

# THE CASE FOR PROACTIVE MANAGEMENT- BASED REGULATION TO IMPROVE PROFESSIONAL SELF-REGULATION FOR U.S. LAWYERS

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## I. INTRODUCTION

The *ABA Journal* reported in November 2012 that the Association's Standing Committee on Professional Discipline ("Standing Committee") was embarking on the first comprehensive review of the American Bar Association's ("ABA") Model Rules for Lawyer Disciplinary Enforcement<sup>1</sup> in twenty years.<sup>2</sup> This came on the heels of a lengthy review of the ABA Model Rules of Professional Conduct ("Model Rules"),<sup>3</sup> which led to recent amendments in response to the globalization of law practice and developments in law practice technology.<sup>4</sup>

This *Journal* article aptly called these two sets of model rules the "bookends" of the guidance the ABA provides to help the state supreme courts structure their "professional conduct systems for lawyers."<sup>5</sup> Both sets have been influential, which may explain why lawyers continue to

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1. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT (2007).

2. James Podgers, *A New Look: ABA Plans First Comprehensive Review of Disciplinary Enforcement Rules in 20 Years*, A.B.A. J., Nov. 2012, at 24, 24 [hereinafter Podgers, *A New Look*]. These rules provide a framework for investigating and prosecuting complaints alleging lawyer misconduct. *Id.*

3. MODEL RULES OF PROF'L CONDUCT (2012).

4. Podgers, *A New Look*, *supra* note 2, at 24. This review was conducted by the ABA Commission on Ethics 20/20, which ABA President Carolyn Lamm appointed in August 2009. See James Podgers, *Firm Hand for Hard Times: Incoming ABA President Carolyn Lamm Seeks Aid for Lawyers Facing Economic Woes*, A.B.A. J., Aug. 2009, at 63, 64. The Commission, of which I was a member, completed its work in February 2013, when the ABA House of Delegates adopted its final four proposals for amending the Model Rules. See Leigh Jones, *ABA Ethics Commission Closes Chapter on Rule Revisions*, NAT'L L.J., Feb. 14, 2013, [http://www.law.com/jsp/nlj.PubArticleNLJ.jsp?id=1202588381157&ABA+ethics\\_commission\\_closes\\_chapter\\_on\\_rule\\_revisions&slreturn=20130121155944](http://www.law.com/jsp/nlj.PubArticleNLJ.jsp?id=1202588381157&ABA+ethics_commission_closes_chapter_on_rule_revisions&slreturn=20130121155944).

5. Podgers, *A New Look*, *supra* note 2, at 24.

refer to them as professional *self*-regulation (“PSR”). In PSR, the courts adopt a code of professional conduct based heavily on the ABA rules in order to govern the lawyers practicing in their jurisdictions.<sup>6</sup> To ensure compliance with those codes, the courts authorize a state bar or judicial agency to receive and process complaints charging lawyers with misconduct.<sup>7</sup> And the courts and their agencies impose discipline, ranging from private warnings to disbarment, on lawyers whom they find to have breached code rules.<sup>8</sup>

But although professional discipline has been PSR’s chief regulatory approach to promoting ethics compliance, it is not the only imaginable approach, and new developments in law practice and regulatory technique are putting the adequacy of disciplinary enforcement in question. For one thing, the disciplinary process has always been reactive, ordinarily triggered only when clients (or others) file complaints alleging lawyer misconduct.<sup>9</sup> But other common law countries, while retaining a disciplinary process, are developing a complementary approach that is proactive and not complaints-based.<sup>10</sup> For another, PSR’s rules of professional conduct and disciplinary proceedings still focus almost exclusively on the individual lawyer,<sup>11</sup> despite the important role that law firm management has come to play in promoting ethical compliance. But regulation in other common law countries has begun to focus as well on law firms and firm management. And finally, with its emphasis on regulation by discipline, PSR has done

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6. 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, 578 & n.3 (2011) [hereinafter Schneyer, *On Further Reflection*]. Until recently, the courts asserted disciplinary jurisdiction only over lawyers licensed to practice in their state. In 2002, however, the ABA amended the Model Rules to provide that “[a] lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.” MODEL RULES OF PROF’L CONDUCT R. 8.5(a) (2012); *cf.* MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 6.A. (2007). Many states, but not all, have followed suit. *See* STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 516-19 (2010).

7. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS §§ 2.2, 2.6, 3.2 (1986) (providing an overview of PSR’s history and structure).

8. *See id.* §§ 3.2–3.

9. Ted Schneyer, *Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice*, 2009 J. PROF. LAW. 13, 21 [hereinafter Schneyer, *Thoughts on Compatibility*].

10. *Id.* at 30-31.

11. *See, e.g.*, William H. Simon, *Where Is the “Quality Movement” in Law Practice?*, 2012 WIS. L. REV. 387, 403 & n.33 (pointing out that, until recently, “professional responsibility doctrine treated lawyers as solitary individuals concerned only with their own conduct”). Milton Regan sees a connection between a regulatory focus on the individual lawyer and a pattern of American lawyers seeking “to guard their individual independence, notwithstanding the increasingly collective and interdependent nature of their practices.” Milton C. Regan, Jr., *Risky Business*, 94 GEO. L.J. 1957, 1958 (2006).

relatively little to protect clients from what is sometimes called “unsatisfactory professional conduct” (“UPC”) as opposed to “serious professional misconduct.” Only the latter entails material violations of ethics rules or other law.<sup>12</sup> But regulators in other common law countries now have considerably more to offer by way of consumer protection. They work to deter UPC no less than more serious misconduct.<sup>13</sup>

Given these and other developments, limiting the Standing Committee’s mission to reviewing the rules of disciplinary procedure is too narrow. With its task so defined, the Standing Committee would have no reason to consider the developments abroad, or, for that matter, recent developments in the regulation of U.S. lawyers and in regulatory theory generally.<sup>14</sup> In view of these developments, the committee should also consider whether PSR can be strengthened at manageable cost by adopting a regulatory program that I will call Proactive Management-Based Regulation (“PMBR”).<sup>15</sup>

Fortunately, there are early indications that PMBR is on the Standing Committee’s agenda.<sup>16</sup> That is the predicate for this Article, which argues that the ABA should recommend, and the state courts should adopt, PMBR programs to supplement professional discipline.<sup>17</sup> The Article presents evidence that PMBR programs both improve legal services by increasing compliance with lawyers’ legal and ethical obligations and help sole practitioners and small firms, in particular, to improve their operations.<sup>18</sup> Adopting PMBR should reduce the volume of complaints filed with disciplinary authorities, thereby reducing disciplinary costs and heightening public perceptions of PSR’s efficacy.<sup>19</sup> Heightening those perceptions is no small thing in an era

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12. Schneyer, *Thoughts on Compatibility*, *supra* note 9, at 28-29.

13. *See id.* at 28-30. UPC is further defined *infra* note 40.

14. In my view, the ABA, in studying and debating issues of lawyer regulation, has too often relied on parochial rhetorical claims rather than empirical evidence and regulatory theory. *See, e.g.*, Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA’s Ancillary Business Debate as a Case Study*, 35 ARIZ. L. REV. 363, 390-91 (1993); Ted Schneyer, “Professionalism” as Pathology: *The ABA’s Latest Policy Debate on Nonlawyer Ownership of Law Practice Entities*, 40 FORDHAM URB. L.J. 75, 95 (2012). For a penetrating critique of ABA policymaking in this respect and suggestions for improvement, see Stephen Gillers, *How to Make Rules for Lawyers: The Professional Responsibility of the Legal Profession*, 40 PEPP. L. REV. 365, 377-418 (2013).

15. *See* Schneyer, *On Further Reflection*, *supra* note 6, at 619-20.

16. Email from Elyn Rosen, Senior Counsel, ABA Ctr. for Prof’l Responsibility, to author (Feb. 25, 2013) (on file with *Hofstra Law Review*).

17. I have supported adoption of PMBR programs in the United States in two previous articles. Schneyer, *On Further Reflection*, *supra* note 6, at 619-27; Schneyer, *Thoughts on Compatibility*, *supra* note 9, at 30-37.

18. *See infra* Part III.

19. *See infra* Part III.

when lawyers are increasingly subject to unwelcome external regulation,<sup>20</sup> which may reflect weaknesses in PSR.<sup>21</sup>

The Article proceeds as follows. To convey a sense of how a full-bodied PMBR program is structured and what it can accomplish, Part II discusses in detail the prototypical program that became fully operational in New South Wales (“NSW”), Australia in 2004.<sup>22</sup> Part II.A describes the program, highlighting two features.<sup>23</sup> The first is a requirement that law practice entities organized as “incorporated legal practices” (“ILPs”),<sup>24</sup> designate one or more of their licensed solicitors as “Legal Practitioner Directors,” who are personally responsible for assessing and maintaining their firm’s “ethical infrastructure”<sup>25</sup>—that is,

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20. See, e.g., Jack R. Bierig, *Whatever Happened to Professional Self-Regulation?*, 69 A.B.A. J. 616, 617 (1983) (arguing that the bar should be permitted to continue to set its own standards); Martha Middleton, *FTC Keep Out: Let Courts Control, House Says*, 69 A.B.A. J. 1366, 1366 (1983) (noting the ABA’s ongoing lobbying campaign to exempt lawyers from regulation under federal consumer protection laws on the ground that ethics rules adopted by state supreme courts and enforced through professional discipline already regulate lawyers’ business practices); see also *Am. Bar Ass’n v. FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005) (upholding ABA’s challenge to FTC’s position that the Gramm-Leach-Bliley Act authorized the agency to regulate law firms as “financial institutions” (internal quotation marks omitted)). Evidence suggests that on a global level the primacy of professional self-regulation is losing ground to legislative and executive branch oversight. 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, 2667-74 (2012) (providing examples of this trend).

21. For one federal regulator’s vote of no confidence in the state supreme courts’ disciplinary systems, see Harvey L. Pitt, Chairman, Sec. Exch. Comm’n, Remarks Before the Annual Meeting of the American Bar Association’s Business Law Section (Aug. 12, 2002) (stating that Chairman Pitt was “not impressed, or pleased, by the generally low level of effective responses we receive from state bar committees when we refer possible disciplinary proceedings to them”). For an argument that regulating law firms, and regulating them proactively, will enhance public acceptance of professional self-regulation for lawyers, see Adam M. Dodek, *Regulating Law Firms in Canada*, 90 CANADIAN B. REV. 383, 433-39 (2012).

22. See *infra* Part II.

23. See *infra* Part II.A.

24. Schneyer, *Thoughts on Compatibility*, *supra* note 9, at 30-31. Australians often refer to “law practices” rather than law firms because they need a term that is broad enough to cover not only traditional law firms, but also firms owned in whole or in part by outside investors, as well as multidisciplinary practices in which lawyers and nonlawyers practice their respective professions, have an ownership interest, and share legal fees. See *id.* The Model Rules use the term “firm” or “law firm” to refer to “a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the law department of a corporation or other organization.” MODEL RULES OF PROF’L CONDUCT R. 1.0(c) (2012) (internal quotation marks omitted). This Article takes no position on whether PMBR programs can or should regulate law practice in settings other than private law firms.

