

INTERNATIONAL LEGAL ETHICS CONFERENCE IV

Stanford Law School, 15-17 July 2010

LAWYER REGULATION, CONSCIOUSNESS-RAISING AND SOCIAL SCIENCE

JOHN BRITON and SCOTT MCLEAN

Legal Services Commissioner

Practice Compliance Manager

Queensland Legal Services Commission

We should say at the outset that we feel a little like interlopers at this scholarly forum. We are not scholars. We are not disinterested students bent on better understanding and describing the factors that drive lawyer and law firm behaviour. We are regulators bent on protecting the rights of the users of legal services and promoting high standards of conduct in the delivery of those services, and ultimately promoting and protecting public confidence in the legal system, the administration of justice and the rule of law.

We have a fundamental interest in the big picture question of regulatory strategy: how can we best regulate lawyers and law firms and the delivery of legal services to achieve those purposes? That is ultimately an empirical question and a question that gives us great scope for productive and mutually beneficial collaborations with scholars. The better informed we are about the behaviour of organisations and of people within organisations, and law firms in particular, the better we can craft regulatory strategies to achieve our purposes. We have something to bring to the table also. The data we harvest through our interactions with lawyers and law firms is a rich source of data for disinterested scholarly analysis, which in turn stands to better inform us again.¹

¹ We fully support research projects of the kind that Mitt Regan, Elizabeth Chambliss and their colleagues describe during this same session at this conference, and the research project that Christine Parker and her colleagues in Australia (and their North American and British collaborators) have been making valiant attempts to get under way over recent years. Equally we are grateful for the

We argued at the last ILEC conference in Australia almost exactly two years ago that our current regulatory strategies, while important and useful, are inherently inadequate to the task. We argued that the strategy that has been adopted in Australia to regulate the delivery of legal services by incorporated legal practices models how we can do better and should be applied not only to incorporated but to all law practices.² We described the strategy and how we were implementing it at the time and we ‘thought out loud’ about what else we might do to better achieve our purposes within that broad framework.

This paper summarises where we’ve got to since, and where the broader debate in Australia has got to and where it might go, and it illustrates the great potential for mutually beneficial collaborations between scholars and regulators.

BIG PICTURE REGULATORY STRATEGY

Currently our strategies for promoting standards of conduct in the delivery of legal services focus squarely on individual lawyers and on ‘front end’ controls – controlling who can be admitted to the profession and then to practice; articulating detailed, prescriptive rules which seek to govern their conduct; and, more recently, mandating compulsory continuing professional development. We have just one strategy for monitoring and enforcing standards of conduct – enabling regulators to receive and deal with complaints about the conduct of individual lawyers and to hold them to account when their conduct falls short of the mark.

Yet our system for dealing with complaints about lawyers, while a fundamentally important regulatory tool which provides aggrieved consumers a means of redress, is an ineffective and inefficient means of achieving the broader regulatory purposes of monitoring and enforcing appropriate standards of conduct in the delivery of legal services and protecting consumers more generally.

interest scholars including Christine Parker have taken in the work we’ve been doing as regulators, some of which she describes during this session also.

² John Briton and Scott McLean, *Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era*. An edited version of the paper appears in *Legal Ethics*, Vol, 11, part 2, Winter 2008. The full version is published on the Commission’s website at www.lsc.qld.gov.au.

Our current system for dealing with complaints:

- is almost entirely reactive rather than proactive and preventative in character. It addresses past and not future behaviour and does no more to encourage high standards of conduct than threaten disciplinary consequences for conduct that falls short of the mark;
- is directed to the merest of minimum standards – the standards below which complainants can justifiably claim redress and / or practitioners can justifiably be held to account before the disciplinary bodies;
- directs regulatory attention disproportionately to sole practitioners and small law practices and lawyers who practice in only certain areas of law, to the extent that the conduct of lawyers who work in medium sized and larger law practices and other areas of law is only nominally subject to regulatory scrutiny;³ and
- gives regulators little if any ‘regulatory grip’ on the underlying causes of complaints, by ignoring the reality that the vast majority of complaints can be put down not to incompetence or knowing dishonesty on the part of individual lawyers but to sloppy business practices and inadequate governance arrangements on the part of their law practices.

Our system for dealing with complaints should be supplemented accordingly with regulatory tools that are genuinely preventative in character; that are directed to ethical capacity-building more so than potential disciplinary consequences; that engage all lawyers and law practices rather than a mere sub-set of lawyers and law practices; and that put the focus not

³ The complaints data tells us year after year that lawyers who do family law, residential conveyances, personal injuries and deceased estates work are many times more likely to find themselves subject to complaint than lawyers who do commercial litigation or banking or building and construction law. Similarly lawyers who work as sole practitioners or in small law practices are many times more likely to find themselves subject to complaint than lawyers who work in medium sized and larger law practices. Yet there is no reason to believe that lawyers who do commercial litigation and the like or who work for medium-sized and larger law practices are more ethical or have higher standards of conduct than lawyers who do family law or work in sole practice or small law practices. Nor do we have any reason to believe that consumers identify and bring to attention more than a fraction of the conduct that might justify a complaint thereby enabling appropriate action to be taken. How then can we look the public in the eye and justify dedicating the totality of the resources at our disposal for monitoring and enforcing appropriate standards of conduct to dealing with complaints? We can't.

only on lawyers but also on law practices and their management systems and supervisory arrangements - on their 'ethical infrastructure'.⁴

We are far from alone in urging reforms to this effect. Our counterparts in New South Wales has similarly argued the case and so, too, the Chief Justice of Western Australia, Hon Wayne Martin, in a paper he gave at the 2009 Conference of Regulatory Officers⁵ and Lord Hunt following his recent and comprehensive review of the regulation of legal services in England and Wales.⁶ There is also a substantial academic literature on the subject.⁷

Ted Schneyer argued almost twenty years ago now for example that not only individual lawyers but law practices should be capable of being held to account when the services they provide fall short of appropriate professional standards. He argued that 'a disciplinary regime that targets only individual lawyers in an era of larger law firms is no longer

⁴ We argued the case in detail in the paper we gave at the Third International Legal Ethics Conference (ILEC3) in July 2008 and have elaborated since in various other papers that are published on the Commission's website, at www.lsc.qld.gov.au. See, for example, the papers delivered at the Queensland Law Society (QLS) Symposium in March 2009, the Australian Legal Practice Management Association Annual Conference in August 2009, and most recently at the QLS Symposium in March 2010.

