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When It Comes to Lawyers, Is an Ounce of Prevention Worth a Pound of Cure

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

Laurel Terry

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

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

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

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

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

and that is summarized in her *Promoting Public Protection*article. Professor Fortney's study explored the issue of ***why*** there had been such a dramatic reduction in client complaints among the Australian ILP firms that had used the self-assessment process. As *Promoting Public Protection*reports, Professor Fortney found that almost three quarters of the firms that conducted the self-assessment ***revised*** their law firm policies as a result of going through the self-assessment process. Her study also found that close to half of the respondents had adopted ***new*** systems, policies, and procedures as a result of the self-assessment procedure. She concluded that

> "Quite simply, these findings point to the positive impact that the self-assessment process has in encouraging firms to examine and improve the firms' management systems, training, and ethical infrastructure. Interestingly, with respect to most steps taken by the firms, there was no significant difference related to firm size and steps taken."

Professor Fortney's article included the table that is reproduced below that shows the impact of the self-assessment process:

Table 1

Steps Taken by Firms in Connection with the First Completion of the Self?Assessment Process

Reviewed firm policies/procedures relating to the delivery of legal services	84%
Revised firm systems, policies, or procedures	71%
Adopted new systems, policies, or procedures	47%
Strengthened firm management	42%
Devoted more attention to ethics initiatives	29%
Implemented more training for firm personnel	27%
Sought guidance from the Legal Services Commissioner/another person/organization	13%
Hired consultant to assist in developing policies and procedures	06%

One additional finding that is noteworthy but is not included in this table is Professor Fortney's finding that a majority of lawyers who used the self-assessment process were satisfied with it, including those lawyers who had been skeptical at the outset. The article notes that "sixty-two percent of the respondents reported that they agreed or strongly agreed with the following statement: the self-assessment process 'was a learning exercise that enabled our firm to improve client service.'" The article also reports that in their text entries, seventy-eight percent of the respondents described positive changes in their impressions of the self-assessment process.

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

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

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

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

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

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