

2012

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Bluebook Citation

Susan Fortney & Tahlia Gordon, *Adopting Law Firm Management System to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation*, 10 U. St. Thomas L.J. 152 (2012).

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ARTICLE

ADOPTING LAW FIRM MANAGEMENT SYSTEMS TO SURVIVE AND THRIVE: A STUDY OF THE AUSTRALIAN APPROACH TO MANAGEMENT-BASED REGULATION

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INTRODUCTION

In 2006, the legal profession in Australia captured attention worldwide when Slater & Gordon, an Australian incorporated legal practice (“ILP”), became the first law firm to publicly sell shares on a stock exchange.¹ Amendments to the New South Wales Legal Profession Act of 2004 (“the Act”) made this listing possible by permitting non-lawyers to own ILP stock without restriction.² This portion of the new law was controversial, sparking debate around the world.³

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1. For insights into Slater & Gordon’s decision to list, as well as regulatory challenges, see generally Andrew Grech & Kirsten Morrison, *Slater & Gordon: The Listing Experience*, 22 GEO. J. LEGAL ETHICS 535 (2009) (providing a “case study” from the perspective of two firm leaders at Slater & Gordon).

2. *Legal Profession Act 2004* (NSW) s 135 (Austl.), available at http://www.austlii.edu.au/au/legis/nsw/consol_act/lpa2004179/ [hereinafter “the Act”].

3. Following the Slater & Gordon listing on the Australian Stock Exchange, numerous commentators debated whether law firms in the United States and U.K. should be allowed to follow Australia and publicly raise capital through the sale of law firm stock. See, e.g., Chandler N. Hodge, Comment, *Law Firms in the U.S.: To Go Public or Not to Go Public?*, 34 U. DAYTON L. REV. 79 (2008); Lindsay Fortado, *Slater & Gordon Lifts Curtain on Global Law Firms Going Public*, BLOOMBERG, June 12, 2007, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aa5QVuS4ICbk&refer=news> (quoting attorneys with different perspectives on the likelihood

Other provisions in the new law require that ILPs take steps to assure compliance with provisions of the Act. Specifically, the legislation provides that the ILP must appoint a legal practitioner director to be generally responsible for the management of the ILP.⁴ The Act also imposes a number of other requirements, including ones relating to accounting for client money and maintaining professional liability insurance.⁵ Most notably, the Act states that:

Each legal practitioner director . . . must ensure that appropriate management systems are implemented and maintained to enable the provision of legal services . . . (a) in accordance with the professional obligations of Australian legal practitioners and other obligations imposed by or under this Act, the regulations or the legal profession rules, and (b) so that those obligations . . . are not affected by other officers or employees of the practice.⁶

Because the Act did not define “appropriate management systems” (“AMS”) the Office of Legal Services Commissioner for New South Wales (“OLSC”) worked with representatives of other organizations and professionals in law practices⁷ to develop guidelines and an approach for evaluating compliance with the statutory requirements.⁸ The collaboration resulted in an “education toward compliance” strategy in which a designated director for an ILP completes a self-assessment process (“SAP”), evaluating the ILP’s compliance with ten specific objectives of sound legal practice.⁹

of more firms going public). Compare Bret Adam Beldt, Comment, *The Inevitable Change of America’s Archaic Limitations on Public Ownership of Law Firms*, 33 J. LEGAL PROF. 117 (2008) (discussing why the benefits of public ownership outweigh critics’ concerns about public ownership), with James R. DeBuse, Note, *Opening at \$25 1/2 is Big Firm U.S.A.: Why America May Eventually Have a Publicly Traded Law Firm, and Why Law Firms Can Succeed Without Going Public*, 34 IOWA J. CORP. L. 317 (2008) (discussing why firms should avoid public ownership altogether).

4. Steven Mark & Tahlia Gordon, *Innovations in Regulation—Responding to a Changing Legal Services Market*, 22 GEO. J. LEGAL ETHICS 501, 506 (2009) (chronicling the statutory requirements).

5. Steve Mark & Georgina Cowdroy, *Incorporated Legal Practices—A New Era in the Provision of Legal Services in the State of New South Wales*, 22 PENN. ST. INT’L L. REV. 671, 684–5 (2004).

6. The Act, *supra* note 2, at s 140. For an analysis of these requirements, see Susan Saab Fortney, *Tales of Two Regimes for Regulating Limited Liability Law Firms in the U.S. and Australia: Client Protection and Risk Management Lessons*, 11(2) LEGAL ETHICS 230, 237 (2009).

7. In Australian legislation, the term “law firm” refers to partnerships of practicing lawyers. The term “law practice” is defined more broadly to mean “an Australian legal practitioner . . . a law firm, . . . a multidisciplinary partnership, . . . an incorporated legal practice, or . . . a complying community legal centre.” The Act, *supra* note 2, at s 4(1). This article uses the terms “law practice” and firms, regardless of organizational structure.

8. Mark & Cowdroy, *supra* note 5, at 686 (describing deliberation about the meaning of the phrase “appropriate management systems” and determining how “appropriateness” should be assessed from a compliance and regulatory perspective).

9. Mark & Gordon, *supra* note 4, at 507–08 (explaining how the stakeholders developed key criteria to ascertain whether an ILP has “appropriate management systems” and developed a “self-assessment” document for directors to evaluate their compliance with the objectives).

Although the AMS requirement and the SAP initially received far less attention than the statutory provisions allowing for the public sale of securities by ILPs, the implementation of the AMS requirement has proven to be a watershed event in the regulation of law firms. Professor Ted Schneyer, author of the seminal piece that articulated the concept of an “ethical infrastructure” in law firms, has described the New South Wales (“NSW”) program as a prototype for “proactive, management-based regulation.”¹⁰ “Ethical infrastructures consist of the policies, procedures, systems and structures—in short, the ‘measures’ that ensure lawyers in their firm comply with their ethical duties and that nonlawyers associated with the firm behave in a manner consistent with the lawyers’ duties.”¹¹ Professor Schneyer credits the NSW program for giving the term “ethical infrastructure” content “by identifying ten types of recurring problems that infrastructure should be designed to prevent or at least mitigate.”¹²

In this sense, the NSW “proactive” approach can be contrasted with the traditional regulatory process, a “reactionary” one triggered after lawyers have allegedly violated professional conduct rules.¹³ Unlike provisions in statutes and disciplinary rules that generally instruct lawyers on proper conduct, the ten objectives cover the principles of sound practice, along with strategies to address concerns that commonly result in complaints against practitioners.

In Australia, other states followed the NSW’s lead by enacting similar legislation with a self-assessment process.¹⁴ Preliminary indications indicated that the new regulatory regime was successfully operating as a part-

10. Ted Schneyer, *On Further Reflection: How “Professional Self-Regulation” Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARIZ. L. REV. 577, 584 (2011) [hereinafter Schneyer, *Professional Self-Regulation*]. Twenty years ago Professor Schneyer first used the term “ethical infrastructure” in advocating for discipline for entire law firms. The justification for doing so is that not all problems relate to individual lawyer conduct, but are attributable to firm-wide concerns and the firm’s ethical infrastructure. Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1, 9 (1991) [hereinafter Schneyer, *Professional Discipline*]. The term “ethical infrastructure” has provided an analytical framework for scholars and commentators around the world. See, e.g., John Chu, *Ethics Auditing: Should It Be Part of Large Law Firms’ Ethical Infrastructure?*, 11(1) LEGAL ETHICS 16, 16 (2008) (article by a scholar in Switzerland); Christine Parker et al., *The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour*, 31(1) UNIV. N.S.W. L.J. 158, 158 (2008) (article by five Australian professors); Alex B. Long, *Whistleblowing Attorneys and Ethical Infrastructures*, 68 MD. L. REV. 786, 786 (2009) (article by an American law professor).

11. Schneyer, *Professional Self-Regulation*, *supra* note 10, at 585.

12. *Id.* (noting that the reasonableness of the measures “will vary with a firm’s size and practice”).

13. Professor Schneyer posits whether a “proactive regulatory program” may complement the disciplinary process by enabling professional self-regulation “to draw more effectively on firm management in order to promote ethical compliance[.]” *Id.* at 584.

14. Legislation in other Australian states and territories reflects the national model laws in allowing law firms to structure themselves as companies and to trade as ILPs subject to regulation. John Briton & Scott McLean, *Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era*, (July 2008), http://www.lsc.qld.gov.au/_data/assets/pdf_file/0014/106214/incorporated-legal-practices.pdf (describing how the new framework for regulating

nership between the regulator and ILPs. Research conducted shortly after implementation of the new regulatory regime revealed a significant reduction in complaint rates for ILPs that completed the self-assessment process.¹⁵ Beyond studying complaints and compliance reporting information, the researchers did not attempt to tackle questions related to the other effects associated with the implementation of AMS and the SAP requirements.

To obtain more data on the impact of the requirements, and to identify possible measures for improving the regulation of firms, we designed a mixed method empirical study. This article will discuss survey findings, focusing on the relationship between the self-assessment process and the ethics norms, systems, conduct, and culture in firms.

Part I of this article provides background information tracing the evolution of the ILP structure for law practices and the development of the AMS and SAP regime. Part II reviews earlier study findings that considered the impact of requiring that ILPs implement AMS and complete a SAP. Part III describes the methodology used in our 2012 study and the general profile of respondents. Part IV analyzes pertinent study findings.

As highlighted in the conclusion, study findings reveal that management-based regulation of incorporated law firms has contributed to the review and revision of existing management systems and to the implementation and development of new management systems. Respondents reported that the AMS and SAP requirements had the greatest impact on firm management and risk management issues. Regardless of the size of the firm, the self-assessment process helped shape the attitudes of many directors. The majority of respondents agreed that the SAP was a learning exercise that enabled their firms to improve client service. The degree of the impact on ethical norms, systems, conduct, and culture in firms largely turns on the extent to which directors seriously examine firm practices and invest in making improvements. Even for those directors who see the self-assessment process as a ministerial exercise of checking boxes or a recipe for implementing systems, the self-assessment process has successfully introduced directors to principles of good management by effectively forcing directors to complete assessment forms, noting compliance with the ten objectives for management systems. Beyond taking the minimum steps for compliance purposes, directors are increasingly recognizing the business imperative for improving management systems to attract and retain clients. In this sense, firms are implementing systems as an aspect of good management and business development. The article concludes with an agenda for

ILPs is more effective than the traditional complaint-driven approach to enforcing standards of conduct).

15. See *infra* notes 69–89 and accompanying text for a discussion of the research studies.

further research of the different dimensions of management-based regulation.

PART I: INCORPORATION OF LEGAL PRACTICES IN NEW SOUTH WALES, AUSTRALIA

A. *Development of the Incorporated Legal Practice Structure*

Through most of the twentieth century, Australian law restricted solicitors to practicing as sole proprietors or in partnerships with other solicitors.¹⁶ Similarly, applicable law only permitted barristers to practice as solo practitioners.¹⁷ For decades, Australian lawyers appeared to accept the justification for limiting the organizational structure for law practices to sole proprietorships or general partnerships. Practitioners and regulators alike viewed partnerships as the only appropriate business structure to preserve the independence of the legal profession.¹⁸ They believed that partnerships provided optimal protection to clients and injured parties because of partnerships' unlimited liability and partners' joint and several liability for the acts and omissions of the partnership and its agents.¹⁹

Beginning in the late 1970s, professional associations in Australia lobbied for legislation to relax the restrictions on organizational structures for law practices.²⁰ Around the country, various states responded to the pressure by enacting legislation enabling lawyers to incorporate as solicitor corporations under provisions of the Legal Professions Act of 1987. In 1990,

16. In Australia, the legal profession is split between solicitors and barristers. Solicitors are local legal practitioners who hold a current certificate to practice as a solicitor or barrister. The Act, *supra* note 2, at s 4. A barrister is "a local legal practitioner who holds a current local practising certificate to practise as a barrister." *Id.* In practical terms, a barrister appears in court on behalf of a client, but is instructed by the solicitor. See Elizabeth Murphy, *How to Qualify as a Lawyer in New South Wales, Australia*, INT'L BAR ASS'N (2007), http://www.ibanet.org/PPID/Constituent/Student_Committee/qualify_lawyer_AustraliaNewSouthWales.aspx (outlining the admissions requirements). For a good overview of the traditional structure of the legal profession in Australia, see JULIAN DISNEY ET AL., *LAWYERS* 27–46 (1986). See also NEW SOUTH WALES LAW REFORM COMM'N, *THE STRUCTURE OF THE LEGAL PROFESSION, THE LEGAL PROFESSION DISCUSSION PAPER IV* 91 (1981) (discussing the basic framework of Australia's legal system).