⁵ The Chief Justice's speech, *The Future of Regulating the Legal Profession: Is the Profession Over-Regulated*, is published on the website of Western Australia's Supreme Court. He argued that the current regulatory framework puts 'too much emphasis upon a policing / punitive model and insufficient emphasis upon other methods of encouraging appropriate standards of professional behaviour.' He said 'in my experience on the body which regulates the legal profession in this state' - and all of us who deal with complaints and discipline have had this experience - 'there were many occasions upon which we were effectively forced to watch from a distance the tragic trajectory of a legal practitioner whose conduct could be confidently predicted to deteriorate to the point where he or she would ultimately be struck off. Often it was like watching a train wreck in slow motion, powerless to do anything to stop it.... In my opinion, the complaints and disciplinary function should not be the central focus of that part of the regulatory framework aimed at the encouragement and maintenance of proper standards of behaviour. I agree with those like NSW Legal Services Commissioner Mark who have suggested that greater emphasis be placed upon the creation of what has been described as an ethical infrastructure... What is needed is a focus on encouraging ethical behaviour and the provision of quality services rather than upon punishing non-compliant behaviour'.

⁶ See the *Hunt Review of the Regulation of Legal Services in England and Wales*, October 2009 (the Hunt Report). Lord Hunt notes that the 'principal theme' of his report is that 'effective regulation of legal services must in future concentrate far more upon promoting good governance arrangements in firms' (p.47). He says, contrasting the current arrangements for the regulation of individual lawyers with proposed reforms which allow increasingly for the regulation of law practices, that 'it is no longer a question of which is better. It is question of how best the two types of regulation can complement each other, whilst remaining proportionate and avoiding double regulation'(p.59).

⁷ The literature is canvassed in detail in C. Parker, A. Evans, L. Haller and R. Mortensen, *The Ethical Infrastructure of Legal Practice in Larger Law practices: Values, Policy and Behaviour*, University of New South Wales Law Journal, 31(1), 2008, 158.

sufficient. Sanctions against firms are needed as well.’ He said ‘the chief reason to allow disciplinary authorities to proceed directly against law firms is prophylaxis – the promotion of firm practices that prevent wrongdoing by individual lawyers.’⁸

More recently Chambliss and Wilkins have argued that Schneyer ‘deserves great credit for initiating the conversation on law firm discipline’ but that the time has come ‘to reconsider the regulatory framework he proposed.’ They argue that ‘the design and monitoring of structural controls within law firms should be recognised - and regulated - as a specialised duty of management’ rather than of law firms per se.’ They argue that ‘all law firms [should] be required to designate at least one partner [to be] the firm’s compliance specialist’ and that compliance specialists should be personally liable for ensuring their firms maintain the appropriate structural controls.⁹ That pretty well describes the regulatory arrangements that apply in Australia to incorporated legal practices and, touch wood, that may well soon come to apply to all law practices, incorporated or otherwise.

THE REGULATORY STRATEGY IN AUSTRALIA

Law firms have been allowed to incorporate in New South Wales since July 2001 and, with the roll-out of state and territory legislation based on the national model laws that were agreed in 2006 with a view to ‘harmonise’ the regulation of the legal profession across the country,¹⁰ progressively thereafter in every other Australian state and territory but for South Australia.¹¹ Notably incorporated legal practices currently comprise just short of 20% of all law practices in New South Wales law practices and already after only three years almost exactly 18% of all law practices in Queensland.¹²

⁸ Ted Schneyer, *Professional Discipline for Law Firms?* 77 Cornell Law Review 1, 1991

⁹ Chambliss and Wilkins, 2001-2002, p.336

¹⁰ the history of the ‘harmonisation’ project and the national model laws can be access on the website of the Law Council of Australia at <http://www.lawcouncil.asn.au>.

¹¹ There have been efforts in Australia since the mid-1990’s to ‘harmonise’ the regulation of the legal profession across the country and it culminated in 2006 when the state and territory governments agreed upon National Model Laws. Every state and territory but for South Australia has enacted local legislation based on the National Model Laws.

¹² The Queensland *Legal Profession Act 2007* (the Act) permits law practices to incorporate. The Act commenced on 1 July 2007 and this data is accurate to 30 June 2010.

The lawyers who engage in legal practice within incorporated legal practices are subject to the same complaints-based regulatory regime as lawyers who engage in legal practice within traditionally structured firms but their firms find themselves subject to additional regulatory requirements.¹³ The regulatory framework that applies to incorporated legal practices:

- requires incorporated legal practices to have at least one legal practitioner director;
- makes legal practitioner directors personally responsible for implementing 'appropriate management systems to enable the provision of legal services by the practice under the professional obligations of Australian legal practitioners', for taking 'all reasonable action' to ensure that lawyers who work for the firm comply with their professional obligations and for taking 'appropriate remedial action' if they don't;¹⁴ and
- authorises the relevant regulatory authority to conduct an audit of an incorporated legal practice about the compliance of the practice and its officers and employees with their professional obligations and the management of the provision of legal services by the incorporated legal practice including the supervision of the officers and employees providing the services, and to conduct a compliance audit 'whether or not a complaint has been made.'

It now seems likely that this same or very similar regulatory framework will soon apply to all law practices in Australia. The 'harmonised' laws that have been enacted in recent years in all the states and territories but for South Australia will very likely be replaced over the next eighteen months or so by nationally uniform laws which were released in draft form for consultation only on 14 May just past.¹⁵

¹³ The Act sets out the regulatory framework at sections 117 to 143 (especially sections 118 and 130) and sections 540 to 574.

¹⁴ A legal practitioner director's failure to take 'all reasonable steps' to meet his or her obligations in this regard is conduct capable of amounting to unsatisfactory professional conduct or professional misconduct.

¹⁵ The Council of Australian Governments (COAG) established the National Legal Profession Reform Project early in 2009 in response to widespread dissatisfaction with the inconsistencies that remain in the regulatory frameworks that apply across the country notwithstanding the recent 'harmonisation' of state and territory laws. The National Legal Profession Reform Taskforce released a consultation package on 14 May including a draft uniform national law. The consultation period ends on 13 August 2010. Full details of the National Legal Profession Reform Project including the consultation package are available on the website of the Australian Government's Attorney-General's Department at <http://www.ag.gov.au/legalprofession>.

