee or expense updates to clients?				
6. The appropriate and preferred methods of ensuring client receipt of important correspondence and other documents?			Confirming client instructions in writing can reduce client confusion and frustration. IRPC 32:1.2, 1.4 .	Dean R. Dietrich, Handling Clients' Text Messages , WIS. LAW., Apr. 2016.
7. The appropriate and preferred methods of addressing language barriers, if any exist?			For more guidance on the appropriate extent and nature of explanation concerning the status of a matter, see IRPC 32:1.4 cmts. 5-6, 1.14 .	Dean R. Dietrich, Ethics: Lawyers Owe Clients 'Reasonable' Communication , WIS. LAW., June 2011.
8. Whether the client wishes to designate someone else with whom you can communicate on their behalf about the matter?			For more guidance on the required notice regarding any trust account withdrawal for earned fees or expenses, see IA Ct. R. 45.7 .	Jonathan J. Walsh & Benjamin C. Woodruff, The Perils and Pitfalls of Emailing and How to Avoid Them , AM. BAR ASS'N (July 12, 2017).
9. Your own communication needs from the client during the course of the representation, including the expected timing and nature of client responses to contacts initiated by you or your staff?			If the client grants permission to communicate with someone else on their behalf, additional concerns related to confidentiality may arise. See IRPC 32:1.6 . Clients need to fully understand their obligations, including providing truthful and timely responses and keeping contact information up to date.	Tom Kulik, To Text, or Not to Text, Clients: An Ethical Question for a Technological Time , Above the Law (Feb. 11, 2019).

Question	Yes	No	Ethical Implications	Additional Resources
Do you utilize standard engagement and disengagement letters?				
Does your engagement letter include:			<p>It is essential both client and lawyer understand the terms of representation and fees for services.</p> <p>IRPC 32:1.5(b) requires lawyers to provide clients with a “basis or rate of the fee and expenses” within a reasonable time of beginning the representation.</p> <p>A closing letter prevents confusion as to whether the lawyer still represents the client if there is subsequent litigation.</p> <p>For more guidance on mandatory and permissive disengagement, see IRPC 32:1.16.</p> <p>The client is the owner of the contents of his or her file. <i>See Iowa Supreme Ct. Att’y Disciplinary Bd. v. Gottschalk</i>, 729 N.W.2d 812, 819–20 (Iowa 2007).</p>	<p>Charles E. Mortimer, Know When to Hold ‘Em, Know When to Fold ‘Em, COLO. OFF. OF ATT’Y REG. COUNSEL (2014).</p> <p>Mark Bassingthwaighe, Why the Use of an Engagement Letter Should Never Be Optional, ALPS BLOG (Feb. 3, 2015).</p> <p>Joshua Maggard, Engage(ment Letters) with Your Clients, AM. BAR ASS’N (May 19, 2017).</p> <p>CNA PROF’L COUNSEL, LAWYERS’ TOOLKIT 4.0: A GUIDE TO MANAGING THE ATTORNEY-CLIENT RELATIONSHIP, (2018) (sample engagement and closing letters).</p>
1. The terms and scope of the representation?				
2. Billing policies?				
3. The services covered by the representation?				
4. How and when the relationship will be terminated?				
5. A disclaimer that no specific outcome is guaranteed?				
Does your disengagement letter address:				
1. The reason(s) for the disengagement?				
2. Any additional obligations of the client or other actions necessary to protect the client’s interests?				
3. The return of client documents?				
4. The transfer/return of the entire client file?				
Do you have internal policies and procedures in place regarding client communication?				
Do your policies address:			<p>The following may help ensure compliance with a communications policy: (1) requiring staff to read and sign the policy, (2) periodically reviewing the policy with staff, and (3) assessing compliance as part of performance reviews.</p> <p>The use of texting to communicate with clients has become more common but can also create challenges. Some mobile phone companies retain texts for only a short period of time. Accordingly, it is important to independently document or retain text communications.</p> <p>Client surveys and interviews allow lawyers to identify what is working well for clients and what is not. Addressing client complaints improves attorney-client relations and may avoid professional responsibility or liability complaints. <i>See also IRPC 32:8.4(g)</i>.</p>	<p>Mark Bassingthwaighe, If You Failed to Document It, It Never Happened, ALPS BLOG (Jan. 18, 2017).</p> <p>Best Practices: Solicit and Respond to Client Feedback, FINDLAW (THOMSON REUTERS) (2019).</p> <p>Lynn Luong, Law Firm Client Relations: How to Get Client Feedback That You Can Use, ABOVE THE LAW (Nov. 9, 2016).</p>
1. Initial and continued compliance by all staff with communication expectations?				
2. Documentation and retention of any text or phone-based client communications?				
3. Retention of email conversations with clients?				
4. In the event a client refuses to follow your advice, documentation of your recommendations that the client refused to follow, the reason(s) you made the recommendations, and your explanation to the client of the risks of not following the advice?				
Do you assess:				
1. Whether you and other staff members comply with communication expectations?				
2. Whether all communications with clients are respectful of clients and their needs?				
3. Whether clients are satisfied with the representation?				

Question	Yes	No	Ethical Implications	Additional Resources
Do you advertise your services?				
Do you assess:				
1. Whether the advertisements, including any office website, are free of any false or misleading statements?			Both untruthful statements and truthful statements that are misleading are prohibited. See IRPC 32:7.1 cmt. 2.	BETTER BUSINESS BUREAU, CODE OF ADVERTISING (2019).
2. Whether the advertisements contain any statements that are likely to create an unjustified expectation of a particular result?			The inclusion of a disclaimer or other qualifying language may prevent a finding a statement is misleading or creates an unjustified expectation. IRPC 32:7.1 cmt. 3.	Gregory C. Sisk & Ellen L. Yee, Lawyer Advertising in Iowa After 2012 , 62 DRAKE L. REV. 549 (2014).

III. CONFIDENTIALITY

Iowa Rule of Professional Conduct 32:1.6 addresses the confidentiality of client information and the circumstances under which disclosure is prohibited, permitted, and required. Confidentiality applies not only to matters communicated in confidence by the client but to all information relating to the representation. A lawyer may not disclose information relating to the representation of a client except as authorized or required by the Rules. Many issues regarding disclosure of confidential information are preventable, and written policies can aid in preventing such disclosures.

Question	Yes	No	Ethical Implications	Additional Resources
When taking on new matters, do you discuss the issue of confidentiality with the client?				
Do you address: 1. The meaning and scope of the lawyer's duty to maintain client confidences and the circumstances under which disclosure relating to the representation is prohibited, permitted, or required?			Lawyers within a firm may disclose to each other information relating to a client unless the client has instructed that certain information be confined to specified lawyers. IRPC 32:1.6 cmt. 5 .	ABA Comm'n on Ethics & Prof'l Resp., Formal Op. 477R (2017) (securing communication of protected client information)
2. (If you work in a law firm) Disclosure of information about the representation to other lawyers and staff at the firm?			When a communication includes information related to representation of a client, the lawyer must take reasonable steps to prevent it from coming into the hands of unintended recipients. Special security measures are not required if the method of communication affords a reasonable expectation of privacy. Factors to be considered in determining the reasonableness of the expectation of privacy include: (1) the sensitivity of the information and (2) the extent to which privacy of the communication is protected by law or agreement. IRPC 32:1.6 cmt 19 .	Robert A. Barrer, Ethical Implications & Best Practices for Use of Email , N.Y. LEGAL ETHICS REP., Mar. 2015.
3. The potential risks of email and text-message communication?			Security measures such as email encryption and secure online client portals help ensure the protection of client confidences.	Holly Urban, Prioritizing Cybersecurity to Protect Client Information from Data Breaches , L. TECH. TODAY (Jan. 3, 2019). Iowa Ethics Op. 15-01 (Jan. 28, 2015) (obligation to warn client about risk of interception of email)
Do you have internal policies and procedures in place regarding preservation of client confidences?				
Do you address: 1. Initial and continued compliance by all staff with policies regarding client confidences?			The following may help ensure compliance with a confidentiality policy: (1) requiring staff to read and sign the policy and (2) periodically reviewing the policy with staff.	Mark Hansen, How Was Work Today, Dear? , ABA J. (Oct. 29, 2005).
2. Initial and continued compliance by all outside vendors with confidentiality requirements?			Rule 32:1.6 prohibits both disclosures relating to the representation of a client <u>and</u> disclosures that may not in	Grace M. Giesel, The Duty of Confidentiality & the Attorney-Client Privilege: Sorting Out the Concepts ,

