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## The Pressures of Billable Hours: Lessons from a Survey of Billing Practices Inside Law Firms

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ARTICLE

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

CHRISTINE PARKER\* AND DAVID RUSCHENA\*\*

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

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

“Then,” said Yossarian, “I’d certainly be a damned fool to think any other way, wouldn’t I?”<sup>1</sup>

INTRODUCTION

Do lawyers’ experiences of time-based billing and billable hour budgets subject them to pressures that encourage unethical practices? This paper argues that billable hour pressure is merely the face of more fundamental pressures stemming from the way that lawyers in private practice perceive their work environments. Even without excessive billable hour targets, lawyers will probably be more likely to engage in unethical behavior when they believe that such behavior is necessary to meet performance indicators, that everyone within their firm is engaging in such behavior, and that there is no other way to succeed at the firm—whether or not their beliefs are correct. The interventions necessary to prevent billing fraud must deal with lawyers’ perceptions and not merely the billable hours regimes in which lawyers work. Indeed, quite fundamental reform of the way firms manage their lawyers and communicate expectations about billing and ethics are necessary to

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1. JOSEPH HELLER, *CATCH-22* 455 (1972).

achieve an environment that is healthier for lawyers and less exploitative for clients.

This paper examines these issues through data from the Queensland Billing Practices Survey, run by the Legal Services Commission in Queensland, Australia. Lawyers from twenty-five private law firms answered questions about the billing systems, office culture, and ethics policies of their firms.

Section I reviews the literature on lawyers' ethics and billable hours. Section II describes the Queensland Billing Practices Survey, the data we obtained from the Survey, and why these data are helpful. Sections III, IV, and V set out the findings from the Survey. Section III examines the billing systems in which the lawyer-respondents work and the degree to which they feel their performance is assessed by reference to their budgetary performance. Section IV considers respondents' perceptions of unethical billing practices in their firms and the extent to which they personally feel ethical pressure from time-based billing. Section V considers law firms' attempts to establish ethics policies to counter unethical billing practices.

Section VI applies the lessons from the Survey to the interventions commonly suggested as appropriate to reduce unethical billing.

## I. BILLABLE HOURS AND UNETHICAL BEHAVIOR

### A. *The Postulated Ethical Impact of Billable Hours*

The ethical impact of time-based billing has been extensively debated within the academy<sup>2</sup> and the profession.<sup>3</sup> According to critics, the use of billable hours can be unfair to both practitioners and their clients.

High billable hour expectations can have a negative effect on lawyers' personal lives, professional development, and capacity to engage in pro

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2. For discussions on both sides of the debate within the academy, see generally CHRISTINE PARKER & ADRIAN EVANS, *INSIDE LAWYERS' ETHICS* (2007); Susan Saab Fortney, *Soul for Sale: An Empirical Study of Satisfaction, Law Firm Culture, and the Effects of Billable Hour Requirements*, 69 UMKC L. REV. 239 (2000) [hereinafter Fortney, *Soul for Sale*]; Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205 (1999); William G. Ross, *Kicking the Unethical Billing Habit*, 50 RUTGERS L. REV. 2199 (1998) [hereinafter Ross, *Kicking the Habit*]; William G. Ross, *The Ethics of Hourly Billing by Attorneys*, 44 RUTGERS L. REV. 1 (1991) [hereinafter Ross, *Ethics of Hourly Billing*].

3. For discussions on both sides of the debate within the profession, see generally AMERICAN BAR ASS'N, ABA COMM'N ON BILLABLE HOURS REPORT (2002), available at <http://www.judicialaccountability.org/articles/ABABillableHours2002.pdf>; Mark Rigotti, *Billing Structure Should Meet Client Needs*, THE AUSTRALIAN, Aug. 27, 2010, <http://www.theaustralian.com.au/business/legal-affairs/billing-structure-should-meet-client-needs/story-e6frg97x-1225910603852>; Kate Gibbs, *Firms' Budgets Behind Billing Fraud*, LAWYERS WEEKLY, Nov. 18, 2005; Kate Gibbs, *Hours of (Billable) Justice*, LAWYERS WEEKLY, Apr. 6, 2007; MODEL RULES OF PROF'L CONDUCT R. 1.5 (1996); Clyde Croft, *Aon and its implications for the Commercial Court*, (Aug. 19, 2010) (unpublished manuscript) (on file with the Supreme Court of Victoria library); James Spigelman, Chief Justice, Supreme Court of New South Wales, Speech at the Opening of Law Term Dinner (Feb. 2, 2004).

bono work.<sup>4</sup> Especially when work is scarce, practitioners can feel pressure to bill more and more on the same files, and they might achieve this by over-working, over-servicing, or, in some cases, falsifying the amount of time spent on a file.<sup>5</sup> Lawyers who are judged (or feel they are judged) only by the number of hours they record may not be rewarded for dealing with matters more efficiently or bringing special skills or relevant experience to the matter. This may result in the employee-lawyer who feels budgetary pressure, rather than the senior lawyer directly responsible to the client, “deciding what work is necessary and appropriate” on each file in order to control—and increase—his or her own hours.<sup>6</sup>

From a client’s point of view, billable hours provide a simple and familiar means of calculating fees but ignore whether the lawyer’s work actually furthers the client’s interests.<sup>7</sup> Lawyers who bill on an hourly basis have limited incentives to engage in case planning and have a specific incentive to adopt defensive over-servicing and strategies.<sup>8</sup> Even in the absence of fraud, clients run the risk of paying for inefficient lawyering, costs incurred in training junior lawyers, turnover, and aggressive time recording.<sup>9</sup> More generally, time-based billing provides clients with little or no predictability about cost. Without further information, clients (especially unsophisticated clients) have no ability to check whether the services for which they are charged are necessary to the matter and efficiently performed.<sup>10</sup> It is also easier for the lawyer to raise the fees when charging by the hour rather than per matter because the hourly increase seems small.