The draft Law proposes a regulatory framework¹⁶ which:

- allows law practices to adopt whatever business structures suit their purposes;
- requires all law practices to have at least one principal, whether that person be a sole practitioner, a partner within a partnership or a legal practitioner director of an incorporated legal practice;
- makes all principals personally responsible for taking ‘all reasonable action’ to ensure that the lawyers who provide legal services for the practice comply with their professional obligations and that the practice provides legal services to the applicable standards;
- authorises the relevant regulatory authority, ‘if [the regulator] considers it necessary to do so’, to conduct an audit of the compliance of a law practice with the applicable standards, including the management of its provision of legal services, and to conduct an audit ‘whether or not a complaint has been made’; and
- authorises the regulator, ‘if [the regulator] considers it necessary to do so,’ to ‘give a management system direction to a law practice... to ensure that appropriate management systems are implemented and maintained to enable the provision of legal services by the law practice... in accordance with the... applicable standards’, and to require the law practice(s) to comply.

These are significant and welcome reforms which, if implemented, will equip us as regulators with an explicitly preventative regulatory tool that will enable and require us to engage co-operatively with lawyers and law practices and, as Lord Hunt urges us, to ‘move from a reactive approach - moving in after problems have occurred - to an active mindset, where the roots of potential problems are identified so far as possible in advance and failures often averted.’¹⁷ They are in our opinion (while we say they need fine-tuning¹⁸) the

¹⁶ See sections 3.2.1 to 3.2.10 and 4.6.1 to 4.6.4

¹⁷ The Hunt Report, at pp.77-78.

¹⁸ There are two problems as we see it with the proposals as currently drafted. First, it is both unfair and unnecessary to make all law practice principals equally responsible for taking ‘all reasonable action’ to ensure that the lawyers who provide legal services for the practice comply with their professional obligations and that the practice provides legal services to the applicable standards. That makes sense in relation to incorporated legal practices because their principals comprise the relatively few legal practitioners who serve also as directors, but imposes an unreasonable burden on the partners in all but very small partnerships, and an increasingly unreasonable burden the larger the

single most effective reform we could make to better protect consumers of legal services and to better promote, monitor and enforce high standards of conduct in the delivery of legal services.

Regrettably it appears that the Large Law Firm Group and the state and territory Law Societies and their peak body, the Law Council of Australia, will oppose these reforms. They have argued in submissions to the National Legal Profession Reform Taskforce that the reforms are unwarranted; that they will impose additional and unnecessary compliance costs, especially on small law practices; and that they will permit unjustified intrusions into the ways law practices manage their affairs, by enabling regulators 'to require particular systems to be implemented' when firms should be free to decide the systems that work best

number of partners. The reality in all but small partnerships is that the partners have varied and different management responsibilities, and some of them little if any operational management responsibility at all. The draft Law should recognise this reality in our view and enable partnerships to limit their partners' liabilities for these regulatory purposes to those of them they designate to be 'supervising legal practitioners'.

Second, it will be a mistake to authorise regulators to conduct a compliance audit of a law practice only 'if the [regulator] considers it necessary to do so.' Those words are intended presumably to limit a regulator's discretion to audit a law practice 'unnecessarily' and in that way to impose an unjustifiable and needless regulatory burden on the practice subject to audit. No law practice should be subject to any unjustifiable and needless regulatory burden, but authorising the regulator to conduct a compliance audit only 'if the [regulator] considers it necessary to do so' serves only to muddy the water. The problem is that those words are capable of multiple meanings and insufficiently precise to convey the legislative intent. They might be interpreted liberally, to authorise the regulator to conduct a compliance audit of a law practice if he / she believes that to be required or appropriate for the effective discharge of his or her functions under the Law. Equally they might be interpreted more narrowly, to authorise the regulator to conduct a compliance audit of a law practice only if he or she has reasonable grounds to believe that the practice is non-compliant. It would be wrong to allow so crucial a power to be the subject of unnecessary argument. The Law should make its purposes plain. Furthermore the narrow interpretation would rob the compliance audit power of its potential to be genuinely and pro-actively preventative. We will hardly 'move from a reactive approach - moving in after problems have occurred - to an active mindset, where the roots of potential problems are identified so far as possible in advance and failures often averted' if we are authorised as regulators to conduct a compliance audit of a law practice only if we have reasonable grounds to believe that the law practice is non-compliant. That requires a problem or problems to have already occurred, or at least sufficient smoke to suspect a fire. Furthermore, as we will argue later in the paper, the narrow interpretation would prevent us from conducting compliance audits of the kinds our counterparts in New South Wales and we in Queensland have conducted of incorporated legal practices over recent years with quite extraordinary success. Far better if the intention is to prevent us imposing an unjustifiable and needless regulatory burden to require us to conduct a compliance audit (or for that matter to exercise any of our powers) in such a way as to keep the compliance cost to the law practice proportionate to the value of the information that is sought to be obtained, and to hold us accountable.

We have made both arguments in much greater detail in submissions to the National Legal Profession Reform Taskforce which are published on both the Commission's and the Attorney-General's Department website.

for them. Their submissions are ill-conceived and ill-informed in our view and should be rejected for reasons that will become apparent.

IMPLEMENTATION

It is simply incorrect for opponents of these reforms to say that they authorise regulators to require a law practice to implement any particular management system, only to require a law practice 'to ensure that appropriate management systems are implemented and maintained to enable the provision of legal services by the law practice... in accordance with the... applicable standards.'

Furthermore those of us who've been responsible for administering the compliance auditing regime that currently applies to incorporated legal practices have forsaken any traditional and prescriptive approach in favour of a principles or outcomes-based approach - we have always sought to engage their legal practitioner directors with problem-solving how they might best develop and continually improve their management systems and processes and workplace cultures to better support and sustain high standards of conduct, and have left them free to decide the systems and processes that best fit the circumstances of their particular practice. We have always understood and respected the fact that 'firms and their managements are better placed than regulators to determine what processes and actions are required within their business to achieve a given regulatory objective. So regulators, instead of focussing on prescribing the processes or actions firms must take, should step back and define the outcomes they require firms to achieve. Firms and their managements will then be free to find the most efficient way of achieving the outcome required.'¹⁹

We have conducted more than 1600 compliance audits in Australia since 2004, 1300 or so in New South Wales and exactly 347²⁰ in Queensland since law practices here were first allowed to incorporate in 2007, and not one of those 1600 and more law practices will say

¹⁹ Julia Black, Martin Hopper and Christa Band, *Making a Success of Principles-Based Regulation*, Law and Financial Markets Review, Volume 1, No. 3, May 2007, p.192.

²⁰ This is the total number of compliance audits that we have conducted in Queensland over the period 1 July 2007 through 30 June 2010. We conduct several different kinds of compliance audit and we will break the figure down by those kinds over subsequent pages.

that we have imposed a particular management system upon them, or required a particular system to be implemented.

It is similarly incorrect for opponents of these reforms to say that they are unwarranted and will impose additional and unnecessary compliance costs on law practices, especially small law practices. The evidence is all to the contrary - and we have a lot of evidence now based on our experience conducting compliance audits of incorporated legal practices.