17. See NEW SOUTH WALES LAW REFORM COMM'N, *supra* note 16, at 9.

18. Practitioners believed that allowing firms to incorporate would enable them to publicly list and offer shares to the public and hire non-lawyers. The fact that they could do so would put them at risk of being influenced by non-lawyer investors who are not bound by the same ethical obligations of the law firm. See, e.g., Jeff Shaw, *Incorporation of Legal Practices Under the Corporations Law*, L. SOC'Y J., Nov. 1999, at 66, 68; Jeff Shaw, *Incorporation Will Benefit Firms*, AUSTRL. FIN. REV., Mar. 14, 2003 at 56.

19. The proponents of the "sole practice" rule for barristers also maintained that the rule ensured independence and, moreover, promoted the duty of a barrister to the court and, thereafter, the client. See Review of the Legal Profession Act Final Report, New S.Wales Law Reform Comm'n, (Apr. 26, 1999), http://www.lawlink.nsw.gov.au/report%5C1pd_reports.nsf/pages/ncpf_10.

20. Interview with Steve Mark, Comm'r, Office of Legal Servs. Comm'r (Mar. 15, 2013).

the NSW Parliament enacted legislation allowing lawyers to incorporate their practices.²¹

Under the legislation, one or more persons could form a solicitor corporation by signing the memorandum and articles of association of the incorporated body and complying with the other registration requirements.²² The 1990 legislation placed strict controls on the structure of the solicitor corporation.²³ Most notably, it imposed unlimited liability on solicitor corporations.²⁴ These provisions made practicing as a solicitor corporation an unattractive option to most solicitors.

The restrictive legislation remained in effect until 1994 when the new provisions were enacted allowing lawyers to share receipts with non-lawyers and to form multidisciplinary practices (“MDPs”).²⁵ The object of the reforms was to create a more competitive market for legal services. The statute imposed a number of structural requirements on MDPs, including the requirement that lawyers retain the majority voting rights in the MDP

21. The Legal Profession Solicitor Corporations Amendment Act of 1990 introduced Part 10A, which enabled the formation of solicitor corporations. *Legal Profession (Solicitor Corporations) Amendment Act 1990* (NSW) pt 10A (Austl.). The 1990 Act amended the Legal Profession Act of 1987. In order to become a solicitor corporation, the statute required a legal practitioner to apply to the Law Society of NSW for a certificate of approval to incorporate. *Id.* at s 172C(1). The Law Society of NSW, the professional association for solicitors, exercised full discretion to decide whether a legal practice could organize as a solicitor corporation. The Australian regulator for corporations at the time, the Corporate Affairs Commission, played no role in regulating the solicitor corporation other than registration process.

22. *Id.* at s 172B. The additional requirements for becoming a solicitor corporation are set out in section 172D(1) of the Legal Profession (Solicitor Corporations) Amendment Act 1990, and provide that a person wishing to incorporate as a solicitor corporation must lodge a number of documents with the corporate regulator, the Corporate Affairs Commission, and the Law Society of New South Wales. *Id.* at s 172D(1).

23. The statute restricted voting shareholders to solicitors holding unrestricted practicing certificates. The statute also restricted voting shareholders to solicitors holding unrestricted practicing certificates. *Id.* at s 172F. The statute required that shareholders be “approved persons” defined to be solicitors and their relatives. *Id.* at s 172G.

24. Section 172E of the Legal Profession (Solicitor Corporations) Amendment Act 1990 stated that a “solicitor corporation is to be formed on the principle of having no limit placed on the liability of its members (except as otherwise provided by or under this Act).” *Legal Profession (Solicitor Corporations) Amendment Act 1990* (NSW) s 172E (Austl.).

25. Subject to various conditions, the legislation allowed barristers and solicitors to share receipts with non-lawyers except where barrister and solicitor rules and regulations did not permit. *Legal Profession Reform Act 1993* (NSW) s 48F(1) (Austl.). Additionally, the law permitted barristers and solicitors to form multidisciplinary partnerships with non-lawyers so long as the partnership engaged in a business ordinarily performed by barristers or solicitors, unless any barrister or solicitor rules or regulations prohibited such a partnership. *Id.* at s 48G. The legislation was inserted into the *Legal Profession Act 1987*.

and retain at least 51 percent of the net income of the partnership.²⁶ As a result of these restrictions, few legal practices were organized as MDPs.²⁷

In 1998, the NSW Attorney General's Department conducted a statutory review of the NSW Legal Profession Act of 1987.²⁸ Despite the earlier attempt at liberalizing the rules for MDPs, the review found that the rules were still anti-competitive and should be repealed.²⁹

The Law Society of NSW supported liberalizing business structures for practitioners. After debating the issues in 1999, the Council for the Law Society concluded that law firms should be able to incorporate and raise capital free from restrictions on the identity of the shareholders.³⁰

On July 1, 2001, the NSW Parliament enacted legislation allowing legal service providers to register as companies with the Australian Securities and Investments Commission ("ASIC"), the agency responsible for ensuring compliance with the Corporations Act of 2001.³¹ The amendments radically changed the options available to lawyers in NSW. For the first time in Australian legal history, legislation permitted legal practices to incorporate, share receipts, and provide legal services either alone or alongside other legal service providers (who may or may not be legal practitioners) without

26. Rule 40 of the NSW Revised Professional Conduct and Practice Rules of 1995 stated that practitioners who conduct a legal partnership with others who do not have NSW practice certificates must "maintain effective control of the legal practice[.]" possess majority voting rights in the partnership, and take other precautions to ensure that the partnership operates in compliance with the Legal Profession Act and all appropriate rules and regulations. 40.1.1–40.1.2.

27. See Mark & Cowdroy, *supra* note 5, at 683–85 (detailing the professional responsibilities of solicitor directors in ILPs).

28. The review was undertaken pursuant to a requirement of the Australian Governments Competition Principles Agreement to study any potentially anti-competitive restrictions in legislation to determine whether they are in the public interest. Council of Australian Governments, Competition Principles Agreement, s 5.1 (Apr. 11, 1995), <http://www.coag.gov.au/node/52>. The review was also commissioned pursuant to a statutory requirement that the amendments made by the Legal Profession Reform Act of 1993 be reviewed within four years of their commencement. *Legal Profession Act 1987* (NSW) sch 8 pt 1 div 1B (Austl.).

29. The Commission reviewing the MDP rules concluded that the requirement that solicitors hold at least half of an MDP's shares should be removed because the restriction was anti-competitive. The risk analysis considers a variety of tools, including responses on the self-assessment forms, complaint histories of practitioners, and responses to other regulatory requirements. See N.S.W. LAW REFORM COMM'N, EXECUTIVE SUMMARY para 10.1 (Apr. 26, 1999), http://www.lawlink.nsw.gov.au/report%5C1pd_reports.nsf/pages/ncpf_exec (summarizing the National Competition Policy Review of the Legal Profession Act of 1987).

30. As the then President of the Law Society stated, "Law firms should be run as a business like any other business." John Breusch, *NSW Law Society Backs Corporatisation*, AUSTRAL. FIN. REV., July 2, 1999, at 26. The Council resolution supporting "corporatization" stated, "in principle, there should be no restriction on the holding of shares in an incorporated legal practice subject to legislation providing adequate safeguards for the integrity of the conduct of legal practice and the appropriate amendment of the professional conduct and practice rules." *Id.*

31. *Legal Profession (Incorporated Legal Practices) Act 2000* (NSW) (Austl.); *Legal Profession (Incorporated Legal Practices) Regulations 2001* (NSW) (Austl.). The legislation was included in the existing legal profession legislation. *Legal Profession Act 1987* div 2A. The provisions relating to incorporated legal practices are now located in the current legal profession legislation. The Act, *supra* note 2, at pt 2.6.

any ownership restrictions.³² The legislation also permitted law practices to become publicly listed companies on the Australian Stock Exchange (“ASX”).³³

The statute imposed two new requirements for ILPs. First, an ILP must appoint at least one “legal practitioner director”³⁴ to oversee the management of the ILP.³⁵ Second, the ILP must implement and maintain AMS to enable the provision of legal services in accordance with the professional obligations of solicitors and the other obligations imposed under the Act.³⁶ Failure to implement and maintain AMS may constitute professional misconduct and can result in legal practitioner directors losing their practicing certificates and liquidation of the legal practice.³⁷

The introduction of ILPs in NSW represented a fundamental philosophical and practical change. With ASIC registration, the boundaries of legal practice and structure moved at that point outside the legal profession to the corporate world. Requiring ILPs to implement and maintain management systems was a radical departure from the traditional approach to regulation of law practice. Rather than the regulator reacting after a complaint against a lawyer, the new approach to regulation was designed to help firm leaders detect and avoid problems.

The requirement to implement and maintain AMS is augmented by comprehensive risk-profiling and audit (practice review) programs conducted by the OLSC.³⁸ In this program, the OLSC works with law practices

32. The Legal Profession Act of 2000 defined an incorporated legal practice as a corporation providing legal services, and which is allowed to provide other services or business lawfully allowed (with the exception of any managed investment scheme). *Legal Profession (Incorporated Legal Practices) Act 2000* (NSW) ss 47C(1)–(2) (Austl.). It is not an incorporated legal practice, however, if it does not receive or expect any “fee, gain or reward” for its legal services, if the only legal services provided are in-house (such as a transaction where the corporation is a party), or if the corporation is exempted from the statute by appropriate regulations. *Id.* at s 47C(3). *See also Legal Profession Act 1987* (NSW) div 2A (Austl.). The legislation is considerably different from the 1993 reforms, which did not permit incorporation but merely the sharing of receipts with restrictions. *Legal Profession Reform Act 1993*, *supra* note 25, at s 48F.

33. Under the legislation there are no restrictions on who can hold shares in an incorporated legal practice. The legislation presented opportunities for legal practices to seek equity investments in the practice from sources outside the profession, including public and private companies and other institutions. For a good discussion of the benefits and disadvantages of incorporation by law firms in NSW, see Philip King, *Should Your Firm Incorporate?*, 39(2) L. Soc’y J. 44 (2001); *see also* Richard Vincent, *What are the Commercial and Corporate Law Effects of Incorporating Legal Practices?*, 40(6) L. Soc’y J. 48 (2002) (discussing which factors law firms in New South Wales should consider when deciding whether to incorporate).

34. A legal practitioner director is defined in the legislation as “a director of an incorporated legal practice who is an Australian legal practitioner holding an unrestricted practicing certificate.” The Act, *supra* note 2, at s 133.

35. *Id.* at s 140(3).

36. *Id.*

37. *Id.* at s 140(5). The OLSC, together with the Council of the Law Society of NSW, share responsibility for regulating incorporated practices.

38. In 2001 legislation was introduced allowing the OLSC and the Law Society Council to “conduct a review of the compliance of an incorporated legal practice (and of its officers and

that appear to be experiencing difficulties.³⁹ The ultimate objective of these practice reviews is to promote compliance with professional obligations under the law and to reduce complaints.⁴⁰

As discussed in the next session, the regulators worked closely with practitioners to develop the contours of the new regulatory regime. The “management-based” approach evolved out of the collaboration of regulators, practitioners, and other stakeholders concerned about lawyer professional conduct and public protection.

B. Implementing Management Systems and Self-Assessment Process

Interestingly, the 2001 legislation did not define or provide any guidance on the meaning of AMS. Speeches accompanying the introduction of the legislation in Parliament did not discuss the term.⁴¹ Thus, the responsibility and opportunity to define the meaning of AMS was left to the profession and the regulators.⁴²

The absence of a definition for AMS as well as other regulatory issues⁴³ prompted Steve Mark, the legal services commissioner for NSW, to convene a forum for interested persons to examine the ILP framework, including the meaning of AMS. With the endorsement of the then Attorney General for NSW, the Hon. Bob Debus, the OLSC developed a formal pro-

employees) with the requirements of or made under this Act in connection with the provision of legal services by the practice.” Legal Profession Act 1987, *supra* note 28, at s 47P. The legislation was amended in 2004 and today confers a broad general power on the OLSC to audit all legal practices not just ILPs. The Act, *supra* note 2, at s 670.