### *1. Assumptions About How Billable Hours Cause Lawyers to Behave Unethically*

The potential for the problems described above is clear and well documented. Many authors assert that the increase in billable hour targets that

4. Robert Hirshon, *Preface to ABA COMM’N. ON BILLABLE HOURS REPORT*, *supra* note 3, at ix.

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

6. AMERICAN BAR ASS’N, *supra* note 3, at 43.

7. See *id.* at 7–8.

8. See *id.* at 5–6.

9. For example, the billable hour makes it easier to justify charging out junior lawyers to perform work that could have been completed more efficiently by a senior lawyer, despite the senior lawyer’s higher billable rate. See Jesse Nelman, *Current Development 2009–2010: A Little Trust Can Go a Long Way Toward Saving the Billable Hour*, 23 GEO. J. LEGAL ETHICS 717, 718–19 (2010); see also AMERICAN BAR ASS’N, *supra* note 3, at 7 (noting that overreliance on billable hours causes clients to essentially pay for associate training).

10. See Lisa G. Lerman, *A Double Standard for Lawyer Dishonesty: Billing Fraud Versus Misappropriation*, 34 HOFSTRA L. REV. 847, 870 (2006); Bret Walker, *Proportionality and Cost-Shifting*, 27 U.N.S.W. L.J. 214, 217 (2006).

accompanied increases in lawyers' salaries, especially in the United States leading up to the Global Economic Crisis of 2007, exacerbated these problems.<sup>11</sup> Yet unethical practices associated with billing may well continue even where hourly billing is replaced by another method.

Joseph La Rue suggests that lawyers' professional lives have become "dominated by the time sheet"<sup>12</sup> for many reasons, including: "the ever-present desire to maximize profits"; "the gradual realization that attorneys could make more money from the labor of others than they could from their own labor alone"; "the advent of large law firms as a way to harness that extra labor"; and "the pressure on managing partners to make firms profitable, which meant that associates had to produce income equal to roughly three times their salary."<sup>13</sup> These factors all exist no matter what billing regime is in place.

Similarly, Richmond argues lawyers overbill due to a number of motivations,<sup>14</sup> only one of which directly relates to hourly billing regimes: ignorance of acceptable standards of conduct, professional insecurity, the absence of a meaningful bond with the firm, lawyers' competitiveness, compensation systems that directly reward high billable hours, an almost adversarial approach to dealings with clients, greed and envy, and mental illness and substance abuse.<sup>15</sup>

Kritzer, too, suggests, on the basis of his empirical literature review, that unethical behavior is not a function of any particular fee arrangement.<sup>16</sup> Rather, it is linked to "issues such as marginality of practice, client pressures, practice context (i.e., what courts or agencies a lawyer practices before), and the social context of a particular law firm."<sup>17</sup> Fee arrangements might influence the specific nature of lawyers' unethical behavior but not the likelihood of such behavior generally.<sup>18</sup>

11. See Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871, 891 (1999).

12. Joseph E. La Rue, *Redeeming the Lawyer's Time: A Proposal for a Shift in How Attorneys Think About—and Utilize—Time*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 473, 483 (2006).

13. *Id.* The other reasons are: "the invention of the computer and time management software"; "the gradual realization that attorneys could make more money billing by the hour than with any other method"; and "the acceptance of billing by the hour by the courts." *Id.*

14. See Richmond, *supra* note 5, at 81.

15. See *id.* at 82–99; Ross, *Ethics of Hourly Billing*, *supra* note 2, at 3 n.6.

16. Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1979 (2002).

17. *Id.* at 1979–80.

18. See also Brian Bartley, *Fair Trade? Why We Need to Rethink Time Billing*, PROCTOR, Sept. 2010, at 12 ("The reality is that there is no system of charging which is not open to abuse—or which can work perfectly well, if applied fairly."); Duncan Webb, *Killing Time: A Limited Defence of Time-Cost Billing*, 13 LEGAL ETHICS 39, 39 (2010) ("The problem of developing a uniform billing framework which is effective, economically defensible and ethical is in fact intractable. That is to say, there is no unified solution.")

A billable hours regime, however, does have the potential to take on a life of its own in the mind of employed lawyers. The sheer quantifiability of a billable hours budget makes it a more obvious and salient indicator of performance than other less choate measures of quality.<sup>19</sup> Professional gossip or cynicism<sup>20</sup> may add to the employee-lawyer's sense that billable hours are all-important performance measures. Billable hours then become the prism through which other pressures are refracted and magnified. This will be further exacerbated where lawyers work in firms with people who see ethically questionable behavior as "the way lawyers do things" or "the way we do things around here."<sup>21</sup>

This makes it important to look at the social environment of the firms in which lawyers work. In the following two subsections we discuss two features of law firms that might support unethical behavior:<sup>22</sup> the extent of competition and greed within a law firm and ignorance of appropriate ethical practices. These can influence lawyers' understanding about what they need to do to "get ahead" and what they are allowed to do without acting unethically.

### B. Competition and Greed

Lawyers use compensation and billing rates as a means of denoting status within a law firm.<sup>23</sup> Patrick Schiltz argues that lawyers are often high achievers who are used to competing and succeeding and desire the status that achievement brings.<sup>24</sup> The lawyer's capacity to generate income (for herself and for her firm) may be the only indicator as to whether she is good at the job.<sup>25</sup> The pressure this places on lawyers is all the more acute when compensation varies with management's assessment of lawyers' contributions to the firm, which in many cases is evaluated mainly by whether the lawyers reached their billable hour targets (rather than the quality and quan-

19. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 302 (Harvard Univ. Press 1993).

20. A number of studies suggest that young lawyers become quite cynical about the ideals of legal practice by the time they finish law school. See, e.g., Howard S. Erlanger, Charles R. Epp, Mia Cahill & Kathleen M. Haines, *Law Student Idealism and Job Choice: Some New Data on an Old Question*, 30 *LAW & SOC'Y REV.* 851 (1996); Andrew Goldsmith, *Warning: Law School Can Endanger Your Health!*, 21 *MONASH U. L. REV.* 272 (1995).

21. PARKER & EVANS, *supra* note 2, at 10.

22. Over-billing and bill padding are equally as dishonest as misappropriation of client funds: in both cases the lawyer is "wrongfully taking client funds for his own use." Lerman, *supra* note 10, at 874. However, the results discussed below show that this view is not held universally amongst practicing lawyers.

23. See Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 *HOFSTRA L. REV.* 879, 881 n.9 (2002); Richmond, *supra* note 5, at 90.

