THE PRESSURES OF BILLABLE HOURS: LESSONS FROM A SURVEY OF BILLING PRACTICES INSIDE LAW FIRMS

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“From now on I’m thinking only of me.”

Major Danby replied indulgently with a superior smile: “But, Yossarian, suppose everyone felt that way.”

“Then,” said Yossarian, “I’d certainly be a damned fool to think any other way, wouldn’t I?”

INTRODUCTION

This paper examines whether lawyers’ experience of time-based billing and billable hour budgets subjects them to pressures that encourage unethical practices. We argue that billable hour pressure is merely the ‘face’ of more fundamental pressures stemming from the way that lawyers in private practice perceive their work environments. Even without excessive billable hour targets, lawyers may be more likely to engage in unethical behaviour where they believe that unethical behaviour is necessary in order to meet performance indicators; that ‘everyone’ within the firm in which they work is engaging in such behaviour; and that there are no other ways to succeed at the firm – whether or not their beliefs are correct. If this is the case, the interventions necessary to prevent billing fraud must deal with lawyers’ perceptions and not merely the billable hours regimes in which lawyers work. Indeed quite fundamental reform of the way in which firms manage their lawyers and communicate expectations about billing and ethics might be necessary to achieve a healthier environment for lawyers and a less exploitative environment for clients.

This paper examines these issues through data from the Queensland Billing Practices Survey (“the Survey”), run by the Legal Services Commission in Queensland, Australia. Solicitors from 25 private law firms answered questions about the billing

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systems, office culture and ethics policies of the firms in which they worked. From their responses, it is possible to gain a greater understanding of lawyers’ perceptions about their firm, how those perceptions influence their views about acceptable practice within the firm, and what can be done to change those perceptions.

This paper begins by reviewing the literature on lawyers’ ethics and billable hours. Commentators have suggested that the main factors that cause unethical billing practices are competition within a firm for higher levels of compensation and ignorance of appropriate ethical practices. We argue that these factors will remain whether or not a billable hours regime is in place.

The second section describes the Queensland Billing Practices Survey, the data we obtained from the Survey and why that data is helpful. The data enable us to examine which management practices put pressure on respondents to bill higher; what respondents understand about the ethics policies of the firms in which they work; and to what degree they have ethical concerns about billing in their firms.

The third, fourth and fifth sections set out the findings from the Survey. The third section examines the billing systems the lawyer respondents work with and the degree to which they feel their performance is assessed by reference to their budgetary performance. Respondents report that the firm environment is dominated by billable hours and that their own performance is assessed primarily by the revenue they generate.

The fourth section considers respondents’ perceptions of unethical billing practices in their firms and the extent to which they themselves feel under ethical pressure from time based billing. Those who are subject to billable hours targets not surprisingly feel under greater pressure to bill, and also (but to a lesser extent) have greater ethical concerns about their firms. However we do not find any clear correlation at the firm level between firms that use billable hour targets and a sense of pressure to bill. What we do find is particular firms where a high proportion of lawyers feel under pressure to bill and have a high degree of concern about the unethical billing practices of others, and others where this is not the case.

The fifth section considers law firms’ attempts to put in place ethics policies to counter unethical billing practices. We find little evidence that these automatically work to actually prevent unethical billing. But we do find that they help lawyers feel less concerned that others might be engaged in unethical practices—and therefore, we suggest, that these systems can help build a positive ethical environment around billing.

The sixth section concludes by applying the lessons from the Survey to the interventions commonly suggested as appropriate to reduce unethical billing.

I. BILLABLE HOURS AND UNETHICAL BEHAVIOUR: A LITERATURE REVIEW
The postulated effects of billable hours

The question of whether the use of time-based billing and billable hour budgets contributes to unethical behaviour by lawyers has been discussed extensively within the academy and the profession. According to critics, billable hours can result in unfairness to both practitioners and their clients.

High billable hour expectations can have a negative effect on lawyers’ personal lives, professional development and capacity to engage in pro bono work. Especially where work is scarce, practitioners can feel pressure to bill more and more on the same files, whether by overwork or by falsifying the time they work. In effect, the employee lawyer (who feels the budgetary pressures) and not the senior lawyer will be “deciding what work is necessary or appropriate” on each file in order to control – and increase – his or her own hours. In addition, lawyers who are only judged by the number of hours they record may not be rewarded for dealing with matters more efficiently or bringing special skills or specific relevant experience to the matter.

These problems flow on to lawyers’ clients. Billable hours provide a simple and familiar means of calculating fees, but ignore whether the lawyer’s work actually furthers the client’s interests. Lawyers who bill on an hourly basis have limited incentives to engage in case planning and have a specific incentive to adopt defensive (over-) servicing and strategies. Even in the absence of fraud, clients run the risk of having to pay for inefficient lawyering, costs incurred in training junior lawyers, costs incurred in training junior lawyers, costs incurred in training junior lawyers,

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5 See Douglas R Richmond, ‘For a Few Dollars More: The Perplexing Problem of Unethical Billing Practices by Lawyers’ (2008) 60 *South Carolina Law Review* 63, 86: *So long as a firm has sufficient billable work and has a system that suitably distributes assignments, lawyers whose chief value to the firm is as timekeepers should be secure in their positions if their performance meets the firm’s standards in terms of competence, diligence and so on.*

6 The ABA Commission on Billable Hours, above n 3, 43.

7 Ibid, 7-8.

8 Ibid, 5.
turnover and ‘aggressive’ time recording. More generally, billing methods based on billable hours provide clients with little or no predictability about cost. Without further information, clients (especially unsophisticated clients) have no capacity to check whether the services for which they are being charged were necessary to the matter and efficiently performed. In addition, charging by the hour can make it easier to sell fee increases to the client, than charging per matter, since the hourly increase seems small.

Assumptions about how billable hours cause lawyers to behave unethically

The potential for the problems described above is clear and well documented. Many authors consider that these problems were exacerbated by the increase in billable hour targets that accompanied increases in employee lawyers’ salaries, especially in the US up to the Global Economic Crisis of 2007. Yet unethical practices associated with billing may well continue even if hourly billing were replaced by an alternate method. La Rue, for example, suggests that lawyers’ professional lives have become “dominated by the time sheet” for at least seven reasons including “the ever-present desire to maximize profits”; “the gradual realization that attorneys could make more money from the labor of others than they could from their own labor alone”; “the advent of large law firms as a way to harness that extra labor”; and “the pressure on managing partners to make firms profitable, which means that associates had to produce income equal to roughly three times their salary”. These factors all exist no matter what billing regime is in place. Similarly, Richmond argues lawyers overbill as a result of a number of motivations, only one of which directly relates to hourly billing regimes: ignorance of acceptable standards of conduct; professional insecurity; the absence of a meaningful bond with the firm; lawyers’ competitiveness; compensation systems that directly reward high billable hours; an almost adversarial approach to dealings with clients; greed and envy; and mental illness and substance abuse. Kritzer, too, suggests on the basis of his review of the empirical literature that

9 For example, the billable hour makes it easier to justify charging out junior lawyers to perform work that could have been completed more efficiently by a senior lawyer, despite the senior lawyer’s higher billable rate. See Jesse Nelman, ‘A Little Trust Can Go a Long Way Toward Saving the Billable Hour’, (2010) 23 Geo. J. Legal Ethics 717, 718-719. See also The ABA Commission on Billable Hours, above n 3, 7.
13 Ibid, 483. The other reasons are: “the invention of the computer and time management software”; “the gradual realization that attorneys could make more money billing by the hour than with any other method”; and “the acceptance of billing by the hour by the courts”.
14 See Richmond, above n 5, 81.
15 See Richmond, above n 5, 82-99; Ross (1991), above n 2, 3 fn 6.
unethical behaviour is not a function of any particular fee arrangement. Rather it is linked to “issues such as marginality of practice, client pressures, practice context (i.e., what courts or agencies a lawyer appears before), and the social context of a particular law firm.” Fee arrangements might influence the specific nature of lawyers’ unethical behaviour, but not the likelihood of unethical behaviour generally.

A billable hours regime, however, does have the potential to take on a life of its own and become more significant in the mind of employed lawyers than it really is. As a result of professional gossip or a sense of cynicism, employed lawyers may feel that their billable hours are all important in performance measurement. Indeed the easy quantifiability of a billable hours budget can simply make it a more obvious and salient measure of performance than less choate measures of quality. Billable hours then become the prism through which other pressures are refracted and magnified.

This is likely to be exacerbated where lawyers have their ethical awareness and imagination dulled by working in firms or being with people who see ethically questionable behaviour as ‘the way lawyers do things’ or ‘the way we do things around here’. Lawyers may not stop to think about whether their billing practices are ethically justified. This makes it important to look at the social environment of the firm in which the lawyer is relationally embedded. In the following two subsections we discuss two general features of the firms that might support unethical behaviour:

18 See also Brian Bartley, ‘Fair trade? Why we need to rethink time billing’, (2010) 30(8) Proctor 12 (stating “The reality is that there is no system of charging which is not open to abuse – or which can work perfectly well, if applied fairly.”); and Duncan Webb, ‘Killing Time: A Limited Defence of Time-Cost Billing’ (2010) Legal Ethics, Summer, 39, 39 (stating “The problem of developing a uniform billing framework which is effective, economically defensible and ethical is in fact intractable. That is to say, there is no unified solution.”)
21 Parker and Evans, above n 2, 10.
22 Parker and Evans note: “Whether or not a lawyer consciously intends to deceive or defraud a client, the fact they would not think that their client might complain about [an excessive] bill is, in itself, remarkable.” Ibid, 182 fn 3.
23 The authors of this paper agree with Lerman that over-billing and bill padding are equally as dishonest as misappropriation of client funds, because in both cases the lawyer is “wrongfully taking client funds for his own use.” See Lerman above n 10, 874. However, the results discussed below show that this view is not held universally amongst practicing lawyers.
Competition and greed

Lawyers use compensation and billing rates as a means of denoting status within a law firm. Patrick Schiltz argues that lawyers are often high achievers who are used to competing and succeeding, and they desire the status that achievement brings. Yet the lawyer’s capacity to generate income (for herself and for her firm) may be the only means of assessing whether he or she is good at the job. In order to maintain the feeling of success, lawyers take high-paying jobs knowing about the burden this will place on them, which explains why there is no shortage of graduates willing to work at large firms, thus submitting to a professional lifestyle that is widely reviled. Lisa Lerman even argues that compensation initiates a vicious circle for lawyers engaged in private practice: not only does it increase the possibility that lawyers will become overly competitive, it is seen as the primary means by which lawyers salve the hurts that excessive competition has done to the rest of their professional lives.

The pressure that this places on lawyers is all the more acute because lawyers’ compensation varies with management’s assessment of the lawyer’s contribution to the firm, and in many cases this is assessed mainly by whether the lawyers reached their billable hour targets (rather than the quality and quantity of the actual work provided to the client). Importantly for the purposes of this article, the pressure to generate income and the compensation for generating income are the fundamental issues – billable hours might simply be a (powerful) conduit of those pressures. Problems with competitiveness and greed exist as soon as a lawyer’s fees are added up, whether through billable hours or through some other measure. These problems exist even if the lawyer does not personally engage in competition about compensation; they occur wherever lawyers feel that the firm is mainly interested in these matters. As such, pressure to inflate fees will cease only if a lawyer’s revenue production is not considered at all for the purposes of her promotion or remuneration.

Ignorance of appropriate ethical practices

Lawyers may also fail to consider whether bill padding and inflation are actually unethical. There are a number of reasons to think that this is so. First, law students’

25 Schiltz, above n 11, 904-6.
26 Ibid, 898: “The hiring partner of any major firm will tell you that if his firm offers first year associates a salary of $69,000 and a competitor down the street offers them $72,000, those who have the choice will flock to the competitor – even if the competitor will require them to bill 200 hours more each year.”
27 Lerman, above n 24, 889.
28 See Fortney, above n 2, 239; Susan Saab Fortney, ‘The Billable Hours Derby: Empirical Data on the Problems and Pressure Points’ (2005) 33 Fordham Urban law Journal 171; Lerman, above n 2, 241, 266; Lerman, above n 10, 847; Ross (1998), above n 2, 2199; Ross (1991), above n 2. See also Kritzer, above n 16.
education about ethical issues may amount to no more than a study of the rules of professional practice. This can encourage the view that the rules are exhaustive of all types of ethical and unethical conduct, which means (by corollary) that any conduct that does not violate the rules is ‘ethical’. 29 Second, lawyers facing disciplinary proceedings for bill padding frequently argue that they merely intended to charge the client a premium; that they were unaware of firm policy; and that they did not intend to deceive the firm or the client about the total amount legitimately owed. 30 Third, if lawyers are as greedy and competitive as the previous discussion suggests, it seems likely that they would want a more direct means of compensation if they were going to engage in dishonest acts. In fact, lawyers engaging in billing fraud are jeopardising their reputations 31 for remarkably indirect personal benefits: the possibility that the firm in which they work will reward them with a bonus, a raise or a promotion. 32

Such ignorance (where it exists) has a number of facets. The first is ignorance of the strict rules of the legal profession, which prohibit billing fraud and excessive billing, and how they apply in practical situations. The second is ignorance of billing practices within the lawyer’s firm, which (presumably) would not tolerate improper billing, at least because of the risk of losing the client. The third, and most important for the purposes of this paper, is ignorance of what other lawyers are actually doing. Few lawyers will have clear information about other lawyers’ billing practices; their beliefs are much more likely to be based on rumour and innuendo. All these factors will contribute to lawyers’ beliefs about what behaviour is necessary, possible and acceptable.