39. The risk analysis considers a variety of tools, including responses on the self-assessment forms, complaint histories of practitioners, and compliance with other regulatory requirements. Steven Mark & Tahlia Gordon, *Compliance Auditing of Law Firms: A Technological Journey to Prevention*, 28(2) U. QUEENSL. L.J. 201–18 (2009).

40. *Id.* at 219.

41. See NSW, Parliamentary Debates, Legislative Council, 23 June 2000, 7624 (Hon. J.W. Shaw) (Austl.), available at <http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20000623025>; NSW, Parliamentary Debates, Legislative Council, 12 Oct. 2000, 9152 (Hon. John Samios, et. al.) (Austl.), available at <http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LC20001012006>; NSW, Parliamentary Debates, Legislative Council, 31 Oct. 2000, 9406 (Bob Debus, et. al.) (Austl.), available at <http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20001031046>.

42. For a discussion of the role of the OLSC in managing the SAP, see Mark & Gordon, *supra* note 4, at 509–10. To obtain guidance, some ILPs referred to other sources and guidelines. For example, several ILPs in existence had gained practice management certification. Such certification included the Best Practice Gateway QLII certification which was developed by the Centre for Best Practice at the College of Law in Sydney and the Law Society of NSW. The QLII program covered concepts of leadership, practice planning, client and work management, people management and business consistency.

43. The 2001 legislation provided very little detail on the roles and responsibilities of the regulators in relation to ILPs. For example, the legislation did not address the process of cessation for ILPs whose legal practitioner director had been removed from office. Nor did the legislation address the procedures in relation to the OLSC’s power to review and audit ILPs. A list of issues that needed to be addressed was contained in the OLSC’s survey. Notes on Stakeholder Forum (on file with author).

gram for the forum and invited representatives from key stakeholder groups. These invitees included the Attorney General's Department, the Law Society of NSW, LawCover (the professional indemnity insurer in NSW), the QL Board (Quality in Law Assurance Program for Lawyers), and the College of Law.⁴⁴ Thirty-five participants were drawn from the various groups, including individuals from ILPs ranging in size, location, and practice.⁴⁵

Over the course of three days in 2003, participants examined issues related to legal ethics, law practice management, and lawyer regulation.⁴⁶ Drawing on their own experiences as regulators, educators, association leaders, and practitioners, they debated whether the regulators should define and monitor specific management systems for ILPs. Forum participants also spent considerable time addressing the following questions: what standards might meet the statutory requirements; what approach should be used to determine if firms, regardless of size, meet the standards; and what would be the best method for independently evaluating a firm's compliance with the requirements? With each of these questions, participants considered the resources and the costs associated with different approaches.⁴⁷

Through discussion, the participants reached a consensus. Rather than imposing prescriptive rules, forum participants agreed that the preferred scheme would be to adopt guidelines that address the concept of professionalism and lawyers' professional obligations. The participants sought to formulate an approach and standards that the legal profession would embrace. Such standards included, for example, processes for better lawyer-client communication and standards covering the duties to preserve confidentiality and avoid conflicts of interest.⁴⁸ Forum participants also recognized that any approach to requiring management systems should be flexible. They agreed that firms should be given the autonomy to implement systems "appropriate" for their circumstances and that "a one size fits all" approach to requiring management systems would neither be desirable nor feasible.⁴⁹

44. OFFICE OF LEGAL SERVS. COMM'R, REPORT ON LEGAL PRACTICES STAKEHOLDERS FORUM, 3 (Mar. 21, 2003) (on file with author); see also Francis Wilkins, *Incorporated Compliance Goals Firm Up*, LAW. WKLY, June 20, 2003, at 1, 6.

45. REPORT ON LEGAL PRACTICES STAKEHOLDERS FORUM, *supra* note 44, at 3. Forum participants were provided with a number of documents for consideration and discussion. These documents included a paper on common comments made in a survey seeking lawyers' views on the legislation; a list of areas of complaint to be addressed by "appropriate management systems"; a list of the statutory obligations of ILPs; copies of the provisions of the legislation in relation to ILPs generally and the Regulations; and a copy of the QLII (gateway to Best Practice) framework. The survey was a short survey letter asking a range of questions about ILPs and practice. Sixty-three responses were submitted to the OLSC.

46. *Id.* at 9–10.

47. *Id.* at 11.

48. *Id.* at 15.

49. *Id.* at 12. What is "appropriate" for a firm may turn on a number of different factors, including the firm's size, structure, organization, and personnel. See MODEL RULES OF PROF'L

Understanding the shared views of the participants, Commissioner Mark proposed a self-assessment process for ILPs to evaluate their management systems.⁵⁰ Participants agreed that the self-assessment process should be built around the document that had already been provided to forum participants, entitled “Areas of Complaint to Be Addressed by ‘Appropriate Management Systems.’”⁵¹ The areas addressed in that document were by no means unique. Rather, the areas covered were fairly rudimentary in that they contextualized concerns that commonly triggered complaints. These areas included negligence, poor communication, delay, disputes over liens, breach of cost disclosure requirements, conflicts of interests, confidentiality, and supervision lapses.⁵²

During the sessions, Commissioner Mark and forum participants agreed to seek amendments to the 2001 legislation to clearly define the roles and responsibilities of the regulators with respect to AMS.⁵³ The Commissioner agreed to continue developing the regulatory approach to ILPs and to share the approach with forum attendees.

Over the ensuing months, the OLSC collaborated with other stakeholders to develop the document, setting out the areas to be addressed by AMS, so that the end result would be both relevant and instructive for the profession. This effort resulted in the articulation of ten areas that should be addressed in an ILP’s management systems. The ten areas, which remain the same today, are:

1. **Negligence** (providing for competent work practices)
2. **Communication** (providing for effective, timely, and courteous communication)
3. **Delay** (providing for timely review, delivery, and follow-up of legal services)
4. **Liens/file transfers** (providing for timely resolution of document/file transfers)
5. **Cost disclosure/billing practices/termination of retainer** (providing for shared understanding and appropriate documentation on commencement and termination of retainer along with appropriate billing practices during the retainer)
6. **Conflict of interests** (providing for timely identification and resolution of “conflict of interests,” including when acting for both

CONDUCT R. 5.1 cmt. 2 (2012) (noting that specific measures that may be required to fulfill responsibilities under the rules may depend on the firm’s structure and nature of practice).

50. REPORT ON LEGAL PRACTICES STAKEHOLDERS FORUM, *supra* note 44, at 13.

51. *Id.* at 14–15; *see also* TERRY PURCELL, 20 ELEMENTS OF AN “APPROPRIATE MANAGEMENT SYSTEM” WHICH ALSO ADDRESS COMMON AREAS OF COMPLAINT (2003) (on file with author) (enumerating twenty management criteria issues applicable to various sized firms for which compliance could be easily established).

52. *Id.* Originally, the document listed fifteen concerns. Interview with Steve Mark, *supra* note 20.

53. Interview with Mark, *supra* note 20.

parties or acting against previous clients as well as potential conflicts which may arise in relationships with debt collectors and mercantile agencies, or conducting another business, referral fees and commissions, etc.)

7. **Records management** (minimizing the likelihood of loss or destruction of correspondence and documents through appropriate document retention, filing, archiving, etc., and providing for compliance with requirements regarding registers of files, safe custody, and financial interests)
8. **Undertakings** (providing for undertakings to be given, monitoring of compliance and timely compliance with notices, orders, rulings, directions or other requirements of regulatory authorities such as the OLSC, courts, and costs assessors)
9. **Supervision of practice and staff** (providing for compliance with statutory obligations covering license and certificate conditions, employment of persons and providing for proper quality assurance of work outputs and performance of legal, paralegal, and non-legal staff involved in the delivery of legal services)
10. **Trust account regulations** (providing for compliance with Part 3.1, Division 2 of the Legal Profession Act and proper accounting procedures)⁵⁴

After finalizing the ten areas of concern and objectives to be addressed, stakeholders worked on developing a process to assess the implementation of these areas. Because participants wanted to avoid an overly formalized process for implementing AMS, the stakeholders created an evaluation document that firms would use to assess their management systems.⁵⁵ The document, entitled “the Self-Assessment Form” (“SAF”), requires that a firm’s legal practitioner director evaluate firm policies, practices, and management systems.⁵⁶ Specifically, the self-assessment document provides a list of objectives and the key concepts for ILPs to consider when assessing each objective.⁵⁷ It also provides examples of ways to achieve each objective.⁵⁸ The examples, however, are provided merely as a guide to the types of procedures and systems that may be appropriate to fit the needs of the ILP’s practice and client base.

Given that it may have been the first time for a law practice to systematically review its management systems, the self-assessment process was

54. *Ten Areas to be Addressed to Demonstrate Compliance with “Appropriate Management Systems,”* OFFICE OF THE LEGAL SERVS. COMM’R, ANNUAL REPORT, 7 (2003–2004), http://www.olsc.nsw.gov.au/olsc/lsc_incorp/olsc_appropriate_management_systems.html.

55. *See Suggestions Concerning the Elements of “Appropriate Management Systems” for Incorporated Legal Practices in NSW,* OFFICE OF THE LEGAL SERVS COMM’R, <http://www.lexcel.com.au/wp-content/uploads/2010/08/ILP-self-assessment-form.doc>.

56. *See id.*

57. *See id.*

58. *See id.*

designed to be as simple and efficient as possible. The process was intended to engage staff members and to motivate the director to evaluate firm management systems.

To assist ILPs in implementing AMS, the College of Law developed training materials.⁵⁹ The legal services commissioner maintained that education should be the main focal point of the ILP regime. The approach taken by the Commissioner was and continues today to be an “education towards compliance” approach.

The educational process starts when the OLSC initiates the SAP after a legal practice incorporates. Once the Law Society notifies the OLSC that a legal practice is incorporated, the OLSC sends a letter to the legal practitioner director (“LPD”) designated for the practice.⁶⁰ The letter asks the LPD to complete the enclosed SAF. As noted above, the SAF requires that the LPD evaluate practices and rate the systems, using the template of the ten objectives for AMS.⁶¹ The letter reminds the director of the OLSC’s and Law Society’s power to audit incorporated practices.⁶² The letter also urges the director to use the SAP to improve the delivery of legal services and to contact the OLSC or Law Society for additional assistance or guidance.⁶³

Once a LPD returns the completed form to the OLSC, a staff member of the OLSC’s Incorporated Practice Unit reviews the disclosure and ratings.⁶⁴ If the LPD rates the practice as compliant or fully compliant, the OLSC sends the LPD a letter stating that no further action is required. If the SAF reveals that the practice is not compliant, the OLSC provides written guidance to the LPD to assist the practice in achieving compliance.⁶⁵ The OLSC requests that the LPD provide written confirmation that compliance has been achieved or an update on the progress made and systems implemented.⁶⁶ Thereafter, the OLSC monitors the practice’s response.⁶⁷

59. The College of Law conducted the first training course in May 2004. The curriculum covered the following subject matter: opening matters and conflicts of interest, client documents, client communication, file supervision, billing, client satisfaction, service queries and complaints, recruitment, training, delegation and supervision, and performance reviews. The College of Law Training Module is on file with the OLSC.

60. E-mail from Esther Bowe, Practice Review Officer, Office of the Legal Servs. Comm’r, to Susan Fortney (Oct. 17, 2012, 19:09 PM EDT) (on file with author).

61. The letter explains the background of the SAF and the SAP. The letter explains that the examples provided in the SAF are “provided merely as a guide to the types of procedures and system that may be appropriate to fit the needs of both your practice and your client [and that it] will be up to the legal practitioner director(s) to determine the relevance to the practice of any gaps in systems identified through the self-assessment and precisely what action needs to be taken to rectify them.” Specimen Letter from OLSC to Legal Services Director (on file with author).