Question	Yes	No	Ethical Implications	Additional Resources
			<p>themselves reveal protected information but could reasonably lead to the discovery of such information. It contains no exceptions for disclosures to family members, friends, or significant others. IRPC 32:1.6 cmt. 4.</p> <p>Although discussing “hypotheticals” with another lawyer is permitted, lawyers should take care to omit any information that would allow the listener to be able to ascertain the identity of the client or situation involved. IRPC 32:1.6 cmt. 4.</p> <p>Outside vendors, such as cleaning staff, contract staff, and IT staff, may come into contact with confidential information as part of their services. Lawyers should consider confidentiality agreements with these vendors.</p>	<p>KY. BAR ASS’N BENCH & BAR, Jan. 2015.</p> <p>Mark Bassingthwaighe, Do Your Risk Management Efforts Ever Focus on Support Staff, ALPS BLOG (Feb. 13, 2013).</p>
<p>Do you address: <u>Client Management</u></p> <p>1. The appropriate time and manner to obtain client consent for disclosure of information relating to representation?</p>			<p>Rule 32:1.6(a) allows a lawyer to reveal information relating to the representation of a client if, <i>inter alia</i>, the client gives informed consent.</p>	<p>David Hudson, When Withdrawing Over a Client’s Failure to Pay, What Do You Say to Protect Confidentiality?, ABA J. (Dec. 19, 2016).</p>
<p>2. Protection of client confidences in a motion to withdraw?</p>			<p>Lawyers may want to memorialize a client’s consent to disclosure so that both parties are clear as to the scope of authorization and when it was made.</p> <p>A motion to withdraw that discusses the reason for the lawyer’s request to withdraw should be carefully drafted to avoid violation of IRPC 32:1.6. See also IRPC 32:1.16 & cmt. 3.</p>	
<p><u>Building & File Security</u></p> <p>1. Practices and precautionary measures, in consideration of the office layout, to eliminate public access and visibility of client files and office computer monitors?</p>			<p>Rule 32:1.6(c) requires lawyers to competently safeguard client information against unauthorized access. See also IRPC 1.6 cmt. 18.</p>	<p>Mark Bassingthwaighe, Why Be Concerned About Law Firm Housekeeping Apathy?, ALPS BLOG (May 13, 2014).</p>
<p>2. The appropriate locations within the office for confidential discussions?</p>			<p>Electronic record storage has become increasingly common in the past several years, but along with it has come increased risks of security breaches. Measures such as password protection, anti-virus software, two-factor authentication, VPNs, and firewalls all help ensure the protection of client confidences.</p>	<p>Kathryn A. Thompson, Keeping Your Office Sharing Arrangements with Other Lawyers Squeaky Clean Under the Ethics Rules, ABA CTR. FOR PROF’L RESP., May 2007.</p>
<p>3. (If you share space with another practitioner/firm) Segregation of files and other confidential client information?</p>				<p>ABA Comm’n on Ethics & Prof’l Resp., Formal Op. 483 (2018) (discussing</p>
<p>4. The security of the office building (such as who has keys to the office, who is responsible for locking the office at night, and who has off-hours access)?</p>				

Question	Yes	No	Ethical Implications	Additional Resources
5. The security of the file storage (whether onsite or offsite)?				lawyers' obligations after an electronic data breach or cyberattack)
6. The security of file destruction procedures?				
<u>Inadvertent Disclosures</u>			<p>An inadvertent disclosure of information relating to the representation of a client does not necessarily constitute a violation of rule 32:1.6. However, lawyers are required to make reasonable efforts to prevent unauthorized access or inadvertent disclosure. IRPC 1.6 cmt. 18.</p> <p>A lawyer who receives a document or electronically stored information from a third party, including opposing counsel, that the lawyer knows or reasonably should know was inadvertently sent is required to promptly notify the sender. IRPC 32:4.4(b).</p>	<p>David L. Hudson Jr., Redacting Confidential Client Information: The Devil Is in the Details, ABA J. (July 1, 2019).</p> <p>Iowa Ethics Op. 15-02 (Jan. 28, 2015) (duties of lawyer upon receipt of inadvertent disclosure or wrongfully obtained information)</p>
1. Practices to avoid inadvertent disclosure of confidential information?				
2. The appropriate procedures following a notification of an inadvertent disclosure (such as notification to the client)?				
<u>Websites and Social Media</u>			<p>A lawyer should take care before posting information online about a client. The duty of confidentiality extends to information related to a representation, even if others may be aware of or have access to that knowledge. See IRPC 1.6(a); <i>Iowa Supreme Ct. Att'y Disciplinary Bd. v. Marzen</i>, 779 N.W.2d 757, 766 (Iowa 2010) ("[T]he rule of confidentiality must apply to <i>all</i> communication between the lawyer and client, even if the information is otherwise available.").</p>	<p>Nick Graf, Social Media Risks for Lawyers, CNA (Sept. 8, 2016).</p> <p>ABA Comm'n on Ethics & Prof'l Resp., Formal Op. 480 (2018) (discussing confidentiality obligations for lawyer blogging and other public commentary).</p> <p>Mark Bassingthwaighe, My Former Client Posted What???, ALPS BLOG (Jan. 3, 2018).</p>
1. The nature and scope of information that should be posted as it relates to your practice?				
2. If posting information relating to the representation of a particular current or former client, the need for client authorization?				
3. Practices to avoid disclosure of confidential information in online content and updates?				

IV. CONFLICTS OF INTEREST

Iowa Rules of Professional Conduct 32:1.7, 1.8, 1.9, 1.10, 1.11, and 1.18 address conflicts of interest that may arise with prospective, current, and former clients, including the circumstances under which a lawyer may represent a client despite the existence of a conflict. It is essential for lawyers to maintain both loyalty to the client and independence in judgment. A lawyer may not represent a client if the representation involves a personal or professional conflict of interest except as authorized by the Rules. Regular maintenance and consultation of a conflict-of-interest database can help lawyers identify potential conflicts as they arise and prevent issues that may result from a failure to properly identify and remedy a conflict of interest, such as disqualification from litigation, fee forfeiture, malpractice liability, and disciplinary proceedings.

Question	Yes	No	Ethical Implications	Additional Resources
Do you have a process/system by which you identify conflicts?				
Does your process/system identify:			<p>For additional guidance on resolution of a conflict of interest, see IRPC 32:1.7 cmts. 2-4.</p> <p>Lawyers with managerial authority within a firm are required to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance all lawyers in the firm will conform to the Rules. IRPC 32:5.1(a) & cmt. 2.</p> <p>For additional guidance on ethical issues that arise with organizational clients, see IRPC 32:1.7 cmts. 34-35 and 32:1.13.</p> <p>A thorough conflict detection system includes both lawyer and staff review. IRPC 32:1.7 cmts. 4-5.</p> <p>Engagement and disengagement letters can clarify whether an attorney-client relationship exists and assist with identification of potential conflicts with current and former clients.</p> <p>Ignorance caused by a failure to institute reasonable conflict-check procedures does not excuse a violation of the conflict-of-interest rules. IRPC 32:1.7 cmt. 3.</p> <p>For additional guidance on imputation of conflict of interest and the appropriate use of screening, see IRPC 32:1.0 cmts. 8-10, 32:1.10, 32:1.11.</p>	<p>Iowa Ethics Op. 18-01 (Dec. 21, 2018) (a “best practice” systems-approach to client selection, avoidance of conflict of interest, and case processing).</p> <p>Iowa Ethics Op. 17-01 (Apr. 28, 2017) (when lawyers change law firms: guidelines for lawyers, their existing law firms, and potential future law firms)</p> <p>Mark Bassingthwaighe, Watch Out for These Common Attorney Conflict of Interest Traps, ALPS BLOG (Mar. 3, 2015).</p> <p>Josh Camson, How to Do a Law Firm Conflicts Check, LAWYERIST (Oct. 14, 2019).</p> <p>Mark Bassingthwaighe, Don't Kiss Off the Importance of Closure Letters, ALPS BLOG (Jan. 26, 2015).</p>
1. Names of clients & matters?				
2. Names of adverse parties?				
3. Names of related parties (such as witnesses, experts, insurance carriers, family members, co-counsel, opposing counsel, related entities, owners of business entities)?				
4. Names of potential/rejected clients & matters?				
5. Dates matters were active/closed/rejected?				
6. Names of lawyers and staff who worked on particular matters?				
Do you have internal procedures in place that address:				
1. Initial and continued compliance by all staff with expectations regarding use of the conflicts process/system when a prospective matter arise?				
2. Maintenance of the conflicts process/system?				
3. Use of engagement and disengagement letters?				
4. (If you work in a firm) Screening measures for members of the firm that are disqualified from certain matters?				