Lawyers engaging in unethical practices may therefore be a manifestation of “Yossarian’s response”: 33 that – given the lawyer’s understanding of the firm and her colleagues – she would be “a damned fool” to do things any other way. Importantly, the lawyer’s perception need not have any basis in reality in order for it to push the lawyer to engage in unethical conduct.

Previous empirical research

Previous research has clearly described how lawyers experience the outcome of these pressures. In 2005, Susan Saab Fortney conducted a cross profession study based on

29 Schiltz, above n 11, 908-9.
30 Lerman, above n 10. Nelman supports this view, suggesting that “abusive billing may actually be the result of both billing ignorance and poor billing judgment, which are sustained by an environmental pressure for lawyers to conform to the unethical billing practices of their colleagues. Put simply, lawyers may not know the practices they employ are unethical.” Nelman, above n 9, 722.
31 Richmond argues that the risk of unethical billing is that professional regulators or courts will view the lawyer’s actions as equivalent to misappropriating client funds. See Richmond, above n 5, 68-69. For a less optimistic view of how regulators are likely to characterise such behaviour, see Lerman, above n 10.
32 See Lerman, above n 24, 895-896.
33 See above n 1 and accompanying text.
interviews and surveys with ‘managing attorneys’ and 4600 ‘supervised attorneys’. Fortney hypothesized that a firm which imposed minimum billing targets would be likely to encourage a culture of overcharging, and respondents were clear that their prospects of both annual bonuses and promotion were directly linked to the extent to which they exceeded minimum billing targets. Similarly, Corbin’s analysis of her interviews with junior and senior lawyers in Queensland law firms “shows that the graduates feel pressured by firm culture, but more specifically budgetary policies, which in their view limit their ability to provide a quality service to clients.” Lisa Lerman has also found that adding hours to time sheets and charging undisclosed premiums as hours is ‘commonplace’.

In 1991, William Ross published the results of a survey of 270 private practitioners and 160 corporate counsel practising throughout the United States. In the abstract, there was general agreement about the effect of billable hours on ethics: 7.2 per cent of private practitioners and 7 per cent of corporate counsel respondents indicated their belief that time-based billing “substantially” or “very substantially” encourages fraud, while another 27.4 per cent of private practitioners and 37.5 per cent of corporate counsel respondents indicating that time-based billing had a moderate effect. However, differences between the two sets of respondents emerged when they described the effect that billable hour regimes had on lawyers’ efficiency: corporate counsel were much more likely than private practitioners to indicate that time-based billing diminishes efficiency. This difference appears to be based on different understandings of the ethics of time-based billing. Private practitioners were much more likely than corporate counsel to agree with the statement that “it is ethical for an attorney to bill a client for work (e.g., research of drafting) that originally was undertaken for another client and has since been ‘recycled’ for the second client” even if “the second client is billed on the based of time and is not informed that the work was ‘re-cycled’.” Similarly, corporate counsel were much more likely than private practitioners to see it as unethical to bill a client for travel time during which the lawyer is able to bill another client for work. These differences are remarkable considering that corporate counsel often start off as private practitioners, and supports the theory that lawyers in private practice are neither educated about nor fully

34 Fortney, above n 28.
35 Ibid.
37 Lerman, above n 10, 882.
38 Ross (1991), above n 2. See footnote 16 for a description of the survey methodology.
39 Ibid, 16-17.
40 Ibid, 17. Similar results are recorded when respondents are asked to speculate about what would happen to lawyers’ bills if time-based billing were replaced by an alternative. More than forty per cent of corporate counsel stated that they believed that the replacement would tend to “moderately” decrease bills; only 9.3% of private practitioners indicated that this was the case: see ibid at 85.
41 Ibid, 39.
42 Ibid, 58.
consider the ethical consequences of their billing behaviour. Corporate counsel by contrast learn to understand the ethical consequences from a client’s perspective.

Need for further empirical analysis

Two issues would therefore benefit from further empirical analysis. The first is whether time-based billing puts greater ethical pressure on lawyers and leads to more unethical behaviour than other billing systems. Lawyers in private practice would probably compete with regard to their budgets, even if they were not subject to set billable hours requirements. Private practices exist so that partners can make a profit, and it would still be easy to quantify the fees each lawyer earns (and to compare them) regardless of what system is used to calculate those fees (time billing or some other system). If so, complaints about billable hours requirements are focussing on a problem that is in fact just a proxy for deeper forces. Changes in billing methods alone may not reduce competition and overcharging. Rather it is necessary to assess individual lawyers’ values awareness – and the firm environment that shapes that values awareness – before appropriate remedies for unethical behaviour can be developed.

The second issue is therefore the degree to which the pattern of social and economic relations within a firm influence ethical behaviour in relation to billing. Ethical misconduct may be the result of an individual lawyer’s reaction to her perceptions about what is acceptable and widespread practice in her firm. Even if lawyers are financially rewarded almost solely on the basis of billable hours generated or clients attracted to the firm, firms might institute policies and processes aimed at reducing unethical behaviour, or they might tacitly encourage padding and overcharging. Firms may encourage discussion of ethical and unethical practices in billing, or they may allow fee earners to arrive at their own conclusions (some of which might be quite cynical).

This study aims to address these two issues using data from a survey of Queensland law firms and their lawyers. The survey and research strategy are described in the next section.

II. THE QUEENSLAND BILLING PRACTICES CHECK SURVEY

Purpose and design of the Billing Practices Check Survey

The Queensland Legal Services Commission (LSC) is the independent, single gateway, complaints-handler and disciplinary prosecutor for the Queensland legal

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43 All external complaints about legal practitioners in Queensland are supposed to be passed to the Legal Services Commission, as opposed to being handled by the professional associations, which previously had the role of handling complaints against lawyers.
profession. It receives complaints about lawyers from clients and others, and can either dismiss them, seek to resolve them, or take disciplinary and other action against the lawyer involved. Dealing with complaints, however, is largely reactionary and the extent to which complaint-handling activities can prevent further complaints arising is limited. Therefore the LSC also does a number of other things to proactively help improve standards of conduct in the legal profession and prevent complaints arising in the first place, including a suite of “ethics checks” for law firms. The Billing Practices Survey is one of these. Where reactive complaint handling can sometimes be tinged with adversarial interactions between regulators, consumers, and the profession, these more proactive approaches, including the Billing Practices Survey, are characterized by collaboration and participation of stakeholders. The ethics check surveys are intended to promote reflection, discussion, and, where appropriate, organisational change in relation to how lawyers handle a number of ethical, professional conduct and consumer issues in their practices.

The Billing Practices Survey (“the Survey”) particularly drew on Susan Fortney’s previous research on billable hours and their impact on ethics. The Survey questions fall into four broad categories:

1. Questions relating to billing practices inside law firms including the use of time-based billing and other methods of billing.

44 The LSC can, and does, craft responses to complaints that are aimed toward improving conduct and not just punishing misconduct, by encouraging remedial action for example. But by the time a complaint reaches an external regulator like the LSC, the damage has been done and the regulator can only do so much to effect repair and achieve further damage limitation.

45 The Workplace Culture Check was the first ethics check for law firms developed. It included questions in relation to the ethical infrastructure and workplace culture inside law firms. Subsequently, the LSC developed two further ethics checks, the Billing Practices Survey and the Complaints Management Survey. The Complaints Management survey was initially developed as part of the regulatory scheme for incorporated legal practices as a way to audit ethical infrastructure in incorporated legal practice. It was labelled as an “ethics check” to emphasize that the focus was not on checking whether appropriate management systems were in place, but rather on the more cultural aspects of a firm’s approach and arrangements for complaints management. All three ethics check surveys are available on the LSC’s website at [http://www.lsc.qld.gov.au/546.htm](http://www.lsc.qld.gov.au/546.htm) along with further information about how they are used and the results of the surveys. For an in depth discussion of the methodology and results of the Workplace Culture Check, see Christine Parker and Lyn Aitken, *The Queensland “Workplace Culture Check”: Learning from Reflection on Ethics Inside Law Firms*, GEORGETOWN JOURNAL OF LEGAL ETHICS (2011) forthcoming. For a description of the methodology of the Complaints Management Survey and discussion of its results, see Christine Parker and Linda Haller, *Inside Running: Internal Complaints Management and Regulation in the Legal Profession*, MONASH UNIVERSITY LAW REVIEW (forthcoming). For a general discussion of the rationale and methodology for this approach by the Legal Services Commission, see John Briton and Scott McLean, *Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era*, 11 LEGAL ETHICS 241 (2008).

46 Fortney, above n 28. See discussion above at text accompanying notes ???

(2) Questions relating to management policies and practices that might put pressure on practitioners to bill higher and to engage in unethical conduct to ensure higher bills. These questions also investigate the extent to which lawyers’ performance is measured and managed by reference to the amount they bill and whether bonuses are paid for exceeding billable hour targets.

(3) Questions relating to management policies and practices inside law firms that seek to ensure that billing practices comply with conduct rules, are understood and consented to by clients and that aim to deter, detect or prevent unethical conduct in billing. These include a number of specific questions about how lawyers and firms communicate with clients about fees and billing, how the firm determines bills, how different practices are billed and also a series of more general questions about whether the firm has ethics policies and training in place.

(4) Questions relating to the ‘ethical outcomes’ of firms billing practices and management policies, including whether practitioners feel under a lot of pressure to bill, whether they have observed instances of unethical conduct and how they would respond to hypothetical scenarios of difficult decisions around billing.

The aim of the Survey was to raise awareness among all law firm staff of the way that certain billing practices might lead to pressure to engage in unethical conduct and the policies and techniques law firms might use to alleviate those pressures. The Survey was also intended to raise lawyers’ consciousness of informal or unspoken assumptions in their firms about appropriate billing practices, as well as to encourage lawyers to critically reflect on whether or not their assumptions were justified and universally shared. Finally the Survey was intended to promote discussion within firms about these issues and, as a result, to prompt change in both individual and law firm attitudes and practices as appropriate. It was not intended as a one-way conversation. That is, the Survey was not designed to be a rigidly prescriptive checklist for good billing practices. The LSC hoped that lawyers and law firms could profitably use the Survey questions as a check of what they were doing. The focus, however, was primarily on uncovering the knowledge and attitudes of various members of the profession in relation to the billing practice operating within their practice and their results in order to open up genuine conversations within firms about appropriate billing. The Survey methodology was also designed to allow the regulator to learn from law firms about how they themselves manage billing.

The online survey instrument enabled systematic collection of the data that could be provided back to the firms for their reflection on their own firm’s culture, and further action on areas that needed improvement. Thus each firm that participated received results comparing how different levels of staff answered the survey questions and how their firm compared with other participating firms. The results were intended to help

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48 This is the authors’ term, not the term used in the survey.
49 Parker and Aitken, above n 45.
the firms reflect on their culture, and on any differing perceptions of their culture within their firm. This means that the Survey was designed primarily as a kind of “participatory action research”\textsuperscript{50} rather than for the purposes of “inferential research”.\textsuperscript{51} That is, the LSC’s purpose in developing the Survey was not to conduct systematic social science research capable of supporting generalization. Rather it was conducted to encourage lawyers and law firms to reflect on their workplace culture and ethical infrastructure, and to consider how they might reinforce what was working well in their law firms, and make changes in areas that needed attention.