24. See Schiltz, *supra* note 11, at 904–06.

25. *Id.*

tity of the actual work provided to the client).<sup>26</sup> In order to maintain the feeling of success, lawyers take high-paying jobs despite knowing the burden this will place on them.<sup>27</sup> Lisa Lerman argues that compensation creates a vicious circle of competition and a means of salving the hurts that excessive competition inflicts upon lawyers' professional lives.<sup>28</sup>

The pressure to generate income and the compensation for generating income are the fundamental issues—billable hours might simply be a powerful conduit of those pressures. Problems with competitiveness and greed exist as soon as a lawyer's fees are measured, whether through billable hours or some other accounting method. Even if a particular lawyer does not personally feel the pressure to be competitive about compensation, he or she might still feel pressure from a sense that the firm is only interested in the amount of fees he or she generates. As such, pressure to inflate fees will cease only if a lawyer's revenue production is not considered at all for the purposes of her promotion or remuneration.

### C. Ignorance of Appropriate Ethical Practices

Lawyers may also fail to consider whether bill padding and inflation are actually unethical. There are a number of reasons to think that this is so. First, law students' education about ethical issues may amount to no more than a study of the rules of professional practice.<sup>29</sup> This can encourage the view that the rules are exhaustive of all types of ethical and unethical conduct, which means, by corollary, that any conduct that does not violate the rules is "ethical."<sup>30</sup>

Second, lawyers facing disciplinary proceedings for bill padding frequently argue that they merely intended to charge the client a premium, that they were unaware of firm policy, and that they did not intend to deceive the firm or the client about the total amount legitimately owed.<sup>31</sup> Such igno-

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26. For discussions of this idea, see generally Fortney, *Soul for Sale*, *supra* note 2, at 239; Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 *FORDHAM URB. L.J.* 171 (2005) [hereinafter Fortney, *Billable Hours*]; Lerman, *supra* note 2, at 241, 266; Lerman, *supra* note 10, at 847; Ross, *Kicking the Habit*, *supra* note 2, at 2199; Ross, *Ethics of Hourly Billing*, *supra* note 2; Kritzer, *supra* note 16.

27. There is no shortage of graduates willing to work at large firms, thus submitting to a professional lifestyle that is widely reviled. "The hiring partner of any major firm will tell you that if his firm offers first year associates a salary of \$69,000, and a competitor down the street offers them \$72,000, those who have the choice will flock to the competitor—even if the competitor will require them to bill 200 hours more each year." Schiltz, *supra* note 11, at 898.

28. Lerman, *supra* note 23, at 889.

29. See Lisa G. Lerman, *Teaching Moral Perception and Moral Judgment in Legal Ethics Courses: A Dialogue About Goals*, 39 *WM. & MARY L. REV.* 457, 463–64 (1998); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 *GEO. J. LEGAL ETHICS* 31, 39 (1995); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998).

30. Schiltz, *supra* note 11, at 908–09.

31. See Lerman, *supra* note 10, at 853–54, 857. Nelman supports this view, suggesting that "abusive billing may actually be the result of both billing ignorance and poor billing judgment,

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

Lawyers engaging in unethical billing practices may therefore manifest “Yossarian’s response” that—given the lawyer’s understanding of the firm and her colleagues—she would be “a damned fool”<sup>32</sup> to do things any other way. The lawyer’s perception need not have any basis in reality in order for it to support unethical conduct.

#### D. Previous Empirical Research

Previous research has described how lawyers experience the outcome of these pressures. In 2005, Susan Fortney interviewed and surveyed 1,138 managing attorneys and 4,649 supervised attorneys on a range of issues including billing practices.<sup>33</sup> Fortney hypothesized that firms imposing minimum billing targets are likely to encourage a culture of overcharging.<sup>34</sup> Respondents were clear that their prospects of both annual bonuses and promotions were directly linked to the extent they exceeded minimum billing targets.<sup>35</sup> Similarly, Corbin’s analysis of her interviews with junior and senior lawyers in Queensland law firms “shows that the graduates feel pressured by firm culture, but more specifically budgetary policies, which in their view limit their ability to provide a quality service to clients.”<sup>36</sup> Lisa Lerman has also found that adding hours to time sheets and charging undisclosed premiums as hours is “commonplace.”<sup>37</sup>

In 1991, William Ross published the results of a survey of 272 private practitioners and eighty corporate counsel practicing throughout the United

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which are sustained by an environmental pressure for lawyers to conform to the unethical billing practices of their colleagues. Put simply, lawyers may not know the practices they employ are unethical.” Nelman, *supra* note 9, at 722.

32. See HELLER, *supra* note 1, at 455.

33. Fortney, *Billable Hours*, *supra* note 26, at 174.

34. See *id.* at 175.

35. See *id.* at 176–78.

36. Lillian Corbin, *How “Firm” are Lawyers’ Perceptions of Professionalism?*, 8 LEGAL ETHICS 265, 276 (2005).

37. Lerman, *supra* note 10, at 882.

States.<sup>38</sup> There was general agreement about the effect of billable hours on ethics: 7.2% of private practitioners and 7% of corporate counsel respondents indicated their belief that time-based billing “substantially” or “very substantially” encourages fraud, while another 27.4% of private practitioners and 37.5% of corporate counsel respondents indicated that time-based billing had a moderate effect.<sup>39</sup> Differences between the two sets of respondents emerged, however, when they described the effect that billable hour regimes had on lawyers’ efficiency: corporate counsel were much more likely than private practitioners to indicate that time-based billing diminishes efficiency.<sup>40</sup>

This discrepancy appears to be based on different understandings of the ethics of time-based billing. Private practitioners were much more likely than corporate counsel to agree with the statement that “it is ethical for an attorney to bill a client for work (e.g., research of drafting) that originally was undertaken for another client and has been ‘re-cycled’ for the second client” even if “the second client is billed on the basis of time and is not informed that the work was ‘re-cycled.’”<sup>41</sup> Similarly, corporate counsel were much more likely than private practitioners to see it as unethical to bill a client for travel time during which the lawyer is able to bill another client for work.<sup>42</sup> These differences are remarkable considering that corporate counsel often start off as private practitioners. It supports the theory that lawyers in private practice are either not educated about the ethical consequences of their billing behavior or are socialized to ignore it. Corporate counsel, by contrast, learn to understand ethical consequences from a client’s perspective.