25. See Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 10 (1991) [hereinafter Schneyer, *Discipline for Law Firms*] (stating that “a law firm’s organization, policies, and operating procedures constitute an ‘ethical infrastructure’ that cuts across particular lawyers and tasks,” and that ethical infrastructures “may have at least as much to do with . . . avoiding” misconduct in law firms as the individual values and skills of their lawyers). I

policies, procedures, and systems designed to prevent common sorts of errors and ethical violations. The second is non-adversarial *collaboration* between regulators and the designated solicitors to help firms develop and maintain “appropriate management systems.”<sup>26</sup> Here, the regulators play a role akin to that of consultants advising on how to manage ethical risks.<sup>27</sup> Part II.B examines two empirical studies of the NSW program, which show, respectively, that the program has dramatically reduced complaints against lawyers practicing in ILPs and the designated solicitors have generally come to accept the program and recognize its value in upgrading their operations.<sup>28</sup> Part II.C presents evidence that program costs have been modest and proportionate to program benefits.<sup>29</sup>

Whether our state supreme courts, working in tandem with the bar, should build a NSW-style PMBR program into their regulatory framework depends, of course, on what the program could add at what cost and whether it would complement, rather than weaken, the disciplinary process. With that in mind, Part III looks at fairly recent developments in PSR and ideas about how PSR can better promote compliance with ethical norms.<sup>30</sup> Part III.A points out that the Model Rules of Professional Conduct now recognize the importance of law firm management in promoting ethics compliance and competent lawyering.<sup>31</sup> Part III.B argues, however, that there is a serious mismatch between the rules that establish broad ethical duties of law firm management and the ABA’s apparent assumption that those duties can be adequately enforced in the disciplinary process.<sup>32</sup> Part III.C shows that PSR has already taken some steps in the direction of proactive regulation, and that adopting a PMBR-style program would be an incremental reform rather than a regulatory sea change.<sup>33</sup> And Part III.D

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coined the term “ethical infrastructure,” but it is now in common use. *See, e.g.*, Elizabeth Chambliss & David B. Wilkins, *Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting*, 30 HOFSTRA L. REV. 691, 692 & n.7 (2002); John Chu, *Ethics Auditing: Should It Be Part of Large Law Firms’ Ethical Infrastructure?*, 11 LEGAL ETHICS 16, 19 (2008); Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786, 791 (2009); Christine Parker et al., *The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour*, 31 U. N.S.W. L.J. 158, 160 & n.5 (2008).

26. 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*, J.L. & SOC’Y 466, 471 (2010) [hereinafter Parker, Gordon & Mark, *An Empirical Assessment*].

27. *Id.* at 473.

28. *See infra* Part II.B.

29. *See infra* Part II.C.

30. *See infra* Part III.

31. *See infra* Part III.A.

32. *See infra* Part III.B.

33. *See infra* Part III.C.

argues that PSR's limited commitment to consumer protection for clients should be strengthened, but that doing so may be impossible without a PMBR program.<sup>34</sup>

Recognizing that PMBR is a little known form of regulation in the United States and that American lawyers and judges prize PSR for its adherence to tradition, I conclude in Part IV by recapping the case for importing NSW-style PMBR to the United States, if not lock, stock, and barrel, then at least in part, as an experiment.<sup>35</sup>

## II. THE ELEMENTS AND IMPACT OF THE NEW SOUTH WALES PROGRAM<sup>36</sup>

### A. *The Program Described*

By 2004, solicitors in NSW were permitted to work in firms organized as limited liability entities or ILPs.<sup>37</sup> ILPs may be

34. See *infra* Part III.D.

35. See *infra* Part IV.

36. Part II draws on portions of two earlier articles. See Schneyer, *On Further Reflection*, *supra* note 6, at 619-27; Schneyer, *Thoughts on Compatibility*, *supra* note 9, at 30-37. In addition, there is now a large body of scholarship on the NSW program. See Susan 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, 156 (2012) [hereinafter Fortney & Gordon, *Australian Approach*]; Steven Mark & Georgina Cowdroy, *Incorporated Legal Practices—A New Era in the Provision of Legal Services in the State of New South Wales*, 22 PENN ST. INT'L L. REV. 671, 688 (2004); Steven Mark & Tahlia Gordon, *Innovation in Regulation—Responding to a Changing Legal Services Market*, 22 GEO. J. LEGAL ETHICS 501, 505-06 (2009); Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 471. Other Australian jurisdictions now have PMBR programs more or less like the one in NSW. See, e.g., John Briton & Scott McLean, *Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era*, 11 LEGAL ETHICS 241, 244-50 (2008) (describing a similar program in Queensland).

37. *Legal Profession (Incorporated Legal Practices) ACT 2000* (NSW) sch 1, pt 3, div 2A(47C)(1)–(2) (Austl.). As of February 2010, there were 902 ILPs in NSW, representing about twenty percent of the law firms and of the roughly 25,000 lawyers then practicing in the state. Memorandum from Esther Bedggood to Steve Mark, Comm'r, Office of Legal Servs. Comm'r (Feb. 15, 2010) (on file with *Hofstra Law Review*). The ILPs tended to be quite small, as are most law firms in the state. See *id.* They included 685 solo practices, 137 firms with 2 principals, 40 with 3, and 34 with 4 or more. *Id.* Two ILPs were law firms listed on the Australian Stock Exchange; 58 were MDPs. *Id.* The largest ILP had 32 principals. *Id.* By 2009, many other NSW firms had expressed interest in becoming ILPs. See generally Steve Mark, *Views from an Australian Regulator*, 2009 J. PROF. LAW. 45 [hereinafter Mark, *Australian Regulator*] (discussing the process of firms incorporating in NSW). Largely for tax reasons, the large law firms in Sydney, the biggest city in NSW, have not become ILPs. See Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 481 n.52. However, new firms in Australia do tend to incorporate, and in 2010, a national task force proposed that the proactive regulatory program for ILPs be extended to include all law practices. See Andrew Grech, *Incorporation No Threat to Standards*, AUSTRALIAN, July 9, 2010, at 29. Regulators in NSW are interested in extending their PMBR program to law practices other than ILPs, but have not yet done so. Email from Tahlia Gordon, Research & Projects

multidisciplinary practices (“MDPs”), may be owned in whole or in part by outside investors, and may even raise capital by listing on the public stock exchange.<sup>38</sup> Concerned that ILPs might pose greater ethical risks than traditional law firms, which are general partnerships and solely owned by lawyers,<sup>39</sup> Steve Mark, NSW’s first Legal Services Commissioner,<sup>40</sup> looked to ILP management to provide safeguards. He

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Manager, Office of Legal Servs. Comm’r, to author (Dec. 12, 2010) (on file with *Hofstra Law Review*).

38. *Legal Profession Act 2004* (NSW) pt 2.6 (Austl.). In 2007, Slater & Gordon, chiefly a plaintiffs’ personal injury firm, became the first law firm in the world to list. See generally Andrew Grech & Kirsten Morrison, *Slater & Gordon: The Listing Experience*, 22 *GEO. J. LEGAL ETHICS* 535 (2009) (examining Slater & Gordon’s restructuring as a listed company).

39. For a comparative study of regulatory responses to the ethical risks that law practice in limited liability entities is sometimes thought to create, see Susan Saab Fortney, *Tales of Two Regimes for Regulating Limited Liability Law Firms in the U.S. and Australia: Client Protection and Risk Management Lessons*, 11 *LEGAL ETHICS* 230, 233-34 (2008). The purpose of requiring ILPs in NSW to implement ethics management systems was “to counter any increased commercial pressure on the ethics of legal practice within ILPs.” Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 475.

40. Mr. Mark stepped down in August 2013. As in other Australian states, the NSW legislature created a legal services commissioner who reports to the state attorney general. *Legal Profession Act 2004* (NSW) pt 7.3 (Austl.). The relationship between the Office of the Legal Services Commissioner (“OLSC”) and the NSW Law Society and Bar Association is described as “co-regulation.” See CHRISTINE PARKER & ADRIAN EVANS, *INSIDE LAWYERS’ ETHICS* 54-56 (2007). With respect to discipline, all complaints against NSW barristers and solicitors go first to the OLSC, which refers complaints alleging serious professional misconduct to the Bar or NSW Law Society for investigation and possible prosecution. See *id.* However, many complaints charge lawyers with what Australians call “unsatisfactory professional conduct” as opposed to “serious professional misconduct.” Schneyer, *Thoughts on Compatibility*, *supra* note 9, at 28. UPC is conduct that “falls short of the standard of competence and diligence that a member of the public is entitled to expect.” See *Legal Profession National Law 2011* (Cth) s 5.4.2 (Austl.).

Examples of UPC include delay in handling client matters, shoddy service, failure to clarify fee terms, and careless errors. Schneyer, *Thoughts on Compatibility*, *supra* note 9, at 28. Australian regulators take UPC complaints quite seriously. See *id.* at 28-29. Some UPC may technically violate the rules of professional conduct but is nonetheless investigated and resolved by the OLSC. *Id.* at 29. UPC complaints are not referred to the Bar or NSW Law Society for disciplinary proceedings, because the complaints are thought to be too minor to warrant formal disciplinary proceedings and because the Bar and NSW Law Society were criticized in the past for being unresponsive to them. *Id.* In many other cases, complaints allege UPC that does not violate ethics rules, but is thought nonetheless to justify regulatory attention as a “consumer complaint.” *Id.* at 28 n.55. Such complaints are often filed by unsophisticated clients who have no other recourse. See Steve Mark, *The Office of the Legal Services Commissioner—Consumer Protection*, PRECEDENT, Jan.–Feb. 2009, at 12, 14 (noting that over fifty percent of the complaints filed with the OLSC are consumer complaints). The considerable administrative expense that Australian regulators incur in giving such serious attention to UPC complaints may have encouraged them to adopt PMBR programs in hopes of reducing complaint rates. See *id.* Disciplinary systems in the United States have traditionally responded weakly or not at all to such complaints, and whether PSR should do more has been a topic of considerable debate. See *infra* Part III.B.

In England and Wales, consumer complaints now appear to be dealt with even more forcefully than in Australia. Legal service providers must maintain an in-house process for responding to such complaints. *Legal Services Act of 2007*, ch 29, pt 6 (Austl.). Complaints that

wanted ILPs to develop and maintain an “ethical infrastructure,” which he defined as “formal and informal management policies, procedures and controls, . . . and habits of interaction . . . that supports and encourages ethical behavior.”<sup>41</sup> His aim was to reduce the risk of errors and misconduct in law practices by motivating *and* helping firms to detect institutional weaknesses and thereby avoid problems.<sup>42</sup>

Legislation in 2004 provided a mechanism for enforcing an ILP’s duty to maintain a satisfactory ethical infrastructure.<sup>43</sup> To ensure that one or more principals in an ILP have *focused* responsibility for discharging this duty, the statute required every ILP to *designate* at least one licensed NSW solicitor as its legal practitioner director (“LPD”)<sup>44</sup> and to have “appropriate management systems” in place to ensure that services are provided in accordance with professional obligations.<sup>45</sup> LPDs are not only generally responsible, like all lawyer principals in an ILP, for overseeing the firm’s delivery of legal services, but also specifically responsible for implementing and maintaining the appropriate systems.<sup>46</sup> Failure to meet that specific duty is professional misconduct for which LPDs can in principle be sanctioned, and, in a serious case, disqualified from further service as an LPD.<sup>47</sup> LPDs also have duties to prevent, report, and remedy serious professional misconduct by lawyers in their firms.<sup>48</sup>

The 2004 legislation did not define “appropriate management systems.”<sup>49</sup> But the Office of the Legal Services Commissioner

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cannot be resolved in-house go to the new Office for Legal Complaints, whose board is controlled by nonlawyers. *Id.* That office operates through ombudsmen with considerable power. *Id.* s 115. If a complaint is found to have merit, the respondent may be directed to apologize, disgorge a fee, rectify an error at her expense, or compensate the complainant in an amount up to £30,000. *Id.* ss 112-13, 126, 138(1).

41. Mark, *Australian Regulator*, *supra* note 37, at 46.

42. *Id.* (calling the program a “quasi-educative mechanism” that moves away from “sole reliance on complaints-based regulation” to include compliance-based regulation, in hopes of providing greater consumer protection).

43. *Legal Profession Act 2004* (NSW) (Austl.).

