



The State Bar *of California*

OPEN SESSION

AGENDA ITEM

124 JULY 2020

REGULATION AND DISCIPLINE COMMITTEE III.A

DATE: July 16, 2020

TO: Members, Regulation and Discipline Committee
Members, Board of Trustees

FROM: Randall Difuntorum, Program Manager, Office of Professional Competence

SUBJECT: Consideration of Attorney Self-Assessment Models

EXECUTIVE SUMMARY

Self-assessment tools are being used by attorney regulators to facilitate the competent and ethical practice of law. In accordance with the Strategic Plan, staff in the Office of Professional Competence (OPC) studied various models for self-assessment programs and requests authorization from the Board of Trustees to develop an implementation plan for a self-assessment program. Staff recommends an online interactive format that will address multiple subjects in separate modules. The program would be voluntary, permit anonymous use, offer MCLE credit, and collect only nonpersonalized, aggregated data. The first topic addressed would be client trust accounting practices. Future topics would be jointly considered by the Office of the Chief Trial Counsel (OCTC) and OPC.

BACKGROUND

The Strategic Plan's Goal 2, Objective e provides that the State Bar shall: "No later than December 31, 2020, evaluate attorney self-assessment models and determine which model will be implemented in California."

The Board discussed the concept of a self-assessment program at its January 26–27, 2018 Strategic Planning meeting. The discussion included a presentation on the Colorado State Bar's self-assessment program. The primary anticipated benefit of a self-assessment program is that it would facilitate a practitioner's self-awareness of gaps in prudent law office management practices, as well as compliance with professional responsibilities. Knowledge of these gaps serves as an incentive for making improvements that enhance competent legal practice.

For example, a study conducted of a self-assessment program used in New South Wales found that many law firms who completed their program subsequently adopted new or revised law firm policies, systems, and procedures as a result of that exercise.¹ A table included in the study detailing this finding is provided below:

**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 | 6% |

Staff believes that a self-assessment program on multiple subjects will facilitate enhanced lawyer self-awareness and be a valuable tool for collecting aggregated data to identify, evaluate, and proactively address common forms of avoidable lawyer misconduct.

DISCUSSION

To prepare a recommendation for a self-assessment program, OPC studied different programs to understand the variety of options for implementation. OPC also inquired about the experience of regulators to gain insights on lawyer adoption and to learn about any changes made after initial deployment.

Basic Program Format: Regarding the various formats of self-assessment programs, a summary is provided as Attachment A and examples are shown in Attachment B. In considering the various formats, the programs in the following states and countries were examined: Colorado; Illinois; Texas; Washington; Wyoming; Australia (Queensland and Victoria); and Canada (Nova Scotia and Ontario). Some programs are voluntary, and some are mandatory. Some offer CLE credit to users and others do not. A common thread is that the substantive content primarily includes law practice management and professional responsibility. In addition, most programs include relevant resources, such as rules, articles, or forms.

A table listing the pros and cons of the self-assessment program formats is provided below.

¹ Susan Fortney and Tahlia Gordon, "Adopting Law Firm Management Systems to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation," *University of St. Thomas Law Journal* 10, no. 1 (2012): pp. 152-194, <https://ir.stthomas.edu/ustlj/vol10/iss1/4/>.

| FORMAT | PROS | CONS |
|-----------------------------------|---|---|
| Online Interactive Modules | <ul style="list-style-type: none"> ○ User engagement ○ Automated tallies/feedback ○ Seamless resource integration ○ Paperless | <ul style="list-style-type: none"> ○ Vendor to create a program ○ Difficult to change content ○ May not be user-friendly to some |
| Noninteractive Online Checklists | <ul style="list-style-type: none"> ○ Simplicity ○ Paperless ○ Easy to change/update ○ Can include linked resources | <ul style="list-style-type: none"> ○ User calculates their own scores ○ Less engaging |
| Printable Checklists or Workbooks | <ul style="list-style-type: none"> ○ Simplicity ○ Easy to change/update ○ Workbooks and completed assessments can be retained for future reference | <ul style="list-style-type: none"> ○ User calculates their own scores ○ Less engaging ○ Resource integration is not seamless |

Given these pros and cons, OPC recommends that an online interactive format be considered for implementation, though with an option for comparable content repackaged as a downloadable version that can be completed offline.

Experience of Regulators: Regarding the experience of regulators, email or telephone interviews were conducted with the following states: Colorado, Illinois, and Wyoming. In particular, staff was interested in whether or not users could maintain anonymity when accessing a self-assessment program, as this has been an issue raised by OCTC staff.