### *E. Need for Further Empirical Analysis*

Two issues would therefore benefit from further empirical analysis. The first is whether time-based billing puts greater ethical pressure on lawyers and leads to more unethical behavior than other billing systems. Private practices exist so that partners can make a profit, and it would still be easy to quantify and compare the fees each lawyer earns regardless of the system used to calculate those fees. If so, complaints about billable hours requirements are focusing on a problem that is a proxy for deeper forces. Changes in billing methods alone may not necessarily reduce competition and overcharging.

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38. Ross, *Ethics of Hourly Billing*, *supra* note 2, at 5. See *id.* n.16 for a description of the survey methodology.

39. *Id.* at 5–6 nn.16–17.

40. *Id.* Similar results occurred when respondents were asked to speculate about what would happen to lawyers’ bills if time-based billing were replaced by an alternative. More than 40% of corporate counsel stated that they believed that the replacement would tend to “moderately” decrease bills; only 9.3% of private practitioners indicated that this was the case. *Id.* at 85.

41. *Id.* at 39.

42. *Id.* at 58.

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

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

## II. THE QUEENSLAND BILLING PRACTICES CHECK SURVEY

### A. *Purpose and Design of the Billing Practices Check Survey*

The Queensland Legal Services Commission (LSC) is the independent, single gateway complaints-handler and disciplinary prosecutor for the Queensland legal profession.<sup>43</sup> It receives complaints about lawyers from clients and others, which it can either dismiss, seek to resolve, or take disciplinary or other action upon.<sup>44</sup> Dealing with complaints, however, is largely reactive and the extent to which complaint-handling activities can prevent further complaints from arising is limited.<sup>45</sup> Therefore, the LSC also has a number of strategies to proactively help improve standards of conduct in the legal profession and prevent complaints from arising in the first place, including a suite of “ethics checks” for law firms.<sup>46</sup> The Billing Practices

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43. All external complaints about legal practitioners in Queensland are supposed to be passed to the LSC, as opposed to being handled by the professional associations, which previously had the role of handling complaints against lawyers.

44. See *Legal Profession Act 2007* (Qld) ch 4 (Austl.); see also State of Queensland, *Welcome to the Legal Services Commission*, LEGAL SERVS. COMM'N, <http://www.lsc.qld.gov.au/> (last visited Oct. 11, 2011) (providing additional general information regarding the LSC).

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

46. The Workplace Culture Check was the first ethics check developed for law firms. It included questions in relation to the ethical infrastructure and workplace culture inside law firms. Subsequently, the LSC developed two further ethics checks, the Billing Practices Survey and the Complaints Management Survey. The Complaints Management Survey was initially developed as part of the regulatory scheme for incorporated legal practices as a way to audit ethical infrastructure in incorporated legal practice. It was labelled as an “ethics check” to emphasize that the focus was not on checking whether appropriate management systems were in place, but rather on the more cultural aspects of a firm's approach and arrangements for complaints management. All three ethics check surveys are available on the LSC's website at <http://www.lsc.qld.gov.au/546.htm> along with further information about how they are used and the results of the surveys. For an

Survey (“the Survey”) is one such check. While reactive complaint-handling can sometimes be adversarial between regulators, consumers, and the profession, more proactive approaches, including the Survey, involve collaboration. The ethics check surveys are intended to promote reflection, discussion, and, where appropriate, organizational change in relation to how lawyers handle a number of ethical, professional conduct, and consumer issues in their practices.

The Survey particularly drew on Susan Fortney’s previous research on billable hours and their impact on ethics.<sup>47</sup> The Survey questions fall into four broad categories:<sup>48</sup>

1. Questions relating to billing practices inside law firms, including the use of time-based billing and other methods of billing.
2. Questions relating to management policies and practices that might put pressure on practitioners to bill higher and to engage in unethical conduct to ensure higher bills. These questions also investigate the extent to which lawyers’ performance is measured and managed by reference to the amount they bill and whether bonuses are paid for exceeding billable hour targets.
3. Questions relating to management policies and practices inside law firms that seek to ensure that billing practices comply with conduct rules, are understood and consented to by clients, and aim to deter, detect, or prevent unethical conduct in billing. These include a number of specific questions about how lawyers and firms communicate with clients about fees and billing, how the firm determines bills, how different practices are billed, and also a series of more general questions about whether the firm has ethics policies and training in place.
4. Questions relating to the “ethical outcomes”<sup>49</sup> of firms’ billing practices and management policies, including whether practitioners feel substantial pressure to bill, whether they have observed instances of unethical conduct, and how they would respond to hypothetical scenarios of difficult billing decisions.

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in-depth discussion of the methodology and results of the Workplace Culture Check, see Christine Parker & Lyn Aitken, *The Queensland “Workplace Culture Check”: Learning from Reflection on Ethics Inside Law Firms*, 24 GEO. J. LEGAL ETHICS 399 (2011) [hereinafter Parker, *Learning from Reflection*]. For a description of the methodology of the Complaints Management Survey and discussion of its results, see Christine Parker & Linda Haller, *Inside Running: Internal Complaints Management Practice and Regulation in the Legal Profession*, 38 MONASH U. L. REV. (forthcoming) [hereinafter Parker, *Inside Running*]. For a general discussion of the rationale and methodology for this approach by the LSC, see John Briton & Scott McLean, *Incorporated Legal Practices: Dragging the Regulation of the Legal Profession into the Modern Era*, 11 LEGAL ETHICS 241 (2008).

47. See Fortney, *Billable Hours*, *supra* note 26. See also discussion *supra* notes 42–45.

48. For the full survey questionnaire, see LEGAL SERVS. COMM’N, BILLING PRACTICES SURVEY, available at [http://www.lsc.qld.gov.au/projects/Billing\\_Practices\\_Survey\\_2010\\_230410.pdf](http://www.lsc.qld.gov.au/projects/Billing_Practices_Survey_2010_230410.pdf).

49. This is the authors’ term, not the term used in the survey.

The aim of the Survey was to raise awareness within law firms of the way that certain billing practices might lead to pressure to engage in unethical conduct and the policies and techniques law firms might use to alleviate those pressures. The Survey was also intended to raise lawyers' consciousness of informal or unspoken assumptions in their firms about appropriate billing practices, as well as to encourage lawyers to critically reflect on whether their assumptions were justified and universally shared.