Question	Yes	No	Ethical Implications	Additional Resources
Before taking on new matters, do you consider whether a conflict of interest may exist?				
Do you assess whether the potential representation: 1. Would be adverse to a current client, even if the matters are unrelated? 2. Would be adverse to a former client in a substantially related matter? 3. Would involve representing multiple clients in a single matter? 4. Would be adverse to a prospective client not engaged by you or your firm in the same or a substantially related matter? 5. Would be limited by your own personal interests? 6. Would be limited by your responsibilities to a third party, including insurance carriers? 7. Would be limited by a positional conflict? 8. Would likely require you to be a necessary witness in the matter? 9. Would involve a lawyer you are or have been affiliated with, such as a former employer or a lawyer with whom you share an office? 10. (If you work in a firm) May involve an imputed disqualification based upon the conflict of a co-worker?			<p>Lawyers are prohibited from undertaking representation directly adverse to a current client without each affected client's informed consent, even if one or more of the matters are transactional. IRPC 32:1.7 cmts. 6–7. For additional guidance on the duties to former clients, see IRPC 32:1.9. For additional guidance on the duties to prospective clients, see IRPC 32:1.18.</p> <p>For additional guidance on the issues that may arise with common representation, see IRPC 32:1.7 cmts. 29–33 and 32:1.8 cmt 13.</p> <p>“The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment” IRPC 1.7 cmt. 8.</p> <p>Generally, a lawyer may take inconsistent legal positions in different tribunals on behalf of different clients, but a conflict arises if there is a significant risk the lawyer's action on behalf of one client will materially limit their effectiveness in representing another client in a different case. IRPC 32:1.7 cmt. 24.</p>	<p>Hal R. Lieberman, Working Knowledge of Conflict of Interest Rules Is Essential, N.Y. L. J. (Sept. 27, 2004).</p> <p>Mark Bassingthwaight, You Don't Get It Both Ways—the Downside of Joint Representation, VA. LAW., Oct. 2015, at 51.</p> <p>ABA Comm'n on Ethics & Prof'l Resp., Formal Op. 340 (1974) (“No disciplinary rule expressly requires a lawyer to decline employment if a . . . close relative represents the opposing party. . . . We cannot assume that a lawyer who is married to another lawyer necessarily will violate any particular disciplinary rule.”).</p>
If you determine a conflict of interest may exist, do you consider whether the conflict or potential conflict is consentable?				
Do you assess: 1. Whether the representation is of two clients on opposing sides in a litigation matter? 2. Whether the representation is prohibited by law? 3. Whether the representation is of criminal co-defendants? (<i>usually</i>) 4. Whether the representation is of both parties in dissolution of marriage proceedings?			<p>See IRPC 32:1.7(b)–(c).</p> <p>To sufficiently assess the nature of a conflict of interest, lawyers need to resist the natural desire to accept new work and to minimize conflicts and instead seriously consider the consequences that may arise due to a conflict.</p>	<p>16 IOWA PRACTICE SERIES, LAWYER & JUDICIAL ETHICS § 5:7(d)(3) (2019) (materially-limited representation conflicts of interest—representing multiple clients in criminal matter)</p>

Question	Yes	No	Ethical Implications	Additional Resources
5. (If not explicitly non-consentable under rule 32:1.7(b) or (c)) Whether you will be able to provide competent and diligent representation to each affected client?			"Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest." IRPC 32:1.7 cmt 15.	
If you determine a consentable conflict of interest exists, do you obtain informed consent, in writing, from each affected client?				
Do you obtain consent from each affected client to disclose information related to the representation necessary to permit each client to make an informed decision about the conflict of interest?			<p>"Informed consent" is "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." IRPC 32:1.0(e); <i>see also</i> IRPC 32:1.7 cmts. 18–19.</p> <p>Informed consent must be confirmed in writing. IRPC 32:1.7(b)(4).</p>	ABA Comm'n on Ethics & Prof'l Resp., Formal Op. 05-436 (2005) (informed consent to future conflicts of interest).
Do you ensure that you have provided each affected client with: 1. Adequate information and explanation about the material risks of the proposed course of conduct? 2. Reasonably available alternatives to the proposed course of conduct?			<p>The extent of the explanation required will depend upon the nature of the conflict and the legal experience of the client. Regardless, a general or open-ended consent is unlikely to suffice. IRPC 32:1.7 cmt. 22.</p> <p>Lawyers undertaking common representation should explain the effect on the attorney-client privilege and confidentiality of client information. IRPC 32:1.7 cmts. 29–33.</p>	Mark Scruggs, How to Write a Good (and Ethical) Conflict of Interest Waiver , LAW. MUTUAL (Apr. 3, 2018).
Do you continue to assess potential conflicts as the representation progresses?				
Do you reassess potential conflicts when:				
1. New parties are added to a matter?			<p>If a new conflict arises after representation has been undertaken, the lawyer generally must withdraw unless the conflict is consentable and informed consent is obtained. IRPC 32:1.7 cmts. 4–5.</p>	ABA Comm'n on Ethics & Prof'l Resp., Formal Op. 08-450 (2008) (conflict of interest when must reveal confidential information relating to one client in order to effectively represent another client)
2. New counsel appear in a matter?				
3. New witnesses are discovered?				
4. Interests of clients diverge?				
5. Changes in your own life occur, whether financial or personal?				
If you determine a conflict of interest has arisen, do you consider whether the conflict is consentable?			<p>It may be necessary to seek court approval before withdrawal. <i>See</i> IRPC 32:1.16.</p>	
If you determine the conflict is consentable, do you obtain informed consent, in writing, from each affected client?				
If the new conflict is not consentable or consent cannot be obtained, do you take steps to withdraw?				

V. RECORDS MANAGEMENT

Organization, management, and security of client files directly impact a lawyer's efficiency and ability to obtain optimal results for clients. Effective records management is essential to a lawyer's ability to comply with the Rules of Professional Conduct from adequately preparing for trial (Rule 32:1.1) to timely responding to client inquiries (Rule 32:1.4). Moreover, files often contain confidential client information (Rule 32:1.6), critical records (Rule 32:1.15), and client-lawyer communications about the objectives of the representation (Rule 32:1.2). Lawyers should thoughtfully consider best practices for file management, security, and retention to avoid the ethical issues that often arise from poor recordkeeping.

Question	Yes	No	Ethical Implications	Additional Resources
Do you have a standardized filing system in place for all client files?				
Do you address:				
1. File-naming conventions for both electronic and paper files?			<p>"A lawyer's management of her records must protect the client's interests . . . must protect the client's confidences and secrets, and must be governed by the lawyer's professional judgment . . ." GEORGE C. CUNNINGHAM & JOHN C. MONTANA, <i>THE LAWYER'S GUIDE TO RECORDS MANAGEMENT AND RETENTION</i> 39 (2006).</p>	<p>IOWA ST. BAR ASS'N, CLIENT FILE RETENTION GUIDE.</p> <p>Iowa Ethics Op. 08-02 (Mar. 4, 2008) (File storage and retention policy).</p> <p>Top 5 Reasons a Document Management Program Is Critical to Law Practice, FINDLAW (Feb. 10, 2017).</p>
2. Consistency between electronic and paper copies of files?				
3. Retention of all email and text communications with clients?				
4. Appropriate safeguarding of client original documents?				
5. Record retention in accordance with IRPC 32:1.15 and any other applicable law?			<p>Failure to implement a well-defined and well-executed structure for naming files, may cause the loss of important client information.</p> <p>Lawyers must hold the property of others with the care required of a professional fiduciary. Some property, like securities, should be kept in a safe deposit box. IRPC 32:1.15 cmt. 1.</p> <p>A policy may help ensure the eventual return of original documents to the client.</p> <p>The Iowa Rules of Professional Conduct do not prescribe a minimum period of time for retention of client files. However, lawyers are required to maintain complete records of account funds and other property for at least six years after termination of the representation. IRPC 32:1.15.</p>	<p>Sam Glover, How to Organize Paperless Law Firm Files, LAWYERIST (Oct. 16, 2019).</p> <p>Beverly Michaelis, Documenting Email as Part of a Client's File, Part I, OR. ST. BAR BULL., Apr. 2013.</p>