62. *Id.*

63. The transmittal letter requests that the LPD complete the form within three months. *Id.*

64. E-mail from Bowe, *supra* note 60.

65. For example, the OLSC may provide a copy of the College of Law’s course guide on implementing AMS. Unless the non-compliance reflects a public protection concern requiring immediate action, the OLSC usually provides additional time for the firm to implement recommendations and achieve compliance. *Id.*

66. *Id.*

The process described above largely turns on a director's willingness to engage in serious examination of practices and to be candid about deficiencies and non-compliance. As discussed below, the power of the OLSC and Law Society to audit a practice may counter any inclination to simply treat the SAP as a perfunctory exercise of reporting compliance without actual evaluation of practices.⁶⁸

As discussed above, the SAP was developed through a collaborative effort of regulators, practitioners, and other interested stakeholders. These deliberations resulted in a SAF that largely addresses concerns involved in client complaints. Given the focus of the SAF, the expectation was that the "education toward compliance" approach would result in a reduction of complaints against practitioners. The studies described in the next section point to the positive impact of the SAP in reducing the number of complaints against practitioners.

PART II: PRIOR STUDIES RELATING TO THE AMS REQUIREMENT AND THE SELF-ASSESSMENT PROCESS

In 2004, the OLSC circulated the SAF to all ILPs that existed on that date. Of the 284 ILPs sent SAFs, 276 returned completed forms to the OLSC.⁶⁹ In addition to returning completed forms, many directors provided positive feedback on the self-assessment process. Some indicated that they welcomed the opportunity to review their policies and practices.⁷⁰ Others submitted negative comments.⁷¹

Subsequently, two research studies evaluated the impact of the requirement that law practices implement AMS and complete the SAF. In 2006, the Centre for Applied Philosophy and Public Ethics ("CAPPE") conducted a research project on ILPs.⁷² The project studied complaints data, SAFs, and other records relating to 200 ILPs.⁷³ The study found that there was a positive correlation between law practices reporting high levels of compliance with the OLSC's ten objectives and relatively low levels of com-

67. *Id.*

68. *See infra* notes 159–61 and accompanying text.

69. Responses on file with the OLSC.

70. *Id.* The following are examples of the positive comments that were submitted:

This has been a useful exercise in ensuring that this Practice is "up to speed" in terms of both management systems and delivery of legal services.

[T]hank you for the opportunity to take part in this valuable initiative. It was very useful for us to do and gave us some ideas for improvement. *Id.*

71. For example, one director commented on the burden created by having to document steps that the firm was already taking. *Id.*

72. SEAMUS MILLER & MATTHEW WARD, COMPLAINTS AND SELF-ASSESSMENT DATA ANALYSIS IN RELATION TO INCORPORATED LEGAL PRACTICES (July 2006), available at <http://www.cappe.edu.au/docs/reports/consultancy/OLSC.pdf>.

73. The study report sets forth findings based on quantitative analysis of an electronic database derived from existing complaints data and a set of SAFs provided by ILPs in connection with the SAP. *Id.* at 2, 6.

plaints.⁷⁴ It also found that, of the ILPs studied, 63 percent had returned their SAFs with substantial comments on them, not just a mere rating, and 56 percent were prompted to make changes to their management systems as a result of the self-assessment process (as indicated by correspondence exchanged between the law practice and the OLSC).⁷⁵ Professor Seamus Miller and Mathew Ward, the authors of the study report, concluded that the findings indicated that “the self-assessment process is being taken seriously” and having “a substantial impact.”⁷⁶

In 2008, following CAPPE’s study, Dr. Christine Parker of the University of Melbourne Law School conducted a study to assess the impact of the NSW regulation of “ethics management.”⁷⁷ She studied the number of complaints relating to ILPs.⁷⁸ The study analyzed the SAFs of 620 ILPs.⁷⁹ The study found that the majority (62%) of ILPs assessed themselves to be in compliance on all ten objectives when they completed their initial self-assessments. Of the remaining 38 percent, about one-half became compliant within three months of their initial self-assessment.⁸⁰

The research model used complaints data to test whether regulating ILPs improves the “ethical management and behaviour as indicated by lower rates of complaints about practitioners in ILPs.”⁸¹ To evaluate the effectiveness of the management-based approach to regulating law practices, the study examined the following questions:

1. Do ILPs have lower complaints rates after self-assessment than before the self-assessment?⁸²
2. Do ILPs have lower complaints rates than non-incorporated legal practices?⁸³

74. *Id.* at 4–5 (noting that for the twenty-one firms that ranked themselves as “compliant,” the average number of complaints per solicitor per annum was .47).

75. *Id.* at 3.

76. *Id.*

77. Tahlia Gordon, Steve A. Mark & Christine E. Parker, *Regulating Law Firm Ethics Management: An Empirical Assessment of the Regulation of Incorporated Legal Practices in NSW*, Univ. Melbourne Legal Studies Research Paper No. 453 (2009) (on file with the Journal of Law and Society and available at <http://ssrn.com/abstract=1527315>).

78. *Id.*

79. *Id.* at 18, 18 n.46 (explaining that eleven firms did not complete a SAF because they provided evidence that they had been accredited to a quality management standard for legal practices).

80. *Id.* ILPs have the highest rates of self-assessed compliance with trust accounting obligations and the lowest rates of self-assessed compliance with management systems to ensure good communication with clients and good supervision of practice.

81. *Id.* at 4. The use of complaints data is based on the fact that the objectives and AMS requirements were designed explicitly to address areas that proved problematic as evidenced by client complaints. *Id.* at 8.

82. *Id.* at 22.

83. Gordon, Mark & Parker, *supra* note 77, at 24.

3. Does the higher implementation of AMS (self-assessed) lead to lower complaints?⁸⁴

Findings related to the first two questions were clear. With respect to the first question, the study found that complaints rates for ILPs went down by two-thirds after the ILP completed its initial self-assessment.⁸⁵ For the second question, the results revealed that the complaints rate for ILPs that completed the SAP was one-third of the number of complaints registered against non-incorporated legal practices.⁸⁶

For the third question, there was little evidence that the number of complaints was affected by different levels of self-assessment reported by ILPs.⁸⁷ Based on these findings, the researchers reached the following conclusion:

In summary, we have shown that there is empirical evidence that the NSW legislation requiring ILPs to implement appropriate management systems combined with the NSW OLSC's self-assessment regime for encouraging firms to actually put this into practice may have made a substantial difference to ethics management in firms as indicated by a dramatic lowering in complaints rates after self-assessment . . . We find, however, little evidence that the actual rating the firms gave themselves for their implementation of appropriate management systems makes a difference to complaints. It appears to be the learning and changes prompted by the process of self-assessment that makes a difference, not the actual (self-assessed) level of implementation of management systems.⁸⁸

As suggested, the positive impact on the rate of complaints may be attributable to the process of learning and changes prompted by the self-assessment. The study did not attempt to gauge the effects of the AMS and SAP requirements beyond considering the impact on the rate of complaints. Because the rate of complaints largely reflects consumer service issues, the researchers recognized that the rates are less informative about other ethical issues that are less of a concern to clients.⁸⁹ The authors recommended further investigation using other research methods.

These early findings revealing a connection between the SAP and reduction of complaints inspired us to examine other effects of requiring firms to implement AMS and complete the SAP. To do so, we formulated a

84. *Id.* at 26.

85. *Id.* at 23.

86. *Id.* at 25–26 (noting that the finding was “statistically significant at the highest level”).

87. *Id.* at 31.

88. *Id.* at 31 (explaining that the statistical analyses also show that the drop in complaints cannot be explained by any changes ILPs go through purely because of incorporation (such as changes in the nature of their practice and clientele) or anything different about ILPs themselves).

89. Gordon, Mark & Parker, *supra* note 77, at 37 (noting that complaints rates are likely to be less informative about duties to the court and other ethical issues that are of less concern to clients).

research plan that employed different methods to study the impact of the regulatory process. The next section describes the methodology used in the 2012 study.

PART III: 2012 STUDY DESIGN AND RESPONDENTS' GENERAL PROFILE

A. Methodology

To obtain more information on the impact of the AMS requirement and the SAP regime, I (Susan Fortney), in cooperation with the OLSC, conducted a mixed method study, combining a survey and interviews. The survey phase used an online questionnaire (“the Questionnaire”).⁹⁰ The Questionnaire sought objective data on approaches, perspectives, and experiences related to the SAP and AMS, as well as respondents’ views on the effects of the SAP and recommendations for improving the SAP.⁹¹ The questions related, *inter alia*, to the ethical infrastructure, culture, and regulation of law firms.⁹²

The Questionnaire consisted of thirty-one items, many with subparts.⁹³ In addition to closed-ended questions, a number of questions allowed respondents to provide text entries. The final section invited comments and longer text entries. The Questionnaire is included as Appendix B to this article.

The survey was administered online using Qualtrics, a web-based system. The system generates invitations and records results anonymously. The target group for the survey was ILPs with two or more solicitors. The law practice must have been incorporated between January 1, 2007, and January 1, 2011. We narrowed the target population to ILPs with two or more solicitors because a purpose of the study was to obtain data on the impact of the AMS and SAP on firm dynamics.⁹⁴ All ILPs with two or more solicitors were invited to participate in the survey.⁹⁵ This reduced possible sampling error.

90. Prior to finalizing the Questionnaire, we sought feedback from experts in legal ethics, law firm governance, and lawyer regulation. In addition, we conducted an informal pretest with a selected group of solicitors who critiqued the draft and the online format. See App. B for a final version of the Questionnaire.

91. The Questionnaire also asked about the existence of specific policies and procedures.

92. The second phase of the study involved interviews of a smaller number of directors in ILPs with two or more directors. Rather than using information drawn from the interviews, this article focuses on survey data. A subsequent article will discuss data obtained from the interviews and specifically address possible steps to improve the regulation of ILPs and the self-assessment process.

93. One of the inquiries was a multi-part scaling item that asked respondents to indicate their agreement-disagreement with 22 statements. See *infra* App. B, at Question 18.

94. Various areas of inquiry, such as questions related to firm discussions and deliberations, would have limited relevance in a firm with only one solicitor.

95. Unlike various studies of law firms that are limited to large law firms, this study intentionally included smaller practices. This is of particular significance in New South Wales where the majority of ILPs are small firms.

The process of inviting directors to participate in the survey started with the NSW Legal Services Commissioner sending a letter of introduction to all ILPs with two or more solicitors. The letter explained that Susan Fortney, in cooperation with the OLSC, was conducting a research project to assess the role and effectiveness of the self-assessment process in the development of AMS. The letter also stated that the study will “explore the impact of the process on relationships, culture, ethical behaviour and professionalism and whether the process can be improved.”⁹⁶ The letter asked the firm to identify the name and email address of the legal practitioner director who last completed the SAF for the firm.

Based on information provided by the ILPs, Professor Susan Fortney used the Qualtrics system to email 356 solicitors.⁹⁷ The email asked directors to complete an online Questionnaire in connection with a study related to the SAP and the development of AMS.⁹⁸ The message asked directors to respond by the date noted in the invitation.⁹⁹ By the final deadline a total of 141 of 356 directors completed the online Questionnaire, producing a response rate of 39.6 percent.¹⁰⁰

B. Possible Sources of Bias

Professor Susan Fortney, the principal investigator on the research project, proposed the project as an independent study.¹⁰¹ Tahlia Gordon, research and projects manager at the OLSC, with the assistance of Esther Bowe, ILP practice review officer at the OLSC, commented on the proposal and assisted in developing the methodology.

As noted above, the response rate was 39.6 percent. A number of factors may have influenced directors’ willingness to complete the Questionnaire. First, the legal services commissioner invited directors to participate. Second, directors were assured that their responses would be handled on an

96. Letter from Steve Mark, Comm’r, Office of Legal Servs. Comm’r, to Legal Practitioner Directors for Inc. Legal Practice Dir. (specimen letter on file with author).

97. E-mail from Susan Fortney (June 28, 2012, 18:04 PM EDT) (on file with author). The email message went directly to persons identified by their firms in response to the earlier inquiry from the OLSC. We did not send invitations to seven firms that indicated that they were not interested in participating in the survey. Another ten firms could not be contacted because no contact information was available for them.