44. *Id.* s 140(1).

45. *Id.* s 140(3).

46. *Id.* A new regulatory program in England and Wales is similar but more intrusive and more demanding of the designated compliance officers in firms. For a useful description, see Jane Hunter, *Outcomes-Focused Regulation in England & Wales: The Compliance Officer Roles*, QUALITY ASSURANCE REV., Winter 2012, at 1, 1-6.

47. *Legal Profession Act 2004* (NSW) ss 140(5), 141(1A) (Austl.). Moreover, an ILP with no authorized LPD may be forced into receivership and shut down. Schneyer, *Thoughts on Computability*, *supra* note 9, at 31. In this sense, the PMBR program is *firm*-based as well as management-based. *Id.* at 30-31. But the OLSC regards these powers as a last resort, not a central feature of the program. *Id.* at 27.

48. *Legal Profession Act 2004* (NSW) ss 141, 143 (Austl.); *see also* Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 471 (discussing a LPD’s duties).

49. The term “appropriate” has the advantage of flexibility, which is necessary in light of

(“OLSC”), in collaboration with the Law Society of NSW, the malpractice insurer in the state, and knowledgeable academics and practitioners, developed a test for determining whether an ILP has appropriate systems in place.<sup>50</sup> The test is whether the firm has and utilizes appropriate systems for managing ten areas in which problems commonly arise, as reflected in client complaints over time.<sup>51</sup> By identifying these problem areas and putting ILPs on notice of the areas for which management systems are needed, the OLSC and its collaborators gave the term “ethical infrastructure” a concrete meaning.<sup>52</sup>

The OLSC issued a list of the ten problem areas to be addressed and the objectives that management systems should be designed to meet in each area.<sup>53</sup> In the area of records management, for example, the objective is “minimizing the likelihood of loss or destruction of correspondence and documents through appropriate . . . retention, filing, archiving etc., and providing for compliance with requirements regarding registers of files, safe custody, [and] financial interests.”<sup>54</sup> In the area of undertakings the objective is appropriate “monitoring of . . . timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the OLSC, [and] courts.”<sup>55</sup> Far from requiring all ILPs to implement the same procedures and

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wide variations in the size, clientele, personnel, and practice fields of firms providing legal services. For a U.S. analogy, see MODEL RULES OF PROF'L CONDUCT R. 5.1(a) (2012) (requiring law firm partners and lawyers with comparable management authority to 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” (emphasis added)); *id.* R. 5.1 cmt. 3 (noting that the measures to be taken can depend on a firm’s “structure and the nature of its practice”).

50. See Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 471.

51. *Id.* at 471-72. In choosing the areas to stress, the OLSC and its collaborators sought an approach that lawyers would regard as practical and useful. See Fortney & Gordon, *Australian Approach*, *supra* note 36, at 161.

52. When I introduced the term “ethical infrastructure” in 1991, I chiefly had in mind procedures for detecting and resolving conflicts of interest, tracking deadlines, accounting for client funds, and ensuring that inexperienced lawyers and other firm personnel are properly trained and supervised—examples identified in the Model Rules. MODEL RULES OF PROF'L CONDUCT R. 5.1 cmts. 2-5 (2012). In my opinion, the NSW PMBR program represents a major advance in “operationalizing” the term.

53. OFFICE OF LEGAL SERVS. COMM’R, ANNUAL REPORT 2003-2004, at 7 (2004), available at [http://www.olsc.nsw.gov.au/agdbasev7/wr/olsc/documents/pdf/2003\\_2004\\_annualreport.pdf](http://www.olsc.nsw.gov.au/agdbasev7/wr/olsc/documents/pdf/2003_2004_annualreport.pdf). The ten areas are: negligence; communication; delay; liens/file transfers; cost disclosure/billing practices/termination of retainer; conflicts of interest; records management; undertakings (i.e., timely compliance with notices, orders, rulings, directions, and other requirements of regulatory authorities); supervision of practice and staff; and trust account regulations. *Id.* Most of these areas chiefly implicate duties to clients, violations of which can often be reduced by appropriate policies, procedures, and systems. *Id.* Perhaps the fulfillment of some duties to third parties, the courts, or the public cannot be ensured as readily through systematization. *Id.* In any event, the ten areas do not, and are presumably not intended to, cover the entire ethical waterfront.

54. *Id.*

55. *Id.*

systems, the OLSC's aim is to encourage ILPs to adopt procedures and build systems that suit their own practices.<sup>56</sup> In that respect, each ILP has considerable autonomy.

All this is what makes the NSW program "management-based regulation," a regulatory model formulated by theorists Cary Coglianese and David Lazer that requires firms to engage in their own planning and develop their own management processes in order to achieve externally defined but broadly stated public goals.<sup>57</sup> Compliance with professional duties is, of course, an example. But what exactly makes the PMBR program *proactive*? And to what degree is the program compliance- rather than complaints-based?

The proactivity element turns on a *self*-assessment process developed by the OLSC and its expert collaborators. The process requires the LPDs in every new ILP to report on the firm's management systems<sup>58</sup> by completing the OLSC's self-assessment form, which is built on the ten problem areas and the objectives ILPs should strive to meet in each area.<sup>59</sup> The self-assessment form also suggests criteria for LPDs to use to determine whether their ILP is in compliance with each objective, and offers in each case examples of what would count as evidence of compliance.<sup>60</sup> With respect to the objective of maintaining

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56. See Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 473.

57. Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC'Y REV. 691, 693-96 (2003) [hereinafter Coglianese & Lazer, *Management-Based Regulation*]; see also Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 470 (contrasting management-based regulation with two more directive regulatory models: (1) external regulation that sets out the management processes or technologies that firms must use to counter specified risks and that sanctions violators *ex post*, and (2) traditional regulation of business, which bans specific conduct and also sanctions violators *ex post*). Coglianese and Lazer posit that management-based regulation is most appropriate where the services being regulated are highly individualized and contextual and the outcomes being sought cannot easily be measured by external regulators. Coglianese & Lazer, *Management-Based Regulation*, *supra*, at 713-15. Australians who have studied the NSW PMBR program regard the objective of promoting ethical compliance as consistent with Coglianese and Lazer's model. See Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 473-74. And that model is consistent with trends in regulatory theory. *Id.* at 470 (noting that legislators and regulators are increasingly encouraging or forcing business organizations to adopt effective systems and procedures to achieve compliance with legal and ethical duties); see generally Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171 (1995) (evaluating audited self-regulation programs throughout the federal government).

58. A number of ILPs were formed between 2001 and 2004, before the self-assessments began. Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 473 n.25. Those ILPs were asked to provide their initial self-assessments in 2004 or 2005. See *id.*

59. OFFICE OF LEGAL SERVS. COMM'R, SUGGESTIONS CONCERNING THE ELEMENTS OF "APPROPRIATE MANAGEMENT SYSTEMS" FOR INCORPORATED LEGAL PRACTICES IN NSW 1 (2013) [hereinafter SUGGESTIONS FOR INCORPORATED LEGAL PRACTICES], available at [http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/ilp\\_self\\_assessment\\_form\\_august2013.pdf](http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/ilp_self_assessment_form_august2013.pdf).

60. *Id.*

“competent work practices” in order to avoid negligence, for example, one compliance criterion is whether firm lawyers practice “only in areas where they have appropriate competence and expertise.”<sup>61</sup> And a “written statement setting out the types of matters” in which the ILP will accept engagements would count as evidence of compliance.<sup>62</sup>

In preparing the self-assessment form, an LPD must indicate the extent to which her ILP has achieved each objective, using a five-point scale ranging from “Non-Compliant” to “Fully Compliant Plus.”<sup>63</sup> After the form is filed, a staff member in the OLSC’s Incorporated Practice Unit reviews the information provided and the LPD’s compliance ratings.<sup>64</sup> If the LPD rates the ILP compliant or better on all counts, the OLSC ordinarily notifies the LPD that no further action is required. If instead the self-assessment indicates that the ILP is less than compliant with any objectives, the OLSC writes to the LPD, providing guidance and offering to assist the ILP to become compliant.<sup>65</sup> The LPD is expected in due course either to confirm in writing that compliance has been achieved or to provide an update on progress, in which case the OLSC will expect further responses.<sup>66</sup>

It is not uncommon for initial self-assessments to rate an ILP only partially compliant or (less often) noncompliant with one or more objectives,<sup>67</sup> triggering a dialogue until an agreement is eventually

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61. *Id.* at 3.

62. *Id.*; see also Mark, *Australian Regulator*, *supra* note 37, at 49 (analyzing the self-assessment form).

63. SUGGESTIONS FOR INCORPORATED LEGAL PRACTICES, *supra* note 59, at 2; see also Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 473-74. The five points and what they mean are as follows: Non-Compliant means “Not all Objectives have not been addressed”; Partially Compliant means “All Objectives have been addressed but the management systems . . . are not fully functional”; Compliant means “Management systems for all Objectives exist and are fully functional”; Fully Compliant means “Management systems exist for all Objectives and all are fully functional and all are regularly assessed for effectiveness”; and Fully Compliant Plus means “All Objectives have been addressed, all management systems are documented and all are fully functional and . . . assessed regularly for effectiveness plus improvements are made when needed.” SUGGESTIONS FOR INCORPORATED LEGAL PRACTICES, *supra* note 59, at 2; see also Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 474 tbl.2.

64. Fortney & Gordon, *Australian Approach*, *supra* note 36, at 165.

65. *Id.*

66. *Id.*

67. A summary of the self-assessment ratings filed by the more than 600 NSW ILPs as of June 2008 revealed that only sixty-two percent rated themselves compliant with all ten objectives. Mark, *Australian Regulator*, *supra* note 37, at 52; Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 483 tbl.3. Half the others became fully compliant within three months of that assessment. Mark, *Australian Regulator*, *supra* note 37, at 52. In the areas of supervision of practice and communication, eighteen percent of the firms rated themselves partially compliant or noncompliant, and no fewer than eight to nine percent gave themselves those ratings in every other area except trust account regulations. Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note

reached. In the very rare cases where no self-assessment is filed, or the response is incomplete or suggests serious shortcomings, or the OLSC receives multiple complaints implicating an ILP's operations, the OLSC may request follow-up assessments, conduct a practice review, or, very occasionally, conduct a formal audit.<sup>68</sup> But ILPs have no general duty to file periodic self-assessments.

Two factors are likely to discourage overly rosy or perfunctory self-assessments. On one hand, the transmittal letter accompanying the self-assessment form that the OLSC sends to new ILPs reminds the LPD that the OLSC (and the NSW Law Society) have authority to audit ILPs.<sup>69</sup> On the other hand, the letter encourages the LPD to use the self-assessment process to improve the firm's delivery of legal services and to contact the OLSC for assistance or guidance.<sup>70</sup> The self-assessment form itself seems designed to give ILPs "a number of 'face-saving' options to admit less than full compliance."<sup>71</sup> The point is to educate firms *toward* compliance, not to detect ethics violations and discipline violators.<sup>72</sup> In NSW, rule violations and management objectives as yet unmet are two different things. This is the sense in which PMBR is compliance- rather than complaints-based.

### B. Positive Assessments of the Program's Impact

I would not expect the ABA and the state supreme courts to jump on the PMBR bandwagon without evidence that doing so could deliver substantial benefits at reasonable cost. Fortunately, although the PMBR program in NSW has only been fully operational since 2004, such evidence already exists. Two well-conceived empirical studies have examined its impact and drawn favorable conclusions.<sup>73</sup> Part II.B.1

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26, at 483 tbl.3.

68. Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 473. In the first half of 2008, the OLSC conducted four formal reviews; resource constraints generally limit it to seven or eight audits a year. Schneyer, *Thoughts on Compatibility*, *supra* note 9, at 32 n.72; *see also infra* note 122 and accompanying text. In one case, a practice review was conducted after the OLSC received complaints about an LPD's lack of supervision. Schneyer, *Thoughts on Compatibility*, *supra* note 9, at 32 n.72. The OLSC had the LPD reassess the firm's management systems. *Id.* When the new self-assessment rated the ILP as only partially compliant on eight of the ten objectives, the OLSC conducted a "compliance audit." *Id.* The audit report noted several areas for improvement, prompting the LPD to implement new systems. *Id.* Rather than sanctioning the LPD, in other words, the OLSC worked together with the LPD to bring the ILP into compliance.

69. *See* Fortney & Gordon, *supra* note 36, at 168-70. The self-assessment form is to be completed and returned to the OLSC within three months, leaving ample time for a considered response. *Id.* at 169 n.99.

70. *Id.* at 168-70.

71. Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 482.

72. *See* Schneyer, *Thoughts on Compatibility*, *supra* note 9, at 32.

73. *See generally* Fortney & Gordon, *Australian Approach*, *supra* note 36 (finding that

draws on a study finding that the program has greatly reduced the volume of disciplinary complaints filed per practitioner per year against lawyers in ILPs.<sup>74</sup> This holds true both when comparing the complaint rates for those lawyers before and after their ILP's self-assessment and when comparing the ILPs' post-assessment complaint rates with the rates for *unincorporated* law practices over the same period. Part II.B.2 draws on a recent study that evidences success of another sort, namely, general (though not universal) acceptance of the program by ILPs, including acknowledgements by LPDs that the program has improved their firms' operations.<sup>75</sup> Part II.C provides indirect evidence that the cost of the NSW PMBR program has so far been modest.<sup>76</sup>

### 1. Reduction in Complaints

Proponents of regulating the management of ethical risks by law firms have often assumed that doing so is especially important for large firms, which need sound bureaucratic controls.<sup>77</sup> Yet, the OLSC in NSW, like most disciplinary agencies in the United States, have long received a disproportionately high percentage of complaints against lawyers who practice alone or in small firms.<sup>78</sup> This suggests that it might actually be solo and small firm practices that need stronger management systems to promote lawyer compliance with certain ethical duties, especially duties running to clients. The vast majority of ILPs in NSW are quite small.<sup>79</sup>

The most extensive empirical study of the NSW PMBR program, using OLSC complaints data, takes the reduction of complaint rates as its measure of program success.<sup>80</sup> The investigators acknowledge that

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regulating ILPs has contributed to the revision of management systems in NSW); Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26 (finding that the NSW approach to regulating ILPs has a positive impact on ethical management and behavior).

74. See *infra* Part II.B.1.

75. See *infra* Part II.B.2.

76. See *infra* Part II.C.

77. This includes my own early arguments stressing the importance of promoting sound ethical infrastructures in large law firms. Schneyer, *Discipline for Law Firms*, *supra* note 25, at 1-11, 37-45.

78. See Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 481 & n.54 (citing Bruce L. Arnold & Fiona M. Kay, *Social Capital, Violations of Trust and the Vulnerability of Isolates: The Social Organization of Law Practice and Professional Self-Regulation*, 23 INT'L J. SOC. L. 321, 333 (1995) (explaining the phenomenon)); see also RICHARD L. ABEL, AMERICAN LAWYERS 145 (1989) (reporting that in the early 1980s, more than eighty percent of the lawyers disciplined in California, Illinois, and the District of Columbia were sole practitioners and none practiced in a firm with more than seven lawyers, yet many lawyers worked in much larger firms in those jurisdictions at the time).

79. Schneyer, *Thoughts on Compatibility*, *supra* note 9, at 31. The vast majority of unincorporated law practices in NSW are also small. *Id.* at 33.

80. Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 478-94 (presenting

complaint rates are neither a perfect nor the only conceivable measure of the program's "ethical output," but argue convincingly that it was the best available measure because complaints data existed for all NSW practitioners in ILPs and unincorporated firms, because all complaints are filed with the OLSC, and because the practice areas for which the OLSC requires self-assessment and appropriate management systems generate the most complaints.<sup>81</sup>

The study measured complaint rates<sup>82</sup> for lawyers in the approximately 630 ILPs that were operating in NSW in 2008 and had already gone through the initial self-assessment process, as well as complaint rates for lawyers in 354 unincorporated practices.<sup>83</sup> It tested three hypotheses: (1) that after self-assessment, ILPs would have lower complaint rates per practitioner per year than they had before self-assessment; (2) that ILPs, after self-assessment, would have fewer complaints per lawyer per year than unincorporated law practices; and (3) assuming that the LPDs' self-assessment ratings were reliable, that ILPs that rated their management systems higher on the compliance scale would have fewer complaints than those who rated themselves lower.<sup>84</sup>

The findings on the first hypothesis were startling. On average, complaints dropped by *two-thirds* after ILPs completed their initial self-assessment.<sup>85</sup> To test the second hypothesis, the study calculated

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the results of this study).

81. *Id.* at 478-79 (internal quotation marks omitted). The authors do note that complaints can only be a rough measure of client dissatisfaction because some clients with legitimate complaints do not complain and because only sixty percent of the complaints filed with the OLSC in the relevant time period were filed by present or former clients of the lawyer(s) involved. *Id.* They also acknowledge that using changes in complaint rates as a measure of improvement in a firm's ethical compliance might be criticized for focusing too heavily on consumer service issues and too lightly on matters in which lawyers breach duties to the courts or third parties, often in order to benefit clients. *Id.* at 498-99.

82. For an explanation and justification of the methods by which the investigators calculated complaint rates, see *id.* at 484-93.

83. *Id.* at 481. Complaints filed during the same three months in which an ILP was self-assessed were not counted because it was unclear whether they concerned events before or after assessment. *Id.* at 485 n.58. Measuring changes in complaint rates before and after the initial self-assessment, rather than before and after the date of incorporation, was vital because some ILPs were first established as firms when they incorporated and because it was the self-assessments that were hypothesized to prompt changes in practice management, not incorporation itself. *Id.* at 485. Because many of the ILPs that were studied had incorporated between 2001 and 2004, before self-assessments began, there was often a substantial time lag between incorporation and assessment. *Id.* at 485 n.59. This was helpful in comparing the complaint rates of self-assessed ILPs with those of unincorporated law practices. It strengthened the investigators' confidence that the self-assessed ILPs' lower complaint rates were attributable to the PMBR program rather than to differences between clientele, firm structure, or practice fields of incorporated and unincorporated firms.

84. *Id.* at 485-92.

85. *Id.* at 485. This drop in complaints was statistically significant at the highest confidence

complaint rates for every year from 2001 (when incorporation was first permitted) to 2008 for 354 unincorporated firms in NSW that had two or more principals in 2008, and then compared their complaint rates per practitioner per year with those of the 143 ILPs that had two or more principals at the time.<sup>86</sup> Before self-assessment, the ILPs had a slightly lower average complaint rate than the unincorporated firms.<sup>87</sup> But after self-assessment, the ILP complaint rate was only about *one-third* the rate for unincorporated firms, which was statistically significant at the highest confidence level and supported the conclusion that the “self-assessment process makes a big difference to complaint rates.”<sup>88</sup> As for the third hypothesis, the study found little evidence of a relationship between an ILP’s self-assessed compliance ratings and its subsequent complaint rates,<sup>89</sup> which suggests that it was the learning and infrastructural adaptations resulting from the self-assessment process that reduced ILP complaint rates.

In sum, this extensive and sophisticated study found considerable reason to believe that NSW-style proactive management-based regulation can enhance the quality and probity of a law firm’s services.<sup>90</sup>

## 2. The ILPs’ Generally Positive Reception of PMBR

An American lawyer might suppose that Australian lawyers and law firms would initially have been hostile to having a new layer of regulation imposed on them, especially a layer introduced by an executive branch agency like the OLSC rather than the organized bar or

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level. *Id.* at 486 & n.60. Moreover, the drop was not an artifact of any overall drop in complaints against NSW practitioners over the relevant time period; nor could it be attributed to some external event such as a publicity campaign by the OLSC or the malpractice insurer in the state. *Id.* at 486.

86. *Id.* at 486-87.

87. *Id.* at 487-88.

88. *Id.* at 488. While there was some evidence that ILPs as a group might have been slightly better managed at the outset and thus had slightly lower rates than unincorporated firms—even without self-assessment—the point is that after self-assessment there was “an additional huge difference” in favor of the ILPs. *Id.*

89. *Id.* at 491. Although the insignificance of the ILPs’ initial compliance ratings might suggest that LPDs did not take the assessment process seriously, the fact that quite a few LPDs were willing to assess themselves as less than compliant with some management-system objectives suggests the opposite, as do findings in an earlier study that sixty-three percent of the self-assessment forms were returned to the OLSC with substantial comments regarding the ILPs’ management systems (though comments were not required) and that fifty-six percent of the ILPs in the study engaged in substantial dialogue with the OLSC and reported making substantial changes in their management systems as a result of the process. *Id.* at 493 (citing SEUMAS MILLER & MATHEW WARD, OFFICE OF LEGAL SERVS. COMM’R, COMPLAINTS AND SELF-ASSESSMENT DATA ANALYSIS IN RELATION TO INCORPORATED LEGAL PRACTICES 3 (2006), available at <http://www.cappe.edu.au/docs/reports/consultancy/OLSC.pdf>).

90. *Id.* at 500 (stating that optimism about the potential benefits of PMBR “might have some real-life traction”).

the courts.<sup>91</sup> On that assumption, however, the generally favorable reaction of ILPs in NSW to the OLSC's PMBR program, as reflected in survey data collected in Professor Susan Fortney's recent impact study in cooperation with the OLSC, should also count as a programmatic success.<sup>92</sup>

The study looked at the impact of the program on ILPs from the point of view of solicitors, virtually all of whom were LPDs, at the 143 ILPs that responded to the survey.<sup>93</sup> The results indicate that the LPDs generally understood the duties that they were assuming when designated by their firms.<sup>94</sup> Seventy-five percent of the respondents had worked with their ILP (or a predecessor firm) for over five years, and had institutional knowledge to draw on in managing the firm.<sup>95</sup> The survey chiefly concerns how respondents viewed the relationship between the self-assessment process and the "ethical norms, systems, conduct, and culture in [their] firms."<sup>96</sup> Here are some representative survey results.

Eighty-four percent of the respondents reported that they had "revised firm policies or procedures relating to the delivery of legal services," and seventy-one percent stated explicitly that they had done so *in connection with the completion of the self-assessment process*.<sup>97</sup> Moreover, forty-seven percent reported that their ILPs had adopted entirely new systems, policies, or procedures,<sup>98</sup> and twenty-nine percent said their firm was devoting more time to "ethics initiatives."<sup>99</sup>

Some survey questions asked whether the respondents' firms had policies and procedures related to communication with clients and supervision of personnel, two areas explicitly covered in the self-

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91. In 2009, Commissioner Mark stated that a number of ILPs were initially "nervous about the process" of self-assessment or practice review. Mark, *Australian Regulator*, *supra* note 37, at 52. He hastened to add, however, that a number of ILPs thanked the OLSC after the self-assessment and review process was over, and said they had improved themselves as a result. *Id.*

92. Fortney & Gordon, *Australian Approach*, *supra* note 36, at 172-81.

93. *See id.* at 170 & n.103. The Fortney study used an online survey of LPDs at ILPs incorporated between January 1, 2007 and January 1, 2011. Those ILPs had all gone through the self-assessment process, and varied widely in size. *Id.* at 170. Ten percent of them had fewer than three solicitors, seventy-eight percent had three to nine, seven percent had ten to nineteen, and five percent had twenty or more. *Id.* The survey questionnaire was sent to 356 potential respondents, 141 of whom completed the questionnaire, a response rate of 39.6%. *Id.* at 169. A second article will discuss data obtained in follow-up interviews with fewer LPDs.