Question	Yes	No	Ethical Implications	Additional Resources
Do you have internal policies and procedures in place to ensure the security of client files?				
Do you assess: 1. Whether you have the time and expertise to oversee technology, including cyber-security, in order to properly maintain files and, if you do not have the time and expertise, whether you have employed or contracted with someone to assist you with this task?			<p>"It is the responsibility of the lawyer delivering legal services online—not the hosting company, the software provider . . . or any other entity—to ensure that . . . the practice complies with the high ethical standards required by the lawyer's law license." STEPHANIE L. KIMBRO, VIRTUAL LAW PRACTICE: HOW TO DELIVER LEGAL SERVICES ONLINE 133 (2010).</p> <p>If you do not have a designated technology compliance officer, you may want to consider hiring or contracting with someone to assist with this task.</p> <p>The following may help ensure compliance with a security policy: (1) requiring staff to read and sign the policy, (2) periodically reviewing the policy with staff, and (3) assessing compliance as part of performance reviews.</p>	<p>Kendra Albert, Computer Security Tools & Concepts for Lawyers, 20 GREEN BAG 2D 127 (2017).</p> <p>Mary Ellen Egan, Cyberthreats 101: The Biggest Computer Crime Risks Lawyers Face, ABA J. (Mar. 1, 2018).</p>
2. Initial and continued compliance by all staff with respect to all security policies?				
<u>Building and File Security</u> Do you address: 1. Parameters regarding file access by members of your staff?			Tracking or limiting access to sensitive documents may help protect client confidentiality.	ABA Comm'n on Ethics & Prof'l Resp., Formal Op. 477R (2017) (securing communication of protected client information).
2. The security of your physical file-storage system?			Utilizing lockable file cabinets or storage rooms are simple ways to help ensure the security of physical client files. Water and fireproof safes or storage can help safeguard documents despite a catastrophic event.	CHRISTOPHER ANDERSON & DAN BARAHONA, WHEN "SECURE ENOUGH" ISN'T ENOUGH: A LAW FIRM GUIDE TO PROTECTING THE CONFIDENTIALITY OF SHARED CLIENT FILES (2013).
3. Whether client files and other documents are adequately protected from catastrophic events?				
4. Measures to guarantee the regular back-up of data?				
5. The appropriate procedures to ensure secure transmission of medical records, financial records, or other highly confidential materials?			<p>Consistent data back-up is essential to avoiding losing files after a cyber-security breach or technological malfunction.</p> <p>Security measures such as email encryption and secure online client portals help ensure the protection of client confidences. <i>See also</i> IRPC 32:1.6 cmt 19.</p>	Holly Urban, Prioritizing Cybersecurity to Protect Client Information from Data Breaches , L. TECH. TODAY (Jan. 3, 2019).
<u>Network/Hardware Security</u> Do you address: 1. Physical security protection for the computer hardware used in the operation of your firm's network?			Secure hardware reduces the chance that confidential information stored or accessed electronically will be compromised. <i>See also</i> IRPC 32:1.6(d) & cmt 19 .	<p>Iowa Ethics Op. 14-01 (Mar. 10, 2014) (computer security).</p> <p>ABA Comm'n on Ethics & Prof'l Resp., Formal Op. 06-</p>

Question	Yes	No	Ethical Implications	Additional Resources
2. Procedures to ensure regular updates to software, including updating patches and antivirus software?			Client information and files stored electronically receive better protection from viruses and potential cybersecurity breaches through regular software updates.	442 (2006) (review and use of metadata).
3. The security of your firm's internet access?				ABA Comm'n on Ethics & Prof'l Resp., Formal Op. 483 (2018) (data breach or cyberattack).
4. (If you use a smart phone or other portable digital devices in your practice) The security of information stored on or accessible through smart phones or other digital devices?				Pem Guerry, Why Remote Security Is a Must , L. TECH. TODAY (Jan. 12, 2017).
5. The appropriate procedures following a security or cyber-security breach?			Using a wireless computer network or an "open" network to do business increases the risk of inadvertent disclosure of client information. Allowing guests to freely use your firm's internal wi-fi network could also compromise client confidences. Periodic testing, such as conducting vulnerability assessments, may help identify cyber security procedures that need improvement.	Sherri Davidoff, Law Firm Cybersecurity Audits: Getting to Good , L. PRACTICE TODAY, Feb. 12, 2016.
<u>Cloud Services</u> Do you consider: 1. Where the cloud servers reside and how the laws of that jurisdiction may impact confidentiality of the information stored on the servers?			Security protections such as data encryption and allowing only the firm to have control of the encryption key help ensure the protection of client confidences. See also IRPC 32:1.6 cmt 19 .	Iowa Ethics Op. 11-01 (Sept. 9, 2011) (cloud computing)
2. Whether and how the contract with the cloud provider addresses confidentiality?				Jason Tashea, Lawyers Have an Ethical Duty to Safeguard Confidential Information in the Cloud , ABA J., Apr. 1, 2018.
3. Whether the cloud service has regular and adequate data backup policies?				Sharon Nelson & John Simek, Selecting a Law Firm Cloud Provider , MICH. BAR J., Mar. 2014.
Do you address: 1. The potential confidentiality risks associated with cloud services and do you obtain client consent to cloud file storage?				Heidi Alexander, How to Vet Cloud Technology Providers , MASS. L. OFF. MGMT. PROGRAM, 2018.
<u>Disaster Plan / Continuity of Operations</u> Do you address: 1. Procedures to follow in the event of a catastrophic event?			A natural disaster or technological breach presents multi-faceted ethical issues related to both confidentiality (IRPC 32:1.6) and diligence (IRPC 32:1.3).	Iowa Ethics Op. 08-03 (June 18, 2008) (Damage file disposition).
2. Continuity of operations in the event of a natural disaster or security breach?				ABA Comm'n on Ethics & Prof'l Resp., Formal Op. 482 (2018) (ethical obligations related to disasters) ABA SPECIAL COMM. ON DISASTER RESPONSE & PREPAREDNESS, SURVIVING A DISASTER: A LAWYER'S GUIDE TO DISASTER PLANNING (2011). Jeff Norris & Greg Inge, Rethink Your Law Firm's IT Disaster Recovery Strategy , ABA J., Oct. 30, 2018.

VI. STAFF & OFFICE MANAGEMENT

Responsible office and staff management are essential to an effective law practice. It not only promotes client satisfaction but helps guarantee compliance with the Rules of Professional Conduct from maintaining adequate supervision over subordinate lawyers and nonlawyers (IRPC 32:5.1–5.5) to ensuring competent and diligent representation (IRPC 32:1.1 and 32:1.3) through client selection and risk management. Written policies and procedures can help the firm address concerns promptly and effectively before they cause larger issues.

Question	Yes	No	Ethical Implications	Additional Resources
Firm Structure				
If you are a sole practitioner				
Do you practice through an entity (e.g., a professional corporation or a single-member professional limited liability company)?			Managing risk by anticipating problems and reducing mistakes helps ensure profitability.	Starting a Law Firm – Business Entities, IOWA ST. BAR ASS'N. FRANK J. CARROLL & BEVERLY EVANS, BUSINESS ORGANIZATIONS UPDATE. Choose a Business Structure, U.S. SMALL BUS. ADMIN.
If not, have you considered the advantages that practicing through an entity can provide, particularly with regard to liability?				
If you practice in a firm				
Is the structure of the firm memorialized in a written agreement which forms and governs the law firm (e.g., partnership agreement, corporate bylaws, and articles of organization)?			Managing risk by anticipating problems and reducing mistakes helps ensure profitability.	Starting a Law Firm – Business Entities, IOWA ST. BAR ASS'N. FRANK J. CARROLL & BEVERLY EVANS, BUSINESS ORGANIZATIONS UPDATE. Choose a Business Structure, U.S. SMALL BUS. ADMIN.
Are these governing documents reviewed at least annually by the partners, shareholders, or members?				
Do you revise the governing documents to reflect changes in ownership?				
Compensation				
Is your compensation adequate to give you time apart from practicing law to handle management of risks to the practice?			The long-term disadvantages of an unmanaged risk can far outweigh short-term income from fees. For instance, during client intake, the lawyer's desire to increase his or her book of business should be balanced against the best interests of the firm as a whole. IRPC 32:1.5(a) requires fees to be reasonable under the circumstances. Compensation should be structured so that the firm can decline an unsuitable prospective client.	
Insurance and Compliance Counsel				