98. The e-mail invitation told addressees that they were “very important in helping provide an accurate picture of firm practices, systems, experiences, and the Self Assessment Process. Most importantly, your feedback will assist in formulating recommendations.” *Id.*

99. Using an anonymous tracking system, reminder messages were sent to directors. The final deadline for completing the survey was August 24, 2012.

100. For some questions, the number of respondents was 139. For those questions, the response rate drops to 39 percent. According to a report generated by the Qualtrics survey, a total of 192 persons had completed some part of the survey.

101. Susan Fortney conducted the research as an unpaid researcher. Maxine Evers also conducted the interviews as an unpaid researcher. The OLSC assisted with some of the out-of-pocket expenses, including the costs associated with transcribing the interviews.

anonymous basis.¹⁰² Third, directors may have appreciated the opportunity to share their experiences, views, and recommendations for improving the AMS and SAP requirements.

A number of persons consulted the survey form, but did not complete it.¹⁰³ The most likely explanation for a director declining to participate or not completing the survey form is lack of time or interest. Another explanation relates to the online format of the survey form. Although most computer users would likely find the online survey easy to navigate, some directors may have quit before completing the entire form.¹⁰⁴ Some directors may have declined to participate or left answers incomplete because they were concerned about what their answers might reveal or object to the AMS and SAP requirements and anything associated with it. Nothing indicates that the ILPs that did not participate in the survey differed from the respondents in size or composition of their firms.

C. Respondents' General Profile

Ninety-six percent of respondents noted that their position was "legal practitioner directors."¹⁰⁵ The respondent ILPs represented a wide range of firm size: 1–2 solicitors (10%); 3–9 solicitors (78%); 10–19 solicitors (7%); and 20 or more (5%).¹⁰⁶ Respondents were close to evenly divided between firms with home offices in Sydney and ILPs with home offices in other communities and suburbs in New South Wales.¹⁰⁷

When asked to indicate the percentage of work time the respondent spends on ethics issues, no respondent indicated that "more than 75%" was

102. Respondents were advised that the study project was being conducted in cooperation with the OLSC and informed of steps taken to protect the anonymity of their responses. Because the OLSC would not know which ILPs actually participated in the survey, the directors appeared to be comfortable providing candid responses.

103. The Qualtrics survey indicated that 192 persons had consulted the report, but only 141 completed the form. The overall response rate is based on that number, although some questions only had responses from 139 respondents.

104. The Qualtrics survey software informs respondents that that the form is incomplete, but the program does not specify what questions are unanswered. Rather than reviewing the entire response, a director may have aborted the process or left answers incomplete.

105. See ILP REPORT, at Question 2 (on file with author). The ILP Report includes all survey responses, including text entries provided by respondents. Invitations to complete the Questionnaire were only sent to the legal practitioner directors designated by firms. Persons who checked "Other" noted titles such as "CEO" and "Practice Manager."

106. These percentages largely reflect the distribution of solicitors in firms of varying sizes in New South Wales. Because of the small number of firms in the category of 20 or more solicitors, some statistical analyses combined the responses in that category with those in the category of firms with 10–19 solicitors.

107. Sixty-nine respondents reported that their firms' home offices were in Sydney, and 68 reported their firms' home offices were in "Other suburb." ILP REPORT, *supra* note 105, at Question 32.

spent.¹⁰⁸ As indicated in Table 1, the majority of respondents (67%) spend less than 10 percent of their time on ethics matters.¹⁰⁹

Table 1: Percentage of Director's Work Time Devoted to Ethics Matters

More than 75%	0%
35–74%	3%
10–34%	30%
Less than 10%	67%

The responses to this inquiry are somewhat surprising given that the Act requires that ILPs designate a legal practitioner director to ensure that AMS are implemented and maintained to enable the provision of legal services in accordance with professional obligations.¹¹⁰ Only 3 percent report devoting 35 to 74 percent of their time to ethics matters. The vast majority of respondents (97%) report devoting less than 35 percent of their time to “ethics matters.” These results may indicate that the responsibilities associated with AMS require less than 35 percent of a director’s time. Another possibility is that many respondents may be differentiating time devoted to AMS and time devoted to ethics matters. Directors may perceive AMS as more of a management tool than one that impacts ethical conduct. Another possibility is that directors believe that management systems work smoothly, enabling them to minimize the time devoted to “ethics matters.”

Based on survey results, most directors understood the obligations they assumed when they were appointed as directors for their ILPs. Ninety-three percent reported that when they were appointed they were aware of the legal requirement that directors of ILPs ensure that management systems are implemented and maintained.¹¹¹

A slight majority of respondents (55%) reported that their firms were in existence at the time the firm incorporated.¹¹² Prior to incorporation, 70 percent of the respondents indicated that their firms had in place management systems to ensure that lawyers acted in accordance with the Act.¹¹³

Close to three-quarters of the respondents had worked with the ILP or its predecessor firm for over five years.¹¹⁴ This group of directors, who apparently climbed the ranks within their firms, possess institutional knowl-

108. See *infra* Table 1; ILP REPORT, *supra* note 105, at Question 3.

109. See *infra* Table 1.

110. Mark & Cowdroy, *supra* note 5, at 681–6. The Legal Profession Act also requires that the director report to the Law Society any professional misconduct by another director. *Id.*

111. ILP REPORT, *supra* note 105, at Question 6.

112. *Id.* at Question 4.

113. *Id.* at Question 5.

114. *Id.* at Question 30. Close to three quarters also were thirty-five to sixty years old. *Id.* at Question 31.

edge that they could draw on in managing firm business. Most of the respondents (96%) had personally completed the SAF.¹¹⁵

PART IV: RESEARCH QUESTIONS AND FINDINGS

For the study we articulated primary and secondary research questions. This article will discuss survey findings related to the following question: What is the relationship between self-assessment and the ethical norms, systems, conduct, and culture in firms? A separate article draws on interview observations to examine other research questions.

A. *Does the SAP Contribute to the Implementation and Development of AMS?*

As a starting point we considered whether the SAP contributes to the implementation and development of AMS. To address this question, the survey instrument sought data on the steps the respondents' firms took in connection with completing the SAP. The Questionnaire provided a list of eight actions, asking respondents to check all of the steps taken in connection with the firm's first completion of the SAP.

As noted in Table 2, the vast majority (84%) indicated that they "reviewed firm policies or procedures relating to the delivery of legal services." Evidently, the review contributed to changes, as suggested by 71 percent of the respondents who indicated that their firms "revised firm systems, policies or procedures" in connection with the firm's completion of the first SAP.¹¹⁶ In addition to revising existing firm systems, policies, or procedures, 47 percent reported that their ILPs actually adopted new systems, policies, or procedures.¹¹⁷ Many directors also indicated that their ILPs strengthened firm management (42%) and devoted more attention to ethics initiatives (29%).¹¹⁸ Lower percentages sought guidance from the OLSC (13%) or another person/organization.¹¹⁹ Six percent hired consultants to assist in developing policies and procedures.¹²⁰

With respect to most steps taken by ILPs in connection with the SAP, there was no significant difference related to firm size and steps taken. A

115. *Id.* at Question 7. Forty-two percent completed two SAFs and 12 percent completed more than two SAFs. *Id.* at Question 10.

116. ILP REPORT, *supra* note 105, at Question 12. Based on information included on the SAF and communications with the OLSC, a 2006 study found that the SAP prompted 56 percent of the ILPs to make management systems changes. See MILLER & WARD, *supra* note 72, at 3. This finding was based on information disclosed to the regulator, rather than information disclosed directly to researchers.

117. ILP REPORT, *supra* note 105, at Question 12. In response to Question 5, 30 percent of respondents indicated that their firms did not have in place management systems to ensure that lawyers acted in accordance with the Legal Profession Act. *Id.* at Question 5.

118. ILP REPORT, *supra* note 105, at Question 12.

119. *Id.*

120. *Id.*

statistical analysis of the relationship between firm size and implementation of training revealed that there was a trending in that larger firms implemented more training than expected.¹²¹ This result is understandable given the dynamics of group practice and the shift to formal training as firms grow.¹²²

Table 2: Steps Taken by Firms in Connection with the First Completion of the SAP

Reviewed firm policies/procedures, relating to the delivery legal services	84%
Revised firm systems, policies, or procedures	71%
Adopted new systems, policies, or procedures	47%
Strengthened firm management	42%
Devoted more attention to ethics initiatives	29%
Implemented more training for firm personnel	27%
Sought guidance from the OLSC or another person/organization	13%
Hired consultant to assist in developing policies and procedures	6%

B. Does the SAP Affect Attitudes, Ethical Norms, Conduct and Culture in Firms?

Various responses indicated that the self-assessment process was transformative in shaping directors' impressions of the SAP and the AMS requirement. One question asked respondents whether they recalled their initial thoughts about the SAP before completing the SAF. Fifty-three percent of those responding to that question indicated that they recalled their initial thoughts.¹²³

Among the positive comments, a number stated that they initially thought that the SAP was a "good idea."¹²⁴ Various respondents noted that the process prompted them to reflect on firm systems and procedures, focus on areas where the firm needed systems in place, and formalize practices.¹²⁵ Some respondents indicated that they valued the educational dimension of

121. *Id.* (based on an analysis of Questions 1 and 12).

122. Increasing the number of professionals may affect the likelihood of informal supervision and mentoring.

123. ILP REPORT, *supra* note 105, at Question 8.

124. *Id.* Another example is: "I thought it was a really good idea, and prompted me to formalize a few more things." *Id.*

125. As stated by one respondent, "The Self Assessment Form is a good checklist for assessing our firm's compliance and potential improvements." *Id.*

the self-assessment process.¹²⁶ The following comment captures that sentiment:

I thought that this was a matter about which I had not given sufficient thought and that it would be a valuable exercise in formalizing what had been a matter to which less than complete attention had been formerly paid. On that basis I felt that it would be helpful in a number of ways—not the least being risk management.¹²⁷

A number of respondents described their negative first impressions of the process.¹²⁸ Some stated that they initially thought that the process was burdensome, a waste of time, and onerous.¹²⁹ A few questioned the application of the SAF to small practices.¹³⁰ Others objected to only requiring ILPs to go through the self-assessment process.¹³¹ As stated by one respondent, “I thought and still think that the SAP is discriminatory and a blunt tool for assessing whether a ‘corporation’ complies with the Act.”¹³² Two respondents specifically commented on how they initially had concerns about the SAF, but saw the value of the SAP once they started the process.¹³³

Another question specifically asked respondents whether their opinion of the SAP changed after they completed the SAF. Twenty-four percent noted that their opinions changed. Of the respondents who provided text entries, 78 percent described positive changes in their impressions of the SAP.¹³⁴ Some noted that they found the process to be “worthwhile” or

126. Referring to the educational reach of the process, one respondent described the SAP as a “great method to ensure self-reflection and solidify the process in the minds of all the staff.” *Id.*

127. *Id.*

128. ILP REPORT, *supra* note 105, at Question 8. As stated by one respondent, “I though[t] it was arduous and not necessarily relevant.” Some indicated that they initially thought that the SAF was “just more red tape” or paperwork. *Id.*

129. A number referred to the length and detail using descriptions such as “excessively long,” “arduous,” “more red tape,” and “more paperwork.” *Id.*

130. This sentiment was expressed by one respondent who described his/her initial impression of the SAP as follows: “Total waste of time for a small firm. In a firm such as ours we supervise each other’s files and work.” *Id.*

131. One respondent raised this concern, stating “Why do only ILP [sic] have to complete the form—surely all firms should be completing it!” *Id.* Another questioned the SAP as follows: “The document is comprehensive and some of the issues do not apply to smaller practices. It is grossly unfair that the burden of such systems fall on small incorporated practices, when larger partnerships are not subject to the same obligations.” ILP REPORT, *supra* note 105, at Question 8.

132. *Id.* The reference to the process being “discriminatory” may refer to the fact that only ILPs, and not other types of law practices, must complete the SAP.