We will review the evidence for each of the two kinds of compliance audit we conduct of incorporated legal practices - internal or self-assessment audits that we expect their legal practitioner directors to conduct themselves, and external audits that we conduct, looking in from the outside. In Queensland we conduct two kinds of external audit – web-based surveys and on-site reviews.

a) self-assessment audits

We have adopted the same self-assessment audit process that has been used in New South Wales since 2004. We require the legal practitioner directors of every incorporated legal practice to audit their practice's management systems and supervisory arrangements soon after the corporation has given the required notice of its intention to commence legal practice. We require them to complete a pro forma self-assessment audit form which asks them to assess and evidence how effectively their systems achieve ten objectives of sound legal practice including competent work practices to avoid negligence; timely and courteous communication; timely delivery, review and follow up of legal services to avoid delay; timely identification and resolution of conflicts of interests and the effective supervision of the practice and its staff. The form is readily accessible in both hard copy and electronic versions on the Commission's website and we will not elaborate further here.

We require legal practitioner directors to return the completed self-assessment form to us within a designated period (usually three months), we evaluate the information they give us, engage in a conversation with them as appropriate about what further steps

they might take, if any, to fix any perceived weaknesses and we ask them to conduct periodic follow-up or maintenance audits to document their progress.

Self-assessment audits, in other words, are ‘gap analyses’ or ‘risk assessments’ or ‘management reviews’ that are designed to be a baseline for future improvements to a practice’s management systems and supervisory arrangements and reports on future improvements.

About 1300 New South Wales incorporated legal practices have completed a self-assessment audit since the compliance auditing regime commenced there in 2004 and exactly 256²¹ in Queensland since 2007 - and the exercise has been hugely successful by any measure and achieved ‘extraordinary cultural change’.²²

Dr Christine Parker of Melbourne University Law School initiated and conducted research in 2008 with the cooperation of my counterpart Commissioner in New South Wales to test the hypothesis that requiring incorporated legal practices to keep and implement appropriate management systems and to undertake self-assessment audits results in improved standards of conduct in those firms. She reviewed the evidence in relation to all 631 incorporated legal practices that had completed a self-assessment audit at that time and found ‘compelling evidence’ that it did just that.²³ She found that the complaint rate per practitioner per year for incorporated legal practices after self-assessment is one third the complaint rate before self-assessment - *one-third* - and that this huge drop is ‘statistically significant at the highest level’. She also found that the complaint rate per practitioner per year for incorporated legal practices that had completed self-assessment audits is one third - *one third* - the complaint rate for traditionally structured firms.

²¹ This is the exact number of self-assessment audits we have conducted in Queensland over the period 1 July 2007 through 30 June 2010.

²² These are Lord Hunt’s words – see the Hunt Report, at p.75.

²³ See C. Parker, T. Gordon and S. Mark, *Research Report: Assessing the Impact of Management-Based Regulation on NSW Incorporated Legal Practices*. The report is accessible on the websites of both the New South Wales and Queensland Legal Services Commissions - www.lawlink.nsw.gov.au/olsc and www.lsc.qld.gov.au respectively – and will be published later this year in a scholarly, refereed international journal, the *Journal of Law and Society*.

That is a great result for consumers, obviously, but also for the law practices concerned and for the reputation of the legal profession more generally. It is too early to replicate the New South Wales research in Queensland but we routinely survey legal practitioner directors after they have completed their firm's self-assessment audit and we can say that two-thirds of them report that the process prompted them to make identifiable improvements to their management systems and supervisory arrangements. That is a great result also, both for those law practices and their clients.

Dr Parker's research tells us not only that self-assessment audits serve a significant preventative purpose but also that it is wrong to conceive of the compliance costs to law practices simply as additional costs that sit on top of a practice's pre-existing regulatory burden. There are trade-offs. We know the compliance costs inherent in responding to complaints, and indeed respondents remind us of them often. Her research tells us and so does our own anecdotal evidence that the compliance costs of the auditing regime are typically off-set by reduced compliance costs in responding to complaints, and significantly so, to the point even of not only not adding to but reducing the regulatory burden overall.²⁴

²⁴ The argument that a compliance auditing regime will impose additional and unnecessary compliance costs is something of a beat up in any event. Why is it, for example, if the regulatory regime that applies to incorporated legal practices imposes such an unreasonable regulatory burden, especially on small firms, that so many firms and most of them small firms are lining up to incorporate?

Law practices have been allowed to incorporate in Queensland only since 1 July 2007 and they are incorporating in steadily increasing numbers. There were 97 incorporated legal practices at 30 June 2008, or 7% of all Queensland law practices; there were 171 or 12% of all law practices at 30 June 2009; and 267 or 18% of all Queensland law practices at 30 June 2010. They are mostly small firms - about a third of them are sole practitioner firms and another third employ only two or three practitioners - and more than two thirds of them practise in suburban Brisbane or in regional and rural cities and towns. Much the same is true in New South Wales.

And why is it, if the regulatory regime that applies to incorporated legal practices imposes such an unreasonable regulatory burden, that incorporated legal practices aren't complaining? We have had only one complaint in Queensland so far, after more than 200 self-assessment audits, but a lot of positive feedback, most of it spontaneous and entirely unsolicited. Here is one recent example, notably from a sole practitioner in a rural town: 'I found the exercise, while time consuming, to be most useful, in particular with respect to identifying some areas of my practice that need improvement.' That is typical.

The message we hear as regulators is that the simple act of requiring a law practice's principals to take time out to stock-take just how well their management systems and supervisory arrangements support the practice and its people to deliver competent and ethical legal services – the simple act of prompting them to reflect on the adequacy of their ethical infrastructure - dramatically improves standards of conduct within their practice.

b) web-based surveys, or ethics checks

We've set out in Queensland to build on that foundation by developing what we hope will become a varied and growing suite of short, sharp on-line surveys (or 'ethics checks') which serve an 'ethical capacity-building' purpose by prompting not only a practice's leaders but all its people to engage with and reflect on ethical issues that arise in their everyday practice of law, prompting both spontaneous and organised discussion within the practice about those issues and prompting the practice to hold an ethical mirror to itself and to identify both the strengths and weaknesses in 'the ways we do things around here' in relation to those issues. We have developed three such surveys to date - a workplace culture check, a complaints management systems check and a billing practices check for medium to large law practices, and we are preparing a fourth, on supervision practices.²⁵

Individuals are most welcome to complete the surveys but they work best when everyone at a law practice takes part, or in larger practices at least a good sample of each of the different levels and classifications of their people and people from its various branch offices, if it has them. That gives the practice a window on the ways its policies and systems are perceived and implemented 'down the line' by the different levels and locations of its people, whether they're followed though in practice and the values and attitudes its people bring to their work. That is a handy indicator of and strength and the consistency of its ethical culture and which of its management systems if any might need improvement.

