

# STANDPOINT

## Towards an Evidence-based Policy Approach for Law Regulation

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## Introduction

Law regulation is a mix of legislative and regulatory requirements, policy rules, professional ethics and best practices. Navigating this complex landscape is a challenge for regulators, law firms and individual attorneys. The system has evolved over time in response to various pressures and stressors, but rarely are requirements, programs or actions evaluated to determine whether they are meeting broader desired outcomes and public policy objectives. Instead, ongoing management is often the result of inertia, tradition, intuition, and contagion (i.e., doing what others do). Law regulation is not alone in this challenge. Medicine and policing are two public policy domains facing similar issues. Similar private-sector issues exist in business management.

A promising response to complex policy and business challenges has been the emergence of an “evidence-based” paradigm. Simply put, an “evidence-based” approach to public policy, professional practice, or business management promotes the use of best-available information, preferably collected using rigorous scientific methods, in strategic, tactical and operational decision-making. While hardly a revolutionary concept, evidence-based practices can be difficult to design and implement in fields dominated by rules of thumb and tradition.

This paper presents an approach for adopting evidence-based principles in law regulation, drawing on best practices from science and business management.

# The Approach

Standpoint’s evidence-based approach consists of five phases comprising an information lifecycle designed to foster adaptive management and continuous regulatory improvement (Figure 1). The framework borrows heavily from the scientific method of iterative hypothesis testing with objective evidence, and is focused on generating reliable inferences from best available information.



Figure 1. The five phases of Standpoint’s evidence-based approach comprise an information lifecycle that is designed to foster adaptive management and continuous improvement.

## 1. Ask

The first phase of the process involves developing the key questions that drive subsequent phases. Questions can span the entire domain of law regulation, from simple compliance inquiries (e.g., are members meeting CLE requirements?) to broader, more strategic queries (e.g., how are the changing demographics of lawyers likely to create new regulatory pressures?). Properly structuring these questions requires forethought to avoid a number of pitfalls:

1. **Failing to define what needs to be achieved** - unlike businesses where the profit motive can focus effort, defining success is more difficult where goals involve protecting the public, ensuring ethical conduct, etc.
2. **Lack of clear measurables** - even where goals are clear, it is often not obvious how to measure current status or progress over time.

3. **Failing to define what is “good”** - where we know the measures, we often don’t set targets to distinguish acceptable from unacceptable conditions.
4. **Focusing on “means” rather than “ends”** - it may be relatively simple to measure the implementation of specific actions, but what purpose are those actions meant to serve?

To avoid these pitfalls, we recommend first developing an *objectives framework* to clarify the overall regulatory management system. Our framework is proposed as an open standard that can be used by regulators to structure their expectations of members and to guide effective evaluation of their performance.

The following are the elements of the framework (Figure 2):

**Desired Outcomes**, which are statements of the end results to be achieved, usually expressed as a qualitative aspiration, e.g., “ensure client confidentiality.” Desired outcomes are *fundamental*, in the sense that they cannot be associated with a higher-level motivation.

**Objectives**, which are measurable statements of what needs to be achieved to meet a desired outcome, e.g., “by the end of the year, implement measures to limit access to hard copy client files to authorized office staff only.” Objectives specify a result (e.g., limiting access to hard copy files) a standard (e.g., only office staff have access) and, optionally, a time frame (e.g., by the end of the year). Some regulator rules may best be described as objectives.

**Best Practices** are tactics, operational guidance or behaviours that support the attainment of objectives, e.g., “keep all hard copy client files in a locked filing cabinet with access to keys limited to staff lawyers and the office manager.” There may several best practices that support an objective and not all may be necessary to achieve any given objective. A single best practice may also support several objectives. Some regulator rules may best be described as best practices.



Figure 2. The objectives framework, which is used to clarify elements of the regulatory system.

With the system organized as an objectives framework, questions can be drafted that address key uncertainties along the pathways from best practices to desired outcomes. For example,

with the emergence of *Proactive Management-based Regulation*, many regulators are implementing self-assessment programs that are designed to gauge the “ethical infrastructure” of law firms and practicing attorneys. An objectives framework can improve the design of these surveys by making explicit the links between questions posed to attorneys and the outcomes expected by the regulator.

## 2. Acquire

The next step in the process is to acquire the data required to test hypotheses (i.e., key questions). Possible data sources include:

1. Existing member databases;
2. Special-purpose surveys of all members or a specific sample;
3. Expert opinion of regulatory staff; and/or,
4. Externally sourced databases.

As with the scientific method, data acquired through rigorously designed experiments employing randomization and proper controls are the most reliable and can be used to identify causal relationships. Although “AB” testing and other experimental designs are becoming more common outside the scientific domain, more often the only data available are “retrospective” (i.e., measuring what has happened in the past) and longitudinal (i.e., not segmented by specific treatments). These are still valid data sources and can provide reliable insights.

## 3. Analyze

The goal of the analysis phase is to draw reliable conclusions from existing or newly acquired data. As noted above, evidence-gathering experiments are the standard for establishing causality and are also simple to analyze. Without experiments, we have only correlational data and analyses tend to be more complex. Any claims of causation are necessarily tentative, but separate lines of evidence can allow us to make strong inferences, at least in some cases.

