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,

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.
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. The highest courts of appellate jurisdiction possess the

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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

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.
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. 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. 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. 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.

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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.

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.”

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

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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. 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. 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. 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.” That information is also not subject to discovery.

Colorado’s voluntary PMBR program is called the Colorado Lawyer Self-Assessment Program, and it is also online. 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

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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/regnep/Rule_756e2_Self-Assessment_FAQ_s.aspx.
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

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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.


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. 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. 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.”

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. 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

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28 Supra note 10, at 724-725.

assistance to those who requested such help. 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.

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. 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. The majority of lawyers who participated in the program expressed satisfaction with the PMBR program, even those who were skeptical when the program began. Queensland, Australia implemented a similar PMBR program with the anecdotal data showing results analogous to those in New South Wales.

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.” That direction may include a requirement that the lawyer or firm provide the regulator with periodic reports of compliance. 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

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30 Supra note 12, at 725.
31 Supra note 12, at 726.
33 Supra note 27, at 156–65.
34 Id.
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. 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.” The Task Force noted in its Report that compliance-based regulation and entity regulation do not have to be implemented together. In 2016, the Convocation approved the Task Force’s recommendations.

In May 2018, the Task Force released another Report to Convocation and the Law Society released for comment the Task Force’s draft Practice Assessment Tool. 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.

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. The PMBR component is called the Management System for Ethical Legal Practice or MSLEP. 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. Starting in January 2018, lawyers must complete a self-assessment based on the ten MSLEP elements. The NSBS does not dictate to lawyers how to meet the MSLEP, but provides guidance, and is developing and curating online resources relating to each of the ten MSLEP elements. Lawyers must submit the self-assessment to the Executive Director’s Office of the NSBS. The MSLEP elements are akin to the ten objectives for appropriate management systems used in New South Wales.

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38 COMPLIANCE-BASED ENTITY REGULATION TASK FORCE, REPORT TO CONVOCATION (May 26, 2016), https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/convocation_may_2016_cber.pdf.
39 Id.
40 Id.
42 COMPLIANCE-BASED ENTITY REGULATION TASK FORCE, REPORT TO CONVOCATION (May 24, 2018), https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/convocation-compliancebasedentityregulationtaskforcereport.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).
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.” 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.

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.” Generally, the Law Societies received positive feedback and made necessary changes. 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...

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.
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.  

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. 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 programs; and advancing diversity and inclusion among legal services providers. 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.

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.

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.
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
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)

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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.**)

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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 of 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.