94. *Id.* at 171.

95. *Id.*

96. *Id.* at 172 (internal quotation marks omitted).

97. *Id.* (internal quotation marks omitted).

98. *Id.*

99. *Id.* Ninety-seven percent of the respondents reported that they spent no more than thirty-four percent of their work time on LPD duties and sixty-seven percent spent no more than ten percent of their time carrying out those duties. *Id.* at 171.

assessment form.<sup>100</sup> The form itself cited a number of policies and procedures as examples of appropriate systems for meeting the objectives in those areas.<sup>101</sup> On client communication, close to one hundred percent of the respondents said their firms had the very policies and procedures mentioned in the form, but fewer said they had systems not mentioned in the form.<sup>102</sup> Results were similar with respect to supervision.<sup>103</sup> This suggests that the assessment form itself may have had educational value.

As for the impact of the assessment process on attitudes, ethical norms, conduct, and culture in the ILPs, slightly more than half the respondents who could remember what their attitudes toward the self-assessment process and the appropriate-management-system requirement had been before they completed the self-assessment form said their impressions at the time were negative.<sup>104</sup> But post-assessment attitudes were considerably more favorable. Some respondents called the process “transformative” in shaping their views of the program,<sup>105</sup> and twenty-five respondents described positive changes in their attitudes.<sup>106</sup> While the post-assessment attitudes of some remained negative, respondents generally recognized the educational value of the process.<sup>107</sup> In fact, sixty-two percent agreed that it was “a learning exercise that enabled [their] firm to improve client service,” and only fifteen percent disagreed with that statement.<sup>108</sup> Asked which aspects of firm practice the process had affected, the respondents in the aggregate replied that the impact on firm management, risk management, and supervision was high, while the impact on client satisfaction, workplace satisfaction, and firm morale was marginal.<sup>109</sup> Fortney and co-author Tahlia Gordon find those responses understandable because management and supervision were so clearly related to the objectives that appropriate management systems are meant to achieve.<sup>110</sup> Finally, sixty-eight percent of the respondents *disagreed* with the statement that the self-assessment process was “a waste of time.”<sup>111</sup>

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100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 179.

104. *Id.* at 173.

105. *Id.*

106. *Id.* at 174.

107. *Id.* at 175.

108. *Id.* (internal quotation marks omitted).

109. *Id.* at 176.

110. *Id.* at 176-77.

111. *Id.* at 180.

### C. Evidence that Programmatic Costs Are Modest

The cost of the NSW PMBR program consists of the OLSC's expenditures to administer the program and the time and expense the ILPs incur in completing the self-assessment form and in any follow-up practice review or audit.<sup>112</sup> Against those costs, a full accounting would factor in the *savings* that the OLSC and the NSW Law Society experience as a result of the sizable reduction in complaint rates attributable to the program.<sup>113</sup> While these costs are difficult to estimate, there is indirect evidence that they have been modest.<sup>114</sup>

Several facts suggest that the OLSC's PMBR costs are also modest. First, the program is funded *entirely* by interest on lawyers' trust accounts and staff requirements have been minimal; the Incorporated Legal Practice Unit, which examines the self-assessment forms, consists of two people.<sup>115</sup> The OLSC has taken additional steps to economize without unduly constraining the program. It recently launched the OLSC Portal, a secure web-based application that, among other things, automates self-assessment reporting, simplifies practice reviews, permits electronic tracking of OLSC audits, and allows all available complaints data to be accessed through a single gateway.<sup>116</sup> The portal also facilitates "risk profiling" by the OLSC,<sup>117</sup> a cost-saving strategy that calls for some discussion.

Risk profiling assumes that certain factors create or heighten the risk that serious professional misconduct or UPC will occur at a firm.<sup>118</sup> These factors can sometimes be identified, and, if so, worthwhile steps can be taken in advance to reduce the chance that a risk will materialize. Insofar as the OLSC, in consultation with others, can discern "lead indicators" of potential misconduct in particular firms, it can monitor and advise those firms more extensively than others, conserving

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112. See *supra* note 67 and accompanying text.

113. See *supra* note 67 and accompanying text.

114. One indication that the ILPs' costs are modest is the fact that the respondents spend relatively little time working on LPD duties. See *supra* note 99. Of course, if the PMBR program is extended to apply to the much more numerous unincorporated law practices in NSW, the aggregate administrative cost to law practices would be considerably higher. But so, presumably, would be the benefits. In 2008, eighty percent of the private practices in NSW were unincorporated, but the ratio of ILPs to unincorporated practices has probably risen since then. See Briton & McLean, *supra* note 36, at 249 & n.17.

115. Email from Tahlia Gordon to author, *supra* note 37.

116. Office of the Legal Services Commissioner, OLSC Portal, available at [http://www.olsc.nsw.gov.au/olsc/lsc\\_portal.html](http://www.olsc.nsw.gov.au/olsc/lsc_portal.html) (last visited Nov. 23, 2013); see also Steve Mark, *The Legal Practice Management and Audit System (LPMAS)*, WITHOUT PREJUDICE, Oct. 2010, at 2, 2 [hereinafter Mark, *LPMAS*], available at [http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/wp\\_issue52\\_oct2010.pdf](http://www.olsc.nsw.gov.au/agdbasev7wr/olsc/documents/pdf/wp_issue52_oct2010.pdf).

117. Mark, *LPMAS*, *supra* note 116.

118. See *supra* note 40 (defining UPC).

resources.<sup>119</sup> The OLSC's experience is that misconduct and errors are not randomly distributed across firms and that a minority of firms are responsible for the "lion's share" of complaints and misconduct.<sup>120</sup> Resource limitations constrain the OLSC from auditing more than a handful of firms per year, and, so far, it has identified audit targets reactively—on the basis of triggering events such as a disproportionate number of complaints or a referral from the NSW trust account inspector.<sup>121</sup> But the OLSC hopes that by using data collected through its automated portal, it can identify audit targets using profiles based on other variables as well, such as a firm's practice field(s), clientele, and number of lawyers.<sup>122</sup> The aim is to economize by using more finely grained profiles to determine which firms are most at risk and in need of assistance.<sup>123</sup>

### III. THE EVOLUTION OF PSR IN THE UNITED STATES AND THE SYSTEMIC WEAKNESSES THAT PMBR PROGRAMS COULD AMELIORATE

Part II described the key features of the PMBR program in NSW,<sup>124</sup> and presented empirical evidence that the NSW program is working well.<sup>125</sup> Drawing on Part II, Part III tries to make the case for bringing PMBR to the United States, at least as an experiment to determine whether it can strengthen PSR as it is currently structured.<sup>126</sup>

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119. Mark, *LPMAS*, *supra* note 116 (explaining risk profiling).

120. *Id.*

121. Email from Tahlia Gordon to author, *supra* note 37.

122. Mark, *LPMAS*, *supra* note 116. Evidence bears out the common belief that sole practitioners and small-firm lawyers tend to be at greater risk for ethics violations than lawyers in larger firms. *See* Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 481. That is the case in NSW, where a disproportionately high percentage of complaints are filed against those lawyers. *Id.* It has also been the case in the United States. *See, e.g.*, DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 997 & n.54 (5th ed. 2009) (noting that in 2001, approximately fifty-six percent of the lawyers in California practiced alone or in firms with fewer than ten lawyers, yet those lawyers accounted for ninety-five percent of disciplinary investigations and ninety-eight percent of sanctions). Solo and small firm lawyers tend to practice in fields such as family law, criminal defense, immigration, personal injury, and consumer bankruptcy—fields in which clients tend to be unsophisticated. *Id.* at 997-98. Among the most common grounds for sanctioning such lawyers in California at the time were misappropriation of client funds, neglect of files, and failure to communicate with clients. *Id.* These problems that call for consumer protection and that appropriate law office management systems can help to prevent them. Moreover, the necessity of mastering new technologies in order to practice law today may put solo and small firm lawyers at still greater risk than lawyers in larger firms, which have substantial in-house technical assistance. *See* Schneyer, *On Further Reflection*, *supra* note 6, at 626 n.265.

123. Mark, *LPMAS*, *supra* note 116.

124. *See supra* Part II.

125. *See supra* Part II.

126. *See infra* Part III.A–D.

As part of its review of the disciplinary process, the Standing Committee could encourage state supreme courts to test some limited PMBR programs in which a sampling of law firms would be asked to provide a NSW-style self-assessment of their ethics-related management systems. At a minimum, this should get more law firms thinking about the matter.<sup>127</sup> I anticipate, however, that more than a few lawyers and judges in the United States would dismiss PMBR out of hand as entirely alien to our regulatory traditions. Part III tries to dispel this attitude.<sup>128</sup> It argues that PSR has evolved in recent decades in ways that lay a foundation for adding PMBR programs to the regulatory mix.<sup>129</sup> These developments include a greater awareness of the importance of law firm management in promoting ethical compliance and the adoption of some forms of proactive regulation. Part III also argues that PSR, as currently constituted, has some regulatory weaknesses that NSW-style PMBR programs could correct.<sup>130</sup>

*A. The ABA Has Acknowledged the Importance of Law Firm Management in Promoting Ethical Compliance*

The ABA's 1908 Canons of Ethics<sup>131</sup> did not even refer to law firms.<sup>132</sup> By the 1980s, however, two-thirds of American lawyers practiced in multi-lawyer settings, and well over half the lawyers in private practice worked in multi-lawyer firms.<sup>133</sup> Many law firms had branch offices, making intra-firm coordination more complicated. Associate-to-partner ratios were often three-to-one or more,

127. See Parker, Gordon & Mark, *An Empirical Assessment*, *supra* note 26, at 495 (inferring from study data that the self-assessment process in NSW is encouraging many practitioners "systematically to think through practice management issues, including ethics management, for the very first time"). The basic idea of self-assessment requirements is not novel in the United States. See, e.g., Edmund B. Spaeth, Jr., *To What Extent Can a Disciplinary Code Assure the Competence of Lawyers?*, 61 TEMP. L. REV. 1211, 1234 (1988) (suggesting that bar counsel could effectively enforce broad ethical duties of law firm management by requiring firms to report periodically on the measures they take to provide reasonable supervision). Cf. Laurel S. Terry, Professor of Law, Pa. State Univ., Presentation at a Meeting of the Nat'l Org. of Bar Counsel, *A Modest Proposal?: Should NOBC Members Use Rule 5.1 More Proactively?* (Aug. 9, 2008) (asking an audience of disciplinary counsel whether their state supreme court could implement a PMBR program by simply adding the following two questions to each lawyer's bar dues statement: "Are you subject to Rule 5.1? If so, have you considered whether you are in compliance with Rule 5.1 this year?").

128. See *infra* Part III.A–D.

129. See *infra* Part III.A–D.

130. See *infra* Part III.A–D.

131. CANONS OF PROF'L ETHICS (1908).

132. See *id.* This is not surprising, since the vast majority of lawyers in private practice at the time were sole practitioners. Law firms were not mentioned in the Canons until 1928, when a new Canon was added stating, quaintly, that "[p]artnerships among lawyers . . . are very common and are not to be condemned." CANONS OF PROF'L ETHICS Canon 33 (1937).

133. ABEL, *supra* note 78, at 179, 300 tbl.37c.

underscoring the need for supervision. And, firms were hiring many nonlawyers, who required training and monitoring.<sup>134</sup>

In this environment, the ABA recognized how important law firm management had become in promoting ethical compliance. As adopted in 1983, the Model Rules of Professional Conduct imposed unprecedentedly broad ethical duties on management.<sup>135</sup> Model Rule 5.1(a) required “a partner in a law firm [to] “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all [of its] lawyers . . . conform to the Rules of Professional Conduct.”<sup>136</sup> Likewise, Rule 5.3(a) required partners to make “reasonable efforts to ensure that the[ir] firm has in effect measures giving reasonable assurance that the . . . conduct of [nonlawyers associated with the firm] is compatible with the [lawyers’] professional obligations.”<sup>137</sup> Taking “measures” is presumably the functional equivalent of establishing appropriate policies, procedures, and management systems.