A detailed discussion of the Colorado and Illinois programs are provided below.² Both programs use the type of online interactive format recommended by OPC; however, the programs differ in that the Colorado program is voluntary, while the Illinois program is mandatory.

Colorado's Voluntary Program:³ Colorado's self-assessment program seeks to improve the legal services provided to clients and simplify the professional experience of lawyers themselves. The program consists of 10 areas of self-assessment and includes a wide range of professional conduct resources, including template forms, advisory opinions, and articles on current professionalism issues.

The 10 self-assessments are aligned with the following 10 principles: (1) developing a competent practice; (2) communicating in an effective, timely, professional manner, including maintaining professional relations; (3) ensuring that confidentiality requirements are met; (4) avoiding conflicts of interest; (5) maintaining appropriate file and records management

² Wyoming Bar Counsel Mark Gifford submitted a brief email about the Wyoming program indicating that their program is a printable self-audit form and that it is anonymous, data is not collected, and no significant feedback has been received from users.

³ Response provided by Colorado Professional Development Counsel Jonathan White.

systems; (6) managing the law firm/legal entity and staff appropriately; (7) charging appropriate fees and making appropriate disbursements; (8) ensuring that reliable trust account practices are in use; (9) working to improve the administration of justice and access to legal services; and (10) wellness and inclusivity. Following implementation, the program's structure and organization has not changed but some content has been updated to align with changes to the Colorado Rules of Professional Conduct or to add new educational resources.

Taking the assessment is anonymous; however, users are able to claim both general and legal ethics CLE credits. No personal identifying information is collected, but the online platform allows users to respond to a limited number of general demographic data-related questions (e.g., the location of their practice in Colorado, whether they are in private practice, government practice, or in-house counsel, and the number of years they have been in practice). Lawyers do not have to respond to these questions to complete the program. The Colorado Supreme Court formalized the program in June 2018, and in doing so, the Court included a rule making the provision of the demographic information completely voluntary. The Court's rules also specify that an attorney's work on the program is confidential and would not be used in a disciplinary proceeding. When contacted by staff, Colorado provided the most thorough information in reporting that the experience has been positive, and observed that the primary factors in the program's success likely include the voluntary nature of the self-assessments and lawyer confidence in program anonymity.

Illinois' Mandatory Program:⁴ Illinois attorneys that are representing private clients, but do not have malpractice insurance, are required to complete the Illinois self-assessment program every two years. Fully retired or inactive lawyers are not subject to this requirement. However, recently retired practitioners and government lawyers are subject to the requirement if they are representing at least one private client. Lawyers who obtain malpractice insurance by the Illinois registration renewal deadline will not be required to take the course. Although mandatory, information about a lawyer's self-assessment is confidential, except for the fact of completion. A particular lawyer's specific self-assessment results are not discoverable in an attorney disciplinary proceeding.

The program is an online interactive course and lawyers can earn up to four hours of free CLE credits. The topics include: client trust accounts; conflicts of interest; technology and ethics; attorney wellness; civility and professionalism; and diversity and inclusion. When contacted by staff, Illinois reported having a positive experience with its self-assessment program, and that approximately 7,000 lawyers were subject to the mandatory requirement to take the course prior to the 2019 registration cycle. Completion of the course is tracked, but not the individual answers. Because it is a required program, it is not anonymous. Lawyers must create an online account and provide attorney identification, which is necessary in order to track course completion.

Based on the experience of regulators, staff identifies the following implementation issues and provides a recommendation for each.

⁴ Response provided by Illinois Senior Counsel of Education and Proactive Initiatives Britney Bowater.

