



Standpoint Decision Support Inc.

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Implementing PMBR - getting it right

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Background

Proactive Management-based Regulation (PMBR) is the term used to describe regulatory measures or other programs that are designed to strengthen ethical practices by lawyers and subsequently reduce rates of client complaints, disciplinary actions, and malpractice claims. The overall goal of PMBR is therefore to shift the emphasis of law regulation from reactionary measures to mitigate poor practice, to preventative measures that improve practices and reduce the need to react. The potential advantages of PMBR are self-evident:

1. Improved trust and confidence in the profession among stakeholders;
2. Better protection of, and service to, consumers of law services and the public in general; and,
3. Reduced costs for regulators.

Evidence

To date, the focus of PMBR programs has been the implementation of self-assessments that encourage compliance with best practices through improved self-awareness. There is empirical evidence that such programs can improve performance. A self-assessment program for incorporated legal practices in New South Wales (NSW) resulted in a 67% reduction in the mean rate of complaints.¹ Follow-up interviews provided evidence that the program encouraged behavioral changes that avoided problems from occurring.²

PMBR and Regulatory Risk

Risk is a function of *likelihood* and *consequence*. Law regulation has traditionally been dominated by activities that focus on mitigating the *consequences* of poor practice. These include disciplinary processes, remediation programs and professional liability insurance. PMBR is instead focused on reducing the *likelihood* of problems that lead to undesirable *consequences*. As a result, PMBR is a logical component of a regulator's overall approach to managing risk.

While self-assessments can provide near-term benefits by immediately improving self-awareness, there are opportunities to leverage their value as part of a comprehensive program of risk reduction through monitoring and adaptive management.

Implementation

The following are recommended steps to implement a PMBR program. Note that programs can be scaled to available resources and benefits can be realized at each step.

¹ Christine E. Parker, Tahlia Gordon & Steve A. Mark, *Regulating Law Firm Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in NSW*, 37 J.L. Soc'y 466, 469 (2010).

² Susan S. Fortney, *Designing and Improving a System of Proactive Management-Based Regulation to Help Lawyers and Protect the Public*, 2016 J. Prof. Law. 91 (2016).

1. Develop a self-assessment questionnaire

The self-assessment questionnaire is the central component of a PMBR program and there are two distinct phases to their development: 1) developing the substantive content; and, 2) crafting the questions to align with program objectives and maximize user engagement.

Questionnaires have been developed for several jurisdictions and can be localized to reflect specific rules and requirements. An excellent reference and starting point is the ABA's *Model Rules of Professional Conduct*.³

Consideration should be given to stratifying the assessment to reflect the needs and interests of different groups of lawyers. In particular, separate assessments for small and large firms should be considered because the roles and responsibilities of lawyers in these settings are quite different. Assessment questions related to practice management for small firms and sole proprietors emphasize individual behavior, while questions for large firms emphasize policies and procedures.

Ideally, assessment questions should address *objectives* (i.e., the outcomes to be achieved) and *best practices* (behaviors likely to fulfil the objectives). Standardized answer scales (e.g., yes/no, 1-5 ranks, etc.) are preferred over text narratives because they lend themselves to analysis (see *Monitor Results* below). However, free-form text fields can be provided for prompting additional feedback in specific instances.

The length of questionnaires should be limited so that the process is not too onerous for lawyers to complete. Fatigue will erode the self-reflection that is such a critical component of the effectiveness of self-assessments.

2. Link resources to assessment questions

While self-awareness supports behavior change, so does education. In the NSW program, many participants reported that they needed more guidance regarding practice management.⁴ Embedding links to resources within questionnaires can provide respondents with references to relevant materials that can support their continuing education and practice improvement. These can be static lists, or can be adapted to user responses (this requires a more sophisticated online platform).

While resources are an important component of the self-assessment package, they should not overwhelm users and divert their attention from assessment questions. Rather, resources should encourage follow-up actions that lawyers can undertake to improve their practice and behavior.

³https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

⁴ Susan S. Fortney, *Designing and Improving a System of Proactive Management-Based Regulation to Help Lawyers and Protect the Public*, 2016 J. Prof. Law. 91 (2016).

3. Deploy the questionnaire to the membership

Online deployment is the easiest and most efficient way of distributing the questionnaire, and lawyers generally appreciate being able to choose how they access materials (i.e., laptop, tablet, phone). Although convenient for both regulators and users, online platforms need to meet security and privacy standards and require some ongoing user support. At the same time, online platforms can be updated easily, can provide scoring or other types of immediate feedback to users and regulators, and can generate stronger engagement with members. In contrast, paper questionnaires are technically simpler, but require additional resources to process manually, and revision cycles are necessarily longer.