²⁵ The surveys are readily accessible on the Commission's website (www.lsc.qld.gov.au). Simply click on the Ethics Checks for Law Firms box on the home page and follow the prompts from there.

We invited 15 law practices to complete the workplace culture check on a purely voluntary basis in February and March 2009 and all 15 firms accepted. A total of 502 people completed the survey. Another 17 firms and 116 people have completed the survey since, entirely at their own initiative. Similarly we invited all 172 Queensland law practices that employ 7 or more practising certificate holders to complete the billing practices survey in April and May 2010, on a purely voluntary basis once again, and 40 of them and 517 people took part.²⁶ Notably in this context, we have asked 65 incorporated legal practices in Queensland to complete the complaints management systems check as a form of compliance audit.²⁷

We have posted the de-identified results of all three surveys on the Commission's website and they make very interesting reading indeed. We will return to the survey results shortly but make the point now that we routinely ask both the individual respondents and the principals of the participating law practices for their feedback after they've completed a survey and the response has been profoundly encouraging.

We have published their feedback on the website also, exactly as they gave it to us, entirely in their own words. They tell us, cutting a longer story short, that the surveys have served exactly the ethical capacity-building we hoped they might. They tell us that participating in the surveys prompted the individuals who took part to think about the ethical issues canvassed in the survey questions, generated both spontaneous and

²⁶ 294 of the 502 people who completed the workplace culture check identified themselves as solicitors, or just short of 4% of all Queensland solicitors, and 371 of the 517 people who completed the billing practices check. Those are extraordinary take-up rates for entirely voluntary surveys and invite the obvious question: why is it, if surveys and potentially compliance audits of these innovative kinds impose such an unreasonable regulatory burden, that so many firms and so many of their people are so keen to take part?

²⁷ Large law practices already conduct internal 'workplace culture checks' and engagement surveys and the like, but authorising the regulator to conduct compliance audits enables smaller and less sophisticated firms to undertake and benefit from a similar process, and a process that has no commercial motivation but is directed solely to requiring them to hold a mirror to their ethical performance. Obviously it is preferable if law practices volunteer to review the effectiveness and efficiency of their management systems and supervisory arrangements in these and like ways or take equivalent steps of their own, but the regulator should be authorised as a last resort to compel those law practices which don't – the very law practices most likely to be non-compliant. It makes a nonsense of regulation to reduce regulators to preaching to the converted.

organised discussion within their practices and lead them to make some useful changes to 'the ways we do things around here.' Here are some examples:

- 'We found the vignettes, covering practical and day-to-day ethical dilemmas experienced by legal practitioners, to be a very useful tool in raising awareness of such issues, prompting thought and discussion amongst the team about how best to handle similar 'real life' situations... The survey certainly created robust discussion around the partnership table... We have, as a result of the survey, strengthened the internal Professional Standards and Ethics committee and importantly, embedded consideration of ethical issues further in the behaviours of all team members with exposure to such issues during both induction and on-going training.'
- 'We considered [the survey] a useful tool to engage our lawyers to think about ethical practices and procedures by participating in the confidential survey. We had good uptake by our lawyers and were encouraged by the results. The outcomes were useful and prompted discussion about internal policies and to be constantly mindful of legal ethics. This can only be beneficial for the firm and ultimately, the reputation of the profession generally. I have no hesitation in recommending participation to other firms who might be considering the surveys. You have nothing to lose and, potentially, much to gain.'
- 'All our staff participated in the survey and we found the feedback provided to us very useful. As a result of this feedback, we identified the need to document two of our 'informal' policies regarding conflicts to ensure consistency... We also carried out compulsory training sessions for all staff to ensure these policies were properly understood and implemented... We would certainly like to see these [surveys] continued in the future to assist us further in developing and testing both the understanding and efficiency of our internal firm policies and procedures.'
- 'As Chairman of the firm I found the responses most informative. Clearly we as a firm are not doing enough to address this issue. I have requested our HR department to provide an action plan to better inform our staff as the survey indicated a lack of contemporary training in the area.'
- 'We found the process to be one of great enlightenment and encouragement... Our lawyers got to express key views about aspects of the firm's operations and we learnt a considerable amount from the exercise. In particular we were able to

discover key things the firm needed to focus on to keep improving. [The surveys are] is a great initiative. It is a great illustration of true engagement with the legal profession in an effort to improve the experiences for our clients and our people. I would encourage more firms to take up the opportunity to participate. It has been a very rewarding experience...’

- ‘The aim of the survey was to generate data to support proactive improvement strategies instead of simply offering lag data on complaints and prosecutions. We saw a genuine effort on the part of the Legal Services Commission to produce information with real business value... We were not surprised that approaching the survey with an open mind, and confidence in the integrity and resilience of our people, meant it had a positive impact internally. The survey data was interesting in terms of confirming that we were doing some things pretty well, but that we were also misreading some signals and had made a few assumptions which weren’t justified.’

c) on-site reviews

On-site reviews comprise tailor-made combinations of some or all the following kinds of activities - further web-based surveys of the kinds we have already described; traditional desk-top policy and procedure reviews; detailed analyses of the firms’ complaints history, including detailed analyses of the investigation files held by the Commission; interviews with the practice’s principals, supervisors and managers; interviews with and/or focus groups of individual employees ‘down the line’ and/or clients; interviews with third parties including, for example, practitioners from other law practices that have regular dealings with the law practice subject to audit; reviews of selected or randomly selected client files and bills, in-house complaints registers and the like; client satisfaction surveys; and mystery or ‘shadow’ shopping - having real or pretend consumers deal with the firm and behave exactly as a genuine client might behave and asking them to report their experience - and similarly mystery complaints.

Clearly on-site reviews by their very nature are a more resource intensive exercise both from our point of view and point of view of the law practices subject to audit, and it follows that we envisage conducting audits of this more intensive kind significantly less

frequently than web-based surveys and only on an 'as needs' basis - on the basis of a risk assessment that tells us that a firm or some aspects of its practice are or are highly likely to be non-compliant. We should always use our best efforts as regulators to target the law practices most at risk of non-compliance with their professional and service obligations. We should never impose any needless regulatory burden on low risk practices but direct our regulatory resource to where it is most needed and can have the most beneficial impact in the public interest.