| ISSUE | STAFF RECOMMENDATION |
|---|--|
| (1) Should the program be voluntary or mandatory? | The program should be voluntary for the initial implementation, but without prejudice to future use as a requirement for certain lawyers (e.g., a respondent in a disciplinary investigation who enters into an agreement in lieu of discipline) once the State Bar has established experience with the program. Similar to the Ethics Hotline, this should encourage lawyer use and lawyer adoption of the program content. |
| (2) Should the program be anonymous? | Yes. If access or use of the online program poses challenges to anonymity, then an alternate method could also be offered, such as an option to download materials for use offline. Providing anonymity should mitigate the potential chilling effect of the program being offered by a lawyer disciplinary agency. |
| (3) Should each use of the program be tracked and user data captured? | Yes. However, any data tracking should preserve the anonymity of users by masking or not capturing personally identifying information. Collecting nonpersonalized, aggregated data would be valuable, for example, to identify trends in lawyer knowledge of professional responsibility and law office management practices. |
| (4) Should MCLE credit be available? | Yes. Offering MCLE credit will provide a significant incentive for lawyers who otherwise might be unsure about the benefit of using the program. |
| (5) Should there be a charge for using the program? | Probably not, but this should be reserved as an open issue until the cost of development and maintenance is determined. |
| (6) Should the program content address only a single subject or be developed as a curriculum of multiple courses? | The program should be launched with a single course on one topic in order to establish the technical and administrative aspects of the program. After a successful launch, the content should be expanded to cover multiple topics, similar to the Colorado and Illinois programs. See below for a proposed process to select program content. |
| (7) Should the program have multiple modules that can be taken separately? | Yes. Similar to the State Bar's administration of e-Learning courses, structuring multi-hour content as separate modules should facilitate ease of use and the offering of discrete units of MCLE credit. |
| (8) Should the program be made available for use by persons who are not State Bar licensees? | Yes. The program content might include topics that could be equally valuable for both lawyer and nonlawyer staff in a law office (including client trust accounting, law office technology, civility, and diversity and inclusion). |

Client Trust Accounting as the Initial Topic: The topic of client trust accounting is recommended as the first subject matter to be addressed by a new self-assessment program because it is a recurring issue in the discipline system and involves issues that are commonly

posed to the Ethics Hotline and the Committee on Professional Responsibility and Conduct. The topic of client trust accounting includes the following issues: IOLTA accounts; prohibited commingling and misappropriation; handling of advances for fees and costs; recordkeeping requirements; disputes with clients concerning funds held in trust; and duties to lienholders and other nonclients. In addition, a lawyer's competent discharge of client trust accounting duties is not simply a product of compliance with disciplinary rules, but also involves best practices in law office management, including supervision of nonlawyer subordinates, billing practices, and use of accounting applications. Given the intersection of disciplinary rules and law office management, client trust accounting is a rich topic for exploring the capabilities of an online self-assessment program.

Selection of the client trust accounting topic also is based on the Board's consideration of the results of the 2015 anonymous voluntary client trust accounting survey. (See July 21, 2016, Board Committee on Regulation and Discipline open agenda [item number III.1.](#)) At the January 23–24, 2015 Board planning meeting, the topic of "Prevention, Education and Proactive Regulation" was discussed, including a preliminary concept paper describing an education initiative for preventing client trust accounting violations. A primary component of this initiative was a proposal to consider an anonymous voluntary survey of licensees to collect data on client trust accounting practices, as well as to assess gaps in awareness of client trust accounting requirements and resources. The Board authorized a survey to be conducted from June 1, 2015 through July 31, 2015, and 1,123 survey responses were timely completed. A staff working group met on October 1, 2015 and January 13, 2016 to review the data collected. Development of a client trust accounting self-assessment program was among the working group's proposals for enhancing education and outreach with the ultimate goal being the prevention of trust accounting violations. Accordingly, staff recommends that client trust accounting duties be the subject matter for the initial implementation of a self-assessment program.

Selection of Future Topics: For selection of other topics to be implemented after the initial launch of a program, staff recommends assigning this function to a small, informal staff working group led by representatives from OCTC and OPC. OCTC and OPC staff have a lengthy, successful history of collaborating on these types of initiatives. The determination of the subject matter and the selection of the first instructors for the State Bar's Ethics School program was a joint effort of OCTC and OPC managers. Similarly, the coauthors that conceived and drafted the first edition of the State Bar's [Handbook on Client Trust Accounting for California Attorneys](#) were OCTC and OPC staff. Most recently, OCTC and OPC staff served as the subject matter experts on the legal ethics content developed for the 10-Hour New Attorney Training e-Learning courses. While OCTC and OPC would take the leadership role in considering self-assessment topics, other staff would be added as needed to the informal working group. For example, to consider self-assessment content on diversity and inclusion, staff in the Office of Access & Inclusion would be included in the working group. Finally, it is anticipated that any final selection of topics by the working group would be made in consultation with the leadership of the Regulation and Discipline Committee.

FISCAL/PERSONNEL IMPACT

This agenda item contemplates Board action to authorize the development of an implementation plan for a self-assessment program. An estimate of the fiscal and personnel impact of creating and maintaining a self-assessment program will be addressed in developing that plan.