These two Rules differ markedly from most provisions in the Model Rules, which concern what I will call lawyers’ “first-order duties”—duties running directly to clients, tribunals, the profession, certain third parties, or the public. Rules 5.1(a) and 5.3(a), by contrast, posit “second-order duties”; they currently require partners and lawyers with “comparable managerial authority” to take “measures” to ensure that all lawyers in a firm comply with their first-order duties

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134. See *id.* at 315 tbl.49; ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 244-45 (1969). In addition, consultants were advising some law firms on risk management, and some malpractice carriers were offering their insureds loss-prevention advice. See Schneyer, *On Further Reflection*, *supra* note 6, at 589-90 & nn.56-59. To this day, however, those sources of advice have probably had a much greater impact on large firms than on small ones. *Id.*

135. I call these duties unprecedented because they go well beyond the more familiar idea that a lawyer with “direct supervisory authority” over another lawyer must make reasonable efforts to ensure that that lawyer conforms to ethics rules. MODEL RULES OF PROF’L CONDUCT R. 5.1(c)(2) (1983); see also *id.* R. 5.3(b) (obligating a lawyer who directly supervises a lay employee at a firm to ensure that the employee’s conduct is consistent with lawyers’ professional obligations).

136. *Id.* R. 5.1(a) (1983). Nearly all states have adopted this Rule, though sometimes with slightly different wording. See GILLERS ET AL., *supra* note 6, at 334-35. Most states that did so followed suit after the ABA amended the Rule in 2002 to address not only law firm partners but also other lawyers who “individually or together with other lawyers possess[] comparable managerial authority in a law firm.” MODEL RULES OF PROF’L CONDUCT R. 5.1(a) (2002); see Lucian T. Pera, *Grading ABA Leadership on Legal Ethics Leadership: State Adoption of the Revised ABA Model Rules of Professional Conduct*, 30 OKLA. CITY U. L. REV. 637, 778 & n.211 (2005). Comment 3 to Rule 5.1 adds that “the ethical atmosphere of a firm can influence the conduct of all its members, and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.” MODEL RULES OF PROF’L CONDUCT R. 5.1 cmt. 3 (emphasis added).

137. MODEL RULES OF PROF’L CONDUCT R. 5.3(a) (1983). Rule 5.3(a), like Rule 5.1(a), was amended in 2002. See MODEL RULES OF PROF’L CONDUCT R. 5.3(a) (2002).

and nonlawyers at the firm act in a manner that is consistent with lawyers' duties.<sup>138</sup>

While imposing these broad second-order duties on law firm managers, however, the ABA seems to have taken it for granted that the duties could and would be enforced just like first-order duties. The Model Rules provide that Rules stated as "imperatives . . . define proper conduct *for purposes of professional discipline*,"<sup>139</sup> and 5.1(a) and 5.3(a) are of that sort. To this day, however, we know very little about what counts as compliance with those Rules, about compliance rates, about whether the Rules induce management to take "measures," or about their impact on the nature and frequency of first-order complaints against lawyers in firms. But four things are clear.

First, we continue to see many disciplinary complaints involving forms of misconduct that seem avoidable if appropriate management systems are in place.<sup>140</sup>

Second, without enforcement of some sort, we cannot assume that lawyer-managers will be sufficiently motivated (and knowledgeable) to discharge their duties under Rules 5.1(a) and 5.3(a).<sup>141</sup> For if that assumption were true, we would be hard pressed to explain such well-established facts as the following: many law firms have no procedures governing their lawyers' investments in client businesses; many lack billing guidelines other than those imposed by clients, many do "little or nothing" to train new associates about proper billing procedures;<sup>142</sup> and many law firm partners regard being monitored by their partners as an "affront."<sup>143</sup>

Third, cases disciplining law firm managers for violating state equivalents of Model Rules 5.1(a) and 5.3(a) have been very rare over the three decades since the Rules were introduced.<sup>144</sup>

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138. MODEL RULES OF PROF'L CONDUCT R. 5.1(a), 5.3(a) (2012).

139. *Id.* scope, cmt. 14 (emphasis added).

140. A large percentage of meritorious disciplinary complaints reportedly stem from misconduct involving "low-level" agency problems, such as failing to communicate with clients, neglecting clients' matters, missing deadlines, or stumbling into conflicts of interest. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 874 (1992).

141. Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation Debates*, 33 FORDHAM URB. L.J. 119, 127 (2005) (citing reasons).

142. *Id.* at 127-28 & nn.45-50 (citing evidence); *see also* Susan Saab Fortney, *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239, 252-58 (2000) (citing evidence).

143. *See* Susan Saab Fortney, *Are Law Firm Partners Islands unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 GEO. J. LEGAL ETHICS 271, 285, 293 (1996) (finding, in a peer review study of 191 Texas law firms, that this attitude was common).

144. *See* ANNOTATED MODEL RULES OF PROF'L CONDUCT 426 (6th ed. 2007) (citing only a handful of such cases as of 2007). From 1992 to 2006, there were only thirteen recorded violations of Rule 5.1 in Alabama, many of which probably implicated the direct supervisory duty of Rule 5.1(b) rather than the broader duty of 5.1(a). Long, *supra* note 25, at 807 n.106 (citing data provided

And fourth, it is a mistake to suppose that the non-enforcement of these disciplinary Rules is a non-problem because the prospect of malpractice liability resulting from a lack of appropriate management systems is motivation enough. As noted earlier, a large share of meritorious disciplinary complaints stem from misconduct that amounts to low-level “agency problems,” which usually cause little or no compensable harm, such as failures to communicate with clients and delays in attending to client matters.<sup>145</sup> By one count, seventy percent of the clients who *were* harmed by malpractice in the 1980s sustained losses too modest to interest a lawyer in taking their case or to make suing worthwhile, even if a lawyer was found.<sup>146</sup> Moreover, although the

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by the General Counsel of the Alabama State Bar). Over the same period, by contrast, there were 636 violations of the Alabama rule prohibiting neglect of client matters, violations that might often reflect a lack of appropriate controls. *Id.*; see also Jonathan M. Epstein, Note, *The In-House Ethics Advisor: Practical Benefits for the Modern Law Firm*, 7 GEO. J. LEGAL ETHICS 1011, 1015 (1994) (noting “a dearth of bar opinions or cases describing what constitutes ‘reasonable efforts’ by partners to ensure that subordinate lawyers within a firm comply with the *Model Rules*”). For Epstein, that “dearth” suggests that the “reasonable efforts” standard is “under-enforced or unenforceable,” contrary to “the intent of the drafters.” Epstein, *supra*, at 1015.

There does appear to be a slight uptick recently in the imposition of discipline for violations of Rules 5.1(a) and 5.3(a), but certainly no trend. See, e.g., *Bd. of Overseers of the Bar v. Warren*, 34 A.3d 1103, 1113 (Me. 2011) (holding that all the members of a firm’s executive committee were subject to discipline under Maine’s equivalent of Model Rule 5.1(a) because none of them, when faced with the “significant malfeasance of a self-destructing partner,” even recognized their responsibility “to contemplate reporting the partner’s conduct” to disciplinary authorities, and stating that “when a firm’s practices and policies do not require the firm’s leadership to at least consider whether it has an ethical obligation to report” the partner to disciplinary authorities, the firm has failed as a matter of law to have in effect “measures giving reasonable assurance that all lawyers in the firm” conform to the rules of ethics (internal quotation marks omitted)). One wonders how the court would have ruled if the committee members *had* contemplated reporting the partner but decided against it. See *In re Phillips*, 244 P.3d 549, 550, 557 (Ariz. 2010) (en banc) (holding that respondent—the sole owner and general manager of a “consumer law firm” with 250 employees, including thirty-eight lawyers—committed multiple violations of Arizona’s Rules 5.1(a) and 5.3(a), as evidenced by the numerous first-order complaints that had been filed alleging misconduct by firm personnel). Cf. *In re Bailey*, 821 A.2d 851, 853 (Del. 2003) (holding that “the managing partner of a law firm has *enhanced duties*, vis-à-vis other lawyers and employees of the firm, to ensure the firm’s compliance with its recordkeeping and tax obligations under the . . . Rules of Professional Conduct” (emphasis added)). *Bailey*, however, did not cite Delaware’s Rule 5.1(a) as the basis for the decision and suggested that disciplinary proceedings under Delaware’s Rules 5.1(a) or 5.3(a) could only be instituted against lawyer-managers who refuse to cooperate with disciplinary authorities or “knowingly fail[] to exercise even a modicum of diligence” with respect to the creation, implementation, and ongoing assessment of controls. *Id.* at 865.

145. See *supra* note 140; see also Wilkins, *supra* note 140, at 874. For the generally unsophisticated clients who file such complaints, the disciplinary process is likely to be the “only game in town,” and therefore, the only legal process that might motivate lawyers to improve firm or office infrastructure in order to avoid further problems.

146. GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 583 (3d ed. 1994) (reporting that in the mid-1980s over seventy percent of the individuals eligible to recover damages for legal malpractice would have been

prospect of vicarious firm liability for harm caused by the negligence of firm personnel gives management some incentive to adopt controls, it may provide no insight into the controls to adopt. Malpractice suits normally allege “first-order” negligence, such as a lawyer’s failure to file a claim before it became time-barred, not a lack of appropriate management systems.<sup>147</sup> And although insured lawyers can sometimes get loss-prevention advice from their carrier, other lawyers have no insurance, or have insurers that give no such advice.<sup>148</sup>

All that aside, it is unseemly that a profession that prides itself on its self-regulatory institutions would not try to structure them in the manner that best encourages firms to have appropriate management systems. Professors Elizabeth Chambliss and David Wilkins “subscribe to a . . . vision of professional self-regulation . . . that demands that the profession offer its own regulatory strategy” for promoting sound ethical infrastructures in all law firms and law offices.<sup>149</sup> I agree. The question becomes whether the disciplinary process can effectively promote compliance with the broad ethical duties of law firm management. For several reasons, I have concluded that it cannot. If this is correct, we can either concede that Rules 5.1(a) and 5.3(a) are essentially hortatory, or find another way to encourage compliance.

*B. The Mismatch Between Broad Ethical Duties of Firm Management and Disciplinary Enforcement*

This Subpart recounts the odyssey that led me to think that the disciplinary process is structurally incapable of spurring law firm managers to fulfill their 5.1(a) and 5.3(a) duties. At the outset, *In re Yacavino*<sup>150</sup> piqued my interest. There, an inexperienced law firm associate was suspended from practice for three years.<sup>151</sup> He had neglected his cases, made false status reports to clients, and prepared a fake court order to further his deception.<sup>152</sup> But he had also been working alone and unsupervised in his firm’s satellite office and the

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entitled to less than one thousand dollars in damages).

147. *Id.*

148. See Schneyer, *On Further Reflection*, *supra* note 6, at 627 & n.273 (reporting on a study of a large sample of Wisconsin lawyers, which found that a considerable number were uninsured and that eighty percent of the uninsured practiced alone or shared office space with other lawyers, but ninety-nine percent of the lawyers practicing in firms with more than ten lawyers were covered).

149. Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 341 (2003) [hereinafter Chambliss & Wilkins, *A New Framework*].

150. 494 A.2d 801 (N.J. 1985).

151. *Id.* at 804.