This requires us of course to become increasingly skilled at risk analysis. Self-assessment audits and on-line ethics checks are two of the key tools we can use to help identify the law practices most at risk of non-compliance and add powerfully to the risk information we already have at our disposal, including the firm's complaints history. They are handy risk indicators and risk indicators of a unique and particularly valuable kind - a kind that gives law practices a window on the adequacy of their management systems and supervisory arrangements at the same time as and even before the regulator, and an opportunity to pull the rug out from under any grounds we might otherwise have to come knocking.²⁸

We mentioned earlier that we and our counterpart regulator in New South Wales have conducted between us more than 1600 compliance audits comprising 1550 or so self-assessment audits and another 65 web-based surveys or 'ethics checks'. Notably we have conducted only 12 on-site reviews, 9 in New South Wales and 3 in Queensland, all of them in circumstances in which we had good reason to believe the law practices to be non-compliant.

We don't have the New South Wales data, and the numbers here are too small to warrant drawing any particular conclusion, but we know that the number of inquiries and complaints we received about the Queensland practices in the 12 months following

²⁸ This is another reason why including the words 'if the Ombudsman considers it necessary to do so' in section 4.6.1 of the draft Legal Profession National Law serve no useful purpose and worse still are self-defeating – see footnote 18, above. They are intended to offer law practices some reassurance that the regulator is precluded from conducting compliance audits needlessly and unjustifiably but they lend themselves to be interpreted in such a way as to preclude the regulator from conducting compliance audits of kinds which are neither needless nor unjustifiable but have achieved 'extraordinary cultural change' to the benefit of consumers and law practices alike. They risk throwing out the baby with the bathwater.

the audit is less than half the number of inquiries and complaints we received about those practices in the 12 months prior to the audit.

WHERE TO FROM HERE?

We will see what happens with the national legal profession reforms, and hope that we will soon be authorised to conduct compliance audits of these kinds not only of incorporated legal practices but all law practices. Meanwhile we will continue to develop a two-way collaboration with legal scholars with whom we have overlapping purposes. We drew on scholarly work to design the initial drafts of the three web-based surveys we've developed thus far as form of compliance audit or as a purely voluntary tool to help law practices stock-take their ethical performance;²⁹ a number of scholars have given generously of their time to help us greatly improve those surveys in subsequent iterations;³⁰ and we're keen to develop relationships with scholars who can lend us their expertise to help us develop further such surveys.

We're keen to help legal scholars meet their purposes also. We conduct the surveys primarily for our own regulatory purposes but we are keenly aware that the results give us a rich source of information about lawyers' values, attitudes and behaviours and ethical cultures within law practices and we believe we should share that information in the public interest. We routinely publish the de-identified results both to enable law practices to compare their results with the results of their law practice peers and to serve a broader public interest also, by exposing aspects of law practice culture to public scrutiny – see Annexure 1.

We hope to deepen that scrutiny by making the raw data available to scholars for more rigorous and detailed analysis. Drs Christine Parker (of Melbourne University Law School)

²⁹ The workplace culture check survey drew on Linda Klebe Trevino, Gary R Weaver, David G Gibson and Barbara Ley Toffler, *Managing Ethics and legal Compliance: What Works and What Hurts*, California Management Review, Vol 41, Issue 2, January 1999. The billing practices check survey drew heavily with her kind permission on Susan Saab Fortney's research that she reported in *Soul for Sale: An Empirical Study of Associate Satisfaction, Law Firm Culture and the Effects of Billable Hours Requirements*, UMKC Law review, Vol 68, 2000-2001.

³⁰ Christine Parker and Linda Haller of the Melbourne University Law School, Susan Saab Fortney of the Texas Tech University School of Law and April Chrzanowski of Griffith University among others all gave us useful feedback on early drafts of all three surveys.

and Lyn Aitken (of the Legal Services Commission) have done just that with the results of the workplace culture check we conducted with 15 volunteer law firms in 2009 and Dr Parker will discuss that research later in this same session at the conference. Dr Parker and her colleague Dr Linda Haller have similarly studied the results of the complaints management system check we ran as a form of compliance audit in 2009 and 2010, and I'm hoping we can persuade Dr Parker and Professor Susan Saab Fortney to take a good look at the results of the billing practices survey that we conducted only a month or so ago and that drew heavily on work Professor Fortney did some ten years ago now. Those results make interesting reading – see Annexure 2.

ANNEXURE 1

Billing practices check results

We wrote to the managing partners / directors of all 172 law firms in Queensland with 7 or more practising certificate holders to invite them to complete the billing practices check for medium to large law firms during April and May 2010. We invited them to preserve their firm's anonymity by identifying the firm by means of a secret and self-selected code. A total of 40 firms accepted the invitation, and a total of 517 people completed the survey by the 31 May cut-off date – 503 people who identified themselves as members of one of the 40 participating law firms (including 13 people who identified themselves as members of a participating law firm but failed to enter their firm code) and 14 people who identified themselves as interested individuals. Notably 371 of the 517 people who completed the survey identified themselves as legal practitioners. This means that 1 in 20 or 5% of all Queensland solicitors completed the survey.

We have collated both the aggregated results including various cross-tabulations and the results for each participating law firm. We will seek feedback over coming weeks from the managing partners / directors of the 40 participating firms and will publish that feedback separately in due course.

Billing practices check 2010 – the aggregated results

- click [BPC-everybody-010610](#) to see the aggregated results for all 517 individual participants
- click [BPC-individuals-standard-010610](#) to see the aggregated results for the 14 interested individuals only
- click [BPC-all-firms-standard-010610](#) to see the aggregated results for the 503 individual respondents from the 40 participating law firms
- click [BPC-all-firms-comments-010610](#) to see the comments those 503 people entered in the free text boxes on the survey

Billing practices check 2010: the cross-tabulated results for the participating law firms

We cross-tabulated the results to compare how the 503 people from the 40 participating law firms answered the questions according to their employment type within their firm, the length of their post-admission experience and their gender - the latter because the Commission's complaints data shows consistently that women lawyers are several times less likely than men lawyers to be subject to complaint (see the Commission's annual reports). We have divided the cross-tabulation by length of post-admission experience into cross-tabulation reports A and B because there are more than 5 categories of post-admission experience and the reports allow a maximum of 5 categories each. We have generated two

cross-tabulation reports for employment type - one which cross tabulates how practitioners answered the survey questions according to their employment type within their firms and the other how non-practitioners answered the questions according to their employment type within their firms. We have also cross-tabulated the results according to the business structures of the participating law firms.