Regulators need to decide whether they will allow anonymous responses. Anonymity encourages more honest responses and makes self-assessment programs more acceptable to members. However, anonymity also limits the extent to which outcomes can be monitored, because individual performance cannot be tracked. However, careful analysis of aggregate data can still provide insights regarding the effectiveness of self-assessment programs and user anonymity does not prevent regulators or the public from realizing the benefits of PMBR.

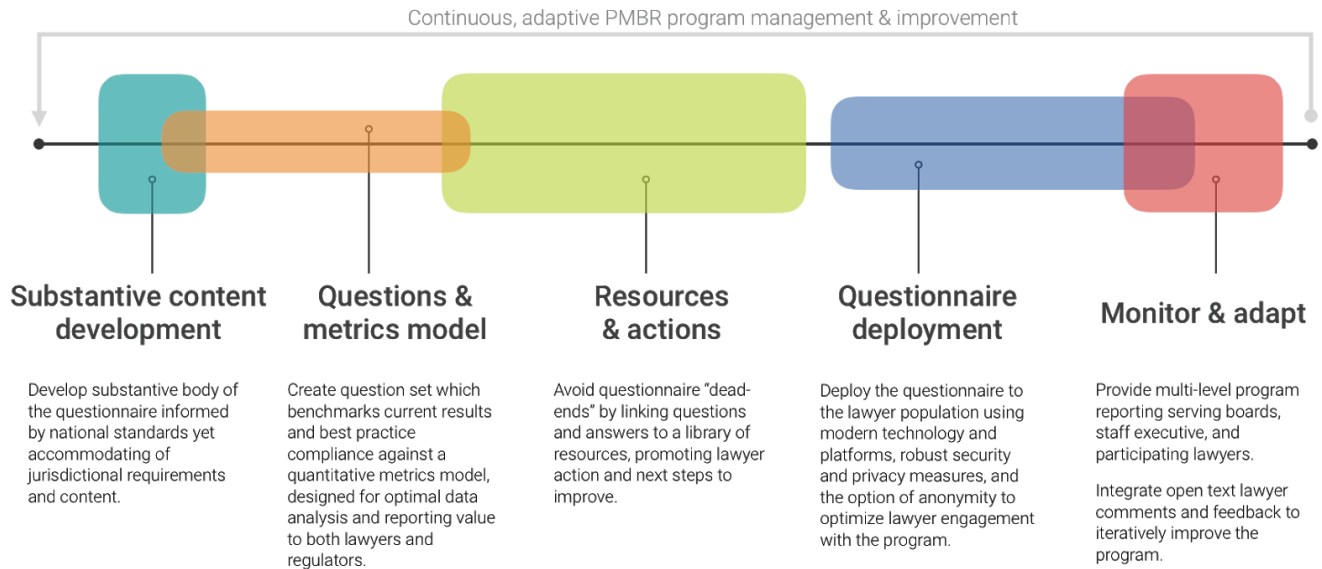
Maintaining complete anonymity might require a trusted third party. For example, if regulators are provided complete but unnamed self-assessment records, survey results might still contain sufficient information to identify individuals (i.e., by geographic location, firm size, area of law, years of practice, etc.). Third parties can aggregate data before they are provided to regulators, thereby providing an extra layer of security.

4. Monitor results and adjust

While simply completing a self-assessment is expected to improve lawyer behavior, closely monitoring program results can generate a variety of benefits to regulators. If NSW had not monitored the complaint rates of firms before and after completing self-assessments, we wouldn't have known whether the program had changed lawyer behavior. As PMBR programs evolve and become more sophisticated, it is important that data are properly managed and analyzed to support continuous improvement.

As noted above, standardized answer scales allow for quantitative analysis and monitoring over time. If questionnaires are deployed online, responses can be monitored in real time, providing important feedback on program uptake and member response to incentives, advertising, or other actions to promote participation.

Analyses can contrast assessment responses among different segments of the lawyer population and highlight areas of poor performance. These areas can then become the focus of targeted programs or actions. As new programs are implemented, the results of their implementation can be monitored and analyzed, establishing feedback that enables continuous improvement.



Summary

PMBR can provide tangible benefits to lawyers, regulators, and the public at large. Central to any PMBR program is a professional self assessment. Key components of a successful program are:

1. A relevant and complete questionnaire that is easy to answer;
2. High quality resources that provide follow-up actions to foster self-improvement;
3. Any-device, platform-agnostic delivery to allow lawyers to respond at their convenience;
4. Anonymity to encourage engagement and honesty (optional);
5. Industry standard data security to ensure lawyer confidentiality;
6. Continuous reporting of respondent data, to provide actionable evidence in support of the jurisdiction's ongoing regulatory strategy and policy development, and,
7. Program support to ensure continuous improvement to support objectives.