Question	Yes	No	Ethical Implications	Additional Resources
<u>If you are a sole practitioner</u>				
Do you have malpractice insurance?			Although not required by the IRPC, it is consistent with a lawyer's fiduciary responsibilities to obtain insurance coverage up to the full amount of the possible harm, not including the cost of defense. Security and other risk management policies promote compliance with the IRPC.	AM. BAR ASS'N, Materials for Purchasers of Professional Liability Insurance , July 7, 2016. Alec Rothrock, Check Your Policy: Disciplinary Defense Insurance "Coverage." THE DOCKET, Nov. 23, 2015.
Have you put in place the risk management policies required or recommended by the insurer?				
Do you have cyber insurance for protection in the event of a cyberattack?				
<u>If you practice in a firm</u>				
Has the firm appointed one of its lawyers to represent the firm in litigation, obtain malpractice insurance, promote professional responsibility and guide and monitor the implementation of risk management policies ("Compliance Counsel")?			Lawyers with managerial authority over the professional work of a firm or with direct supervisory authority over another lawyer must make reasonable efforts to ensure general compliance with the IRPC. IRPC 32:5.1 ; 32:5.3 .	AM. BAR ASS'N, Materials for Purchasers of Professional Liability Insurance , July 7, 2016.
Does the firm have cyber insurance for protection in the event of a cyberattack?				
<u>Business Manual</u>				
Do you or your firm have a manual of risk management policies?			The following may help ensure compliance with a written risk management policy: (1) requiring staff to read and sign the policy and (2) periodically reviewing the policy with staff, and (3) assessing compliance as part of performance reviews.	Committees: Ethics & Practice Guidelines , IOWA ST. BAR ASS'N. Law Office Management , LAWYERIST (Oct. 8, 2019).
Do you or your firm ensure initial and continued compliance by all staff with risk management policies?				
Are staff supported in making reports under these policies?				
Does the policy address timely reporting of:			Timely reporting of problems is essential to the reduction of risk. The firm's culture should foster an appreciation that each employee owes his or her loyalty to the firm's clients and the firm's reputation, not to an individual who might prefer to hide a mistake. If feasible, allowing reports to be made confidentially may encourage reporting. These areas relate to several of the IRPC, including IRPC 32:1.1 , 32:1.3 , 32:1.4 , 32:1.5(a) , 32:3.4(c) , 32:5.5 , 32:8.1 , and 32:8.3 .	
1. Ethics violations?				
2. Court-ordered sanctions for litigation misconduct?				
3. Regulatory investigations?				
4. Client allegations of malpractice or wrongdoing by firm lawyers or staff?				
5. Billing disputes?				
6. Alcohol, drug, or other employee problems?				
7. Over-charging expenses to clients?				
8. Incompetence?				
9. Unauthorized practice of law?				
10. Harassment?				
11. Any other matters that impede client satisfaction?				
<u>Supervision</u>				

Question	Yes	No	Ethical Implications	Additional Resources
Do you or others in your firm conduct performance reviews of staff?			Lawyers with managerial authority over the professional work of a firm or with direct supervisory authority over a lawyer must make reasonable efforts to ensure general compliance with the IRPC. IRPC 32:5.1 ; 32:5.3 . Ongoing monitoring and mentoring of employees is also valuable from a business standpoint. Successful lawyering requires proficiency and efficiency. To achieve these goals, managers need employees who perform well. It may be worthwhile to develop a handbook that addresses the professional obligations of all staff. Missed deadlines are one of the most common ethics complaints.	Managing People in a Law Firm , LAWYERIST (Sept. 30, 2019).
Do you have procedures in place to ensure that the conduct of your staff conforms to your professional obligations?				
Do you regularly review each client matter to check that you and staff have timely performed tasks?				
<u>If you practice in a firm</u>				
Does the firm have a mentoring program for its associates?			A meaningful mentorship can improve attorney performance.	Managing People in a Law Firm , LAWYERIST (Sept. 30, 2019).
<u>Hiring</u>				
Do you perform due diligence before hiring new staff?			In addition to the interview, the hiring authority should thoroughly investigate the applicant’s background, including work and criminal history.	EFFECTIVELY STAFFING YOUR LAW FIRM (Jennifer J. Rose, ed., 2d ed. 2017).
<u>Termination of Staff</u>				
Do you take steps when a staff member is terminated or leaves the firm to ensure client files remain confidential?			If a staff member must be terminated, the priority should be maintaining security and confidentiality. This requires the return of all firm property and removal of all access. It may entail changing passwords.	
<u>Accepting New Engagements</u>				
Do you undertake due diligence before agreeing to represent new clients or taking on a new matter for an existing client?			Due diligence includes assessing your competency and the client’s capacity to pay.	Linda Oligschlaeger, A Few Tips on How to Collect Your Fees , THE MO. BAR (2019).
<u>Provision of Law-Related Services</u>				
Are you engaged in the provision of law-related services or do you control an organization that provides such services?			Lawyers are subject to the IRPC when providing law-related services if those services are provided: (1) by the lawyer in circumstances that are not distinct from the lawyer’s provision of services to clients, or (2) in other circumstances if the lawyer fails to take reasonable measures to ensure a person obtaining the services knows the services are not legal services and the protections of the client-lawyer relationship do not exist. IRPC 32:5.7(a) .	Iowa Ethics Op. 96-08 (Aug. 29, 1996) (lawyer-accountant)
If so, do you need to take measures to assure clients that the services are not legal services?				
<u>Disengagements</u>				

Question	Yes	No	Ethical Implications	Additional Resources
Do you require that a letter be sent to each client or successor counsel promptly following a file closing?			A closing letter helps prevent confusion about the representation in the event of subsequent litigation. It is also an opportunity for a lawyer to end the attorney-client relationship on a positive note. Upon termination of representation, lawyers must take steps to protect a client's interests, including surrendering papers and property to which the client is entitled and refunding any payments that have not been earned. See IRPC 32:1.16(d) .	Miranda K. Mandel, Ethical & Liability Concerns When the Client Relationship Ends , ATT'YS LIAB. ASSURANCE SOC'Y, INC. (2014). CNA PROF'L COUNSEL, LAWYERS' TOOLKIT 4.0: A GUIDE TO MANAGING THE ATTORNEY-CLIENT RELATIONSHIP , (2018) (sample engagement and closing letters).
Do you have a standard procedure for returning unearned fees and other client funds to clients?				
Do you have a procedure for collecting accounts receivable?				
Do you have a standard procedure for notifying the court of your disengagement?				
Closing/Succession Planning				
Have you identified and authorized a qualified entity or attorney to serve as your designated representative to act in the event of your death or disability?			For more guidance on the requirement for death or disability designation and authorization, see Iowa Ct. R. 39:18 .	SUCCESSION PLANNING FOR IOWA LAWYERS , OFF. OF PROF'L REG. (2011). Succession Planning by Iowa Attorneys , IOWA JUD. BRANCH. LATERAL LINK, Mandatory Law Firm Retirement, Succession Planning, and You , ABOVE THE LAW (July 24, 2014).
Do you maintain a current list of active clients in a location accessible to your designated representative?				
Does your designated representative have knowledge of the location of passwords and other security protocols necessary to access your electronic files and records?				
Have you considered a supplemental written plan designating an attorney or entity to perform additional functions in the event of your death or disability?				
Do you have written plans for winding down your practice?				

VII. FINANCIAL MANAGEMENT

Iowa Rule of Professional Conduct 32:1.5(b) requires lawyers to communicate both the scope of representation and the basis/rate of the fee and expenses for which the client will be responsible. A written fee agreement or statement concerning the terms of engagement significantly reduces the possibility of misunderstanding by either the client or the lawyer.

As an engagement progresses, lawyers frequently come into possession of the property of a client or third party, including money. Lawyers have a fiduciary duty to safeguard the property of others. That duty includes keeping funds that belong to clients or third parties separate from the lawyer's own property. Under Iowa Rule of Professional Conduct 32:1.15, lawyers are required to maintain a trust account if they accept fees from clients for work they have not yet performed or for expenses not yet incurred. Lawyers are also required to have a trust account if they receive client settlement funds or hold a third party's funds as part of a legal representation. Proper trust account management is vital to an ethical, professional practice.

The following self-assessment is divided into two sections. The first section consists of considerations related to engagements and fee agreements. The second concerns the management and safekeeping of funds.

PART A: FEES

Question	Yes	No	Ethical Implications	Additional Resources
When taking on new matters, do you consider and properly identify the client?				
<i>If the client is an entity, do you consider:</i> 1. Whether the person with whom you are dealing has the authority to bind the client?			For additional guidance on organizations as clients, see IRPC 32:1.13 .	Iowa Ethics Op. 99-01 (Sept. 8, 1999) (propriety of guidelines imposed by insurance company engaging lawyer to represent its insured). Paula M. Bagger, When a Third Party Pays the Legal Fees , AM. BAR ASS'N (May 21, 2019).
2. Whether the client has policies that require in-house approval of your fee agreement?			A lawyer may <u>not</u> accept compensation for representing a client from someone other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence or the attorney-client relationship; and (3) information relating to the representation is protected from disclosure to the payer as described in rule 32:1.6.	
<i>If someone other than the client is paying your fee, do you obtain:</i> 1. A separate written understanding with the person handling payment?			IRPC 32:1.8(f) & cmt. 11-12 . Absent any contrary agreement between all parties, if a third party pays a retainer, any funds left over at the end of the case should be returned to the client. Iowa Ct. R. 45.7(5) .	
2. Informed consent from the client?				