Nevertheless the LSC’s method did utilize features of traditional research in systematically gathering information and analyzing and reporting on it. Therefore it can be used cautiously to draw inferences about billing practices inside law firms and their effects.\textsuperscript{52} Data generated by participatory action research like this across a wide enough range of cases can be used to draw (weakly, at least) inferences about likely patterns or relationships - where the patterns and relationships in the data are so strong that it is unlikely they could be explained any other way. It is also possible to use these data to throw doubt on theories where patterns and relationships in the data are completely inconsistent with that theory. However the observer must be very careful to pay attention to both the research tool that generated the data and the sample (and response rate) in determining what inferences can be drawn. This is important since there is still a dearth of empirical evidence on practices inside law firms.\textsuperscript{53}

One important issue is that there may be some social desirability bias in answers to these questions given the context of the Survey. That is, respondents may have answered the Survey questions in a way that is generally fairly negative about time billing because they perceived that the Survey was run by Queensland’s regulator of legal services, or because respondents only found out about the Survey from the management of their law firm. In addition, the tone of the Survey generally may have influenced respondents to respond in a way that emphasized their own ethical behaviour. However, the Survey was conducted anonymously, and many respondents took the opportunity to write negatively of their firm or of the Survey methodology itself.\textsuperscript{54} It is therefore safe to assume that social desirability bias was not so great as to undermine the results generally.


\textsuperscript{51} For a discussion of the requirements of inferential social research, see A. Bryman, \textit{Social Research Methods} (2008) 31. Other pages???

\textsuperscript{52} See Parker and Aitken above n 45 for a fuller argument on this point.


\textsuperscript{54} Social desirability may not be much of a concern if a respondent feels able to write: “This survey is a waste of my time and other members of the firm. We will not participate again.”
Use of Billing Practices Survey Data in this Paper

In this paper we use the data from the Survey to examine:

1) The extent to which lawyers report that their firms use three different billing systems (billable hours, fixed fee arrangements or contingency fees) and the extent to which they perceive that their firms use billable hours to assess and motivate their performance. The results are reported in section III below.

2) The extent to which lawyers have different perceptions and experiences of ethical pressures and concerns emanating from their firms’ billing practices. We also consider as far as possible whether these ethical pressures and concerns differ in firms with different billing practices. The results are reported in section IV below.

3) Whether firms seek to ameliorate any false signals sent out by hourly billing and performance measurement on the basis of hourly billing by implementing policies and systems for infusing ethical value into billing and into practice more generally, and whether these measures to infuse ethical value actually result in better perceptions and experiences, and hence better ethical outcomes. The results are reported in section V below.

To answer these questions, it is largely not necessary that Survey responses accurately reflect what is actually happening at the respondent’s firm. Rather it is important that the Survey be capable of capturing respondents’ perceptions about firm practices, and hence the pressures they feel. This is indeed the general thrust of the Survey.

It is equally important that we consider not only individual perceptions, but also whole firms. We want to know whether firms have consistent ethical characters in relation to billing that differ from one another. Or, to put it another way, do individuals in the same firm tend to have consistent or varying perceptions of the billing practices of the firm and of the ethical values and policies around billing? Consistency, or lack of it, among individuals within the firm gives us a sense of how well the leadership of the firm communicates or discusses and shares its ethics, policies and values. Firm leaders may feel that the ethical values of their firm are clear but, as we will show, our data uncovers a large degree of variation in individuals’ perceptions of firm policies and values within the same firm. This may mean that individual lawyers feel uncertain and unsupported about the applicability of ethical judgment to billing matters. We suggest that the ethical character of billing is a characteristic of the practices of the firm as a whole as much as it is a characteristic of the circumstances of the individual.

Participants in the Billing Practices Survey

The Queensland Legal Services Commission wrote to the managing partners/directors of all 172 law firms in Queensland with seven or more legal practitioners to invite them to complete the billing practices check during April and May 2010. A total of 40
firms accepted the invitation to take part in the Survey by the end of May 2010, resulting in 517 responses. However data cleaning for the purposes of the analysis in this paper resulted in 324 responses from 25 firms. As explained further below, the purpose was to create a robust data set with valid information about cultures and practices at the level of the firm as a whole, as well as about individuals’ perceptions.

In order to participate in the Survey, firms needed to ask all their employees—or at least representative samples of the different levels and classifications of employees, including those in branch offices—to complete the Survey anonymously online. Anonymity for participating staff of law firms, and confidentiality for the firms, was critically important to the success of the Survey in achieving both a good response rate and honest answers. The LSC did not deal directly with the individuals who completed the Survey, and the firms themselves participated anonymously through a coding process. This meant that the LSC (and the researchers) could not identify which responses came from which particular firm.

For the purposes of the analyses in this paper, the data have been cleaned in order to focus on the practices and understandings of fee earners, that is lawyers who have some responsibility for billing. Firms where less than five practitioners responded to the Survey were disregarded from the analysis for this paper since we are interested in examining the impact of firm practices and cultures on individuals. Similarly because we want to have a valid view of the firm practices and cultures in those firms that we do examine, we have also disregarded from the sample all those firms where we do not have a sufficient proportion of practitioners from the whole firm answering the Survey. This means that for the purposes of this paper, we use 324 responses from 25 firms.

The following subsections summarise the characteristics of the 324 individual respondents and 25 firms included in this analysis. It is important to note that not all respondents answered all the questions in the Survey. As a result the total number of responses will differ between questions, and the proportion of answers will be reported as a percentage.

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55 Firms that participated in the survey were invited to preserve their firm’s anonymity by identifying the firm in each survey response by means of a secret and self-selected code. Each individual respondent used the code in responding to the survey. The survey manager for each firm could access their own firm’s aggregate results online using a unique code, but the results available to the LSC (and researchers) show only the code for each firm, not the firm name. Each individual participated completely anonymously. The firm survey manager could see only aggregate results for his or her firm.

56 Individual responses that could not be connected to a valid firm code were disregarded. We also disregarded responses by individuals who are not full legal practitioners. That is, responses by non-legal staff, paralegal clerks and trainee lawyers (in their first year of legal employment) are disregarded.

57 That is challenging since due to the need to keep firms anonymous, the LSC did not collect data on the exact number of practicing certificate holders in each firm. Rather respondents only had to nominate the range in which they fell (5-9; 10-19; 20-49; >50). Therefore we have taken the lower number of the range for each firm and disregarded those responses where we did not have at least half of the lowest number of practitioners in that firm.
Characteristics of individual respondents and their firms

Of the 324 respondents, 56 per cent were male and 44 per cent were female,\(^{58}\) which closely matches the proportion of male and female solicitors for the whole of Queensland.\(^{59}\) As Table One shows, women are more likely to be junior solicitors,\(^{60}\) while men are more likely to hold senior positions,\(^{61}\) which also reflects the general population of lawyers in Queensland and throughout the common law world.\(^ {62}\)

Almost half (45 per cent) of respondents had been practising for less than five years, and almost two thirds (63 per cent) had been practising for less than ten years (see Table Two).\(^ {63}\) The distribution of respondents’ seniority varied between firms. Some firm’s respondents were entirely comprised of junior solicitors; for other firms, up to 50 per cent of respondents were partners/directors.

Sixteen (64 per cent) of the twenty-five firms participating in the Survey were partnerships (accounting for 76 per cent of the individual lawyer respondents to the Survey). The remaining nine firms were incorporated legal practices.\(^ {64}\) This is a slight

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\(^{58}\) Three respondents did not specify their gender.


\(^{60}\) Defined as not having achieved senior associateship, consultancy or partnership at the time of the Survey.

\(^{61}\) This distribution is statistically significant: Pearson chi-Square value 45.312, df = 8, \(p < 0.001\).


The fact that partners and directors are predominantly male should be borne in mind where later analyses indicate that seniority or gender affects responses. Generally it seems that seniority is more fundamental than gender in explaining lawyers’ perceptions of law firm management and ethical culture: Parker and Aitken, above n 45.

\(^{63}\) This seems consistent with the general demographic that more than half of Queensland solicitors are under 40 years of age: Law Society of Queensland, 2008-09 Annual Report above n 59, 10. Data on years practising is not available

\(^{64}\) In Queensland and a number of other states of Australia, legal practices are allowed to incorporate under the ordinary corporations legislation. Firms that incorporate have additional legal obligations to put in place internal ethical management systems: see Christine Parker, ‘An opportunity for the ethical maturation of the law firm: the ethical implications of incorporated and listed law firms’ in K. Tranter, *et al* (eds), *Reaffirming Legal Ethics: Taking Stock and New Ideas* (2010) 96-128; and Christine Parker, Tahlia Gordon and Steve Mark, ‘Regulating law firm ethics management: An empirical assessment of an innovation in regulation of the legal profession in New South Wales’ (2010) 37 *Journal of Law and Society* 466-500.
overrepresentation of the proportion of firms with seven or more practising certificate holders that are incorporated legal practices.\textsuperscript{65}

As shown in Table Three, 60 per cent of the 25 firms (accounting for 74 per cent of the individual lawyer respondents) were located in Queensland’s capital city (Brisbane), with the remainder in regional cities or towns. This means there is a small overrepresentation of city lawyers among our respondents.\textsuperscript{66} Thirty-six per cent of the firms (comprising 45 per cent of the individual respondents) had multiple offices. Approximately half the respondents worked at practices with more than twenty certified lawyers (see Table Three). This is an overrepresentation of larger firms compared with the general population of Queensland law firms.\textsuperscript{67} The gender composition of the firms varied widely, between 23 per cent and 91 per cent male.\textsuperscript{68}

Overall, as far as can be determined from the available data, the respondents to the Survey are broadly representative of gender and seniority demographic trends in the Queensland legal profession. They slightly over-represent city and incorporated legal practice lawyers. They strongly over-represent large firm lawyers, even taking into account that only firms with more than seven practitioners were invited to participate in the Survey. This was intended: the purpose of the Survey was to encourage discussion and critical self-examination of cultural and communication issues in relation to billing that are more relevant to firms with more than a few practitioners, and especially medium to large firms.

Regardless of the representativeness of the sample, the absolute sample size (25 firms and 324 lawyers) is still a reasonable slice of the 170 law firms with more than seven practitioners in Queensland.\textsuperscript{69} It is sufficient to provide some sense of the scale of any issues, and is enough to test the relationship between different factors. It is, however, important to bear in mind that this group of 25 firms have chosen themselves out of the 170 firms that were invited to do the Survey in the first place. We might expect these firms to have the greatest interest in ethical issues around billing and therefore the greatest commitment to doing the right thing. We therefore expect this group to represent the best case for billing practices and ethics. Any failure to accurately

\textsuperscript{65} Based on data reported at Legal Services Commission (Queensland), Annual Report 2009-2010, 61: 22\% of firms with seven or more practitioners are incorporated legal practices. This overrepresentation is not surprising given that ILPs special regulatory arrangements probably give them a closer relationship with the LSC which was conducting the survey.

\textsuperscript{66} About 64 per cent of Queensland solicitors practise in the Brisbane CBD and suburbs Law Society of Queensland 2008-09 Annual Report, above n 59, 10.

\textsuperscript{67} Legal Services Commission (Queensland) 2009-10 Annual Report, 61. According to the LSC’s figures firms with seven or more practitioners only represent about 10\% of all firms in Queensland. Even among this group, firms with 50 or more practitioners only represent about 12\% of firms in Queensland (compared with 34\% participating in the survey) while firms with less than 20 practitioners are underrepresented compared with the population of law firms.

\textsuperscript{68} No data are available on the gender profile of firms in Queensland generally to compare. But we do know that 55\% of lawyers in Queensland are male: Law Society of Queensland, 2008-09 Annual Report above n 59, 11.

\textsuperscript{69} It amounts to 15\% of all 170 firms and a much larger proportion of firms with more than 20 practitioners.
represent the objective truth of lawyers’ views about ethical behaviour will therefore tend to lie in an over-estimation of lawyers’ compliance with professional norms.

<table>
<thead>
<tr>
<th>Table One: Respondents’ Role in Firm, by Gender</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td><strong>Employee lawyers (not Partners / Directors)</strong></td>
</tr>
<tr>
<td>Male (n = 181)</td>
</tr>
<tr>
<td>61%</td>
</tr>
<tr>
<td>1st to 3rd year lawyer</td>
</tr>
<tr>
<td>4th+ year lawyer</td>
</tr>
<tr>
<td>Senior Associate</td>
</tr>
<tr>
<td>Consultant / Special Counsel</td>
</tr>
<tr>
<td>Partner / Director</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Table Two: Duration that Respondents had held a Practicing Certificate</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
<tr>
<td><strong>Male (n = 181)</strong></td>
</tr>
<tr>
<td>Less than 5 years</td>
</tr>
<tr>
<td>5 to 9 years</td>
</tr>
<tr>
<td>10 to 19 years</td>
</tr>
<tr>
<td>20 to 29 years</td>
</tr>
<tr>
<td>30+ years</td>
</tr>
</tbody>
</table>

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70 Three respondents did not specify their gender.