133. One respondent stated, “It was overwhelming. However once we took the time to go through it we realized that our office/solicitors manual was quite comprehensive. In any event, it made us focus on the issues that we needed to address.” *Id.* A similar sentiment was expressed by other respondents, one of whom noted, “I was apprehensive about further regulation but ultimately, once I read the form completely, I realized it was a helpful tool.” *Id.*

134. A few text entries were neither negative nor positive. Only one respondent expressed a negative opinion, stating “[t]he self-assessment form was too complicated and generic to be of any real value.” *Id.* One comment stated “[t]hought provoking, but somewhat overly proscriptive, set of ideals to aim for.” *Id.* at Question 9.

“useful,” while others described how their thinking evolved.¹³⁵ One respondent indicated that the SAP started an evaluation process that the respondent voluntarily repeated.¹³⁶

A number referred to what they learned from the process. As simply stated by one respondent, “I become aware of the areas I needed to cover in the practice.” Another stated that she or he benefited from information provided as part of the feedback from the OLSC.

These comments, and similar ones, reveal that individual respondents generally recognized the educational value of completing the SAP. In response to an inquiry that asked respondents to note whether they agreed with statements, the majority of respondents (62%) indicated that they agreed or strongly agreed with the following statement, “The SAP was a learning exercise that enabled our firm to improve client service.”¹³⁷ Only 15 percent disagreed or strongly disagreed with the statement.¹³⁸ Interestingly, there was no statistically significant difference related to firm size and the respondents’ opinions on the learning value of the SAP. This suggests that regardless of firm size, the majority of the respondents recognized the educational value of completing the SAP.

Fewer respondents reported that they believed the SAP affected their consideration of ethics issues. Forty-eight percent of respondents indicated that they agreed or strongly agreed with the following statement: “The SAP prompted firm directors to reflect on ethical conduct.”¹³⁹ Similarly, 44 percent of respondents indicated that they agreed or strongly agreed that the “SAP enhanced [their] awareness of ethics issues.”¹⁴⁰ Twenty-three percent indicated that they disagreed (17%) or strongly disagreed (6%) with the statement.¹⁴¹ These results are consistent with other findings that suggest that larger percentages of directors perceive that the SAP and AMS requirements affect “client service matters” more than general ethics concerns.¹⁴²

135. For example, one respondent stated, “I formed the view that it was a useful reminder to review the management systems in place.” *Id.*

136. As stated, “I found the process extremely helpful. It exposed a number of areas that required a policy update and alerted my attention to some specific areas requiring improvement. I voluntarily repeated the process with a manager from an interstate office, to bring that office’s policies up to date.” *Id.* at Question 9.

137. Fifty-five percent of respondents indicated that they “agreed” with the statement and 7 percent noted that they “strongly agreed” with the statement. ILP REPORT, *supra* note 105, at Question 18, #7.

138. Eleven percent disagreed with the statement and 4 percent “strongly disagreed” with the statement. The balance of respondents checked “neither agree nor disagree.” *Id.*

139. Twenty-two percent disagreed or “strongly disagreed” with the statement. *Id.* at Question 18, #12.

140. Forty-two percent agreed with the statement and 2 percent “strongly agreed” with the statement. *Id.* at Question 18, #8.

141. *Id.*

142. *See infra* notes 151–152 and accompanying text.

A multi-part question asked respondents to “rate the impact of [the] Self-Assessment Process in improving” different aspects of firm practice.¹⁴³ For recording purposes, the Questionnaire used the following scale: (1) No impact, (2) Some impact, and (3) High impact.¹⁴⁴ Table 3 below groups the different aspects of firm practice into four categories: Management, Client/Professionalism Concerns, Ethics Concerns, and Firm Dynamics.¹⁴⁵ According to the means for respondents’ ratings, the greatest impact appeared to be in the general category of Management, with the following means: Firm Management (2.47), Supervision (2.24), and Risk Management (2.38).¹⁴⁶

Interestingly, an analysis of the interrelationship between responses on impact and firm size revealed a trend in which respondents from smaller firms reported that the SAP had more impact on supervision than in larger firms.¹⁴⁷ Otherwise, the cross-tabulations did not reveal any significant differences between the impact reported by respondents and firm size. This suggests that, regardless of firm size, respondents reported similar perceptions of the impact of SAP on various aspects of firm practice.

The next category of responses covered Client and Professionalism concerns. In this category, the highest impact score was a mean of 2.13 for Client Communication, followed by a mean of 2.07 for Professionalism, and a mean of 1.97 for Accountability to Clients.¹⁴⁸ The mean rating for the impact on Client Satisfaction was only 1.73.¹⁴⁹ This rating suggests that respondents, as a group, did not believe that the SAP affected Client Satisfaction as much as the SAP affected other aspects of the attorney-client relationship.

For general ethics concerns, the mean impact ratings were lower than the ratings in the first two categories (Management and Client/Professionalism). The lowest reported impact related to firm dynamics issues.¹⁵⁰

A comparison of these results indicates that the largest percentage of respondents believed that the greatest impact was on matters related to firm management and risk management. This outcome can be explained by the fact that the ten objectives for AMS and examples in the SAF largely focus on matters related to practice management and specific professional con-

143. ILP REPORT, *supra* note 105, at Question 13.

144. *See infra* Appendix B, at Question 13.

145. A statistical analysis revealed that the categories are valid as indicated by the correlations at a .05 alpha level.

146. ILP REPORT, *supra* note 105, at Question 13.

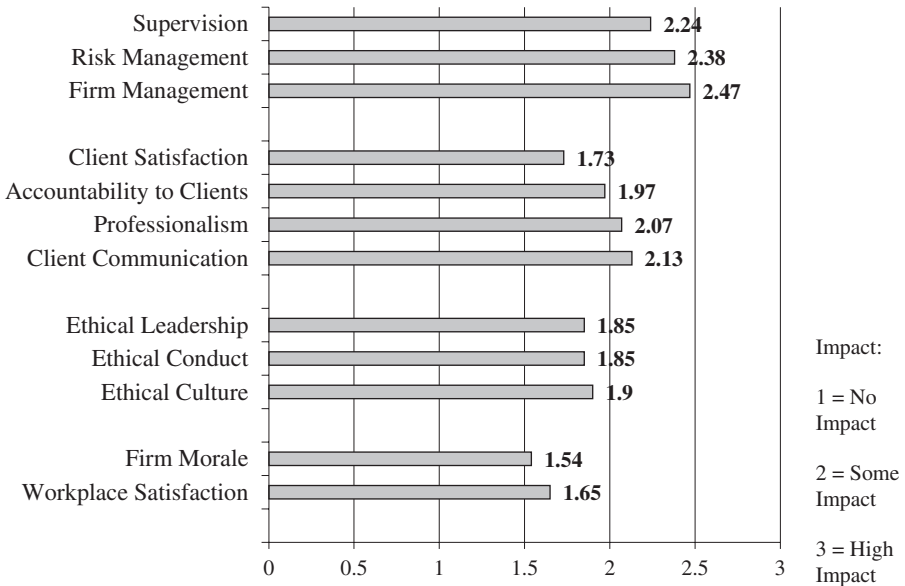
147. *Id.* (based on a cross-tabulation of Questions 1 and 13).

148. ILP REPORT, *supra* note 105, at Question 13.

149. *Id.*

150. *Id.* The mean rating for impact of the SAP on Workplace Satisfaction was 1.65 and the mean impact rating for Firm Morale was 1.54.

Table 3: Rating of Impact of SAP in Improving Aspects of Firm Practice



duct concerns, such as proper records management.¹⁵¹ Beyond ethics issues that are covered by the specific objectives in the SAF, such as conflicts of interest, the SAF does not expressly address more general ethics concerns. Therefore, many directors may not recognize the nexus between matters covered in the SAF and ethical conduct. Rather, they may perceive the SAP as more of a tool to improve management systems. Other survey results support this conclusion.¹⁵²

151. Following each objective, the SAF sets forth “Key concepts to consider when addressing the Objective” and “Examples of possible evidence or systems most likely to lead to compliance.” See *Suggestions Concerning the Elements of “Appropriate Management Systems” for Incorporated Legal Practices in NSW*, *supra* note 55.

152. See *supra* notes 139–142 and accompanying text. Survey results also suggest that ILPs are devoting more resources to risk management and quality assurance than “ethics management.” For example, only 63 percent of the respondents indicated that their firms had appointed a director or committee to direct ethics initiatives. ILP REPORT, *supra* note 105, at Question 27, #3. By comparison, 76 percent of the respondents indicated that their firms had appointed a director or committee to handle risk management and quality assurance issues. *Id.* at Question 27, #2. In Australia, the role of ethics or general counsel for firms has received less attention than in other countries. For example, in 2005 a *University of Kansas Law Review* symposium issue was devoted to developments related to the appointment of general counsel of law firms. In the United States, a group of law firm general counsel in the ABA Business Law Section formed the Firm Counsel Project. See Graham Hunt, *Firm Counsel Connection*, ABA BUSINESS LAW SECTION (Mar. 1, 2013), <http://apps.americanbar.org/dch/committee.cfm?com=CL290005&edit=1> (noting that the mission of the Project is to “build a community of lawyers within law firms, corporate law departments, and other law offices who perform internal functions related to ethics, risk management, or loss prevention.”).

When asked to describe the most significant improvement as a result of the SAP, the most common response was “firm management” followed by “risk management.”¹⁵³ Various respondents referred to ways in which the SAP contributed to a focused review and more management systems. Out of text entries, 20 percent reported that there was “nil” or “no improvement.”¹⁵⁴ Only one respondent specifically referred to ethics, stating that the most significant improvement was the “ethical approach to client matters.”¹⁵⁵

In describing other aspects of firm practice that were positively impacted by SAP, a number of responses related to “awareness” of requirements and management issues.¹⁵⁶ A few referred to discipline, efficiency, and productivity.¹⁵⁷

Beyond describing the impact on discrete aspects of practice, other responses revealed that the majority of respondents recognize the positive effects of the SAP on their law practices. Sixty-five percent of respondents agreed that the SAP assisted the firm in addressing problems.¹⁵⁸ Only 13 percent disagreed with the statement.¹⁵⁹

The Questionnaire also explored whether directors would seriously examine practices and procedures if the regulatory regime did not require that they did so. In the study, a relatively small percentage of respondents (16%) indicated that they agreed with the following statement: “The SAP is unnecessary because firms independently engage in self-evaluation.”¹⁶⁰ Fifty-six percent disagreed with this statement.¹⁶¹ If the majority of firms are not voluntarily evaluating their management systems, the regulatory scheme of

153. ILP REPORT, *supra* note 105, at Question 15.

154. *Id.*

155. *Id.* The respondent noted “Ethical approach to client matters.” *Id.* A similar pattern emerged in analyzing the results to the question that asked directors to describe the area of firm practice that improved the most as a result of AMS. *Id.* at Question 16. The most common response was firm management, followed by risk management. A few referred to ethics or professionalism matters. *Id.*

156. ILP REPORT, *supra* note 105, at Question 14. One respondent expressed the sentiment as follows: “It gave me confidence that I was doing the right thing and that appropriate systems were in place.” *Id.*

157. One noted that the SAP “partly influenced move to Law 9000 accreditation.” Another refers to the business angles of the SAP, replying that the SAP impacted the “[c]ommerciality of the practice. The document provided a roadmap for improvement in the practice, which in [turn] is improving the commercial viability of the practice through greater profits.” *Id.*

158. Seven percent “strongly agree[d]” with the statement and 58 percent “agree[d]” with the statement. *Id.* at Question 18, #9.

159. This broke down between 10 percent indicating that they “disagree[d]” with the statement and 3 percent who “strongly disagree[d]” with the statement. The balance (22 percent) noted that they neither agreed/disagreed with the statement. *Id.*

160. ILP REPORT, *supra* note 105, at Question 18, #11. Four percent indicated that they “strongly agree[d]” with the statement and 12 percent agreed with the statement. Twenty-eight percent neither agreed nor disagreed. *Id.*

161. Twelve percent strongly disagreed and 44 percent disagreed with the statement that “[t]he SAP is unnecessary because firms independently engage in self-evaluation.” *Id.*

requiring directors to complete a SAF effectively pushes directors to at least complete a SAF. The degree to which directors accurately complete the SAF remains unclear.