Do you utilize a standard engagement letter and/or fee agreement?			
Do you address: 1. The scope of the representation? 2. Fees and expenses? 3. <i>If your fees may be recoverable from another party, the client's responsibility for fees?</i> 4. <i>If an IOLTA account is to be employed, that the client will not earn interest on the funds?</i> 5. Timing for the return of the signed fee agreement and whether it is required in order for you to commence work? 6. Whether you require payment from the client before work will begin? 7. Compensation of other lawyers or paralegals who work on the matter? 8. <i>If you are working with a lawyer who is outside your firm, the responsibilities of each lawyer and client consent?</i> 9. The mechanism(s) for the parties to resolve disputes related to the agreement? 10. The circumstances under which you may be forced to ask the court for permission to withdraw, or when you have to do so in a non-litigation matter? 11. The rights you and the client have to withdraw or terminate the relationship based on certain events or conduct, such as non-payment or non-cooperation? 12. Consent to disclose confidential information the client may provide to you when you reasonably believe that such disclosure would assist in achieving a satisfactory result in the case?			<p>Generally, scope of representation and the basis/rate of fee and expenses should be communicated to the client, <i>preferably in writing</i>, either before or shortly after commencing representation. An exception exists when the lawyer will charge the same basis/rate to a regularly represented client. IRPC 32:1.5(b).</p> <p>Lawyers must also communicate with the client about any changes in the basis/rate of the fee or expenses. IRPC 32:1.5(b)</p> <p>A written statement reduces the likelihood of misunderstanding, particularly if providing unbundled legal representation. IRPC 32:1.5 cmt. 2. For additional guidance on limiting the scope of representation, see IRPC 1.2(c).</p> <p>For additional guidance on mandatory and permissive withdrawal, see IRPC 32:1.16.</p> <p>Explaining to the client the circumstances in which you may need to disclose confidential information to achieve a satisfactory resolution can help reduce any misunderstanding and dispute in the future. See IRPC 32:1.6 cmt. 5.</p> <p>Marian C. Rice, Engagement Letters: Beginning a Beautiful Relationship, L. PRACTICE MAG., May/June 2013.</p> <p>David L. Hudson, Jr., Sharing Fees with a Lawyer Outside the Firm Is OK as Long as Certain Ethics Rules Are Followed, ABA J., July 1, 2016.</p> <p>ABA Comm'n on Ethics & Prof'l Resp., Formal Op. 02-425 (2002) (retainer agreement requiring the arbitration of fee disputes and malpractice claims)</p> <p>Helen W. Gunnarsson, Avoiding Withdrawal Pains, ILL. BAR J., May 2010.</p> <p>Dean R. Dietrich, Ethics: "Impliedly Authorized" Disclosure of Client Information, WIS. LAW., October 7, 2010.</p> <p>ABA Comm'n on Ethics & Prof'l Resp., Formal Op. 93-379 (1993) (billing for professional fees, disbursements and other expenses)</p>
<u>For retainers</u>			
1. Do you explain to the client how advance fee payments and special retainers will be held in trust before they are earned?			<p>Advance fee payments are payments for contemplated services made to a lawyer before the lawyer has earned the fee. Iowa Ct. R. 45.7(1).</p> <p><i>Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Apland</i>, 577 N.W.2d 50 (Iowa 1998).</p>
2. <i>If you accept payment of retainers by credit card, do you deposit those retainers directly into the client trust account?</i>			<p>A special retainer is a fee charged for performance of contemplated services. Nonrefundable special retainers are prohibited, as is the withdrawal of unearned fees. Iowa Ct. R. 45.9. Absent any contrary agreement by the client, the client must be credited with the full</p> <p>Iowa Ethics Op. 03-05 (June 17, 2003) (payment of retainer by credit card).</p>

			amount of the retainer. Iowa Ct. R. 45.7(5) .	
<u>For flat fee agreements</u>				
<i>If you accept flat fee retainers, do you deposit the retainer directly into the client trust account?</i>				
Do you specify: 1. The scope of the services you agree to perform for the flat fee?			A flat fee is a fee that includes <u>all services</u> a lawyer will perform regardless of the complexity of the work. Iowa Ct. R. 45.10(1) .	Iowa Ethics Op. 01-02 (Sept. 25, 2001) (advance flat fee payments)
1. The amount to be paid to you and the timing of that payment for the services to be performed?				
2. The amount of the flat fee to be earned if you complete specific tasks or certain events occur before the representation concludes?			“A lawyer and client may agree as to when, how, and in what proportion the lawyer may withdraw funds from an advance fee payment of a flat fee. The agreement, however, must reasonably protect the client’s right to a refund of unearned fees if the lawyer fails to complete the services or the client discharges the lawyer. In no event may the lawyer withdraw unearned fees.” Iowa Ct. R. 45.10(3) .	
3. The method you will use to calculate the fees you earn if the representation terminates before the completion of specific tasks or the occurrence of specific events?				
4. The procedures you will follow if a dispute arises as to whether you earned all or part of the fee?				
<u>For contingent fee agreements</u>				
Have you considered whether the contingent fee arrangement is prohibited under IRPC 32:1.5(d)?			Lawyers are prohibited from charging: (1) a fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; <u>or</u> (2) a contingent fee for representing a criminal defendant. IRPC 32:1.5(d) .	Iowa Ethics Op. 98-03 (Sept. 2, 1998) (reverse contingent fees).
Does the agreement: 1. Clearly define the gross recovery that is subject to the percentage you earn?				
2. Explain client responsibility for costs and expenses (even if the client recovers nothing)?				
<u>For costs and expenses</u>				
Have you described costs and expenses to the client?			Advance expense payments are payments for contemplated expenses in connection with the lawyer’s services that are made before the expense is incurred. Advance expense payments must be deposited into the trust account and withdrawn only as the expense is incurred. Iowa Ct. R. 45.7(2)–(3) .	SDCBA Legal Ethics Opinion 2013-3 , SAN DIEGO CTY. BAR ASS’N, July 16, 2013.
Have you considered collecting advance expense payments?				
Do you specify: 1. <i>(If you advance costs or expenses)</i> When the client is obligated to reimburse you?				
2. The client’s responsibility for costs such as postage, copying, depositions, transcripts, service of process?			The basis or rate of anticipated expenses for which the client will be responsible must be communicated to the client, preferably in writing. IRPC 32:1.5(b) .	

PART B: TRUST ACCOUNTING

Question	Yes	No	Ethical Implications	Additional Resources
Do you hold funds for your clients or third parties as part of your legal representation of another?				
Do you have one or more client trust accounts?			<p>Any lawyer in who receives from clients or third parties is required to maintain a trust account for:</p> <ol style="list-style-type: none"> 1. Advanced payment of fees that have not been earned 2. Advance payment of expenses 3. Funds that have been entrusted to the lawyer's care in connection with a representation <p>See Iowa Ct. R. 45.1.</p> <p>A bank, savings bank, trust company, savings and loan association, credit union, or federally regulated investment company may serve as a depository institution as long as the entity is authorized to do business in Iowa and is FDIC/NCUSIF insured. See Iowa Ct. R. 45.3.</p> <p>A pooled interest-bearing trust account ("IOLTA account") is generally required for a client's funds that are nominal or reasonably expected to be held for a short time. But funds may alternatively be deposited in a separate interest-bearing trust account on which the interest, net of any transaction costs, will be paid to the client; or a pooled interest-bearing trust account with subaccountings that provide for computation of interest earned by each client and payment of interest, net any transaction costs. For more guidance, see Iowa Ct. R. 45.4.</p> <p>Lawyers may designate a successor signatory on their trust account(s). See Iowa Ct. R. 45.11; see also Iowa Ct. R. 39.18 (succession planning).</p> <p>Jurisdictions vary in their trust account requirements. Lawyers who practice in multiple jurisdictions should familiarize themselves with jurisdiction-specific trust account rules.</p>	<p>OFF. OF PROF'L REGULATION OF THE SUP. CT. OF IOWA, TRUST ACCOUNTS IN IOWA (2018).</p> <p>Trust Accounts in Iowa, IOWA JUD. BRANCH.</p> <p>IOLTA, IOWA JUD. BRANCH.</p> <p>Ed Poll, Trust Accounts: Accountability, Access, and Advantages, LAW PRAC. TODAY, Jan. 24, 2015.</p> <p>Steven J. Best, A Lawyer's 7-Point Plan for Trust Account Management: How to Reduce liability and Avoid Sanctions with Good Trust Accounting Practices, LEXISNEXIS L. FIRM PRAC. MGMT. WHITE PAPER SERIES (2013).</p> <p>MANAGING TRUST ACCOUNTING FOR COMPLIANCE, LEXISNEXIS BEST PRAC. (2010).</p>
Do you have an IOLTA account?				
Is your client trust account(s) clearly labeled as a trust account?				
Is your client trust account depository institution authorized to do business in Iowa and FDIC/NCUSIF insured?				
For funds held as part of your Iowa practice, is your trust account at an approved financial institution doing business in the State of Iowa?				
Have you designated a successor signatory on your trust account(s), whose authority would become effective upon the occurrence of a specified event or events?				
If you practice in more than one state or multiple jurisdictions:				
1. Do you maintain a client trust account in each state in which you practice?				
2. Do you follow each state's varying rules of professional conduct concerning trust accounts?				
If client deposits exceed FDIC insurance limits (generally \$250,000 per depositor):				
1. Do you discuss the deposit insurance issue with your clients?				
2. Do you consider splitting the deposits over two or more banks?				
3. Do you consider whether the client would be entitled to the interest that accrues?				