152. *Id.* at 802.

court had recently revamped its rules of professional conduct to include New Jersey's Rule 5.1(a).<sup>153</sup> Why, then, was no partner charged?

For one thing, no partner was in charge of Yacovino's cases; he simply took them over from a lawyer who retired.<sup>154</sup> With no direct supervisor, no one was accountable for poor *direct* supervision.<sup>155</sup> A management problem there surely was, but quite possibly a problem for which no particular partner could fairly be singled out for blame.<sup>156</sup> I concluded that the prospects for enforcing Rule 5.1(a) against partners were dim because the rule simply addressed "a partner in a law firm" and it was widely assumed that this meant "each" partner. The current Illinois and New Hampshire versions of the Rule confirm this by referring to "each partner" rather than "*a* partner."<sup>157</sup> But either way, it seemed clear that the Rule would rarely be enforced. Managerial responsibility would often be too diffuse for disciplinary counsel to use it.

Struck by the growing complexity of managing modern law firms, and, more broadly, by the growing use of management systems to control organizational risks, I became interested around 1990 in the potential value of law *firm* policies, procedures, and systems, not just to enhance the efficiency with which work is performed, but also to reduce the risk of professional misconduct. And I was disappointed by the paucity of cases in which lawyer-managers were disciplined for Rule 5.1(a) or 5.3(a) violations. I proposed law firm discipline as a solution in 1991,<sup>158</sup> and supported it in another article in 1998.<sup>159</sup>

My proposal that the courts take disciplinary jurisdiction over law firms as well as partners for purposes of enforcing Model Rules 5.1(a) and 5.3(a) has received a mixed reception. On the regulatory front, New York and New Jersey have provided for law firm discipline,<sup>160</sup> but no

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153. *Id.* at 803-04.

154. *Id.* at 802.

155. *Id.* at 804.

156. The court came up with a possible solution twelve years later when it publicly disciplined a law *firm* for the first time. *In re Jacoby & Meyers*, 687 A.2d 1007, 1007 (N.J. 1997).

157. ILL. RULES OF PROF'L CONDUCT R. 5.1 (2010); N.H. RULES OF PROF'L CONDUCT R. 5.1 (2008). A comment to the New Hampshire rule states that the alteration was not substantive; it was simply "intended to *emphasize* that the obligations created by the rule are shared by all the managers of a law firm and *cannot be delegated to one manager by the others.*" N.H. RULES OF PROF'L CONDUCT R. 5.1 ethics comm. cmt. (2008) (emphasis added); *see also* GILLERS ET AL., *supra* note 6, at 334. It seems fatuous to suppose that no partner in, say, a 200-partner law firm may delegate Rule 5.1(a) responsibilities to central management.

158. Schneyer, *Discipline for Law Firms*, *supra* note 25, at 42-45.

159. Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms*, 39 S. TEX. L. REV. 245, 273-75 (1998).

160. *See* Schneyer, *On Further Reflection*, *supra* note 6, at 612-15 & nn.184-209 (citing authorities).

other U.S. jurisdiction has followed suit—yet.<sup>161</sup> Among the commentators, several criticize the proposal, but others, most notably Chambliss, rebut their objections.<sup>162</sup>

In any event, the New Jersey and New York courts have made very little use of their disciplinary jurisdiction over law firms and have provided no insight into what would and would not satisfy law firms'—or firm managers'—duties under Rules 5.1(a) and 5.3(a).<sup>163</sup> The lesson here is that, although the diffuseness of partner accountability under these rules may well undercut disciplinary enforcement against partners, two more fundamental problems stand in the way of enforcing the Rules by disciplining firm partners or firms.<sup>164</sup>

The first problem is the impracticality of enforcing second-order rules of ethics in reactive disciplinary proceedings. Disciplinary

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161. Massachusetts appears to be on the road to law firm discipline, however. In 2008, the Massachusetts Board of Bar Overseers expressed regret that it lacked authority to discipline “a large international professional corporation” that became embroiled in a conflict because the firm’s “system for detecting conflicts . . . was deficient.” MASS. BD. OF BAR OVERSEERS, 2008 ADMONITIONS, ADMONITION NO. 08-11 (2008), available at <http://www.mass.gov/obcbbo/admon2008.htm>. More recently, the state’s high court gave notice of a proposed change in Rule 5.1 to provide for law firm discipline and called for comments. See Press Release, Mass. Supreme Judicial Court, Supreme Judicial Court Standing Advisory Committee Seeks Comment on Proposed Changes to Rules of Professional Conduct (July 11, 2013) (on file with *Hofstra Law Review*) (providing a link to the Committee’s Report and Proposals). Moreover, several Canadian provinces now regulate law firms as well as lawyers, and a recent article strongly advocates a greater focus in Canada on regulating firms and firm management. See generally Dodek, *supra* note 21 (suggesting a “template” for law firm regulation).

162. For a brief discussion of the critics’ arguments and responses to them, see Schneyer, *On Further Reflection*, *supra* note 6, at 617-19 & nn.214-29.

163. Since 1997, law firms have been publicly disciplined in only four New Jersey cases and one New York case. See *id.* at 613 & n.191 (citing cases). And the courts’ “analysis” in those cases is terse and singularly uninformative. *Id.* at 613.

164. Another important development that has somewhat slaked my interest in law firm discipline as I first conceived of it is the recognition that much of what I hoped could be accomplished through disciplinary enforcement against law firms can probably be achieved as easily and less controversially by focusing law firm responsibility for maintaining appropriate management systems on one or a few specialists. That strategy is reflected in NSW’s PMBR program, which requires each ILP to designate one or more LPDs to take responsibility for creating and maintaining such systems. Ironically, the PMBR strategy was developed in large part by legal ethics scholars in the United States. See Chambliss & Wilkins, *A New Framework*, *supra* note 149, at 342-50; see also Chambliss, *supra* note 141, at 132-36 (describing the strategy as the “professionalization of ethics” (internal quotation marks omitted)).

There are other examples of the designation strategy. On the private side, the Attorneys’ Liability Assurance Society, a malpractice insurer for large law firms, requires each firm to designate a partner as the firm’s loss prevention counsel, who, among other things, acts as a liaison between firm and insurer. See Chambliss, *supra* note 141, at 130 & n.68. Cf. *In re Bailey*, 821 A.2d 851, 853 (Del. 2003) (holding that “the managing partner of a law firm has enhanced duties, vis-à-vis other lawyers and employees of the firm, to ensure the law firm’s compliance with its recordkeeping and tax obligations under the Delaware Lawyers’ Rules of Professional Conduct” (emphasis added)).

authorities receive many complaints each year.<sup>165</sup> Most are filed by unsophisticated clients against sole practitioners and small firm lawyers, complainants who are unlikely to specify any ethics rules as the basis for their allegations. Instead, disciplinary counsel must consider which rules, if any, are pertinent when deciding whether and how to investigate and whether to file charges. It must be extremely rare for complaints to refer to Rules 5.1(a) or 5.3(a) or even suggest that broad duties of law firm management might be implicated in the complainant's grievance.<sup>166</sup> Surely, no client who complains that a lawyer missed several hearings in her case will allege that the lapses were due to an inadequate calendaring system at the lawyer's firm, though that might be the case.

How, then, do lawyer-managers *ever* get charged with violating those second-order rules? Most cases are probably spawned by multiple complaints against lawyers at a firm which, taken together, suggest that poor management systems may be implicated and that, without regulatory intervention, additional complaints are likely. If disciplinary counsel investigate such a cluster of complaints with Rule 5.1(a) or 5.3(a) in mind, find substantial evidence of infrastructural deficiencies, and identify appropriate targets, they may file charges. Yet, investigating such cases, prosecuting them, and negotiating the sorts of corrective measures that respondents must take are time-intensive.<sup>167</sup> And with few precedents on the books, outcomes will be uncertain unless violations are blatant. Moreover, unless proceedings result in public sanctions, the nature of the management-system deficiencies that were uncovered will not come to the attention of other firms, limiting the educational value of the enterprise. In short, disciplinary agencies with tight budgets have always focused, and will continue to focus, on lawyers who commit first-order transgressions such as misappropriation of funds or neglecting client matters.

The second problem that hampers disciplinary enforcement of provisions like Rule 5.1(a) against firms (as well as partners) is posed by

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165. See AM. BAR ASS'N STANDING COMM. ON PROF'L DISCIPLINE, 2006 SURVEY ON LAWYER DISCIPLINE SYSTEMS chart 1 (2007) (reporting that state disciplinary authorities in the United States received 123,927 complaints in 2006).

166. Who, after all, can be expected to file a complaint alleging violations of these rules? Those most likely to be aware of inadequate management systems at a firm are lawyers at the firm. But fear of retaliation against a lawyer who complains to disciplinary authorities about violations of these rules at his firm makes such complaints extremely unlikely. See Long, *supra* note 25, at 812-13. Alex Long has suggested that disciplinary counsel could make it their policy to "investigat[e] whether a firm has complied with . . . Rule 5.1[(a)] every time an ethics complaint against a lawyer in the firm is filed." *Id.* at 813 (emphasis added). That, too, seems impractical.

167. In some cases, respondents can be diverted to Law Office Management Assistance Programs ("LOMAPs") for advice on law office management issues. See Schneyer, *On Further Reflection*, *supra* note 6, at 586-87 & nn.43-44.

the Rule's "reasonableness" standards.<sup>168</sup> Counsel must show that the respondent failed to make *reasonable* efforts to ensure that the firm had measures in place that provide *reasonable assurance* that firm lawyers would comply with their ethical obligations.<sup>169</sup> But there is no authoritative list of the measures firms must have in place. Nor, given the wide variation in firm size, specialties, clientele, and the like, can there be. Moreover, the ethical risks that call for "measures," and the measures they call for, can change rapidly, as is the case today in managing law firm risks associated with the use of social media, data storage in "clouds," and other new technologies. This may be why Professors Geoffrey Hazard and W. William Hodes consider "an entirely negligence-based disciplinary system for lack of proper supervision . . . as inadvisable as a negligence-based disciplinary system for isolated instances of malpractice."<sup>170</sup>

These realities explain and justify the flexible reasonableness standards. Yet, such standards make *disciplinary* enforcement problematic. Disciplinary proceedings are sometimes said to be "quasi-criminal,"<sup>171</sup> which puts a premium on giving lawyers fair notice of the alleged misconduct. Of course, if the managing partner of a firm made no effort to have even a minimal conflicts-checking system in place, the vague "reasonableness" standards in Rule 5.1(a) would pose no obstacle to discipline. But the uncertain application of those standards in many potential cases probably makes—and should make—disciplinary authorities slow to second-guess firm managers. Though the Rule has a negligence *mens rea*, disciplinary counsel would ordinarily not file charges against partners or firms unless there was evidence of knowing or reckless violations.

At the same time, the reasonableness standards raise the remote but disturbing possibility that a managing partner might be disciplined for violating Rules 5.1(a) or 5.3(a) when her firm's procedures failed to

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168. See MODEL RULES OF PROF'L CONDUCT R. 5.1 (2012).

169. See *id.*

170. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING § 42.6 (3d ed. 2001 & Supp. 2010). For similar reasons, the Texas Supreme Court opted not to include Model Rule 5.1(a) in its rules of professional conduct. Instead a comment to Texas Rule 5.01 provides:

Wholly aside from the dictates of these rules for discipline, a lawyer in a position of authority in a firm . . . should feel a moral compunction to make reasonable efforts to ensure that the office, firm, or agency has in effect appropriate procedural measures giving reasonable assurance that all lawyers in the [entity] conform to these rules.

TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 5.01 cmt. 6 (2013). Texas also relegates Model Rule 5.3(a) to a comment. See *id.* R. 5.02 cmt. 2.