C. Does the SAP Accurately Reflect Firm Practice and Contribute to Serious Examination of Firm Practices?

Multi-part questions provided respondents an opportunity to indicate whether their firms had policies and procedures relating to communication with clients and supervision of personnel, two areas specifically covered by the objectives in the SAF.¹⁶² A number of the policies and procedures described in the questions were ones described as examples of AMS in the SAF.

With respect to client communication, nearly all of the respondents indicated that their firms had the policies and procedures described in the SAF, while lower percentages indicated that their firms had policies and procedures not described in the SAF.¹⁶³

A similar pattern emerged in analyzing the results of a multi-part question related to firm supervision.¹⁶⁴ Large percentages of respondents indicated that their firms implemented controls that are specifically described in the SAF, but lower percentages reported controls not described in the SAF. For example, 92 percent of firms indicated that their firms had a regular practice of verifying credentials and certifications of all practitioners, a supervisory control noted in the SAF.¹⁶⁵ By contrast only 66 percent indicated that their firms made a regular practice of having a practitioner (not involved in the representation) periodically review all current files, a measure not expressly described in the SAF.

The fact that a large percentage of firms report having the policies and procedures described in the SAF supports the conclusion that many firms use the SAF as a kind of “cookbook” for creating firm systems. A few firms may not treat the SAF as a “recipe” because they report not having policies and procedures that are specifically described in the SAF. These firms may be using others means to satisfy the regulatory objectives. Another explanation for less than all firms using the policies and procedures outlined in the SAF is that some directors may not candidly report compliance with regulatory objectives when they complete the SAF.

162. *Id.* at Question 23.

163. For example, 99 percent of respondents reported that their firms had policies/procedures covering (1) cost agreements and (2) written retainers disclosing the scope of representation, two items described in the SAF. *Id.* at Question 23, #3, #1. By contrast only 83 percent indicated that their firms had policies/procedures relating to standardized procedures for client intake and screening. *Id.* at Question 23, #4.

164. ILP REPORT, *supra* note 105, at Question 24.

165. *Id.*

This raises the question of whether directors are accurately reporting policies and procedures when they complete the SAP. Although a slight majority of respondents (51%) apparently believe that the SAP reflects actual practices in firms, 19 percent indicated that they agreed with the following statement: “The SAP does not reflect actual practices in firms.”¹⁶⁶ Those individuals who believe that SAP responses do not reflect actual practices in firms may be communicating that they were not candid when they completed the SAP or that they doubt that directors in other firms accurately reported practices in their firms.

To explore respondents’ views on whether firm directors were seriously examining firm management systems, the Questionnaire asked respondents to rate their agreement with the following statement: The “SAP amounts to meaningless box ticking.”¹⁶⁷ Twelve percent agreed with the statement and 66 percent disagreed with the statement.¹⁶⁸ This result suggests that the majority of respondents believe that directors are doing more than simply going through the motions when completing the SAP.¹⁶⁹

The risk of a regulatory audit may serve as a disincentive for directors to simply check boxes or misrepresent firm practices. Of the persons who noted their agreement or disagreement, the largest percentage of respondents (43%) agreed with the following statement: “The possibility of a Practice Audit by the OLSC contributes to candor when directors completed the SAP.”¹⁷⁰

D. What are Directors’ Concerns Related to the SAP and AMS Requirements?

Do directors believe that the benefits of the SAP justify any downside associated with completing the process? Because time is money for lawyers in private practice, do respondents believe that the process takes too much time and thus imposes unnecessary costs? In the survey, 19 percent indicated that they agreed with the statement that the “SAP was a waste of time.”¹⁷¹ The majority (68%) disagreed with the statement.¹⁷²

166. *Id.* at Question 18, #20. Thirty percent did not agree/disagree with the following statement: “The SAP does not reflect actual practices in firms.” *Id.*

167. *Id.* at Question 18, #18. Twenty-two percent indicated that they neither agreed nor disagreed. In Australia, “box ticking” refers to “checking boxes.”

168. *Id.*

169. Directors may have been reluctant to indicate that the SAP process was “box ticking” because they were concerned about more onerous regulation if they reported that the SAP amounted to a meaningless exercise.

170. ILP REPORT, *supra* note 105, at Question 18, #23. Fifteen percent disagreed and 42 percent neither agreed nor disagreed. *Id.* Forty-nine percent of respondents agreed that the “SAP opens the door to further inquiry to the OLSC into firm practices.” *Id.* at Question 18, #21.

171. *Id.* at Question 18, #10. In response to a separate inquiry, 18 percent indicated that the process takes too much time, while 50 percent disagreed with the statement. *Id.* at Question 18, #19.

172. *Id.*

When asked to describe concerns related to the self-assessment process, a number of respondents referred to the amount of time necessary to complete the process. As stated by one respondent:

Time is the enemy of all professionals as there are so many issues from management, staff, client, ethics, education, training[,] etc. You cannot expect a successful lawyer to be able to have plenty of free time so they must delegate but that involves supervision and training and on it goes. Anything that takes [away] the experienced practitioner's valuable time is seen as the enemy. Anything that saves time to allow a concentration on client issues and services is the friend.¹⁷³

Time was also an issue when respondents were asked to describe the main challenge to the firm implementing AMS. Approximately one-third of the respondents referred to "time." Close to 10 percent identified "costs" or "resources" as a challenge to implementing AMS. A few noted that staff resistance, implementation, and consistency throughout the firm were challenges they encountered. As with other responses to inquiries, some respondents questioned the necessity of regulation, in particular as applied to small firms.¹⁷⁴

PART V: SIGNIFICANCE OF SURVEY FINDINGS

The survey results reveal that the majority of respondents recognize the value of requiring firms to implement and maintain AMS and self-assess their management systems. A number of respondents indicated that they were sceptical at the outset of the process, but that their attitudes changed once they completed the SAP.

Although 19 percent of respondents indicated that they believed the SAP was a "waste of time," the majority of respondents representing firms of all sizes reported that the SAP had a positive effect on different aspects of firm practice, most notably firm management, supervision and risk management, followed by a positive impact on client service issues. These results can be explained by the fact that the ten objectives and the SAF examples primarily address practice management issues that commonly result in client complaints. As discussed above, the SAP has had less impact on issues not specifically covered in the SAF, such as establishing formal mechanisms for addressing ethics concerns of firm personnel.

Survey results suggest that directors' perspectives on the SAP and management systems fall along a continuum. At one end, a director may "go through the motions" by simply "box ticking," representing that the

173. *Id.* at Question 22.

174. In particular, directors with smaller practices expressed feeling pulled in multiple directions. One director described the concern as having to devote the time to "formally record what frequently occurs on an informal basis in a very small firm." ILP REPORT, *supra* note 105, at Question 22.

firm is compliant without genuine examination. Moving along the continuum, firms may only take the necessary steps for minimum compliance with the objectives. Others may adopt systems for risk management. Finally, the most proactive ILPs are those who are using management systems to distinguish the firm for business development purposes. For example, some Sydney firms that first improved their management systems as part of the SAP have continued the process to earn a Quality Management Certification under guidelines adopted by the International Organization for Standards. Lawyers may use such certification to retain clients and impress prospective clients.

Even for those ILPs that are doing the minimum to comply with the objectives articulated in the SAF, the “education toward compliance” approach guides directors in implementing management systems. Only 16 percent of the respondents indicated that the SAP was unnecessary because firms were independently engaging in self-evaluation. For the ILPs that do not independently evaluate their practices, the SAP regime gives directors the regulatory “nudge” to first examine and revise existing controls and then adopt new systems. The SAF itself educates directors by providing examples of management policies and procedures to help ensure that legal services are being delivered in accordance with the practitioners’ professional obligations.

CONCLUSION

The results of the study revealed that the AMS and SAP had the greatest impact on firm management and risk management. Regardless of firm size, the SAP has shaped the attitudes of many directors and introduced them to principles of good management. The degree of impact on ethics norms, systems, conduct, and firm culture however largely turns on the extent to which practitioners seriously examine firm practice and invest in making improvements.

Increasingly, practitioners are recognizing the business imperative for improving management systems. Law firms are in the business of attracting and retaining clients. Like other businesses, sound management practices are essential. The SAF provides law firms with a basic framework to apply management principles to practice.

Beyond the basic building blocks provided by the SAF, lawyers may be eager to improve the firm’s management systems, but need assistance in doing so. The challenge for regulators is to support practice leaders interested in developing management systems and fortifying their ethical infrastructure.¹⁷⁵

175. For an interesting essay on “quality assurance” efforts in law practice, including an analysis of the cultural, institutional, and doctrinal obstacles, see William H. Simon, *Where is the “Quality Movement” in Law Practice?*, 2012 WIS. L. REV. 387 (2012) (reviewing the limited

One strategy to assist practice leaders in developing management systems further may be to use the collaborative approach that resulted in the development of the ten objectives for AMS and the SAP regime. Using a similar approach, the OLSC and other regulators in Australia could organize a series of workshops to examine the issues raised by this research. In convening such workshops, regulators should consider inviting not only leaders from firms of all sizes, but also junior lawyers and non-lawyer personnel from law practices. In addition, law practice management and legal ethics experts should be asked to take an active role in these forums. Legal ethics experts may be able to contribute to the discourse of how the objectives could, for example, address general ethics concerns and duties to persons other than clients. Through this expanded collaborative effort, the Australian regulators could refine the SAF to help firms improve the ethical delivery of legal services.

The results of this study should also interest practice leaders of non-incorporated practices. As discussed above, a significant number of respondents recognized the value of AMS and the SAP. By logical extension, it would appear that unincorporated firms, their clients, and their communities would also benefit from the implementation of AMS. The findings from this study, and earlier ones, make a strong case for enacting legislation that imposes the AMS requirement on all law practices, regardless of their structure.¹⁷⁶

Outside of Australia, the NSW experience with management-based objectives has implications for regulators, researchers, educators, and lawyers. The results from this study and earlier research should inspire regulators to consider proactive partnerships with lawyers, rather than resorting to the traditional paradigm of reactive complaints-driven regulation of firms.

Regulators, insurers, and professional associations should work with practitioners to develop tools to assist lawyers in systematically evaluating their firm's systems, policies, and procedures.¹⁷⁷ Although some insurers and professional associations currently assist firms by providing auditing services and self-assessment instruments, many lawyers would benefit from

progress of the "Quality Movement" in the legal profession, and assessing the cultural, institutional, and doctrinal obstacles reforms face).

176. In the study, 79 percent of respondents agreed or strongly agreed with the following statement, "Unincorporated firms should be required to implement AMS." ILP REPORT, *supra* note 105, at Question 18, #24.

177. Over twenty years ago, the American Law Institute-American Bar Association Committee on Continuing Professional Education authorized a Peer Review Project to study the feasibility of a neutral self-assessment model for use by practitioners. The project, renamed the "Practice Evaluation Project," published *A Practical Guide to Achieving Excellence in the Practice of Law: Standards, Methods, and Self-Evaluation*. A.L.I.-A.B.A. COMMITTEE ON CONTINUING PROF. EDUC., *A PRACTICAL GUIDE TO ACHIEVING EXCELLENCE IN THE PRACTICE OF LAW* xiii (1992). For a discussion of other bar initiatives to develop materials and guides to assist lawyers in evaluating their practices, see Susan Saab Fortney, *Am I My Partner's Keeper? Peer Review in Law Firms*, 66 U. COLO. L. REV. 329, 361-66 (1995).

expanded dissemination of these tools and availability of these services.¹⁷⁸ In addition, deeper insurance premium discounts for firms participating in audits and self-assessments may capture the attention of lawyers who have declined to seriously examine their systems, policies and procedures.

Professional groups, such as Law Practice Management Sections of bar associations, can assist firms in facilitating more self-assessment and examination of firm practices.¹⁷⁹ To do so, management experts should address a range of issues including any obstacles that affect lawyers' willingness to engage in self-assessment. For example, some practitioners may resist self-examination because they are concerned that information developed during the self-assessment process could be damaging in the event of discovery in a subsequent malpractice case.¹⁸⁰ To deal with this concern, interested parties should seek some statutory protection for information that is developed in a self-assessment process. A comprehensive self-evaluation or peer review privilege could protect information developed as part of an audit or self-evaluation.¹⁸¹

The preliminary results from this study, and others conducted on the Australian regulatory regime for ILPs, also have implications for future empirical research. The studies illustrate how empirical research can bridge the disjunction between legal scholarship and law practice. Many regulators, practitioners, and other stakeholders are keenly interested in empirical research on the legal profession.¹⁸² Empirical researchers should consider collaborations with stakeholders, such as professional associations interested in improving the ethics and regulation of the legal profession.