71 Three respondents did not specify their gender.
### III. FIRM BILLING METHODS AND PERFORMANCE MEASUREMENT

We begin our analysis by considering several aspects of firm billing practice that might put ethical pressure on lawyers: the billing methods do lawyers use—time based billing or other methods; the level of billable hour targets (if any); whether the number of hours billed is used as the main means of measuring the performance of lawyers or whether more broad-based performance measures are used; and some other practices that might put particular emphasis on the value of high billable hours such as publishing a list comparing lawyers’ performance or giving bonuses to those who make higher billings.

In each of the sections below, we look first at individual lawyers’ responses to the Survey. We then go on to aggregate individual responses to the firm level in order to evaluate whether different firms have different practices and ethical characters in relation to billing and what impact this has on individuals and their billing practices.

#### Billing methods

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72 As noted in the description of the methodology we used for this study, we excluded firms with less than five practicing certificate holders from the sample.
As shown in Table Four, the great majority (91 percent) of respondents indicated that their firm ‘always’ or ‘mostly’ used hourly billing.\textsuperscript{73} About a fifth (22 percent) reported that they ‘always’ or ‘mostly’ perform work for a fixed fee. Almost half (44 percent) indicated that their firm did work on a no-win, no-fee basis to some extent, but only 4 percent of respondents indicated that their firm ‘always’ provides services in this way.\textsuperscript{74} This means that this study is not sufficiently powerful to consider whether Kritzer’s view that different fee arrangements influence the specific nature of the unethical behaviour but not the likelihood of unethical behaviour generally, is correct. Other arrangements used from time to time included schedules of fees (5 respondents); assessment by independent costs assessors (4 respondents),\textsuperscript{75} and incentive fees.\textsuperscript{76}

In 18 of the 25, firms 85 percent or more of respondents reported that the firm always or mostly used time-based (hourly) billing (in 9 firms, 100 percent of lawyers chose this option). In only 2 firms did 70 percent or more of respondents choose that the firm ‘always’ or ‘mostly’ used fixed fee by agreement. In the remainder of the firms, well under half ticked ‘sometimes’ or ‘never’. There is therefore a fair degree of agreement within each firm as to the dominant billing method used.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
 & Always & Mostly & Sometimes & Never \\
\hline
Time Based (Hourly) (n=304) & 25\% & 66\% & 9\% & 0 \\
\hline
Time Based (No win No fee) (n=212) & 4\% & 9\% & 31\% & 56\% \\
\hline
Fixed Fee by agreement (n=243) & 2\% & 21\% & 73\% & 5\% \\
\hline
\end{tabular}
\caption{Individual Lawyers’ Perceptions of their Firm's Billing Methods}
\end{table}

\textsuperscript{73} This means that there is not sufficient variation in our data to robustly test what difference the various billing methods make to ethical perceptions and behaviors.

\textsuperscript{74} Section 325 of Queensland’s \textit{Legal Profession Act} 2007 prohibits law firms from charging contingency fees, which it defines as “a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates”. Speculative litigation is therefore funded by litigation funders who pay lawyers on an hourly rate, by fixed fee or on a no-win, no-fee basis. For a discussion of litigation funders in Australia, see Bernard Murphy and Camille Cameron, ‘Access to Justice and the Evolution of Class Action Litigation in Australia (2006) 30 Melbourne University Law Review 399.

\textsuperscript{75} It was not clear what on what basis of measurement such assessments were made.

\textsuperscript{76} These other methods were each mentioned in comments in the open text box provided for recording “other” billing methods.
Billable Hour Targets

Of the 324 respondents, 86 percent indicated that they were set a billable hour target. This is a lower proportion of lawyers than has been reported in the United States. In Australia billable hour targets are generally set as a daily figure, rather than by year. Table Five sets out the distribution of daily targets, broken down by gender. Table Six shows the breakdown by partner versus other lawyers. The targets are generally around six billable hours per day equates to 1380 billable hours per year, less than two-thirds of the targets set in very large firms in the United States before the Global Economic Crisis. If responses to the Survey suggest that respondents experience temptation to unethical practices with these fairly modest billable hour targets, then big firm American lawyers may well experience greater temptations, even with reductions in salaries and billable hour targets since the Global Economic Crisis.

A greater proportion of male lawyers had no daily target at all. A much greater proportion of female solicitors than male solicitors were required to bill more than six billable hours per day. The difference in gender distribution is likely to reflect the greater number of male solicitors who are partners or directors of the firm in which they work. Partners and directors will have obligations to expand their businesses and to manage junior lawyers and therefore lower billable hour targets or no targets (as reflected in Table Six).

Table Seven aggregates the individual lawyers’ reports of their daily billable hour targets by firm. Individuals within firms were not unanimous about the level of daily billable hour targets although the majority did tend to clump together. That is, individuals reported a variety of targets even within firms. But visual inspection of results showed that in most firms the individual responses tended to clump together towards the low, moderate or high end of the scale.

96% of respondents answering an on-line survey created by the ABA Commission on Billable Hours indicated that they had been set a minimum hour requirement. See The ABA Commission on Billable Hours, above n 3, 43.

A series of studies studying the billable hour targets for American lawyers are set out in Schiltz, above n 11, 891-2 and Richmond, above n 5, 88.

Chi squared tests confirmed that the association was statistically significant. p = 0.04, Pearson Chi-square value = 8.095, df = 1.

This difference is statistically significant: Pearson Chi-square: p = 0.01. Vae = 21.353, df = 5. It is also consistent with previous findings: Fortney found that the mean annual billable expectation for managing associates was 1,861 hours, while for supervised attorneys it was 1,887. See Fortney, above n 28, 175-176.
Table Five: Individual Lawyers’ Daily Billable Hour Targets, by Gender

<table>
<thead>
<tr>
<th></th>
<th>Male (n = 180)</th>
<th>Female (n = 141)</th>
<th>Total (n = 323)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No daily target</td>
<td>16%</td>
<td>11%</td>
<td>13%</td>
</tr>
<tr>
<td>Less than 6 hours per day</td>
<td>32%</td>
<td>21%</td>
<td>27%</td>
</tr>
<tr>
<td>6 hours per day</td>
<td>14%</td>
<td>14%</td>
<td>14%</td>
</tr>
<tr>
<td>More than 6 hours per day</td>
<td>39%</td>
<td>55%</td>
<td>46%</td>
</tr>
</tbody>
</table>

Table Six: Individual Lawyers’ Daily Billable Hour Targets, by Role

<table>
<thead>
<tr>
<th></th>
<th>Partner (n = 80)</th>
<th>Other lawyers (n = 243)</th>
<th>Total (n = 323)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No daily target</td>
<td>18%</td>
<td>12%</td>
<td>13%</td>
</tr>
<tr>
<td>Less than 6 hours per day</td>
<td>39%</td>
<td>23%</td>
<td>27%</td>
</tr>
<tr>
<td>6 hours per day</td>
<td>15%</td>
<td>13%</td>
<td>14%</td>
</tr>
<tr>
<td>More than 6 hours per day</td>
<td>29%</td>
<td>53%</td>
<td>46%</td>
</tr>
</tbody>
</table>

81 Two of the respondents who did not specify their gender provided information about the expected billable hours. Both these respondents indicated that they were expected to bill more than 6.5 hours per day.

82 All but one of the respondents indicating a budget greater than 6 hours per day indicated that their budget was 6.5 billable hours per day.
Table Seven: Level of Firm’s Overall Daily Billable Hour Targets

<table>
<thead>
<tr>
<th>Firm’s overall daily billable hour targets</th>
<th>Percentage of firms (n=25)</th>
</tr>
</thead>
<tbody>
<tr>
<td>No daily target</td>
<td>16%</td>
</tr>
<tr>
<td>Less than 6 hours per day</td>
<td>40%</td>
</tr>
<tr>
<td>6 hours per day</td>
<td>16%</td>
</tr>
<tr>
<td>More than 6 hours per day</td>
<td>28%</td>
</tr>
</tbody>
</table>

Billable hours as a measure of performance

For each of a series of potential performance measures, respondents were asked whether the firm ‘always’, ‘mostly’, ‘sometimes’, or ‘never’, took the issue into account. Table Eight displays the proportion of respondents who agreed that their firm ‘always’ or ‘mostly’ took the issue into account (shown in order from matters most commonly taken into account in assessments to those least commonly taken into account).

Partners are consistently more sanguine about the diversity and substance of the matters relevant to a fee earner’s performance than other lawyers. Strikingly, the proportion of partners who consider that a lawyer’s ethical reputation is always or mostly relevant to her compensation is almost twice as high as the proportion of other lawyers holding the same view (60 percent of partners versus 33 percent of employed lawyers). This means that among partners it is the fifth most commonly chosen item that is relevant to assessing lawyers’ performance. Among other lawyers, by contrast, it is number eight, ahead of “number of pro bono hours” only.

Looking more closely at the first item, the amount that the fee earner has billed, 71 percent of employed lawyers considered this to be ‘always’ relevant to the measurement and management of his or her performance compared with 65 percent of partners. That measure is the only one that a higher proportion of employed lawyers consider to be ‘always’ relevant. Employed lawyers are much more likely to believe that performance measurement and management is solely determined by the amount earned, while partners see performance assessment as based on a range of factors including the amount earned, competence, efficiency, and ethics.

These responses are consistent with Fortney’s findings that while 83 percent of supervised attorneys indicated that bonuses were largely based on billable hours

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83 The coding of firms’ overall billable hour targets (i.e. none, less than six hour, six hours, more than six hours) was achieved by visual inspection of the data to observe where the majority of individual responses within each firm fell.

84 Not shown in Table Eight.
production, only 67 percent of managing attorneys agreed.\textsuperscript{85} Fortney noted that this difference might arise because the populations of managing attorneys and supervised attorneys responding to her survey were drawn from different firms, because attorneys’ perceptions about bonuses differ within the same firm, or because managing attorneys declined to acknowledge the significant role that hours play in bonus determinations.\textsuperscript{86} As mentioned above, great care has been taken to ensure that the populations of junior and senior lawyers in this study are from the same set of 25 firms. Therefore it seems likely that senior and junior lawyers within the same firm have quite different perceptions about the variety and substance of matters taken into account in assessing lawyers’ performance. Junior lawyers feel more constrained—as if their performance is measured on a single dimension, not multiple ones—than management think they are.

Table Eight: Individual Lawyers’ Perception of Factors ‘Always’ or ‘Mostly’ Used to Measure and Manage Performance, by Role

<table>
<thead>
<tr>
<th></th>
<th>Partners</th>
<th>Other Lawyers</th>
<th>Total (n = 324)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Amount fee earner has billed</td>
<td>84%</td>
<td>79%\textsuperscript{†}</td>
<td>80%</td>
</tr>
<tr>
<td>Client satisfaction</td>
<td>77%</td>
<td>61%\textsuperscript{‡}</td>
<td>65%</td>
</tr>
<tr>
<td>Efficiency of fee earner’s work</td>
<td>72%</td>
<td>62%\textsuperscript{†}</td>
<td>65%</td>
</tr>
<tr>
<td>Fee earner’s diligence and competence</td>
<td>69%</td>
<td>60%\textsuperscript{‡}</td>
<td>62%</td>
</tr>
<tr>
<td>Accuracy of fee earner’s costs estimates</td>
<td>54%</td>
<td>42%\textsuperscript{‡}</td>
<td>45%</td>
</tr>
<tr>
<td>Amount of supervisory work undertaken</td>
<td>58%</td>
<td>38%\textsuperscript{‡}</td>
<td>43%</td>
</tr>
<tr>
<td>Fee earner’s maintenance of updated costs estimates</td>
<td>51%</td>
<td>38%\textsuperscript{‡}</td>
<td>41%</td>
</tr>
<tr>
<td>Fee earner’s ethical reputation</td>
<td>61%</td>
<td>33%\textsuperscript{‡}</td>
<td>40%</td>
</tr>
<tr>
<td>Number of pro-bono hours worked</td>
<td>48%</td>
<td>21%\textsuperscript{‡}</td>
<td>28%</td>
</tr>
</tbody>
</table>

\textsuperscript{†} indicates difference in distribution in responses between partners and other lawyers is significant to \( p = 0.05 \) or less.