AMENDMENTS TO RULES OF THE STATE BAR

None

AMENDMENTS TO BOARD OF TRUSTEES POLICY MANUAL

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Objective e: No later than December 31, 2020, evaluate attorney self-assessment models and determine which model will be implemented in California.

RECOMMENDATIONS

Should the Regulation and Discipline Committee concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Regulation and Discipline Committee recommends that the Board of Trustees approves the staff-recommended model of a self-assessment program and authorizes development of an implementation plan for that model with client trust accounting as the first topic; and it is

FURTHER RESOLVED, that a staff working group led by representatives of the Office of the Chief Trial Counsel and the Office of Professional Competence should be convened as needed to develop the subject matter for future topics to be included in the self-assessment program, in consultation with the leadership of the Regulation and Discipline Committee.

Should the Board of Trustees concur in the proposed action, passage of the following resolution is recommended:

RESOLVED, that the Board of Trustees, upon recommendation of the Regulation and Discipline Committee, approves the staff-recommended model of a self-assessment

program and authorizes development of an implementation plan for that model with client trust accounting as the first topic; and it is

FURTHER RESOLVED, that a staff working group led by representatives of the Office of the Chief Trial Counsel and the Office of Professional Competence should be convened as needed to develop the subject matter for future topics to be included in the self-assessment program, in consultation with the leadership of the Regulation and Discipline Committee.

ATTACHMENT(S) LIST

- A.** Summary of Selected Lawyer Self-Assessment Tools
- B.** Examples of Self-Assessment Program Materials

| Summary of Selected Lawyer Self-Assessment Tools | | | | | |
|--|---|--------------------------------------|------|--|---|
| State/ Country | Format | MCLE Credit | Cost | Mandatory/ Voluntary | Links |
| USA | | | | | |
| Colorado | Available as an online program or as a printable survey. Includes ten sections that can be taken separately and each section provides relevant resources related to the questions answered. | Yes (Legal Ethics) | Free | Voluntary | https://www.coloradosupremecourt.com/AboutUs/LawyerSelfAssessmentProgram.asp |
| Illinois | An online self-assessment course divided into interactive modules. Similar to CLE e-Learning modules with audio/video elements. | Yes (Professional Responsibility) | Free | Mandatory (every 2 years; only for lawyers w/o malpractice insurance) | https://www.iardc.org/pmbr.html |
| Texas | Online questionnaire format with a focus on malpractice avoidance. Provided resources include template forms. | No | Free | Voluntary | http://www.texasbarcle.com/materials/special/lomselfaudit.pdf |
| Washington | Online questionnaire format (fillable PDF). One part of broader practice management assistance resources. | No | Free | Voluntary | https://www.wsba.org/docs/default-source/resources-services/practice-management-(lomap)/self-audit-checklist.pdf?sfvrsn=a27f39f1_2 |
| Wyoming | Downloadable checklist to be completed offline. A basic y/n/na checklist format. Resources are not integrated but are available on separate webpages. | No | Free | Voluntary | https://www.wyomingbar.org/for-lawyers/lawyer-resources/law-office-self-audit-checklist/ |
| CANADA | | | | | |
| Nova Scotia | Online questionnaire format with a separately provided Workbook. Links to resources are provided in the questionnaire. | No | Free | Mandatory (every 3 years) | https://nsbs.org/legal-profession/your-practice/practice-support-resources/mselp/ |
| Ontario | Online questionnaire format (fillable PDF) using checklists, multiple choice, and narrative answers. Available to all but some may be selected for a practice management review requiring completion of the form. | No | Free | Mandatory (for certain selected practitioners in their first 8 years of practice) | https://lawsocietyontario.azureedge.net/media/iso/media/legacy/pdf/b/basic-mangement-checklist-lawyer.pdf |
| AUSTRALIA | | | | | |
| Queensland | Table format with sections for the user to input strategies for improvement. | No | Free | Mandatory (regulatory body selects firms to audit following completion of self- assessment) | https://www.lsc.qld.gov.au/_data/assets/pdf_file/0007/650923/ilp-self-assessment-audit-form-version-4-2.pdf |
| Victoria | Downloadable questionnaire format with ratings and sections to input strategies to address issues. | No | Free | Voluntary | https://lsbc.vic.gov.au/resources/legal-practice-self-assessment-audit |

Examples of Self-Assessment Program Materials

WYOMING PRINTABLE CHECKLIST**SELF-AUDIT CHECKLIST**

This checklist is a tool provided by the Wyoming State Bar for the small law office to help identify strengths and weaknesses of office management practices. It is designed for both lawyers and non-lawyer staff to complete, although non-lawyer staff may only be able to complete portions of the audit. Those completing any portion of the audit should be candid, so responses may vary between the lawyers and the non-lawyers. Use the results to foster a better mutual understanding of what goes on within the office. This knowledge will enable you take the requisite action to ensure that the office is managed properly.