We distinguish among three levels of analysis:

1. The **primary analysis**, which reports means and standard deviations of raw data. This is straightforward but does not account for interactions among variables. It is best considered an initial analysis that provides an overall description of a dataset.
2. A **secondary analysis**, which analyzes relationships among variables descriptively and generates groups and themes for deeper insight (Figure 3).
3. A **tertiary analysis**, which links groups and themes, often to other data sources to propose causal relationships and generate hypotheses for further testing.

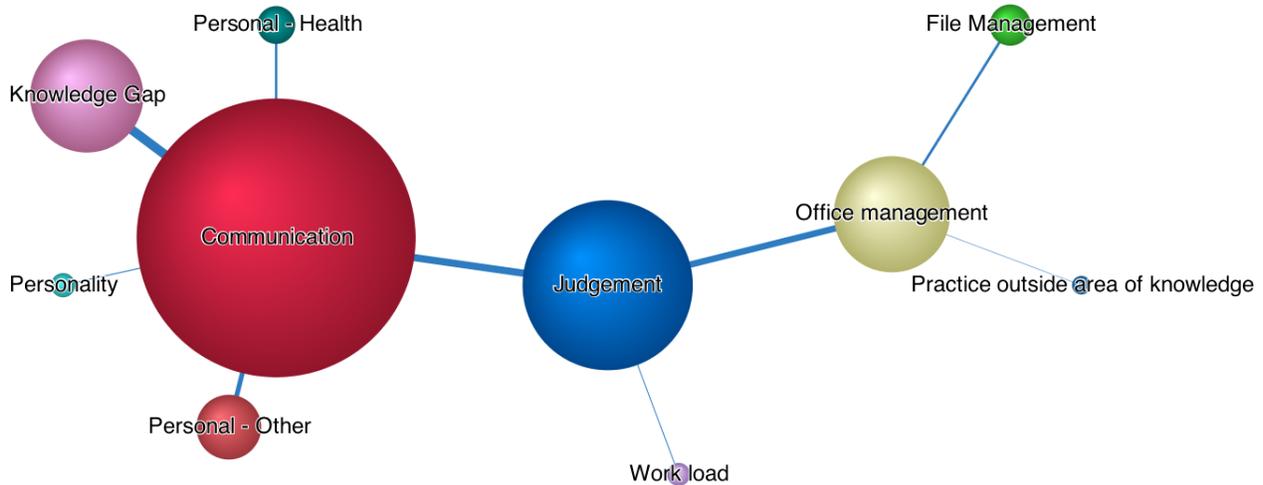


Figure 3. Example of an exploratory analysis describing the relationships among factors defining root causes of poor practice among a sample of attorneys. The size of circles indicate the relative frequency of problems and the thickness of links between circles indicate the strength of the correlational relationships between causes.

Secondary and tertiary analyses often involve the development of statistical models, which can be very useful for extrapolating trends (e.g., forecasting complaint rates with changes in lawyer demography).

## 4. Act

Regulatory programs or actions can be designed to address specific issues identified during the analysis phase. Using the proper statistical techniques, the effect of proposed actions can be forecasted as “what-if” scenarios, and estimated benefits associated with individual actions, or a suite of actions, can be contrasted to identify the policies most likely to achieve desired outcomes. In other words, we can predict the effects of policies before they are implemented. Then when policies are implemented, we can compare our forecasts with “real world” performance to help improve our predictive tools.

## 5. Monitor

Monitoring is a crucial component of an evidence-based approach because it provides feedback on performance of a system and the effectiveness of policies implemented to achieve desired outcomes. We define three different types of monitoring:

1. **Behavior monitoring**, which is the suite of activities that regulators undertake to determine whether members are meeting rules and implementing best practices.
2. **Results monitoring**, which is the suite of activities that regulators undertake to determine whether the behaviors of members are generating expected results, as expressed by objectives.
3. **Effectiveness monitoring**, which is the suite of activities that regulators undertake to determine whether objectives, if achieved, result in the desired outcomes.

These different monitoring types have different requirements in terms of timing and tools. Typically, behavior monitoring occurs most frequently, and self-monitoring by individual firms and attorneys can be enabled through the use of online “dashboards” and other feedback mechanisms. Results and effectiveness monitoring occur less frequently and are often tied to strategic planning cycles.

## Adaptive Management and Continuous Improvement

Standpoint’s evidence-based process is designed as a continuous loop that serves the process of adaptive management. Adaptive management is a formalized, iterative process of decision-making and adjustment in the face of uncertainty, with the goal of reducing uncertainty over time through monitoring. The phases outlined above serve the adaptive management process by:

1. Formalizing our current knowledge of regulatory systems as testable models;
2. Developing forecasts of future implications that provide additional key questions; and,
3. Monitoring system inputs and outputs over time and using results to improve estimates and the reliability of forecasts.

These steps are necessary to provide the feedback required to make iterative improvements to the regulatory system.

## Further Reading

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