\textsuperscript{‡} indicates difference in distribution in responses between partners and other lawyers is significant to \( p = 0.001 \) or less.

\textit{Bonuses for exceeding billable hour targets and billable hours rankings}

Firms use two other performance assessment approaches that can increase competition between lawyers: the circulation of lists that rank fee earners’

\textsuperscript{85} Fortney, above n 28, 176-177.

\textsuperscript{86} Ibid, 177.
performance and awarding bonuses when lawyers exceed billing targets. Thirty nine per cent (126 of 324) of respondents reported that their firm had adopted a policy to reward fee earners who exceeded their budget of billable hours.\textsuperscript{87} Thirty per cent of respondents (95 of 316) reported that their firm published a list that ranked fee earners’ performance. Only three per cent of these respondents (3 of 95) reported that their firm anonymized the list.

Aggregating to the firm level, the clear majority of lawyers in six of the firms said their firm published a ranking list of fee earners’ performance by name, while a majority of lawyers in 19 firms indicated that their firms did not.\textsuperscript{88} There was much less unanimity around whether bonuses are available for exceeding billable hours. In 19 firms, 60 percent or more of lawyers indicated that their firm did give bonuses to lawyers exceeding the target and in 15 firms less than half of the lawyers indicated that such bonuses existed. But unanimous agreement that the bonuses existed occurred in only two firms and unanimous agreement that the bonuses did not exist occurred in only three firms. It seems that most people in a firm know whether or not a list ranking fee earners’ performance is published: Knowledge of bonuses for exceeding billing targets is much less consistent. Perhaps lawyers only know for sure how their own bonuses, if they receive one, are calculated. This means that ‘knowledge’ of bonuses for exceeding billable hours targets could be a matter of rumour and jealousy rather than transparency.

\textit{Summary}

Respondents indicated that their working environment is dominated by billing, especially hourly billing. Hourly billing forms the basis of firms’ revenue calculations, and the great majority of respondents have billable hour targets (usually around six hours per day), which employee lawyers see as the primary means by which their performance is evaluated.

\textbf{IV. BILLABLE HOURS AND ETHICAL PRESSURES AND CONCERNS}

In this part we examine respondents’ experiences of unethical practices and then their perception of ethical pressure within the firm at which they work. The important question is whether there is a link between the billing practices in a lawyer’s firm and either their observation of unethical practices or their perception of ethical pressure. That is, are the billing practices described above associated with greater ethical pressure and more unethical outcomes? We analyse our data to determine whether

\textsuperscript{87} This comprised 43 percent of male respondents and 36 percent of female respondents. The difference was not quite statistically significant. Pearson Chi-square = 5.52; $p = 0.062$.

\textsuperscript{88} As with the previous table the coding of firms as to whether they publish a list or not is based on visual inspection of what individual respondents in that firm said. In each case the result was unanimous or close to unanimous.
there is such a link at both the individual and firm level. Finally we report on respondents’ reactions to two hypothetical scenarios—one involving bill padding and the other involving time billing—in order to flesh out these issues a little more.

**Ethical concerns**

Respondents were asked whether they had ever had ‘concerns’ about bill padding or observed actual incidents of bill padding and, if they had, what they had done about it. A summary of the responses is shown in Table Nine. By asking about both concerns about and actual observed instances of bill padding, we can see the degree to which lawyers’ suspicions run ahead of hard evidence.

Thirty-four percent of respondents reported concerns about the billing practices of other legal practitioners in their firm; and 23 percent reported having observed instances of ‘padding’ bills for work not actually performed (although only 2 percent reported that padding occurred regularly). As an overall figure, this is a sizeable proportion of the respondents.

<table>
<thead>
<tr>
<th>Table Nine: Proportions of Individual Lawyers with Ethical Concerns about Billing</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Have you ever had concerns about the billing practices of other legal practitioners/staff in your firm? (n=317)</strong></td>
</tr>
<tr>
<td><strong>During your employment at the firm have you ever observed any instances of “padding” bills for work not actually performed? (n=318)</strong></td>
</tr>
<tr>
<td></td>
</tr>
<tr>
<td></td>
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<td></td>
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</tbody>
</table>

There does, however, seem to be a substantial difference between firms. In 11 of the 25 firms, more than half of the lawyer respondents reported that they had had

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89 There were no statistically significant differences by gender or by partner versus other lawyers in the responses to these questions in our data. Although a higher proportion of partners reported such concerns about billing practices (38.3%) than other lawyers (32.6%), fewer partners reported having observed instances of bill padding (69.1%) than other lawyers (79.7%).

90 The only other data available for comparison is Ross (1991) above n 2, Appendix A. He found that 12.3 percent of private lawyers responded that lawyers ‘frequently’ pad their hours and 38 percent of private lawyers responded that lawyers ‘occasionally’ pad their hours.
concerns about the billing practices of others within the firm. In these firms perceptions that unethical billing practices may be being used appear to be rife. In a further 5 firms, more than 20 percent of the lawyers reported concerns about others’ billing practices. There were only two firms where no lawyers reported having concerns about the billing practices of others in the firm.

In 11 of the 25 firms, more than 20 percent of the lawyers reported that they had actually observed instances of bill padding. This includes 5 firms where more than 40 percent of the lawyers said they had observed bill padding. However in no firm had more than half of the lawyers observed bill padding.

Thus while it is likely that there will be at least one lawyer with ethical concerns in every firm, there are some firms where concerns of unethical practice are shared by significant parts of the workforce. The responses also indicate that a difference existed between people’s suspicions and their specific evidence. In such firms, the fact that actual evidence is limited may not be sufficient to counter rumor and suspicion, all of which would encourage the kind of ethical apathy that characterizes Yossarian’s response.

Those lawyers who had reported that they had ethical concerns about billing or had observed bill padding were asked how they had handled those concerns. Seven percent of those who answered this question reported doing nothing; 14 percent reported discussing the matter with their supervisor; 11 percent reported discussing the matter with another legal practitioner; and 9 percent discussed the matter with the legal practitioner in question. Other responses mentioned in open text comments included having the matter dealt with by the managing partner (2 instances) or the partners generally (3 instances); writing off the time without apparently taking further action (3 instances), and dealing with the conduct as a training issue (4 instances):

These were not cases of bills which had been rendered to clients, but instances of draft bills prepared by junior practitioners who have not had exposure to the taxation of costs regime. In these cases, I discussed with the practitioners what were and were not appropriate charges to be made.

Most respondents’ open text comments agreed that bill padding is ethically problematic, although some respondents expressed frustration at being compared to fee earners who are considered corrupt. For example,

Padding goes on throughout the firm and it is like an unwinnable war. I regularly get into trouble because I am not one of the big billers of the firm, even though my work is always done and my clients are happy. I

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91 The highest instance of concerns about billing practices was one firm where three quarters of the lawyers said they had concerns about the billing practices of others in the firm.
92 Largely the same firms as those where more than half of the lawyers had concerns about others’ billing practices, as discussed below.
93 One hundred and twenty respondents answered this question; that is 37% of the total 324 respondents – showing that the 34% and 23% in Table Nine are not completely overlapping groups.
refuse to pad my time sheet and I left a previous employer where time sheet padding was blatant and rife...Where the only way you ever get ahead is by making the firm lots of money, the pressure to pad time sheets will always be there.

On the other hand some responses indicated skepticism about whether double-charging is always ethically questionable. Especially where their work related to the production and use of template documents, respondents appeared to believe they were entitled to recoup the time and effort spent on the template by charging more than strict time-based billing would allow.94

In certain case ‘padding’ is very much warranted as time charging can at times devalue the true work that goes into a matter, from researching at home to using precedents developed over years of practice and experience. There are times where if you do not ‘pad’ a bill you are effectively devaluing your work. The key is to be fair and reasonable about it, in which case it’s not something which ought to raise any concerns.

These respondents did not appear to consider whether they should already have factored these costs into their hourly rates, or whether – if they were to adopt a value-billing approach – they and their clients would be better off charging a fixed fee. Finally, no respondent gave any indication that, if the value of their work to the client is the most important issue in determining the appropriate amount to bill, that they had ever decreased the amount of otherwise efficient work for which they had billed a client.

Ethical pressure

Respondents were asked to what extent they agreed with a series of statements about the nature of time billing generally and their experiences of legal practice at their firm. The statements and the average responses are set out in Table Ten. Taken as a whole, respondents were generally ambivalent about the benefits and the hazards of time billing. In particular, although few respondents agreed that time billing is the only valid way to measure fee earners’ performance (mean response of 2.2 on a scale from 1 to 5, ‘strongly disagree’ to ‘strongly agree’), they were less dismissive of the proposition that time billing was the only accurate way to assess and reward the effort that fee earners put in (mean response of 2.7), and even less dismissive of the proposition that time billing is the only realistic way to bill for most legal work (mean response of 3.1).

There is a significant difference between partners and other lawyers on a number of the statements that relate to the sense of ethical pressure that time billing creates in

lawyers’ minds. This is marked in Table Ten.\textsuperscript{95} Partners’ responses to the statements were marked by the same comparative optimism as their views about the matters relevant to performance assessment, except that in this case partners were more skeptical of statements that were negative about billing. Partners were significantly less likely than employed lawyers to agree that time billing creates greater competition, cutting corners, excessive duplication of effort and so on. The strongest difference is on the statement that time billing adversely affects the quality of mentoring, with partners much less likely to believe this is so than employed lawyers.

Particularly relevant for the purposes of this study is the statement, “It feels as if there is pressure to bill from the management of the practice”. Even the majority of partners agreed with this statement, but partners expressed less agreement than other lawyers.\textsuperscript{96} There are also large differences between firms in the average response of their lawyers to this question. In seven firms, the average response was 4.0 or above indicating that the vast majority of lawyers agreed or strongly agreed that they felt under pressure to bill. There was only one firm with an average response to this question under 3.0, indicating that the lawyers mostly did not feel under pressure to bill. In all other firms, the balance of lawyers’ opinion was that they felt under pressure to bill.

Respondents’ opinions of time billing varied according to whether they have a daily billable hour target or not. Those with no daily billable hour target are significantly less likely to report they feel under pressure to bill,\textsuperscript{97} and (perhaps unsurprisingly) are also significantly less likely to think that time is the only realistic way to bill for most legal work.\textsuperscript{98} Those without a daily billable hour target are significantly more likely to think that time billing does not encourage project or case planning,\textsuperscript{99} that is those who are subject to billable hour targets do not feel that project and case planning suffers as a result.

\textsuperscript{95} Calculated using between groups ANOVA. Full statistics available from the first author upon request.

\textsuperscript{96} Mean for partners is 3.5 and for other lawyers is 3.8. The difference in variation between the two groups is statistically significant. Between groups ANOVA F = 6.2; p = 0.01.

\textsuperscript{97} Mean of 3.1 compared with 3.8. Significance tested using ANOVA. F=9.983; p=.000.

\textsuperscript{98} Mean of 2.7 compared with 3.2. ANOVA: F=5; p=.007.

\textsuperscript{99} Mean of 3.2 compared with 2.8. ANOVA: F=4.2; p=.016.
Table Ten: Individual Lawyers' Sense of Support of and Pressure from Time Billing (n=316)

<table>
<thead>
<tr>
<th>Statements Supportive of Time Billing</th>
<th>Partners (n=237)</th>
<th>Other Lawyers (n=80)</th>
<th>All Lawyers (standard deviation shown in brackets) (n=316)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Time billing is the most realistic way to bill for most legal work</td>
<td>3.0</td>
<td>3.2</td>
<td>3.1 (1.2)</td>
</tr>
<tr>
<td>Time billing is the only accurate way to give lawyers fair remuneration for the work they put in</td>
<td>2.8</td>
<td>2.6</td>
<td>2.7 (1.1)</td>
</tr>
<tr>
<td>Time billing is the only valid way to measure a fee earner's performance</td>
<td>2.4</td>
<td>2.1</td>
<td>2.2 (1.0)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Statements About Ethical Pressures Arising from Time Billing</th>
<th>Partners (n=237)</th>
<th>Other Lawyers (n=80)</th>
<th>All Lawyers (standard deviation shown in brackets) (n=316)</th>
</tr>
</thead>
<tbody>
<tr>
<td>It feels as if there is pressure to bill from the management of the practice</td>
<td>3.5</td>
<td>3.8†</td>
<td>3.7 (1.1)</td>
</tr>
<tr>
<td>Time billing results in lawyers competing against each other within the practice</td>
<td>3.0</td>
<td>3.6‡</td>
<td>3.4 (1.1)</td>
</tr>
<tr>
<td>Time billing fails to discourage excessive duplication of effort</td>
<td>3.1</td>
<td>3.4†</td>
<td>3.3 (1.0)</td>
</tr>
<tr>
<td>Time billing adversely effects the quality of mentoring</td>
<td>2.6</td>
<td>3.3‡</td>
<td>3.1 (1.2)</td>
</tr>
<tr>
<td>Time billing encourages cutting corners when there is pressure to meet a budget</td>
<td>2.6</td>
<td>3.1†</td>
<td>2.9 (1.1)</td>
</tr>
<tr>
<td>Time billing does not encourage project or case planning</td>
<td>2.7</td>
<td>2.9</td>
<td>2.9 (1.1)</td>
</tr>
</tbody>
</table>

† indicates there is a difference in responses between partners and other lawyers that is significant to p = 0.05 or less.