- click [BPC-all-firms-cross-tab-by-non-PC-holder-occupation-010610](#) to see how people from the 40 participating firms responded according to their employment type within their firm
- click [BPC-all-firms-cross-tab-by-PC-holder-occupation-010610](#) to see how people from the 40 participating firms responded according to their employment type within their firm
- click [BPC-all-firms-cross-tab-by-post-admission-experience-A-010610](#) to see how people from the 40 participating firms responded according to their seniority within their firm
- click [BPC-all-firms-cross-tab-by-post-admission-experience-B-10610](#) to see how people from the 40 participating firms responded according to their seniority within their firm
- click [BPC-all-firms-cross-tab-by-gender-010610](#) to see how people from the 40 participating firms responded according to their gender
- click [BPC-all-firms-cross-tab-by-business-structure-010610](#) to see how people from the 40 participating firms responded according to the business structure of their law firm

Billing practices check 2010 - results for each participating law firm

We have sorted each firm's results into categories determined by the size of the firm. We determine the size of a firm by the number of practising certificate holders the firm employs. Notably, while 40 firms participated, we have published the results for only 32 of those firms (and have not published separate reports for the branch offices of several of those firms). That is because only very few people from those firms / branch offices completed this survey and we do not want to publish any information that might allow them to be identified. We indicate by parentheses when we have collapsed the results for separate branch offices into one 'whole of firm' report.

- **firms / branch offices with 5 - 9 practising certificate holders**

Aggregated results for all firms in this band

[BPC-5to9pcholders-June2010](#)

Aggregated results cross tabulated by occupation of pc holder

[BPC-5to9pcholders-crosstab-occupation-June2010](#)

- [388bmy](#)
- [autumn](#)
- [boiler](#)

- [lagelb](#) (and visited office)
- [lscmay](#)
- [pencil](#)
- [samgap](#)
- [skrgtt](#)
- [Sunrise](#)
- [THOMAS](#)
- [tkbs25](#)

- **firms / branch offices with 10-19 practising certificate holders**

Aggregated results for all firms in this band

[bpc-10to19pcholders-June2010](#)

Aggregated results cross tabulated by occupation of pc holder

[bpc-10to19pcholders-crosstab-occupation-June2010](#)

- [1327](#)
- [bsith \(and bsithi-1\)](#)
- [clmpts \(1 and 2\)](#)
- [gmrstz](#)
- [GPJDDS \(1 and 2\)](#)
- [pig246](#)
- [pjzsal](#)
- [qbcpfz](#)
- [survey](#)
- [TURBOX](#)

- **firms / branch offices with 20-49 practising certificate holders**

Aggregated results for all firms in this band

[bpc-20to49pcholders-June2010](#)

Aggregated results cross tabulated by occupation of pc holder

[bpc-20to49pcholders-crosstab-occupation-June2010](#)

- [4goto8](#)

- [burton](#)
 - [confer](#)
 - [fh66fh](#)
 - [RED123](#)
 - [saints](#)
-
- **firms / branch offices with more than 50 practising certificate holders**

Aggregated results for all firms in this band

[bpc-over50pcholders-June2010](#)

Aggregated results cross tabulated by occupation of pc holder

[bpc-over50pcholders-crosstab-occupation-June2010](#)

- [bilsur](#)
- [cbd215](#)
- [humgoe](#)
- [madrid-1](#)
- [wavlsc](#)

ANNEXURE 2

The billing practices check 2010: selected questions and results

Billing Practices Survey



Billing Practices Survey

Does your firm have a policy and/or procedure in place for:				
	Yes	No	I don't know	Response Count
monitoring the billing practices/ activities of the legal practitioner directors/partners?	63.6% (292)	8.5% (39)	27.9% (128)	459
reviewing the billing practices of individual partners or legal practitioner directors?	58.2% (267)	10.0% (46)	31.8% (146)	459
detection of improper billing practices?	50.2% (229)	13.2% (60)	36.6% (167)	456
regular review (at least monthly) of all solicitors timesheets	60.5% (277)	16.8% (77)	22.7% (104)	458
regular review (at least monthly) of all non-legal staff timesheets	25.9% (118)	29.0% (132)	45.1% (205)	455
reviewing all accounts rendered by the practice?	61.6% (282)	9.8% (45)	28.6% (131)	458
supervisors to review all your accounts each month?	66.9% (307)	15.9% (73)	17.2% (79)	459
dealing with complaints by clients about an account?	80.6% (370)	2.6% (12)	16.8% (77)	459
dealing with employee concerns about an account?	64.5% (296)	9.4% (43)	26.1% (120)	459
dealing with ethical concerns, or queries about billing practices by solicitors, other staff or partners?	63.2% (289)	10.5% (48)	26.3% (120)	457
reporting improper billing practices to the Legal Services Commissioner?	30.3% (139)	20.5% (94)	49.1% (225)	458
answered question				460
skipped question				57

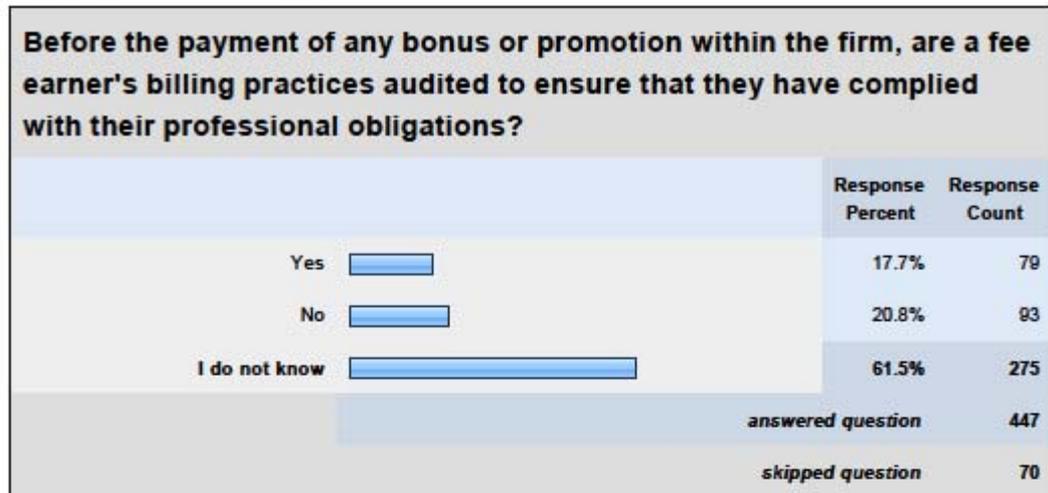
Billing Practices Survey

Does your firm have billing policies and/or procedures in respect of when it is appropriate to bill for any of the following:				
	Yes	No	I don't know	Response Count
Drafting	73.1% (334)	11.8% (53)	15.3% (70)	457
Research	71.3% (326)	12.3% (56)	16.4% (75)	457
Travel	69.1% (315)	12.3% (56)	18.6% (85)	456
Waiting (eg for Court/meetings)	61.0% (278)	14.5% (66)	24.8% (112)	456
Internal conferences	70.0% (319)	14.0% (64)	16.0% (73)	456
Internal reviews of files	64.4% (293)	16.3% (74)	19.3% (88)	455
Preparing internal memoranda	66.4% (302)	15.4% (70)	18.2% (83)	455
Supervision	65.9% (300)	12.5% (57)	21.5% (98)	455
File Management	64.5% (294)	15.4% (70)	20.2% (92)	456
Administration	68.1% (309)	13.9% (63)	18.1% (82)	454
answered question				457
skipped question				60