Name of firm:

Members of firm:

Areas of practice:

The areas addressed are: Client Relations, Confidentiality, Conflicts of Interest, Docket/Calendaring, Records Management, Staff Management, Financial Management (Timekeeping-Billing-Budgeting-Financial Record-keeping and Reporting), and Professional Practice and Technology.

Please take a few moments to review all of the questions and make note of any areas that you would like to discuss more thoroughly. The last page allows space for your notes and clarifications. "YES" means all or most of the time; "NO" means never or rarely. We recommend that all employees in the office also complete this checklist.

CONFIDENTIALITY

Clients depend on their lawyer to safeguard the information they provide. The Rules of Professional Conduct provide for only limited situations where this trust may be broken. Since trust is very difficult to reestablish once it has been broken, it is important that you take steps to ensure that every member of the firm does all they can to safeguard client information.

| | Yes | No | N/A |
|---|-----|----|-----|
| Do all new employees sign a confidentiality form acknowledging they have discussed confidentiality with you, read the relevant Rules of Professional Conduct, and will not breach the confidentiality of any client during and after their association with the firm? | | | |
| Do we make sure no client files or other confidential materials are ever left in the reception area or other public access areas? | | | |
| While conferring in person with clients, do we avoid taking calls or otherwise talking with other clients so as to protect client identities and confidentialities? | | | |
| Are the fax machines and copiers located away from where non-firm persons may be able to see confidential materials? | | | |
| If we are in an office-sharing arrangement, have we discussed confidentiality with the landlord, other tenants and any employees who may be privy to confidential information (e.g. receptionist, word processor, etc.)? | | | |

CONFLICTS OF INTEREST

Many law firms rely on the staffs' collective memories to do their conflict of interest checks. This method rarely works accurately over any period of time. Every case handled cannot be so memorable that you will never forget every person involved. You should maintain a written conflict of interest system and keep it up to date. All staff members should be trained to use the system and conflict checks should be done prior to the discussion of any new matter with a client or potential client.

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Law Office Management Assistance Program

Self-Audit Checklist

This completed form will describe your office administrative practices and offer a fresh look at your firm's current functions. Consider asking your staff and other lawyers to complete a copy of this Checklist. A number of the responses may vary from yours. That is not unusual. This exercise should foster a better mutual understanding of what goes on in your office and enhance your practice.

Name of Firm

Name of person completing this audit?

Firm Elevator Pitch:

Firm Mission Statement:

2. Clients depend on you to safeguard the information they provide. Trust is very difficult to reestablish once it has been broken so it is important that you take steps to ensure that every member of the firm does all they can to safeguard client information.

| CONFIDENTIALITY | |
|---|----------------------|
| 2.1. Do you offer training and materials to staff to assist them in understanding, spotting, and helping the firm avoid confidentiality breaches? | <input type="text"/> |
| 2.2. Have you discussed confidentiality with landlords, other tenants, interns, volunteers, and employees, including family members who work for or assist you? | <input type="text"/> |
| 2.3. Do those you discussed confidentiality with have a signed confidentiality acknowledgment? | <input type="text"/> |
| 2.4. Do you ensure client files and confidential materials are never left unsecured in common areas? | <input type="text"/> |
| 2.5. When conferring in person with clients do you avoid taking calls or otherwise talking with other clients so as to protect client identities? | <input type="text"/> |
| 2.6. Is the office locked every night? | <input type="text"/> |
| 2.7. Is email marked "Confidential Privileged Communication"? | <input type="text"/> |
| 2.8. Are fax machines, copiers and mail located where non-firm persons will not be able to see confidential materials? | <input type="text"/> |
| 2.9. Do you use passwords to protect client confidences on all applicable devices and services? | <input type="text"/> |

Notes

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ILLINOIS INTERACTIVE ONLINE PROGRAM