Researchers could tackle a variety of projects to obtain a better understanding of the impact of management-based regulation on law practice. To assess the positive impact of the new regulatory regime, researchers could, for example, design a study comparing data from incorporated legal practices and unincorporated legal practices. Specifically, the research could consider the impact of requiring that firms appoint a practitioner to ensure

178. For an example of a comprehensive tool with numerous self-assessment instruments for law firms, see ANTHONY E. DAVIS & PETER R. JARVIS, *RISK MANAGEMENT: SURVIVAL TOOLS FOR LAW FIRMS* (2nd ed. 2007).

179. Schneyer, *Professional Self-Regulation*, *supra* note 10, at 587, n.44 (referring to services provided by Law Office Management Assistance Programs in bar associations).

180. In a study conducted on peer review of law firms, 36 percent of the respondents, who were managing partners in Texas firms with ten or more attorneys, indicated that they were more likely to conduct peer review if the results would be protected from discovery. Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves: An Empirical Study of Law Firm Peer Review and Culture*, 10 *GEO. J. LEGAL ETHICS* 271, 297 (1996).

181. *See id.* at 297–306 (analyzing the use of the attorney-client privilege and self-evaluative privilege to protect internal firm records and communications).

182. For an example of a comprehensive report that draws on data on the impact of deregulation of the provision of legal work, see LEGAL SERVICES BOARD, *MARKET IMPACTS OF THE LEGAL SERVICES ACT—BASELINE REPORT (FINAL)* (2012), <https://research.legalservicesboard.org.uk/wp-content/media/Impacts-of-the-LSA-2012-Final-baseline-report.pdf>.

that lawyers in their firms comply with their professional obligations. Although many firms in the United States and other countries have appointed lawyers to serve as law firm ethics, loss prevention counsel, general counsel, or compliance officers, no large-scale, systematic research has focused on the impact of requiring the appointment of lawyers who serve in such positions.¹⁸³

Beyond analysing directors' and senior practitioners' opinions on the impact of the AMS requirement and the SAP, as we have done here, researchers could also seek data from junior attorneys and non-lawyers. This will help illuminate whether firm systems, policies, and procedures are affecting the conduct and perceptions of professionals throughout the entire organization.

As noted above, the current SAP appears to have the greatest impact on those aspects of firm practice that are specifically covered in the SAF. This is explained by the fact that the SAF largely targeted concerns that commonly result in client complaints. The impact of the new regulatory regime on non-client concerns also deserves attention. Future research might, for example, explore how improved management structures impacts access to justice, as well as duties to the legal system and society.

Although additional research will provide more data, the 2012 study reveals that management-based regulation helps to educate lawyers in developing management systems. Regulators in other jurisdictions should seriously consider following the Australian lead in providing guidance to lawyers who recognize the importance of effective management systems in enabling firms to survive and thrive in our evolving global marketplace.

183. Such research could build on the pioneering work of Professors Elizabeth Chambliss and David Wilkins. *See generally*, Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002); Elizabeth Chambliss, *The Professionalization of Law Firm In-House Counsel*, 84 N.C. L. REV. 1515 (2006).

APPENDIX A
ABBREVIATIONS USED IN THE ARTICLE

Appropriate Management Systems – AMS
Incorporated Legal Practice – ILP
Legal Practitioner Director – LPD
New South Wales – NSW
Office of Legal Services Commissioner – OLSC
Self-Assessment Form – SAF
Self- Assessment Process – SAP

APPENDIX B
INCORPORATED LEGAL PRACTICES QUESTIONNAIRE

Default Question Block

Please complete the following questions by ticking a response or completing a blank. If a question seems inappropriate or incomplete for your situation, please write an explanation in the Comment Section at the end of the survey.

The Survey consists of 31 questions and should take 12-18 minutes to complete.

Question 1

What is the size of your firm, including branch offices?

- 20 or more solicitors
- 10 - 19 solicitors
- 3 - 9 solicitors
- 1 - 2 solicitors

Question 2

What is your position at your firm?

- Legal Practitioner Director
- Other

Question 3

What percentage of your work time do you spend on ethics issues?

- More than 75% of my time
- 35 - 74% of my time
- 10 - 34% of my time
- Less than 10% of my time

Question 4

At the time that your firm incorporated, was the firm already in existence?

- Yes
- No

Question 5

Prior to incorporation, did your firm have in place management systems to ensure that lawyers acted in accordance with the Legal Profession Act?

- Yes
- No

Question 6

When you were appointed as a director for your Incorporated Legal Practice (ILP) were you aware of the legal requirement that directors of ILPs ensure that “Appropriate Management Systems” (AMS) be implemented and maintained to ensure that the ILP complies with legal requirements of the Legal Profession Act and related regulations?

- Yes
- No

Question 7

Have you completed the Office of the Legal Services Commissioner Self Assessment Form (SAF) designed for ILPs to review their Appropriate Management Systems?

- No
- If yes, answer Question 8

Question 8

Do you recall your initial thoughts about the Self Assessment Process (SAP) before you completed the Self Assessment Form?

- No
- Yes - If yes, briefly describe your initial thoughts and answer Question 9

Question 9

After you completed the Self Assessment Form, did your opinion of the Self Assessment Process change?

- No
- Yes - If yes, describe the change.

Question 10

How many Self Assessment Forms has your firm completed?

- One
- Two
- More than two

Question 11

In what year was the last Self Assessment Form completed for your firm?

Question 12

In connection with your firm’s first completion of the Self Assessment Process, did your firm take any of the following steps? Please tick all that apply.

- Sought guidance from the Office of the Legal Services Commissioner or another person/organization
- Reviewed firm policies or procedures relating to the delivery of legal services
- Hired a consultant to assist the firm in developing policies and procedures
- Strengthened firm management
- Implemented more training for firm personnel
- Adopted new systems, policies or procedures
- Revised firm systems, policies or procedures
- Devoted more attention to ethics initiatives

Question 13

Please rate the impact of the Self Assessment Process in improving the following aspects of firm practice:

	No impact	Some impact	High impact
Firm management	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Supervision	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Firm morale	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Professionalism	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ethical culture	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Accountability to clients	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Risk management	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ethical conduct	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Workplace satisfaction	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Client communication	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Client satisfaction	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Ethical leadership	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

Question 14

Other than the items described in Question 13, please describe other aspects of firm practice that were positively impacted by the Self Assessment Process.

Question 15

From the list in Questions 13, please describe the impact of the Self Assessment Process (SAP) that you believe was the MOST significant improvement (if any).

Please state “No Improvement” if you believe that no area of firm practice improved as a result of the SAP

The following questions address Appropriate Management Systems.

Question 16

From the list in Question 13, please describe the area of firm practice (if any) that improved the MOST as a result of Appropriate Management System (AMS). Please state “No improvement” if you believe that no area of firm practice improved as a result of AMS.

Question 17

How would you rate your firm’s efforts to implement Appropriate Management System (AMS)?

- Excellent
- Good
- Average
- Poor
- Very Poor

Question 18

Please indicate whether you agree with each of the following statements:

	Strongly disagree	Disagree	Neither Agree nor Disagree	Agree	Strongly Agree
The adoption of Appropriate Management Systems (AMS) reduced the number of client complaints.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The adoption of AMS reduced the firm's professional liability risk.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The specific implementation of AMS should be left to individual firms.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Unincorporated firms should be required to implement AMS.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The Self Assessment Process (SAP) improved our relationship with the Office of the Legal Services Commissioner (OLSC)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The possibility of a Practice Audit by the OLSC contributes to candor when directors complete the SAP	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
SAP opens the door to further inquiry by the OLSC into the firm's practices.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SAP was a learning exercise that enabled our firm to improve client service.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SAP enhanced my awareness of ethics issues.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SAP assisted the firm in addressing potential problems.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SAP is a waste of time.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SAP is unnecessary because firms independently engage in self-evaluation.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SAP prompted firm directors to reflect on ethical conduct.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
The SAP changed director attitudes on firm practices.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
SAP does not provide enough guidance to firms.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
SAP amounts to meaningless box ticking.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
SAP takes too much time.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
SAP does not reflect actual practices in firms.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
SAP interferes with firm autonomy.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Each practitioner as a master of his/her own craft should be permitted to practice with little or no supervision.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Law firms exist primarily to facilitate each practitioner's practice by providing assistance such as support staff and insurance coverage.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
Firm practitioners should operate as a single entity in representing clients.	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input checked="" type="radio"/>

Question 19

What is the main challenge to your firm implementing Appropriate Management Systems?

Question 20

Does your firm periodically reassess its Appropriate Management Systems?

- Yes
- No

Question 21

Please provide your opinion on how the Self Assessment Process can be improved.

Question 22

Please note any concerns you have about the Self Assessment Process.

Question 23

Does your firm have policies/procedures covering the following:

	Yes	No
Written retainers disclosing the scope of representation	<input type="radio"/>	<input type="radio"/>
Written disclosure of the processes involved in representing clients	<input type="radio"/>	<input type="radio"/>
Cost agreements	<input type="radio"/>	<input type="radio"/>
Standardized procedures for client intake and screening	<input type="radio"/>	<input type="radio"/>
Regular client communications regarding work plans and progress	<input type="radio"/>	<input type="radio"/>

Question 24

Does your firm have a regular practice concerning the following:

	Yes	No
Verifications of the credentials and certifications of all practitioners	<input type="radio"/>	<input type="radio"/>
Structured training for all practitioners and staff members	<input type="radio"/>	<input type="radio"/>
Periodic review of all current files by a practitioner not involved in the representation	<input type="radio"/>	<input type="radio"/>
Regular meetings of directors to review firm management issues including risk and human management issues	<input type="radio"/>	<input type="radio"/>
Periodic review of compliance with the Legal Profession Act and other legal authority that imposes obligations on your firm.	<input type="radio"/>	<input type="radio"/>
Other supervision initiatives - Please describe in the comment section.	<input type="radio"/>	<input type="radio"/>

Question 25

Does your firm have a policy or system for dealing with ethics concerns of firm personnel?

- Yes
- No

Question 26

Which of the following, if any, does your firm use to address ethical concerns of firm personnel? Tick all that apply.

- Designated ethics practitioner
- Ethics committee
- Written policy encouraging reporting of ethics problems
- Scheduled in-firm meetings
- Scheduled training on ethics issues
- Other (Please describe)

Question 27

Does your firm have a director or committee appointed to:

	Yes	No
Handle professional negligence problems	<input type="radio"/>	<input type="radio"/>
Handle risk management and quality assurance issues	<input type="radio"/>	<input type="radio"/>
Direct ethics initiatives	<input type="radio"/>	<input type="radio"/>
Evaluate the manner in which all practitioners handle client matters	<input type="radio"/>	<input type="radio"/>

Question 28

Does your firm conduct periodic reviews to determine if practitioners comply with office procedures relating to the following:

	Yes	No
Calendar control	<input type="radio"/>	<input type="radio"/>
Client screening	<input type="radio"/>	<input type="radio"/>
Conflicts of interest	<input type="radio"/>	<input type="radio"/>
Retainer/cost agreements	<input type="radio"/>	<input type="radio"/>
Billing	<input type="radio"/>	<input type="radio"/>

Question 29

How long have you worked with your current firm or its predecessor firm?

Less than 36 months

36 - 60 months

Over 60 months



Question 30

What is your age?

Under 35 years

35 - 60 years

Over 60 years



Question 31

What is the location of the home office of your firm?

Sydney

Other suburb



To learn more about Appropriate Management Systems and the Self Assessment Process, Professor Susan Fortney with Maxine Evers, Senior Lecturer in the Faculty of Law at University of Technology, Sydney, will be interviewing directors of ILPs. If you are willing to be interviewed, please email Professor Fortney at susan.fortney@hofstra.edu. In the email, please include your name and contact information.

Please provide your comments below.
Thank you very much for completing this survey.