Do you have internal policies and procedures in place regarding trust accounting?			
When you receive client funds, do you consider whether a separate interest-bearing account should be used rather than the IOLTA pooled account?			<p>In determining the type of account to use in each situation, consider the likely period of deposit, the amount of interest the funds will likely earn, and the cost of establishing and maintaining a separate account for the benefit of the individual client. See Iowa Ct. R. 45.4(3).</p> <p>Financial records are required to be maintained in accordance with Iowa Ct. R. 45.2 and IRPC 32:1.15.</p> <p>A lawyer with direct supervisory authority over a nonlawyer is required to make reasonable efforts to ensure the nonlawyer's conduct is compatible with the lawyer's professional obligations. IRPC 32:5.3.</p>
Have you designated an individual within your firm to be responsible for the operation of the client trust account?			
If a non-lawyer has been delegated day-to-day trust account management duties: <ol style="list-style-type: none"> Has the non-lawyer been provided training that covers how to handle client or third party funds? 			
<ol style="list-style-type: none"> Do you regularly review the trust accounting to ensure compliance with the Rules of Professional Conduct and Client Trust Account Rules? 			<p>OFF. OF PROF'L REGULATION OF THE SUP. CT. OF IOWA, TRUST ACCOUNTS IN IOWA (2018).</p> <p>Trust Accounts in Iowa, IOWA JUD. BRANCH.</p> <p>Managing Trust Accounting for Compliance, LEXISNEXIS BEST PRAC. (2010).</p>
Do your policies ensure: <ol style="list-style-type: none"> Unearned fees remain in the client trust account until they have been earned? 			
<ol style="list-style-type: none"> There is never a negative client sub-account balance? 			
<ol style="list-style-type: none"> Contemporaneous notice to the client of the removal of earned funds? 			<p>OFF. OF PROF'L REGULATION OF THE SUP. CT. OF IOWA, TRUST ACCOUNTS IN IOWA (2018).</p> <p>Ed Poll, Trust Accounts: Accountability, Access, and Advantages, LAW PRAC. TODAY, Jan. 24, 2015.</p> <p>Amy DeVan, Use of the Client Trust Account: What Not to Do, THE DOCKET, June 30, 2016.</p>
<ol style="list-style-type: none"> Business or personal funds are not deposited into the client trust account? 			
<ol style="list-style-type: none"> All client funds are deposited directly into the trust account? 			
<ol style="list-style-type: none"> Disputed funds are held in the client trust account until the dispute is resolved voluntarily or by court action? 			<ol style="list-style-type: none"> Funds to pay or avoid imposition of fees and charges that are a lawyer's responsibility (but not allowable monthly service charges), and Funds belonging in part to a client and in part currently or potentially to the lawyer (but the portion belonging to the lawyer may be withdrawn when due unless disputed) <p>Iowa Ct. R. 45.1.</p> <p>Trust account records should be sufficiently detailed to identify the date, source, and description of each deposit, as well as the date, payee, and purpose of each disbursement. Iowa Ct. R. 45.2(3).</p>
<ol style="list-style-type: none"> Timely provision of accounting upon request to clients and/or third parties for whom you hold or have held funds? 			
<ol style="list-style-type: none"> Retention of trust account records for a period of at least six years after the termination of representation? 			
<ol style="list-style-type: none"> Monthly three-way reconciliations of the client trust account(s)? 			<p>Promptly upon request, a lawyer must render a full accounting regarding property held by the lawyer belonging to a client or third party. IRPC 32:1.15.</p>
Do your monthly reconciliations ensure: <ol style="list-style-type: none"> The total of the client sub-account balance is the same as the bank statement balance (with adjustments)? 			

2. The bank statement balance with adjustments is the same as the check register/general ledger balance?			Financial records that must be maintained are described in Iowa Ct. R. 45.2(3) , and include:	
To promote compliance with recordkeeping requirements, do you maintain:				
1. A general ledger that lists all transactions in the client trust account(s)?			<ul style="list-style-type: none"> • Receipt and disbursement journals, • Ledger records for all client trust accounting, • Copies of retainer and compensation agreements, • Copies of accountings to clients or third parties, 	
2. Separate client and administrative ledgers?			<ul style="list-style-type: none"> • Copies of bills for legal fees and expenses, • Copies of records showing disbursements on behalf of clients, 	
3. Copies of monthly trial balances and monthly reconciliations of the client trust account(s)?			<ul style="list-style-type: none"> • Checking records and bank statements, • Records of electronic transfers, • Copies of monthly trial balances and reconciliations, and • Copies of client files reasonably related to trust account transactions 	

VIII. ACCESS TO JUSTICE & CLIENT DEVELOPMENT

Lawyers have the duty to promote and to protect the public interest. This responsibility is outlined in Iowa Rule of Professional Conduct 32:6.1. One of the most significant issues tied to this duty is access to justice. “Access to justice” is a concept much broader than access to the courts and litigation; it encompasses a recognition that everyone is entitled to the protection of the law. It is about finding meaningful solutions to best serve Iowans as they engage with the justice system. Improving access to justice in Iowa requires change that reaches well beyond the traditional understanding of legal aid. The responsibility also falls to Iowa lawyers, law firms, and other for-profit legal organizations to look at what they might do to better meet their obligations to promote and protect the public interest. Encouraging pro bono or other volunteer work, as well as exploring alternative fee arrangements and limited scope representation (where appropriate and permitted), are just a few of the tangible steps that law firms and legal organizations can take to do their part to close the justice gap.

Client development is closely linked to access to justice. When lawyers retain clients using alternative fee structures or limited scope representation, more people gain access to legal services and lawyers expand their client base and diversify revenue streams. Providing legal services at reduced rates for low-income clients, adopting alternate billing models, and providing unbundled services are all ways that lawyers can increase access to justice while simultaneously developing new clients.

In 2016, the Iowa Supreme Court, upon the recommendation of the Iowa State Bar Association, established the Iowa Access to Justice Commission to find solutions to best serve Iowans who may encounter barriers to or difficulties with fully accessing the Iowa justice system. The 2019 report is available [here](#).

Question	Yes	No	Ethical Implications	Additional Resources
Does your business structure incorporate alternative operational strategies aimed at reducing expenses and improving long-term sustainability?				
Do you assess: 1. The makeup of your monthly expenses and overhead?			Low expenses and overhead mean less money is required for a practice to be profitable and sustainable. In addition, tools like timekeeping and case management systems can increase productivity and reduce the need for staff while also promoting compliance with ethical rules such as IRPC 32:1.3 (Diligence) and 32:1.4 (Communication). Some cost-saving measures, such as sharing office space, may implicate ethical considerations. See, e.g., IRPC 32:7.5 cmt. 2 (Firm Names and Letterheads), 32:1.6 (Confidentiality).	Randall Ryder, How to Keep Your Solo Practice Sustainable and Lean , LAWYERIST (July 11, 2019). Kathryn Thompson, Keeping Your Office Sharing Arrangements with Other Lawyers Squeaky Clean Under the Ethics Rules , ABA CTR. FOR PROF'L RESP., May 2007.
2. Whether business expenses (such as building costs, service providers, contractors, staff, equipment/supplies) could be reduced?				
3. Whether use of technology could increase your efficiency and your ability to provide legal services at a lower cost/hourly fee?				
Is your office set-up conducive to providing services to a broader population?				