Finally, the Survey was intended to promote discussion within firms about these issues and, as a result, to prompt change in both individual and law firm attitudes and practices as appropriate. It was not intended to be a one-way conversation; that is, it was not designed to be a rigidly prescriptive checklist for good billing practices. The LSC hoped that lawyers and law firms could profitably use the Survey questions as a check of what they were doing. The focus, however, was primarily on uncovering the knowledge and attitudes of various members of the profession in relation to the billing practices operating within their firms in order to facilitate genuine conversations about appropriate billing.<sup>50</sup> The Survey methodology was also designed to allow the regulator to learn from law firms about how they themselves manage billing.

The online survey instrument enabled systematic collection of the data that could be provided back to the firms. Each firm that participated received results comparing how different levels of staff answered the survey questions and how it compared with other participating firms. The Survey was designed primarily as a kind of "participatory action research"<sup>51</sup> rather than for the purposes of "inferential research."<sup>52</sup> That is, the LSC's purpose in developing the Survey was not to conduct systematic social science research capable of supporting generalization. Rather, it was to encourage lawyers and law firms to reflect on and discuss their firms' billing practices and ethics policies more generally, and the (differing) perceptions of the ethical requirements and impacts of billing practices within the firm.

Data generated by participatory action research like this across a wide enough range of cases can be used to draw at least weak inferences about likely patterns or relationships where the patterns and relationships in the data are so strong that it is unlikely they could be explained any other

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50. Parker, *Learning from Reflection*, *supra* note 46.

51. For a discussion of participatory action research, see Kurt Lewin, *Action Research and Minority Problems*, 2 J. SOC. ISSUES 34, 34–46 (1946); *see also* Colin Eden & Chris Huxham, *Researching Organizations Using Action Research*, in THE SAGE HANDBOOK OF ORGANIZATION STUDIES 388 (Stewart R. Clegg et al. eds., 2d ed. Sage Publ'g 2006); *see generally* PAULO FREIRE, PEDAGOGY OF THE OPPRESSED (Myra Bergman Ramos trans., Continuum Publ'g Co. 1990) (co-learning and action based on critical reflection); Orlando Fals-Borda, *The Application of Participatory Action-Research in Latin America*, 2 INT'L SOC. 329 (1987) (refining the approach in Latin America).

52. *See generally* ALAN BRYMAN, SOCIAL RESEARCH METHODS (3d ed. 2008) (discussing the requirements of inferential social research).

way.<sup>53</sup> It is also possible to use these data to throw doubt on theories where patterns and relationships in the data are completely inconsistent with that theory. The observer must be very careful, however, to pay attention to both the research tool that generated the data, the sample, and the response rate in determining what inferences can be drawn.

There may be some social desirability bias in the responses to the Survey. The tone of the Survey may have influenced respondents to emphasize their own ethical behavior or they may have sought to convey views that they thought might accord with the views of either the LSC or the management of their firms. The Survey was conducted anonymously, however, and many respondents took the opportunity to write negatively of their firm or of the Survey methodology itself.<sup>54</sup> Accordingly, there is reason to believe that social desirability bias was not so great as to undermine the results generally.

### B. *Use of the Survey Data in This Paper*

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

1. The extent to which lawyers report that their firms use each of three different billing systems—billable hours, fixed fee arrangements, or contingency fees—and the extent to which they perceive that their firms use billable hours to assess and motivate their performance. The results are reported in Section III below.
2. The extent to which lawyers have different perceptions and experiences of ethical pressures and concerns emanating from their firms' billing practices. We also consider as far as possible whether these ethical pressures and concerns differ in firms with different billing practices. The results are reported in Section IV below.
3. Whether firms seek to ameliorate any false signals sent out by hourly billing and performance measurement on the basis of such billing by implementing policies and systems to infuse ethical values into billing and practice more generally and whether these measures actually result in better perceptions, experiences, and ethical outcomes. The results are reported in Section V below.

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

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53. See Parker, *Learning from Reflection*, *supra* note 46, at 412–18 (offering a fuller argument on this point).

54. Social desirability may not be much of a concern if a respondent feels able to write: "This survey is a waste of my time and other members of the firm. We will not participate again."

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

### *C. Participants in the Survey*

The LSC wrote to the managing partners or directors of all 172 law firms in Queensland with seven or more legal practitioners to invite them to complete the billing practices check during April and May 2010. Forty firms accepted the invitation to take part in the Survey by the end of May 2010, resulting in 517 responses. Data cleaning for the purposes of the analysis in this paper, however, resulted in 324 responses from twenty-five firms. As explained further below, the purpose was to create a robust data set with valid information about cultures and practices of firms as a whole, as well as about individuals' perceptions.

In order to participate in the Survey, law firms needed to ask all their employees—or at least representative samples of the different levels and classifications of employees, including those in branch offices—to complete the Survey anonymously online. Anonymity for participating staff and confidentiality for the firms was critically important to the success of the Survey in achieving both a good response rate and honest answers. The LSC did not deal directly with the individuals who completed the Survey, and the firms themselves participated anonymously through a coding process.<sup>55</sup> This meant that the LSC and the researchers could not identify which responses came from which particular firm.

For the purposes of the analyses in this paper, the data have been cleaned in order to focus on the practices and perceptions of fee earners; that

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

is, lawyers who have some responsibility for billing.<sup>56</sup> We did not include firms with fewer than five practitioners responding to the Survey because we were interested in examining the impact of firm practices and cultures on individuals. Similarly, because we want an accurate view of the practices and cultures in the firms we examine, we have also disregarded from the sample all those firms where an insufficient proportion of practitioners from the whole firm answered the Survey.<sup>57</sup>

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

#### D. *Characteristics of Individual Respondents and Their Firms*

Of the 324 respondents, 56% were male and 44% were female,<sup>58</sup> which closely matches the proportion of male and female lawyers for the whole of Queensland.<sup>59</sup> As Table One shows, women are more likely to be junior lawyers<sup>60</sup> while men are more likely to hold senior positions,<sup>61</sup> which also reflects the general population of lawyers in Queensland and throughout the common law world.<sup>62</sup>

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

57. This was challenging because as a result of the need to keep firms anonymous, the LSC did not collect data on the exact number of practicing certificate holders in each firm. Rather, respondents only had to nominate the range in which they fell (5–9; 10–19; 20–49; >50). Therefore, we took the lower number of the range for each firm and disregarded those responses where we did not have at least half of the lowest number of practitioners in that firm.