‡ indicates there is a difference in responses between partners and other lawyers that is significant to p = 0.001 or less.
**Relationship between firm billing practices and ethical pressures and concerns: individuals**

A critical question is whether lawyers who feel that time-based billing is more important for their firms or who feel that billable hours dominate their performance assessment (as discussed in section III above) also have greater concerns about the ethical practices in their firm and feel under greater ethical pressure themselves. If so, this might be because they feel that the firm values maximization of billable hours to the exclusion of ethical concerns (as discussed in the subsections above). That is, do lawyers’ experiences of the importance of billable hours in their firms’ billing methods and performance assessment correlate with their perceptions of ethical outcomes in relation to billing in their firms?

Table Eleven shows the differences in perceptions of ethical pressure for lawyers who have a daily billable hours target, compared with lawyers who do not. As might be expected there is a dramatic difference in whether they feel “pressure to bill from the management of the practice”: 74 percent of those who do have daily targets feel pressure compared with 35 percent of those who do not.\(^{100}\) Having a billable hour target or not also makes a difference (albeit smaller) as to whether lawyers had observed any instances of padding bills for work not actually performed, and whether they had concerns about the billing practices of others in their firms.\(^{101}\)

Table Twelve shows a similar analysis, this time between those lawyers who report that they work in a firm that publishes a ranking list of fee earners, and those who do not. Lawyers in firms with ranking lists are more likely to feel under pressure to bill.\(^{102}\) However the difference is not as dramatic as that between those who do have daily billable hour targets and those that do not. Similarly lawyers in firms where rankings occur are also more likely to have observed instances of padding and to have had concerns about the billing practices of others in their firm compared with lawyers in firms that did not rank fee earners.\(^{103}\)

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\(^{100}\) The statistical significance could not be tested because of the relatively low number of respondents who have no daily billable hour targets – but the difference is so large it is clear that it is important.

\(^{101}\) 24% of those with a target had observed padding, compared with only 9% who did not have a target, and 36% of those with a target had concerns compared with 19% of those who did not have a target. Statistical significance could not be tested. See note 100 above.

\(^{102}\) 78% of ranked lawyers feel under pressure to bill compared with 64% of non-ranked lawyers.

\(^{103}\) Again, parameters for tests of significant difference were not met and therefore they cannot be calculated.
### Table Eleven: Associations between Whether Lawyers Have a Daily Billable Hour Target and Ethical Pressures and Concerns

<table>
<thead>
<tr>
<th>Proportion of lawyers who report that they do/do not have a daily billable hour target…</th>
<th>Daily billable hour target (n=272)</th>
<th>No daily billable hour target (n=43)</th>
</tr>
</thead>
<tbody>
<tr>
<td>…who strongly agree / agree with statement “It feels as if there is pressure to bill from the management of the practice”</td>
<td>74%</td>
<td>35%</td>
</tr>
<tr>
<td>… who have observed any instances of padding</td>
<td>24%</td>
<td>9%</td>
</tr>
<tr>
<td>…who have ever had concerns about the billing practices of other legal practitioners/staff in their firm</td>
<td>36%</td>
<td>19%</td>
</tr>
</tbody>
</table>

### Table Twelve: Associations between Whether Firm Publishes a Ranking List of Fee Earners and Ethical Pressures and Concerns

<table>
<thead>
<tr>
<th>Proportion of lawyers who report that their firm does/does not publish a ranking list…</th>
<th>Firm does publish a ranking (n=95\textsuperscript{104})</th>
<th>Firm does not publish a ranking (n=222)</th>
</tr>
</thead>
<tbody>
<tr>
<td>…who strongly agree / agree with statement “It feels as if there is pressure to bill from the management of the practice”</td>
<td>78%</td>
<td>64%</td>
</tr>
<tr>
<td>… who have observed any instances of padding</td>
<td>30%</td>
<td>20%</td>
</tr>
<tr>
<td>…who have ever had concerns about the billing practices of other legal practitioners/staff in their firm</td>
<td>39%</td>
<td>32%</td>
</tr>
</tbody>
</table>

**Relationship between firm billing practices and ethical pressures and concerns: firms**

The section above considers the relationship between perceptions of billing practices and ethical outcomes at the level of the individual lawyer. But it is equally important

\textsuperscript{104} Of the 95 respondents, 3 respondents indicated that their firm’s list does not identify the fee earners.
to consider this relationship at the level of the whole firm, and how it impacts on individuals. We would expect that if billable hours are the source of ethical concerns, then those firms where lawyers in general report higher billable hours and greater use of billable hours in performance assessment would also be firms in which lawyers have more ethical concerns and feel under greater pressure to bill. Therefore we tested whether there is any statistical associations between various billing practices and ethical pressures and concerns at the whole of firm level (shown in Table Thirteen).

We did not find any significant correlation between the percentage of lawyers in the firm reporting that their firm always or mostly uses time-based billing and the level of ethical pressures and concerns felt by lawyers in those firms. Nor did the use of set billable hour targets, the awarding of bonuses for exceeding targets or the circulation of lists ranking billing performance make a difference to firm lawyers’ overall perceptions of ethical pressures and concerns. Thus there we find no evidence that firms’ use of billable hours directly and uniformly leads to higher ethical concerns and pressures.

There are however a series of correlations between solicitors perceiving pressure from management to bill, solicitors having concerns about the billing practices of other fee earners in their firm, and solicitors observing instances of bill padding for work not performed. If a firm has more solicitors agreeing with the proposition that there are concerns about billing practices, that firm will also have more solicitors who agree that there is pressure to bill and that they have observed bill padding. However, on a firm-wide basis, a higher average sense of pressure to bill among the lawyers does not correlate with observed instances of bill-padding. In some firms, then, there is a shared perception of pressure to bill associated with concerns about billing practices—but this does not mean that lawyers in fact have observed unethical practice. Nor does it relate directly to the fact that those firms formally use billable

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105 There were not enough firms where it was clear they always or mostly used fixed fees by agreement to do a similar statistic. ANOVA was used to check for correlations. Full statistics are available from the first author. There was also no correlation dividing the firms into those in which a majority of lawyers reported time based billing was used and those in which a majority said it was not used.

106 In firms without a billable hours target, 25% of lawyers indicated concerns about other lawyers’ billing practices, 10% reported having observed bill padding, and the mean response when questioned about feeling pressure to bill was 3.4. In firms with a billable hours target, 39% of lawyers indicated concerns about other lawyers’ billing practices, 22% reported having observed bill padding, and the mean response when questioned about feeling pressure to bill was 3.7. Although figures suggesting ethical problems are uniformly higher for firms with billable hours targets, none of the comparisons was statistically significant or approached significance. There was also no significant associations between between firms with respondents reporting higher billable hours and firms with respondents reporting lower billable hours.

107 As mentioned previously, the lawyers in each firm are not even very unanimous about whether their firm offers such bonuses or not. It is not possible to reliably divide the firms into those that offer such a bonus and those that do not. Therefore the statistic has been calculated only using proportion of lawyers in each firm who have reported that the firm has such a bonus.

108 Because lawyers were fairly unanimous about whether their firms published a ranking list or not, it was possible to divide the firms into those that did publish a ranking list and those that did not (on the basis of what the vast majority of lawyers in each firm reported). On this basis 6 firms did publish a ranking list and 19 firms did not.
hours in particular ways. Rather it is a matter of perception and perhaps rumour and suspicion among lawyers in those firms.
Table Thirteen: Is there a significant association between firm billing practices and three ethical outcomes?

<table>
<thead>
<tr>
<th>Firm Billing Practices</th>
<th>Three Ethical Concerns</th>
</tr>
</thead>
<tbody>
<tr>
<td>Firm always/mostly uses time-based (hourly) billing</td>
<td>Proportion of lawyers in firm who strongly agree / agree with statement “It feels as if there is pressure to bill from the management of the practice”.</td>
</tr>
<tr>
<td>Existence/level of billable hour targets in firm</td>
<td>Proportion of lawyers in firm who have observed any instances of padding</td>
</tr>
<tr>
<td>Firm gives bonuses for exceeding billable hour target</td>
<td>Proportion of lawyers in firm who have ever had concerns about the billing practices of other legal practitioners/staff in their firm</td>
</tr>
<tr>
<td>Firm publishes a ranking list of fee earners</td>
<td>No significant associations</td>
</tr>
</tbody>
</table>

**Three Ethical Outcomes**

<table>
<thead>
<tr>
<th>Proportion of lawyers in firm who strongly agree / agree with statement “It feels as if there is pressure to bill from the management of the practice”.</th>
<th>NA</th>
<th>Not significantly associated</th>
<th>Significantly and positively associated</th>
<th>Significantly and positively associated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proportion of lawyers in firm who have observed any instances of padding</td>
<td>Not significantly associated</td>
<td>NA</td>
<td>Significantly and positively associated</td>
<td>Significantly and positively associated</td>
</tr>
<tr>
<td>Proportion of lawyers in firm who have ever had concerns about the billing practices of other legal practitioners/staff in their firm</td>
<td>Significantly and positively associated</td>
<td>Significantly and positively associated</td>
<td>NA</td>
<td></td>
</tr>
</tbody>
</table>

---

109 Pearson Correlation = 0.527, significance (2-tailed) = 0.007.
110 Pearson Correlation = 0.628, significance (2-tailed) = 0.001.
111 See note 109 above.
112 See note 110 above.
Hypothetical scenarios

A more in depth way to understand how billing pressures operate in lawyers’ day-to-day practice is through their responses to a series of realistic hypothetical scenarios that were included in the Survey.113

The first scenario is as follows:

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.

Roughly three quarters of respondents stated that the billing practice was not ethically appropriate, and that the culture in their firm did not encourage the practice (see Table Fourteen). There was no difference between partners’ and other lawyers’ views about the ethical propriety of the hypothetical scenario. However, partners were slightly more optimistic than other lawyers that the culture of their firm discouraged the practice.

Table Fourteen: Responses to first hypothetical scenario

<table>
<thead>
<tr>
<th></th>
<th>Partners (n=81)</th>
<th>Others (n=237)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Yes</td>
<td>No</td>
</tr>
<tr>
<td>Billing practice is</td>
<td></td>
<td></td>
</tr>
<tr>
<td>ethically appropriate</td>
<td>7%</td>
<td>78%</td>
</tr>
<tr>
<td>(n = 318)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Culture in firm</td>
<td></td>
<td></td>
</tr>
<tr>
<td>encourages this practice</td>
<td>7%</td>
<td>80%</td>
</tr>
<tr>
<td>(n = 317)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

In open text comments 27 people stated that they responded ‘maybe’ because they did not know the answer; a further eight expressly indicated that did not know about the ethical acceptability of the billing practice because they did not know about the firm policy. This result is consistent with Fortney’s survey, in which one quarter of respondents did not know about the relevant billing guidelines, which Fortney noted

113 There were five scenarios included in the Survey. We briefly discuss two here.
was the same as having no guidance at all.  Other open text comments disputed whether charging the $9000 really was unethical on the basis that it might reflect the value of the work. But, as some recognized, the problem is that it may not have been agreed with the client before the bill was rendered.

The second scenario was as follows:

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 traveling/waiting on their behalf.

Respondents were asked whether they would bill both client A and client B two hours, and whether the culture in their firm encouraged the practice. Again, around three quarters of respondents stated that it would be ethically inappropriate to bill both clients, and that the culture in their firm did not encourage the practice (see Table Fifteen). Again, partners were more optimistic than employee lawyers in their belief that the culture of the firm discouraged the practice. And again, 25 of 43 respondents who responded ‘maybe’ and provided additional comments indicated that they were unaware of a firm policy on the appropriate charging practices.