Question	Yes	No	Ethical Implications	Additional Resources
Do you provide training to help staff interact with the public and potential clients?			<p>Training may help lawyers and staff develop strategies for communicating with non-English speaking clients, low-income clients, and clients who may have had negative experiences with the justice system in the past.</p> <p>Hiring bilingual staff and/or providing interpreter/translator services may aid the office in outreach. It also promotes compliance with the Rules of Professional Conduct, including ensuring effective communication with (IRPC 32:1.4) and obtaining informed consent from (IRPC 32:1.0(e)) non-English speaking or English-as-a-second-language clients.</p> <p>“Every person who cannot speak or understand the English language and who is a party to any legal proceeding or a witness therein, shall be entitled to an interpreter to assist such person throughout the proceeding.” Iowa Code § 622A.2.</p>	<p>N.Y.C. BAR ASS’N COMM. ON MINORITIES IN THE PROF., BEST PRACTICES STANDARDS FOR THE RECRUITMENT, RETENTION, DEVELOPMENT, AND ADVANCEMENT OF RACIAL/ETHNIC MINORITY ATTORNEYS.</p> <p>MINORITY CORP. COUNS. ASS’N, CREATING PATHWAYS TO DIVERSITY.</p> <p>David Douglass, The Ethics Argument for Promoting Equality in the Profession, ABA J., Nov. 1, 2019.</p>
Do you have a policy or plan in place to promote cultural competency in your office?				
Do you consider diversity as relevant to the effort to promote access to justice when recruiting new staff?				
Do you have bilingual staff and/or access to interpreter/translator services?				
Do you provide alternatives for clients with reduced ability to travel and/or clients who are unavailable during regular business hours?				
Have you implemented alternative billing arrangements?				
Have you considered:			<p>Alternative arrangements may include payment plans, reduced fees, sliding scale fees and “modest means” fee structures, unbundled services, and pro bono services.</p> <p>Although lawyers and clients have latitude to limit the scope of representation, the limitation must be reasonable under the circumstances and compliant with the Rules of Professional Conduct and other law. See IRPC 32:1.2 cmts. 6–8.</p>	<p>Justice Index 2016, NATIONAL CENTER FOR ACCESS TO JUSTICE, FORDHAM LAW SCHOOL.</p> <p>JANICE B. DAVIDSON, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNBUNDLING LEGAL SERVICES: OPTIONS FOR CLIENTS, COURTS & COUNSEL (2015).</p> <p>IOWA LEGAL AID.</p> <p>MUSCATINE LEGAL SERVICES.</p> <p>LEGAL AID OF STORY COUNTY.</p> <p>IOWA ST. BAR ASS’N, Legal Assistance; Low Income Legal Assistance Resources.</p> <p>IOWA JUDICIAL BRANCH, Representing Yourself – Overview.</p>
1. Using alternative pay arrangements based on income level?				
2. Providing limited scope representation, i.e., unbundled services?				
If you are unable to take a client, do you direct them to meaningful legal resources?				
Do you regularly provide pro bono legal services or other volunteer services related to the legal system?				

Question	Yes	No	Ethical Implications	Additional Resources
Do you or your firm have a written pro bono or other volunteer policy?			Lawyers have a professional responsibility to provide legal services to those who cannot pay, and in accordance with rule 32:6.1 , should aspire to render at least 50 hours of pro bono services each year.	CANADIAN BAR ASS'N, The ABCs of Creating a Pro Bono Policy for Your Law Firm (Oct. 13, 2009).
Do you contribute financial support to organizations that provide legal services to persons of limited means?				IOWA ACCESS TO JUSTICE COMM'N, 2019 REPORT, App. C (Access to Justice Corporate Playbook), App. E (Sample Pro Bono Policy Statement).
Is your marketing strategy designed both to increase business and to bridge the justice gap?				
Are you involved in the Iowa Bar Association, a local bar association, and/or a specialty bar association?			Professional associations often help lawyers find pro-bono resources and other valuable resources for working with modest means or indigent clients.	SUCCESSFUL BUSINESS PLANNING: REPRESENTING THE MODERATE INCOME CLIENT , COLO. BAR ASS'N (2013). IOWA ST. BAR ASS'N Steve Olenski, The 7 Lethal Internet Marketing Mistakes Law Firms Make , FORBES, Mar. 5, 2015.
Do you have a website?				
Do you use internet tools for marketing?				
Do you market in nontraditional ways and reach out to underserved legal markets?				
Do you evaluate your success in providing access to justice?				
Do you track and evaluate the demographics of clients and where clients are from?			“As a public citizen, a lawyer should seek improvement of the law, access to the legal justice system, the administration of justice, and the quality of service rendered by the legal profession.” IRPC preamble cmt. 6 .	Marc Davis, How Pro Bono Representations Lead to Paid Work for Lawyers , ABA J., June 1, 2018.
Do you conduct interviews with clients at the end of representation to evaluate how they feel they have been treated in the legal system?				
Do you or your law firm periodically review your success in reaching out to underserved populations?				

IX. WELL-BEING & INCLUSIVITY

It is essential for lawyers to develop healthy lifestyles that embrace work-life balance. In 2015, the ABA Commission on Lawyer Assistance Programs and the Hazelden-Betty Ford Foundation conducted a study of approximately 11,400 actively practicing lawyers from 19 states, which found approximately 21% qualified as problem drinkers, 28% struggled with depression, and 19% demonstrated symptoms of anxiety. The study also revealed almost one third of the lawyers reporting those issues were under the age of 30 and had been in practice for less than 10 years.

In addition, attraction and retention of quality staff has become increasingly challenging due to the reduction in law school attendance, aging in the profession, and rapidly changing technology. Diversity is when you count people; inclusiveness is when you make people count. Lawyers need both to have sustainable diversity in their workplaces. Studies show that keeping staff happy, healthy, engaged, and motivated increase retention rates.

This assessment presents a series of questions designed to help evaluate whether your practice promotes wellness and inclusivity. For additional resources and support, the [Iowa Lawyer Assistance Program](#) offers Iowa lawyers confidential assistance for any career-related challenges, including coping with work stress, anxiety, support in grieving a loss, or confronting substance-use issues. Other resources to consider include the [American Bar Association's Office of Diversity and Inclusion](#), and [What If I Say the Wrong Thing](#), by Verna Myers.

PART A: WELLNESS

Question	Yes	No
Do you or your firm/organization recognize the importance wellness plays in a person's professional and personal life?		
Do you or your firm/organization have procedures to easily identify lawyers/staff with any kind of practice or personal problem?		
Do you or your firm/organization have a non-punitive method of adjusting the workload of a lawyer experiencing a practice or personal problem until the issue is resolved?		
Do you have a mentor, trusted colleague, family, or friend that you can turn to for support in the event you experience a personal or practice difficulty (or both) and need support?		
Do you take steps to keep stress associated with the practice of law at a minimum? These may include: <ul style="list-style-type: none">• Taking time to spend with family and friends;• Volunteering time through community service organizations;• Planning and taking time off;• Reading a new book;• Engaging in physical activity;• Practicing yoga or meditation.		
If you find yourself becoming stressed or anxious, are you familiar with simple techniques to quickly reduce stress including: <ul style="list-style-type: none">• Taking a deep breath;• Placing one hand on your upper chest, one on your abdomen, and breathing (a practice that activates calming neurotransmitters);• Opening your eyes and smiling (the act of smiling releases endorphins);• Saying to yourself: "I have the resources to deal with this" and then using those resources.		
Does your firm/organization have policies and procedures that encourage work life balance/integration and that include:		

Question	Yes	No
<ul style="list-style-type: none"> • Taking their entitled breaks: lunch breaks, sick leave, annual leave. • Availability of family/parental leave. • Flexible hours when needed. 		
Does your firm/organization provide/offer appropriate and regular quality of life programs during regular business hours, and is everyone encouraged and able to take advantage of them?		
Does your firm/organization's work environment promote a healthy lifestyle, for example, ergonomically correct work stations, work breaks, walking paths, and access to healthy food & drink choices?		
Does your firm/organization have appropriate referrals for programs to assist with mental health issues (stress, anxiety, depression, bipolar, relationships, etc.)?		
Does your firm/organization ensure awareness within the workplace of referrals for programs to assist with mental health issues?		
Does your firm/organization have appropriate referrals for programs to assist with substance abuse & addiction issues (alcohol, drugs, gambling, sex, food, etc.)		
Does the firm/organization have a dedicated budget to wellness?		

PART B: DIVERSITY/INCLUSIVENESS

Question	Yes	No
Has your firm/organization developed a rationale for the need for creating a more diverse and inclusive workplace that is tied to your firm/organization's business imperatives and strategies?		
Have you taken steps to increase your awareness of implicit bias and other barriers that affect those underrepresented in the legal profession? [Consider the Project Implicit free online assessments at https://implicit.harvard.edu/implicit/aboutus.html .]		
Have you assessed which groups with which you feel comfortable, or have a natural affinity, and taken steps to meet with or market to those groups that fall outside that list?		
Have you developed and implemented an inclusivity plan that includes a written statement that defines inclusivity and the benefits you hope to gain from being inclusive?		
Does your firm/organization regularly review the compensation structure to ensure that it demonstrates equal opportunities for all?		
Has your firm/organization devised measures to evaluate diversity and inclusion initiatives and ensure accountability?		
Has your firm/organization identified a person, department and/or committee to monitor your diversity/inclusiveness efforts?		
Does the firm/organization have a dedicated budget to support diversity/inclusiveness efforts?		
Has the firm/organization implemented training sessions for employees that focus on issues related to diversity/inclusiveness?		

PART C: MISCELLANEOUS

Question	Yes	No
Does management/senior staff set a good example for staff by creating, implementing, and monitoring dependable office policies and systems, including work-life balance and mentoring programs?		
Are the above policies reviewed on a regular basis for effectiveness and up-to-date information?		
Does Human Resources or management conduct exit interviews that allow for an honest and respectful discussion?		

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