Introductory Video



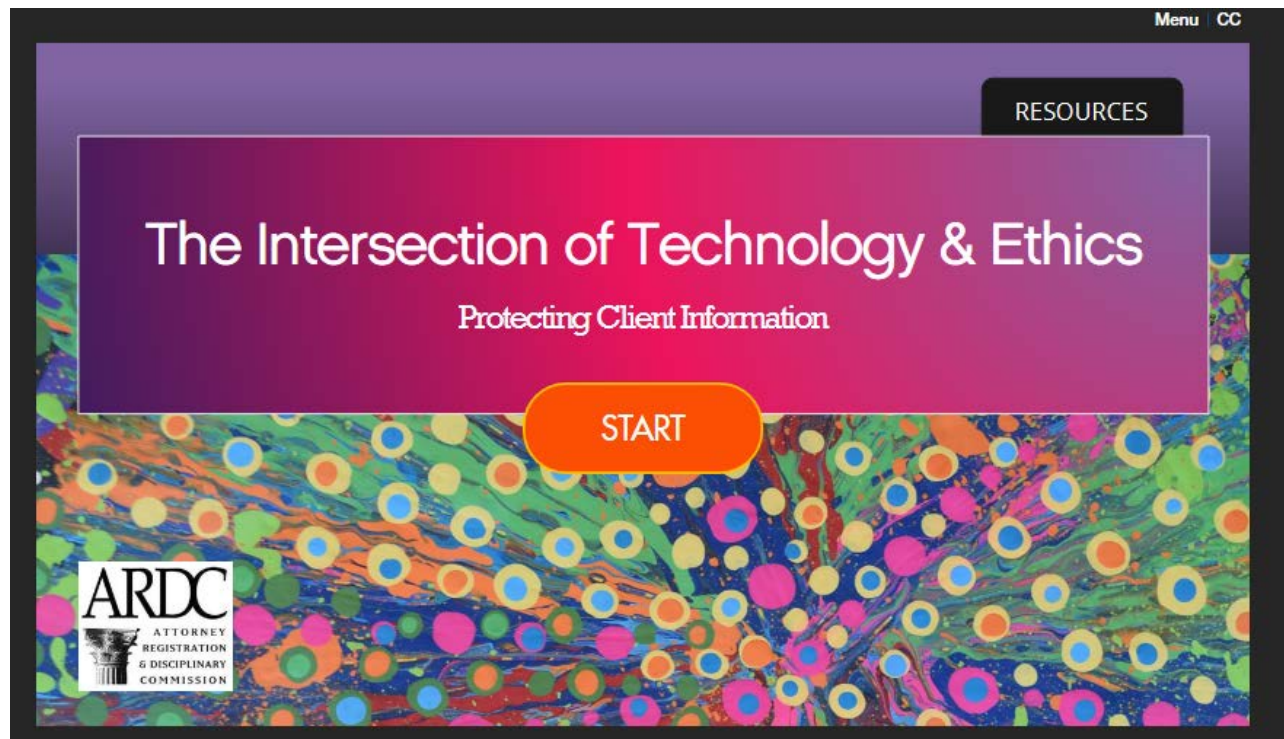
PMBR Modules

The PMBR four-hour self-assessment course is divided into eight interactive modules aimed at helping lawyers improve how they practice law. Each module is between fifteen to forty-five minutes in length. Lawyers who complete the entire course or any module within the course will receive free Illinois MCLE professional responsibility credit.

For answers to commonly asked questions, please visit our [PMBR FAQs](#) page.

Course Registration Instructions

- ▶ The Intersection of Technology & Ethics: Protecting Client Information
- ▶ Conflicts of Interest: Ensuring Undivided Loyalty
- ▶ Fees, Costs & Billing Practices: Getting Paid Ethically
- ▶ Attorney-Client Relationships: Effectively Connect and Communicate with Clients
- ▶ Client Trust Accounts
- ▶ Attorney Wellness
- ▶ Civility & Professionalism
- ▶ Diversity & Inclusion: Culturally-Competent Lawyering



Menu CC

Objectives

This PMBR module addresses the importance of protecting client information and maintaining attorney competence while using technology.

You will:

- [Learn](#) the ethics rules that come into play when using technology;
- [Apply](#) the ethics rules to several different scenarios; and
- [Reflect](#) on the systems you have in place to protect client information when using technology.

Additionally, this module will provide you with resources to help you implement systems to protect client information.

▶ ◁ ▷

This slide is titled 'Objectives' and is part of a presentation. It features a blue and green abstract pattern at the top. The main content describes the purpose of the PMBR module, which is to address the importance of protecting client information and maintaining attorney competence while using technology. It lists three objectives: Learn, Apply, and Reflect. The slide also includes a video player interface at the bottom with a progress bar and navigation buttons.