58. Three respondents did not specify their gender.

59. Note that these proportions refer only to solicitors and not barristers (i.e., specialist advocates). Queensland has a divided profession (solicitors and barristers), and only solicitors can practice in law firms. Therefore, it is only relevant to compare the survey respondents with the whole population of solicitors. The Queensland Law Society's 2009–2010 Annual Report records that 45% of practicing solicitors are female. QUEENSL. LAW SOC'Y, ANNUAL REPORT 13 (2010), available at <http://www.qls.com.au/content/lwp/wcm/resources/file/eb688c44e099ffb/2009-10-qls-annual-report.pdf>.

60. A "junior lawyer" is defined as not having achieved senior associateship, consultancy, or partnership at the time of the Survey.

61. This distribution is statistically significant: Pearson Chi-square value 45.312, df = 8,  $p < 0.001$ .

62. For Australia, see generally Joanne Bagust, *Work Practices and Culture in Major Australian Law Firms* 268 (Nov. 2009) (unpublished PhD thesis, La Trobe University) (on file with author); Francesca Bartlett, *Professional Discipline Against Female Lawyers in Queensland*, 17 GRIFFITH L. REV. 301, 306–07 (2008); Virginia Harrison, *Women Slide in Partnership Ranks*, THE AUSTRALIAN, June 25, 2010, <http://www.theaustralian.com.au/business/legal-affairs/women-slide-in-partnership-ranks/story-e6frg97x-1225884034943>. For other jurisdictions, see generally Steve French, Note, *Of Problems, Pitfalls and Possibilities: A Comprehensive Look at Female Attorneys and Law Firm Partnership*, 21 WOMEN'S RTS. L. REP. 189 (2000); Fiona Kay & Elizabeth

TABLE ONE: RESPONDENTS' ROLE IN FIRM, BY GENDER

	Male (n = 181)	Female (n = 141)	Total (n = 324)
<b>Employee Lawyers (not Partners/Directors)</b>	61%	93%	75%
<i>First- to Third-Year Lawyer</i>	28%	45%	36%
<i>Fourth-Year+ Lawyer</i>	13%	22%	17%
<i>Senior Associate</i>	11%	22%	16%
<i>Consultant/Special Counsel</i>	9%	4%	7%
<b>Partner/Director</b>	39%	7%	25%

Almost half (45%) of respondents had been practicing for less than five years, and almost two-thirds (63%) had been practicing for less than ten years (see Table Two).<sup>63</sup> The distribution of respondents' seniority varied between firms. Some firms' respondents were entirely comprised of junior solicitors; for other firms, up to 50% of respondents were partners or directors.

TABLE TWO: DURATION THAT RESPONDENTS HAD HELD A PRACTICING CERTIFICATE

	Male (n = 181)	Female (n = 141)	Total (n = 324)
<b>Less than 5 years</b>	34%	60%	45%
<b>5 to 9 years</b>	16%	19%	17%
<b>10 to 19 years</b>	19%	17%	18%
<b>20 to 29 years</b>	24%	4%	15%
<b>30+ years</b>	7%	0%	4%

Sixteen (64%) of the twenty-five firms participating in the Survey were partnerships (accounting for 76% of the individual lawyer respondents). The remaining nine firms were incorporated legal practices.<sup>64</sup> This

Gorman, *Women in the Legal Profession*, 4 ANN. REV. L. & SOC. SCI. 299 (2008). The fact that partners and directors are predominantly male should be borne in mind where later analyses indicate that seniority or gender affects responses. Generally it seems that seniority is more fundamental than gender in explaining lawyers' perceptions of law firm management and ethical culture. See Parker, *Learning from Reflection*, *supra* note 46, at 417.

63. This seems consistent with the general demographic that more than half of Queensland solicitors are under 40 years of age. See QUEENSL. LAW SOC'Y, *supra* note 59, at 12. Data on years practicing is not available.

64. In Queensland and a number of other Australian states, legal practices are allowed to incorporate under the ordinary corporations legislation. Firms that incorporate have additional legal obligations to put in place internal ethical management systems. See Christine Parker, *An Opportunity for the Ethical Maturation of the Law Firm: The Ethical Implications of Incorporated and Listed Law Firms*, in REAFFIRMING LEGAL ETHICS: TAKING STOCK AND NEW IDEAS 96–128 (Kieran Tranter et al. eds., 2010); Christine Parker, Tahlia Gordon & Steve Mark, *Regulating Law*

is a slight overrepresentation of firms with seven or more practicing certificate holders that are incorporated legal practices compared with the larger legal community.<sup>65</sup>

As shown in Table Three, 60% of the twenty-five firms (accounting for 74% of the individual lawyer respondents) were located in Brisbane, Queensland's capital city, with the remainder in regional cities or towns. This means that city lawyers are slightly overrepresented among our respondents.<sup>66</sup> Thirty-six percent of the firms (comprising 45% of the individual respondents) had multiple offices. Approximately half the respondents worked at practices with more than twenty certified lawyers (see Table Three). This is an overrepresentation of larger firms compared with the general population of Queensland law firms.<sup>67</sup> The gender composition of the firms varied widely, between 23% and 91% male.<sup>68</sup>

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

Regardless of the representativeness of the sample, the absolute sample size (twenty-five firms and 324 lawyers) is still a reasonable slice of the 170 law firms with more than seven practitioners in Queensland.<sup>69</sup> It is sufficient to provide some sense of the scale of any issues and is enough to test the relationship between different factors. It is, however, important to bear in mind that this group of twenty-five participating firms self-selected

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*Firm Ethics Management: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales*, 37 J.L. & Soc'y 466, 467 (2010).

65. Twenty percent of firms with seven or more practitioners are incorporated legal practices. QUEENSL. LAW SOC'Y, *supra* note 59, at 61. This overrepresentation is not surprising given that such practices' special regulatory arrangements probably give them a closer relationship with the LSC, the entity conducting the survey.