171. *In re Ruffalo*, 390 U.S. 544, 551 (1968). In *Ruffalo*, Justice Byron White took the position that a federal court "may not deprive an attorney of the opportunity to practice his profession on the basis of a determination after the fact that conduct is unethical if responsible attorneys would differ in appraising the propriety of that conduct." *Id.* at 556 (White, J., concurring).

prevent lawyer misconduct, even if it was far from clear that the partner failed to make “reasonable efforts” to ensure that measures were in place to guard against such misconduct. Disciplining that manager might amount to making her *vicariously* liable for another lawyer’s misconduct, which would be improper.<sup>172</sup>

At bottom, then, a reactive complaints-based disciplinary system cannot realistically serve as the regulatory system of choice for enforcing the broad second-order ethical duties that Rules 5.1(a) and 5.3(a) impose on management.

*C. PSR Appears to Be Evolving in the Direction of  
Proactive Regulation and Adopting PMBR Programs Would Not Be a  
Drastic Shift in Philosophy*

The proactive element of PMBR, manifested in the self-assessment process, stands in sharp contrast with the reactive disciplinary process. Yet it is increasingly consistent with the broader PSR system that is evolving in the United States. In recent decades, a number of significant proactive tools have been added to the PSR mix. Mandatory continuing legal education (“MCLE”) is an obvious example, and many MCLE programs have an ethics component.<sup>173</sup> Some state supreme courts now require lawyers to answer questions on their annual dues statements or registration renewal forms which are meant to promote ethics compliance.<sup>174</sup> Other proactive programs were recommended in 1992 by a commission that performed what is still the ABA’s most forward-

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172. See, e.g., *In re Galbasini*, 786 P.2d 971, 975 (Ariz. 1990) (in banc) (stating that ethics rules imposing supervisory duties on firm partners establish independent duties for management but do not authorize the imposition of vicarious discipline for the misconduct of others at the firm). For a fascinating case in which the founder, manager, and sole principal of a law firm was disciplined for violating Rules 5.1(a) and 5.3(a), even though respondent argued—not without reason—that he was instead being disciplined vicariously for improprieties committed by others at the firm, see *In re Phillips*, 244 P.3d 549, 557 (Ariz. 2010) (en banc); see also Schneyer, *On Further Reflection*, *supra* note 6, at 597-603 (discussing the case at length).

173. See, e.g., *MCLE Requirements*, N.Y. CITY B. (2013), <http://www.nycbar.org/cle/mcle-requirements> (listing several states that have an MCLE ethics requirement).

174. For example, the Delaware Supreme Court’s Annual Registration Statement instructs lawyers who are responsible for the maintenance of the firm’s financial books and records, such as a “managing partner,” to certify, among other things, that all taxes have been timely filed and paid, that their firm’s trust account is maintained with a financial institution that has agreed to comply with overdraft notification procedures, that all fiduciary funds held by the firm are maintained in a trust account in accordance with Rule 1.15(a) of the Delaware Lawyers’ Rules of Professional Conduct, that check register balances for all firm bank accounts are reconciled monthly with bank statement balances, and that before preparing a Certificate of Compliance they reviewed Rule 1.15. See generally DEL. SUPREME COURT, ANNUAL REGISTRATION STATEMENT (2000), available at <http://forms.lp.findlaw.com/form/courtforms/state/de/de000001.pdf>.

looking evaluation of “disciplinary enforcement,” an evaluation that went well beyond a review of disciplinary procedures.<sup>175</sup>

The McKay Commission identified several problem areas in which disciplinary complaints and harm to clients could be greatly reduced by proactive regulation. Noting, for example, that in 1989 the bar’s client security funds had received over \$72 million in claims for reimbursement of stolen money, the Commission rejected the traditional view that disciplinary counsel must show cause to believe that misconduct has already occurred before counsel may audit lawyers’ trust accounts, and recommended that the courts adopt a rule providing for random audits.<sup>176</sup> In 1993, the ABA adopted a Model Rule on the subject,<sup>177</sup> and a number of jurisdictions now conduct random audits, which are a proven deterrent to the misuse of client money and property in law practice.<sup>178</sup>

*D. PSR Should Strengthen Its Commitment to Consumer Protection but Is Unlikely to Do So Without a PMBR Program to Prevent Unsatisfactory Professional Conduct and Reduce UPC Complaints*

A fascinating passage in the Introduction to the McKay Commission’s Report acknowledged the need to expand the regulation of lawyers to protect the public and assist lawyers. “Times,” the Commission wrote:

have changed. The expectations of the public and the client have changed. The existing system of regulating the profession is narrowly focused on violations of professional ethics. It provides no mechanisms to handle other types of clients’ complaints. The system does not address complaints that the lawyer’s service was overpriced or unreasonably slow. The system does not usually address complaints of incompetence or negligence . . . . It does not address complaints that

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175. AM. BAR ASS’N COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY (1992) [hereinafter MCKAY COMM’N REPORT], available at [http://www.americanbar.org/groups/professional\\_responsibility/resources/report\\_archive/mckay\\_report.html](http://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report.html). This commission is often called the McKay Commission after Robert McKay, its chair from 1989-1990. *Id.*

176. *Id.* at recommendation 16 & cmts. The Commission reported that although a random trust account audit program in New Jersey “initially was greeted with great suspicion,” it was eventually well accepted and “has educated the legal profession about how to keep proper financial records.” *Id.*

177. AM. BAR ASS’N, COMPENDIUM OF CLIENT PROTECTION RULES 43-46 (2007).

178. RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY: A STUDENT’S GUIDE 675 (2012-2013 ed. 2012).

the lawyer promised services that were not performed or billed for services that were not authorized.

Some jurisdictions dismiss up to ninety percent of all complaints. Most are dismissed because the conduct alleged does not violate the rules of professional conduct. The Commission has gathered much information about these dismissed complaints. It convinces us that many of them do state legitimate grounds for client dissatisfaction. The disciplinary system does not address these tens of thousands of complaints annually. The public is left with no practical remedy. . . .

The disciplinary process also does nothing to improve the inadequate legal or office management skills that cause many of these complaints. Many state bar associations have mandatory continuing legal education, substance abuse counseling, and other programs. However, these programs are not coordinated with the disciplinary process. Lawyers with substandard skills often need more help than these programs can provide. The judiciary and profession should create new programs and coordinate all such programs . . . .<sup>179</sup>

This was an unequivocal call to beef up the consumer protection that PSR affords clients who are the victims or potential victims of what the Australians call UPC.<sup>180</sup>

In a related bow to proactivity, the McKay Commission recommended that the courts establish a Lawyer Practice Assistance Committee, both to work with lawyers referred to it by disciplinary counsel *and* to work with lawyers who voluntarily seek assistance by, among other things, reviewing lawyers' offices and "case management practices."<sup>181</sup> A number of U.S. jurisdictions have implemented this recommendation, establishing Law Office Management Assistance Programs ("LOMAPs").<sup>182</sup> LOMAPs generally have two functions. On one hand, they are tied to the reactive disciplinary process, serving as diversion programs for lawyers referred by disciplinary counsel after receiving complaints alleging minor violations that are likely to reflect deficiencies in office management.<sup>183</sup> On the other, they "regulate" proactively by advising lawyers who voluntarily seek their assistance on such matters as trust accounting, office technology, client

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179. MCKAY COMM'N REPORT, *supra* note 175, at intro.; *see also id.* at recommendation 2 cmts. (stating that "[e]xisting regulation, while generally effective in disciplining serious misconduct, does not adequately protect the public from lawyer incompetence and neglect. This failure is having severe repercussions for the legal profession").

180. *See supra* note 40 (defining UPC).

181. MCKAY COMM'N REPORT, *supra* note 175, at recommendation 4.

182. *See* Schneyer, *On Further Reflection*, *supra* note 6, at 587 n.44 (discussing LOMAPs and their work).

183. *Id.*

relations and marketing, hiring and training policies, and conflicts checking systems.<sup>184</sup>

As things stand, PSR faces two dilemmas in deciding whether it can and should beef-up the consumer protection it provides to clients. One way to beef-up would be simply to expand the use of the disciplinary process to respond to UPC complaints. But the additional UPC complaints one would expect if such complaints were getting more serious attention, coupled with the already crushing volume of those complaints, make this approach impractical and unlikely to gain support. The more practical approach may be for the courts to establish NSW-style PMBR programs as a complement to discipline. Doing so could be expected to cut down substantially on UPC complaints by encouraging and helping firms to develop and adhere to policies, procedures, and systems designed to forestall acts and omissions that generate those complaints.

The second dilemma concerns the decades-long jurisdictional struggle between the bar, on one hand, and the FTC and various state consumer protection programs, on the other, concerning the authority to regulate lawyers' business practices.<sup>185</sup> The bar, of course, prefers that consumer protection for law clients be the exclusive preserve of the state supreme courts. But, given the difficulties of relying exclusively on the reactive disciplinary process to deal with the UPC problem, the state supreme courts have little choice but to cede more regulatory authority in this area to external regulators.<sup>186</sup>

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184. *Id.* In their proactive work, LOMAPs compare in some respects with the work of staffers in the NSW OLSC's Incorporated Legal Practices Unit. But they have no authority to require law firms to self-assess and report on their management systems. Yet, LOMAPs' staffers often have expertise in the management of solo practices and small law firms that is likely to correspond to the expertise of staff members at the NSW OLSC. This suggests that if state supreme courts were to adopt NSW-style PMBR programs, it would not be difficult to staff them. *See id.*

185. *See* Middleton, *supra* note 20, at 1366 (reporting on an ABA and state bar lobbying campaign to exempt lawyers from regulation under federal consumer protection laws on the ground that legal ethics rules promulgated by the state supreme courts already regulate lawyers' business practices); *see also* Am. Bar Ass'n v. FTC, 430 F.3d 457, 471 (D.C. Cir. 2005) (upholding an ABA challenge to FTC's position that the Gramm-Leach-Bliley Act of 1999 authorized the agency to regulate law firms as "financial institution[s]" (internal quotation marks omitted)).

186. *Compare, e.g.,* Crowe v. Tull, 126 P.3d 196, 205 (Colo. 2006) (en banc) (holding that state consumer protection laws apply to lawyers' business practices), *with* Short v. Demopolis, 691 P.2d 163, 168-69 (Wash. 1984) (en banc) (same), *and* Cripe v. Leiter, 703 N.E.2d 100, 106 (Ill. 1998) (continuing to hold that lawyers are exempt from liability under such statutes on the ground that they cannot have been intended to make lawyer overbilling actionable since the state supreme courts already regulate lawyers' fees).

#### IV. CONCLUSION

This Article reveals a profound mismatch between the broad ethical duties of law firm management that the ABA and many state supreme courts have recognized since the 1980s and the reactive disciplinary process that PSR relies on to enforce those duties and thereby promote stronger ethical infrastructures.<sup>187</sup> The Article explains why there is a mismatch and why, without reforms, traditional PSR cannot make good on its commitment to improving law firm management systems for avoiding lawyer misconduct.<sup>188</sup> The Article commends NSW-style PMBR programs as the best road forward, and suggests that courts which do not wish to go that far for now can still make a start by adopting or strengthening LOMAPs and requiring law firms to designate lawyer-managers to file occasional informational reports on the measures their firm takes to provide reasonable assurance that their lawyers will fulfill their first-order ethical obligations and their staffs will conduct themselves in a manner consistent with those obligations.<sup>189</sup>

The tradition of professional self-regulation for American lawyers must sometimes yield to new programs if PSR is to be effective. A move toward proactive, compliance-based regulation as a complement to reactive disciplinary enforcement of broad duties of law firm management is a case in point.<sup>190</sup>

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187. *See supra* Part III.

188. *See supra* Part III.

189. *See supra* Part II.

190. *See supra* Part III.