<table>
<thead>
<tr>
<th>Table Fifteen: Responses to Hypothetical Scenario involving billing clients for same time period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Partners (n=81)</td>
</tr>
<tr>
<td>----------------</td>
</tr>
<tr>
<td>Yes</td>
</tr>
<tr>
<td>Bill both client A and client B</td>
</tr>
<tr>
<td>Culture in firm encourages this practice (n = 317)</td>
</tr>
</tbody>
</table>

114 Fortney, above n 2, 253.
115 One respondent commented: ‘I answered ‘maybe’ because the client thought they would be charged at an hourly rate, which they obviously have not been given the premium bill. However, if the work was worth $10,000 as quoted (and I understand that is subjective) and the client agreed to that quote, I do not think there is an ethical issue in charging the client $9k. The problem arises, as I said, with the fact that the client thought they would be charged at an hourly rate for work done.’ Another commented: ‘Lawyers fall victim to undercharging for their IP. Some matters should be ‘value’ billed rather than time billed, particularly if the lawyer involved is particularly efficient and the general estimate is more than the time incurred. Also, with long term clients it is a matter of ‘swings and roundabouts’ where there are substantial write offs on other matters or work provided without time being charged to the file.’

116 One respondent comments: ‘A contract is binding and so if the fee agreement (contract) does not allow for a performance uplift over and above physical time spent then billing more than the contractual amount is wrong (i.e. time spent is the determinant of the appropriate fee). If however the fee agreement allows for an uplift over and above time and the client is happy to pay the premium for the job well done then you would be mad not to charge the higher fee.’
Summary

The results set out in this section provide further evidence of a series of schisms between and within firms about appropriate billing practices. First, evidence exists of differences between partners and employee lawyers about what billing practices are expected or encouraged. This further emphasizes the difference between lawyers’ perceptions of the basis on which they might advance their careers. Second, significant numbers of lawyers in some firms are suspicious about the behavior of fellow lawyers. These suspicions are not strongly based in real knowledge of other people’s behavior. One possible reason for these suspicions is another schism that exists: between people who consider time-based billing to be definitive of the amount that they should charge the client, and those who consider time-based billing to be indicative. To the extent that correct billing practices are ever discussed within the firm (this issue is discussed below), the time-skeptics’ views could be a source of suspicion.

V. FIRM ETHICS POLICIES AND THEIR EFFECTS

Finally we consider whether lawyers are aware of their firms having systems in place aimed at preventing ethical misconduct in relation to billing, and whether these make any difference to ethical pressures and concerns.

Firm ethics policies and ethical pressures and concerns: individual lawyers

Some firms put in place measures to educate lawyers about their ethical obligations in relation to billing and to uncover and punish unethical billing practices. Table Sixteen shows the responses to a question asking whether respondents’ firms had in place a number of policies and/or procedures specifically for ensuring ethical practices in relation to billing. The vast majority of lawyers reported that reactive monitoring practices were in place: measures to deal with complaints and concerns raised by clients and employees. Far fewer reported that more proactive measures were in place: a smaller majority reported that there were policies or procedures in place to ‘monitor’ or ‘review’ billing practices, and lower proportions of lawyers reported that their firms had specific measures in place to review all accounts or to review timesheets regularly. Partners are generally more aware of policies and procedures for

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117 There were also a number of further, even more specific questions about policies and procedures in relation to billing practices in the firms that are not reported here. Full results of the survey are available on the Queensland Legal Services Commission website.
monitoring billing practices than are junior lawyers.\textsuperscript{118} There is one exception: employed solicitors are more aware that their billing practices are directly reviewed.\textsuperscript{119}

Similarly, in a separate question, respondents were asked whether their firms audited fee earners’ billing practices before the firm paid bonuses: only 18 percent reported that their firm audited billing practices.\textsuperscript{120} There was a very large difference between partners and employed lawyers here: 41 percent of partners said their firms did audit a fee earner’s billing practices before paying a bonus, but only 10 percent of employed lawyers said this was the case. The vast majority of employed lawyers (75 percent) did not know whether auditing occurred or not, while only 13 percent of partners said they did not know.\textsuperscript{121}

Policies and procedures in relation to billing practices specifically are not the only measures that might be important in controlling unethical billing: more general systems and procedures for training and discussing ethical issues might also have an effect. Table Seventeen therefore shows results to a question that asked whether various avenues for ethical awareness and raising ethical concerns were available in the firm. In no case did more than half the respondents report that their firm had employed the measure. The highest responses were for ethics training, which 44 percent of respondents stated took place in their firms. Six per cent of employees did not know whether their firm used any of the nominated methods to address ethical concerns. Partners are more likely to report that their firm has a designated ethics partner or solicitor than employed lawyers (46 percent compared with 35 percent) and that their firm has scheduled in-firm meetings to address ethical concerns and queries (41 percent of partners compared with 27 percent of employed lawyers tick yes).\textsuperscript{122}

In their (optional) open text responses to this question, a number of lawyers commented that their firm had an informal culture of dealing with ethical concerns, generally by discussing concerns with a partner.

Two of our partners deal with ethical issues. We have a culture of raising problems as they arise (without blame) and then designate a partner to resolve the issue. Our Monday meetings are used to reinforce ethical and other queries of that nature and are openly discussed with all present.

I’m not sure if we have a formal “policy”. The partners have an open door policy about pretty much everything, including employees’ concerns about ethics, relating to billing or otherwise. If any employee, whether it be a

\textsuperscript{118} The difference is statistically significant for all items: Pearson chi square: $p = .000$ for all items. The results also differ significantly by gender, but we expect that the explanation for this difference is the difference in seniority in the firm. Therefore we only show the breakdown by seniority.

\textsuperscript{119} This difference confirms previous research on differences between partners and other lawyers in relation to workplace culture policies. See Parker and Aitken, above n 45.

\textsuperscript{120} 23 percent reported that their firm did not audit billing practices, and 59 percent did not know either way. 319 respondents answered the question.

\textsuperscript{121} The difference is obviously statistically significant. Pearson chi square: $p = .000$.

\textsuperscript{122} Parameters for testing statistical significance do not apply.
solicitor or support staff member, was unsure about the amount of an account, they are always encouraged to talk to the supervising solicitor or one of the partners to put their concerns forward and resolve the issue.

A number also mentioned encouraging use of the professional association, the Law Society of Queensland, to answer ethical queries:

The staff are encouraged to approach a partner with ethical concerns and they don’t know the partners approach the Law Society.

However some lawyers did mention more specific and proactive firm procedures or policies to ensure ethical concerns are ventilated and resolved such as:

Regular emails requesting issues be identified with supervising partner and escalated as necessary.

Practice support lawyers in the firm conduct regular file audits.

### Table Sixteen: Individual Lawyers’ Awareness that their Firm has Ethics Policies for Billing by Role

<table>
<thead>
<tr>
<th>Does your firm have a policy and/or procedure in place for:</th>
<th>Partner</th>
<th>Other lawyers</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dealing with clients’ account complaints</td>
<td>98%</td>
<td>79%</td>
<td>83%</td>
</tr>
<tr>
<td>Dealing with employees’ concerns about an account</td>
<td>82%</td>
<td>66%</td>
<td>70%</td>
</tr>
<tr>
<td>Dealing with ethical concerns or queries about billing</td>
<td>78%</td>
<td>64%</td>
<td>68%</td>
</tr>
<tr>
<td>Supervisors reviewing all solicitors’ accounts every month</td>
<td>65%</td>
<td>68%</td>
<td>67%</td>
</tr>
<tr>
<td>Monitoring billing practices</td>
<td>78%</td>
<td>59%</td>
<td>64%</td>
</tr>
<tr>
<td>Reviewing all accounts rendered by the practice</td>
<td>64%</td>
<td>60%</td>
<td>61%</td>
</tr>
<tr>
<td>Reviewing billing practices</td>
<td>70%</td>
<td>52%</td>
<td>57%</td>
</tr>
<tr>
<td>Reviewing all solicitors’ timesheets regularly</td>
<td>55%</td>
<td>58%</td>
<td>57%</td>
</tr>
<tr>
<td>Detecting improper billing practices</td>
<td>69%</td>
<td>45%</td>
<td>51%</td>
</tr>
<tr>
<td>Reporting improper billing practices to Legal Services Commissioner</td>
<td>25%</td>
<td>32%</td>
<td>30%</td>
</tr>
</tbody>
</table>
Table Seventeen: Individual Lawyers’ Awareness that Firm has General Ethics Policies

<table>
<thead>
<tr>
<th>Does your firm have any of the following to address ethical concerns or queries of employees?</th>
<th>Percentage of lawyers ticking yes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Designated ethics partner/solicitor:</td>
<td>38%</td>
</tr>
<tr>
<td>Ethics committee:</td>
<td>24%</td>
</tr>
<tr>
<td>Written policy of encouraging reporting of misconduct:</td>
<td>26%</td>
</tr>
<tr>
<td>Scheduled in-firm meetings:</td>
<td>31%</td>
</tr>
<tr>
<td>Scheduled training on ethics issues:</td>
<td>44%</td>
</tr>
</tbody>
</table>

The critical question is whether firm ethics policies actually alleviate lawyers’ perceptions that they are under ethical pressure in relation to billing, and reduce actual unethical practices.

Statistical testing showed that there is no relationship between individual lawyers reporting that their firms have policies in place to encourage ethical billing practices and whether they felt under more or less pressure to bill. However, there is a statistical relationship between firm policies to ensure ethical billing and lawyers reporting lesser observed instances of bill padding, and also reporting a lower level of ethical concerns about the billing practices of other lawyers within their firms (see Tables Eighteen and Nineteen). Thus at the level of individual lawyers’ perceptions, monitoring did not reduce lawyers’ perceptions that management placed them under pressure to bill, but eased perceptions that their competitors were engaging in bill padding.

123 That is there is no statistical correlation between any of the items shown in Table 16 and our measure of whether lawyers feel under pressure to bill.

124 The difference is statistically significant. Pearson chi-square = 16.539; p = 0.002. (There were similar, but generally weaker, relationships between most of the other items shown in Table Sixteen and either ethical concerns or observed instances of bill padding or both: Statistics available from the first author upon request. Similar tests of the association between lawyers reporting the existence of general ethics policies in their firms (the items shown in Table Seventeen) and the three ethical outcomes did not identify any clear relationship: Statistics available from the first author upon request.)
Table Eighteen: Observed padding, by existence of policies detecting improper billing practices

<table>
<thead>
<tr>
<th>Firm has a policy in place to detect improper billing practices?</th>
<th>Yes (n = 161)</th>
<th>No (n = 46)</th>
<th>Don’t know (n = 108)</th>
<th>Total (n = 315)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>19%</td>
<td>81%</td>
<td></td>
<td>23%</td>
</tr>
<tr>
<td>No</td>
<td>45%</td>
<td>55%</td>
<td></td>
<td>50%</td>
</tr>
<tr>
<td>Don’t know</td>
<td>20%</td>
<td>79%</td>
<td></td>
<td>20%</td>
</tr>
</tbody>
</table>

Table Nineteen: Concerns about improper billing practices, by existence of policies detecting improper billing practices

<table>
<thead>
<tr>
<th>Firm has a policy in place to detect improper billing practices?</th>
<th>Yes (n = 161)</th>
<th>No (n = 46)</th>
<th>Don’t know (n = 108)</th>
<th>Total (n = 315)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>24%</td>
<td>76%</td>
<td></td>
<td>34%</td>
</tr>
<tr>
<td>No</td>
<td>57%</td>
<td>44%</td>
<td></td>
<td>50%</td>
</tr>
<tr>
<td>Don’t know</td>
<td>40%</td>
<td>60%</td>
<td></td>
<td>40%</td>
</tr>
</tbody>
</table>

Firm ethics policies and ethical pressures and concerns: firms

Ethics policies are intended to ensure consistent perceptions and practices throughout the whole firm. Yet respondents from the same firm often answered these questions differently. In many firms there was no clear majority one way or another as to whether a particular aspect of ethical infrastructure was in place. If we consider a clear majority to be either 25% or less or 75% or more reporting the same way, then respondents from 18 of the 25 firms could not agree about whether an internal discipline policy for improper billing existed. 14 of the 25 firms could not agree whether the firm had a policy in place for detecting improper billing practices. That is, between 25% and 75% of the respondents from these 14 firms agreed that there was a policy in place to detect improper billing practices. Respondents from 11 of the 25 firms could not agree about whether a specifically designated ethics partner had been appointed. Respondents from 11 of the 25 firms also could not agree about whether the firm offered scheduled training on ethics issues.