66. About 64% of Queensland solicitors practice in the Brisbane central business district and suburbs. *Id.* at 12.

67. LEGAL SERVS. COMM'N, 2009–2010 ANNUAL REPORT (Queensland) at 61. According to the LSC's figures, firms with seven or more practitioners only represent about 10% of all firms in Queensland. Even among this group, firms with fifty or more practitioners only represent about 12% of firms in Queensland (compared with 34% participating in the survey), while firms with less than twenty practitioners are underrepresented compared with the population of law firms.

68. No data are available on the gender profile of firms in Queensland generally to compare, but we do know that 55% of lawyers in Queensland are male. QUEENSL. LAW SOC'Y, *supra* note 59, at 13.

69. It amounts to 15% of all 170 firms and a much larger proportion of firms with more than twenty practitioners.

TABLE THREE: INDIVIDUAL AND FIRM RESPONDENTS TO THE BILLING PRACTICES SURVEY, BY NUMBER OF PRACTICING CERTIFICATE (PC) HOLDERS IN FIRM AND LOCATION

	Breakdown of Individual Respondents			Breakdown of Firms Participating in Survey		
	Brisbane CBD or suburbs (n = 241)	Regional City or Town (n = 83)	Total Individuals (n = 324)	Brisbane CBD or suburbs (n = 15)	Regional City or Town (n = 10)	Total Firms (n = 25)
<b>5-9 PC holders</b>	11%	29%	15%	27%	50%	36%
<b>10-19 PC holders</b>	30%	55%	36%	47%	40%	44%
<b>20-49 PC holders</b>	15%	16%	15%	13%	10%	12%
<b>50+ PC holders</b>	45%	0%	34%	13%	0%	8%
<b>Total</b>	60%	40%	100%	74%	26%	100%

to do the Survey in the first place. We might expect these firms to have the greatest interest in ethical issues around billing and therefore the greatest commitment to discussing and managing ethics in the firm. We therefore expect this group to represent the best case for billing practices and ethics. Any failure to accurately represent the objective truth of lawyers' views about ethical behavior will therefore tend to lie in an overestimation of lawyers' compliance with professional norms.

### III. FIRM BILLING METHODS AND PERFORMANCE MEASUREMENT

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

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

### A. *Billing Methods*

As shown in Table Four, the great majority (91%) of individual respondents indicated that their firm “always” or “mostly” used hourly billing.<sup>70</sup> About a fifth (22%) report that they “always” or “mostly” perform work for a fixed fee. Almost half (44%) indicated that their firm did work on a no-win no-fee basis to some extent, but only 4% of respondents indicated that their firm “always” provides services in this way.<sup>71</sup> This means that the scope of this study is not broad enough to consider whether Kritzer’s view—that different fee arrangements influence the specific nature of the unethical behavior, but not the likelihood of such behavior generally—is correct. Other arrangements sometimes used included fee schedules (five respondents), assessment by independent costs assessors (four respondents),<sup>72</sup> and incentive fees.<sup>73</sup>

TABLE FOUR: INDIVIDUAL LAWYERS’ PERCEPTIONS OF THEIR FIRM’S BILLING METHODS

	Always	Mostly	Sometimes	Never
<b>Time Based (Hourly)</b> (n = 304)	25%	66%	9%	0%
<b>Time Based (No-win No-fee)</b> (n = 212)	4%	9%	31%	56%
<b>Fixed Fee by Agreement</b> (n = 243)	2%	21%	73%	5%

In eighteen of the twenty-five firms, 85% or more of individual respondents reported that the firm “always” or “mostly” used time-based (hourly) billing (in nine firms, 100% of lawyers chose this option). In only two firms did 70% or more of respondents choose that the firm “always” or “mostly” used fixed fee agreements. In the remainder of the firms, well under half chose “sometimes” or “never.” There is therefore a fair degree of agreement within each firm as to the dominant billing method used.

70. This means that there is not sufficient variation in our data to robustly test the effects of various billing methods on ethical perceptions and behaviors.

71. *Legal Profession Act 2007* (Qld) s 325 (Austl.) (prohibiting law firms from charging contingency fees, which it defines as “a costs agreement under which the amount payable to the law practice, or any part of that amount, is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceedings to which the agreement relates”). Speculative litigation is therefore funded by litigation funders who pay lawyers on an hourly rate, by fixed fee or on a no-win no-fee basis. For a discussion of litigation funders in Australia, see Bernard Murphy & Camille Cameron, *Access to Justice and the Evolution of Class Action Litigation in Australia*, 30 MELB. U. L. REV. 399, 434–39 (2006).

72. The basis of measurement for such assessments was unclear.

73. These other methods were each mentioned in comments in the open text box provided for recording “other” billing methods.

### B. Billable Hour Targets

Of the 324 individual respondents, 86% indicated that they were given a billable hour target. This proportion is lower than what has been reported in the United States.<sup>74</sup> In Australia, billable hour targets are generally set as a daily figure rather than by year. Table Five sets out the distribution of daily targets, broken down by gender. Table Six shows the breakdown by partner versus other lawyers. The targets are generally around six billable hours per day, which equates to 1,380 billable hours per year—less than two-thirds of the targets set in very large firms in the United States before the Global Economic Crisis.<sup>75</sup> If this Survey suggests that respondents experience temptation to practice unethically with these fairly modest billable hour targets, then big-firm American lawyers may well experience greater temptation.

TABLE FIVE: INDIVIDUAL LAWYERS' DAILY BILLABLE HOUR TARGETS, BY GENDER

	Male (n = 180)	Female (n = 141)	Total (n = 323)
<b>No daily target</b>	16%	11%	13%
<b>Fewer than six hours per day</b>	32%	21%	27%
<b>Six hours per day</b>	14%	14%	14%
<b>More than six hours per day</b>	39%	55%	46%

A larger proportion of male than female lawyers had no daily target at all. A much greater proportion of female solicitors than male solicitors were required to bill more than six billable hours per day (see Table Five).<sup>76</sup> The difference in gender distribution is likely to reflect the greater number of male solicitors who are partners or directors of the firm in which they work. As partners and directors have obligations to expand their businesses and to manage junior lawyers, they have lower billable hour targets or no targets (as reflected in Table Six).<sup>77</sup>

Table Seven aggregates the individual lawyers' reports of their daily billable hour targets by firm. Individuals within firms were not unanimous

74. Ninety-six percent of law firm respondents answering an on-line survey created by the ABA Commission on Billable Hours indicated that they have a minimum hour requirement. See AMERICAN BAR ASS'N, *supra* note 3, at 43 (stating that twenty-two of 570 law firms responding did not have a minimum hour requirement).