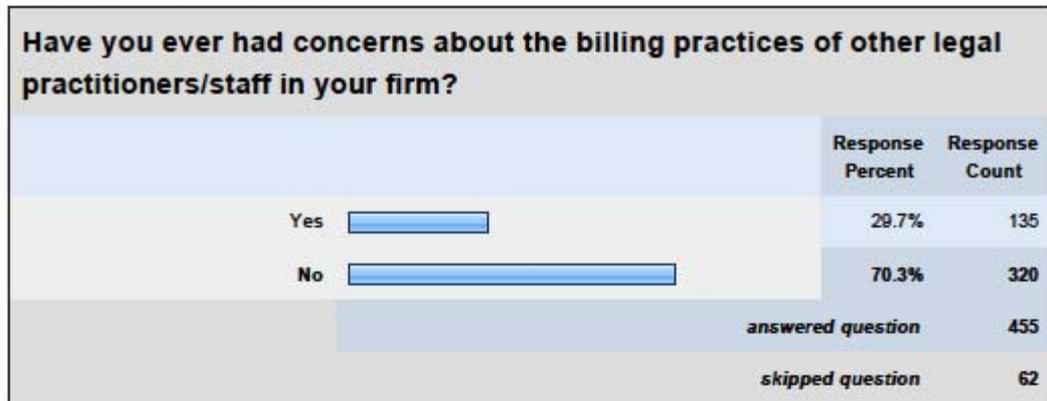
Billing Practices Survey

Does your firm measure and manage a fee earner's performance in relation to:						
	Always	Sometimes	Mostly	Never	I don't know	Response Count
the amount you have billed	64.0% (293)	13.1% (60)	13.1% (60)	0.2% (1)	9.6% (44)	458
the accuracy of your cost estimates	14.3% (65)	28.8% (130)	5.0% (27)	20.3% (92)	30.8% (140)	454
the use of costs updating	14.0% (63)	24.4% (110)	6.4% (29)	20.2% (91)	35.0% (158)	451
the number of pro-bono hours worked	8.6% (39)	17.7% (80)	3.3% (15)	35.3% (160)	35.1% (159)	453
the amount of supervisory work undertaken	17.6% (80)	24.6% (112)	8.8% (40)	15.4% (70)	33.6% (153)	455
the ethical reputation of the fee earner	23.3% (106)	15.0% (68)	4.6% (21)	18.3% (83)	38.8% (176)	454
the level of the fee earners diligence and competence	44.7% (204)	15.4% (70)	12.3% (56)	5.5% (25)	22.1% (101)	456
the efficiency of work performed	43.5% (199)	18.6% (85)	12.9% (59)	5.7% (26)	19.3% (88)	457
Client satisfaction	44.0% (199)	20.1% (91)	12.2% (55)	4.2% (19)	19.5% (88)	452
				Other (please specify)		7
				answered question		459
				skipped question		58

Billing Practices Survey



Billing Practices Survey



Billing Practices Survey

A client retains a firm on the basis that they will be charged on an hourly rate. Partner A provides a client with an estimate of work for \$10,000.00. At the conclusion of the matter, the account comes to \$5,000.00 on a time costing basis. Partner A charges the client \$9,000.00 as the work performed by the firm was, in his view, of a high quality and the outcome exceptional.

	Yes	No	Maybe	Response Count
in your opinion, is the billing practice ethically appropriate?	10.2% (46)	74.0% (335)	15.9% (72)	453
would the culture of your firm encourage this practice?	11.1% (50)	74.7% (337)	14.2% (64)	451
does your firm have a policy/procedure in relation to this issue?	37.1% (168)	38.6% (173)	24.3% (109)	448
have you ever been given guidance/advice in relation to the practices described above?	37.8% (169)	58.8% (263)	3.4% (15)	447
			If you selected "maybe" please explain why	96
			<i>answered question</i>	453
			<i>skipped question</i>	64

Billing Practices Survey

You are taking a two hour plane trip from Brisbane to Melbourne to conduct an interview in a matter involving client A. While on the plane, you review materials for another file you are working on for client B for the following week. Your firm has a billing procedure whereby you normally bill clients for your time spent travelling/waiting on their behalf.

	Yes	no	Maybe	Response Count
Would you bill both client A and B two hours each?	12.4% (56)	77.8% (350)	9.8% (44)	450
Would the culture of your firm encourage this practice?	10.2% (46)	72.4% (325)	17.4% (78)	449
Does your firm have a policy/procedure in relation to this issue?	33.2% (148)	43.7% (195)	23.1% (103)	446
Have you ever been given guidance/advice in relation to the practices described above?	35.0% (157)	61.8% (277)	3.1% (14)	448
			If you selected "maybe" please explain why	70
			<i>answered question</i>	451
			<i>skipped question</i>	66

Billing Practices Survey

<p>You research an area for one client which takes two hours. A few months later the same issue arises in respect of a second client and as a result of the previous work product, the time to complete the advice for the second client takes only one hour.</p>				
	Yes	No	Maybe	Response Count
Do you bill the second client the same as you did for the first client?	5.6% (25)	84.0% (377)	10.5% (47)	449
In your opinion, is it ethical to use re-cycled work product which leads a practitioner to billing more than the number of hours actually worked?	10.1% (45)	76.1% (340)	13.9% (62)	447
Would the culture of your firm encourage this practice?	10.6% (47)	73.3% (326)	16.2% (72)	445
Does your firm have a policy/procedure in relation to this issue?	28.1% (124)	48.6% (215)	23.3% (103)	442
Have you ever been given guidance/advice in relation to the practices described above?	30.9% (137)	64.6% (287)	4.5% (20)	444
			If you selected "maybe" please explain why	100
			<i>answered question</i>	449
			<i>skipped question</i>	68