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125 Pearson chi-square p = 0.000: value = 18.795, df = 2.
126 If we consider a clear majority to be either 25% or less or 75% or more reporting the same way, then
exists, or significant disagreement about whether a particular item of infrastructure fits within the definition given.

There are also no correlations between the proportion of lawyers in a firm reporting that a certain ethical system/policy is in place and ethical outcomes. This is hardly surprising given there is very little agreement within firms about the existence of elements of ethical infrastructure in each firm.

This finding supports the argument that any impacts of these ethical systems on ethical outcomes are in lawyers’ perceptions of their work environment, rather than the objective effects of the systems as such. That is, if an individual lawyer feels that their firm is monitoring his or her colleagues’ behavior, he/she will feel comforted that those colleagues are not behaving unethically (see the section immediately above)—but this does not necessarily mean that ethics policies necessarily have any direct, independent effect consistently throughout the whole firm.127 There is evidence from studies of other areas of rule-following that people are more likely to comply with rules if they believe that their colleagues and competitors will be caught and punished if they do not follow the rules.128 There is also evidence in psychology that people feel others need to be deterred from breaking the rules, whereas they believe that they themselves will behave ethically because it is the right thing to do without the need for deterrence.129 Indeed deterrence might be counterproductive.130

V. CONCLUSION

The problems of billable hours have triggered a debate regarding the merits of time-based billing over, for example, value-based tenders or event-fee substitutes. There is no consensus as to which ought to prevail.131 In reality, lawyers face an insoluble


130 Ibid.

131 See, for example, Webb, above n 18; Gibbs, above n 3, 18-19, Amora Jamison, Analysing Alternatives to Time-Based Billing and the Australian Legal Market (paper presented by New South Wales Legal Services Commissioner, 18 July 2007). Available at:
conflict of interest when billing their clients; time-based costing arguably rewards inefficiency, while fixed fee agreements may encourage fee earners to perform work with the minimum of effort. As Bartley points out, “there is nothing inherently wrong with billing on the basis of time spent – provided the time is product, recorded fairly and charged at an appropriate rate.”

This paper has confirmed that “many of the legal profession’s contemporary woes intersect at the billable hour.” We have uncovered a series of clear phenomena that influence lawyers’ working environment in a way that can push lawyers towards unethical behaviour. These factors are not just billable hours, but the culture of competition and lawyers’ assumptions about other lawyers. These factors need to be addressed by lawyers and the firms for which they work. It seems clear that unethical behaviour would continue to exist–albeit perhaps less acutely–if an alternate billing method replaced billable hours. However, firms can counter the perceptions that influence a lawyer to engage in unethical billing by clarifying that lawyers can achieve high status by honest means.

Cultural disconnect

First, junior lawyers labor under the strong and consistent impression that the value of their work is assessed primarily on the basis of the fees that they earn. As one respondents to the survey commented, when given the opportunity to nominate “other” issues which would count toward lawyers’ performance reviews:

This firm is all about the money and while they say and like to pretend that other things matter, in reality they don’t. It is all about how much money you make the partners. This view is incorrect to the extent that partners are considerably more optimistic about the extent to which other aspects of a lawyer’s work is considered when management assess that lawyer’s performance. These responses are consistent with Fortney’s report of “a disconnect between partners and associates [whereby many] associates do not feel committed to their firms and partners do not feel committed to associates.”

Lawyers who perceive that their firms are only interested in revenue production may feel a direct pressure to bill and a reduced motivation to deal with their case


132 Webb, above n 18, 40; Ross (1991) above n 2, 24-25.
133 Spigelman, above n 3.
134 Bartley, above n 18. See Richmond, above n 5, fn 41 for a list of cases in the United States involving misconduct relating to fixed fees.
135 Bartley, ibid.
136 Hirshon, above n 4, ix.
efficiently. Less directly, lawyers’ reduced loyalty to the firm causes a declining loyalty to the firm’s reputation. Especially where several lawyers work on the one matter (and any individual lawyer’s billable hours are merged with other lawyers’ charges), the client’s dissatisfaction with excessive billing is likely to be directed at the firm, rather than the lawyer individually. Unethical lawyers are therefore somewhat shielded from the possible consequences of their actions. Firm leaders therefore need to know what employed lawyers are thinking and talking about as opposed to feeling comfortable that they are sending the right messages from on top.

**Ethical confusion**

Second, a significant minority of lawyers do not have strong views about the inherent ethical character of bill padding. These lawyers do not view their work as involving merely a service; to them, allegations that padding is unethical beg the question about why they should only be entitled to charge for their marginal costs. Instead, they look to their firm’s policy for guidance on these issues. This can be problematic, not least because employees at many firms cannot agree on whether a policy even exists. Seventeen per cent of the respondents did not know whether their firm used any of the nominated methods to address ethical concerns.

Disagreement about whether a policy exists and what a policy requires has a cascading effect. Some lawyers – who have not derived an ethical judgment from first principles – might engage in questionable practices because they are unaware that a policy prevents unethical behaviour. The perception that some lawyers are engaging in such practices might cause other lawyers, who have arrived at an ethical judgment and have (until now) refrained from such practices, to change their behaviour, if not their minds, simply because they now need to ‘keep up’.

**Interventions to prevent Yossarian’s response**

These results suggest that, as discussed above, the appropriate locus for remedial action is the firm itself. Firms also have the greatest ongoing need to develop appropriate interventions, as they will suffer most from the negative publicity or poor reputation that unethical billing practices generate.

Commentators who argue that competition and greed are the primary causes of billable hour fraud suggest eliminating minimum billing requirements; changing the compensation culture amongst lawyers to avoid creating incentives to commit billing fraud; rewarding people for the quality of their work, not the quantity; rewarding other activities, such as mentoring; providing reduced-hour incentives that still provide the possibility of making partner; installing professional management personnel to administer and audit firm billing practices; and using alternative billing

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These commentators suggest that clear billing guidelines, training on billing and monitoring of guidelines are insufficient. As one Survey respondent noted:

Here’s the thing … you can do all of the surveys of this nature that you want to. The firms can produce pretty policies which say all of the right things, however, while the driving force behind a lawyer’s advancement is time recording, you will always have an issue with time sheet padding and ‘time theft’. Younger lawyers in a firm, despite all their high ideals, will always fall into line with what the firm wants, and will not be empowered to do anything differently.

It is nevertheless clear that policies, and the discussion and enforcement of policies, have a vital role to play in preventing, or decreasing the temptation to engage in, unethical billing practices. This paper has shown that the existence of ethical infrastructure will not affect lawyers’ perception of a pressure to bill. Ethical infrastructure will, however, reduce their suspicions that other lawyers are billing unethically, as well as their direct experiences of unethical billing.

Policies should inform staff about what practices are considered ethical and unethical, put processes in place to detect and investigate unethical practices, and set out penalties for staff who engage in unethical behaviour. Clear, well-publicised and enforced policies should provide guidance for well-meaning but ill-considered lawyers by helping them to resist informal pressure (real or perceived) to lower their practice standards.140

Firm policies need to be detailed enough to authoritatively instruct lawyers as to what factors constitute a proper bill. The policies should start from how time is to be recorded but go on to include such matters as:

- whether it is necessary to take contemporaneous notes of time spent on files, or permissible to reconstruct the hours worked;
- whether, if travelling for client, efforts will be made to use the time spent travelling to do work on the client’s behalf (preferably on the same file);
- that it is impermissible to record fictitious hours or to double-bill is also necessary;
- that lawyers should keep more detailed time entries, to make it easier for clients and management to assess a lawyer’s efficiency;141 and
- that if the lawyer wishes to charge a premium for work performed, they should charge an hourly rate greater than the normal rate.142

139 Lerman, above n 24, 916-918; Susan Saab Fortney, ‘I Don’t have Time to be Ethical: Addressing the Effects of Billable Hour Pressure’, (2003) 39 Idaho Law Review 305, 316-317; La Rue, above n Error! Bookmark not defined., 495-499.
141 Richmond, above n 5, 83.
These policies must engage with the challenge discussed above, that lawyers are producing a product, not providing a service, and that lawyers can therefore bill on the basis of the overall value to the client, or the overall costs to the firm. Lawyers will view ethical guidelines that do not engage with this challenge as circular. Accusations of misconduct will be more persuasive if they analyse the agreement between the lawyer and the client. If the agreement specifies that the lawyer will charge on the basis of their time, then the lawyer is acting fraudulently by padding his or her bill, no matter what work has been done previously.

If firms instigate such policies, they must ensure that staff are aware of such policies. This paper adds to the previous literature that clearly shows that many staff are not aware of such policies. The majority of employee lawyers did not know whether their firms audit a fee earner’s billing practices before paying a bonus. Many responses to the hypothetical questions have adopted the same attitude towards a firm’s policies that has been postulated for professional practice rules: that firm policies on billing are the beginning and the end of a lawyer’s ethical obligations. Partners and directors who assume that their employees are aware of the firm’s ethical infrastructure are risking their firm’s reputation with their complacency.

Clients

Regulators considering the problem of unethical behaviour should also consider empowering clients to challenge unethical behaviour and excessive billing. It is clear that “less sophisticated consumers of legal services” have difficulty assessing whether lawyers’ bills are fair and reasonable. Client empowerment should therefore occur through procedures aimed at ensuring that otherwise unsophisticated legal consumers are in the best position to develop an informed understanding of the product they should receive from a given firm. The first stage in this process requires the lawyer to inform the client of both the material elements of the fee agreement (that is, the services for which the lawyer charges and how much the lawyer charges for each service), as well as the lawyer’s billing practices (that is, how the lawyer plans to calculate the amount owed for each service). An attorney should warn prospective clients, for example, if the attorney customarily bills a minimum of a quarter of an hour for any activity, even for a one-minute call.

142 Lerman, above n 10, 866
143 Fortney notes that 24% of the 1999-2000 Associate Survey respondents did not know whether the firm had any written billing guidelines: see Fortney, above n 2, 253.
144 Fortney, above n 139, 314
145 Richmond, above n 5, 74, 77.
146 Ross (1991) above n 2, 71. In Australia, if the minimum unit of time billing is not disclosed by the practitioner, the courts have held that the practitioner is only entitled to recover charges in accordance with the actual time that has elapsed. See Moray v Lane (unreported, Supreme Court of New South Wales, Allen J, 26 February 1993).
The second stage in this process requires the lawyer to provide the client with information to enable the client to make appropriate comparative assessments. This might involve:

- Information about how much of the total time billed to a file was actually billed to the client (known as the realisation rate). The realisation rate is a measure of a lawyers’ overall efficiency; if a law firm charges its clients for every single minute that its lawyers spent on the client’s file, that suggests either perfectly efficient lawyers or a failure to scrutinise the effectiveness of the lawyers’ actions.

- Current and past costs of handling similar projects.

- A detailed summary of what needs to be done on the client’s matter and what problems might arise.

- Statistics setting out the usual time that lawyers spend on different types of cases.

- Asking firms to address some kind of standardized problem (such as a contract) which the firm could process and cost out.

More sophisticated clients going to tender on legal services could also seek information about tenderers’ ethical monitoring and auditing practices.147

**Future research**

This is a self-report survey, so it is only possible to report respondents’ subjective perceptions of the pressures upon their billing practices and their concerns about unethical conduct in their firms. It did not seek, and cannot provide, “objective”, verifiable evidence of misconduct.

The Survey has concluded that lawyers in private practice would compete on matters associated with their budgets, even if they were not subject to set billable hours requirements. This conclusion is inferential, rather than based on clear responses. It is important to bear in mind that the billable hours system is so pervasive that it is hard to get enough lawyers and firms using an alternative system to test the difference with confidence, and this was not possible with these data.148 Discussion on this issue would certainly benefit from a study that was sufficiently powerful to compare different fee arrangements and examine how each arrangement influenced specific unethical behaviour. It may be that a list of earnings would operate to undermine ethical practices, even if there were no billable hour budgets. Otherwise, the issue is perhaps more something for law firm management to experiment with rather than for researchers to test.

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148 See above note 73.
Empirical research on the issue of billable hours has so far been limited to surveys about respondents’ views of the frequency of unethical behaviour and respondents’ perceptions about the pressures to engage in such behaviour. This method provides a useful start to a discussion about how perceptions can behaviour. More advanced research is necessary in order to understand whether partners’ optimism, or employee lawyers’ pessimism is more accurate. Further research could operate by providing respondents with a a series of archetypes of lawyer behaviour (a high biller who is inefficient, a high biller who may be acting unethically, a low biller who engages in significant pro bono activity, and so on) and asking respondents to predict each archetype’s rate of advancement and likely compensation, if that archetype were working at the respondents’ firm.