75. A series of studies studying the billable hour targets for American lawyers are set out in Schiltz, *supra* note 11, at 891–92, and Richmond, *supra* note 5, at 88.

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

77. This difference is statistically significant: Pearson Chi-square:  $p = 0.01$ . Value = 21.353,  $df = 5$ . It is also consistent with previous findings. For example, Fortney found that the mean annual billable expectation for managing associates was 1,861 hours, while the mean for supervised attorneys was 1,887. Fortney, *Billable Hours*, *supra* note 26, at 175–76.

TABLE SIX: INDIVIDUAL LAWYERS' DAILY BILLABLE HOUR TARGETS, BY ROLE

	<b>Partner</b> ( <i>n</i> = 80)	<b>Other lawyers</b> ( <i>n</i> = 243)	<b>Total</b> ( <i>n</i> = 323)
<b>No daily target</b>	18%	12%	13%
<b>Less than six hours per day</b>	39%	23%	27%
<b>Six hours per day</b>	15%	13%	14%
<b>More than six hours per day</b>	29%	53%	46%

about the level of daily billable hour targets, although the majority tended to clump together. That is, individuals reported a variety of targets even within the same firm. But visual inspection of results showed that in most firms the individual responses tended to clump together towards the low, moderate, or high end of the scale.

TABLE SEVEN: LEVEL OF FIRM'S OVERALL DAILY BILLABLE HOUR TARGETS<sup>78</sup>

	<b>Percentage of firms</b> ( <i>n</i> = 25)
<b>No daily target</b>	16%
<b>Fewer than six hours per day</b>	40%
<b>Six hours per day</b>	16%
<b>More than six hours per day</b>	28%

### C. *Billable Hours as a Measure of Performance*

For each of a series of potential performance measures (e.g., amount billed, client satisfaction, etc.), respondents were asked whether the firm “always,” “mostly,” “sometimes,” or “never” took the issue into account. Table Eight displays the proportion of respondents who agreed that their firm “always” or “mostly” took the issue into account (shown in order from matters most to least commonly considered).

Survey results showed that partners are consistently more sanguine about the diversity and substance of matters relevant to a fee earner's performance than other lawyers. Employed lawyers are much more likely to believe that performance measurement and management is solely determined by the amount earned, while partners see performance assessment as based on a range of factors including the amount earned, competence, effi-

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

TABLE EIGHT: INDIVIDUAL LAWYERS’ PERCEPTION OF FACTORS “ALWAYS” OR “MOSTLY” USED TO MEASURE AND MANAGE PERFORMANCE, BY ROLE

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

† Indicates difference in distribution in responses between partners and other lawyers is significant to p = 0.05 or less.

‡ Indicates difference in distribution in responses between partners and other lawyers is significant to p = 0.001 or less.

ciency, and ethics.<sup>79</sup> Strikingly, the proportion of partners who consider that a lawyer’s ethical reputation is always or mostly relevant to her compensation is almost twice as high as the proportion of other lawyers holding the same view (60% of partners versus 33% of employed lawyers). This means that among partners it is the fifth most commonly chosen item that is relevant to assessing lawyers’ performance. By contrast, it is number eight among other lawyers, only ahead of “number of pro bono hours.”

These responses are consistent with Fortney’s findings that while 83% of supervised attorneys indicated that bonuses were largely based on billable hours production, only 67% of managing attorneys agreed.<sup>80</sup> Fortney noted that this difference might arise because the populations of managing attorneys and supervised attorneys responding to her survey were drawn from different firms, because attorneys’ perceptions about bonuses differ within the same firm, or because managing attorneys declined to acknowledge the significant role that hours play in bonus determinations.<sup>81</sup>

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79. Looking more closely at the amount that the fee earner has billed, 71% of employed lawyers, compared with 65% of partners, considered this to be “always” relevant to the measurement and management of his or her performance. Of the measures identified, “amount earned” is the only one that a higher proportion of employed lawyers than partners consider to be “always” relevant. (Not shown in Table Eight.)

80. Fortney, *Billable Hours*, *supra* note 26, at 176–77.

81. *Id.* at 177.

As mentioned above, great care has been taken to ensure that the populations of junior and senior lawyers in this study are from the same set of twenty-five firms. Therefore, it seems likely that senior and junior lawyers within the same firm have quite different perceptions about the variety and substance of matters taken into account in assessing lawyers' performance. While junior lawyers feel as if their performance is measured largely on a single dimension, management sees performance measurement as multi-stranded.

*D. Bonuses for Exceeding Billable Hour Targets and Billable Hours Rankings*

Firms use two other performance assessment approaches that can increase competition between lawyers: the circulation of lists that rank fee earners' performance and awarding bonuses when lawyers exceed billing targets. Thirty-nine percent (126 of 324) of respondents reported that their firm had adopted a policy to reward fee earners who exceeded their budget of billable hours.<sup>82</sup> Thirty percent of respondents (ninety-five of 316) reported that their firm published a list that ranked fee earners' performance. Only 3% of these respondents (three of ninety-five) reported that their firm made the list anonymous.

Aggregating to the firm level, the clear majority of lawyers in six of the firms said their firm published a ranking list of fee earners' performance by name, while a majority of lawyers in the other nineteen firms indicated that their firms did not.<sup>83</sup> There was much less unanimity around whether bonuses were available for exceeding billable hours. In nineteen firms, 60% or more of lawyers indicated that their firm did give bonuses to lawyers exceeding the target, and in fifteen firms fewer than half of the lawyers indicated that such bonuses existed.

Unanimous agreement that the bonuses existed occurred in only two firms and such agreement that the bonuses did not exist occurred in only three firms. It seems that while most people in a firm know whether or not a list ranking fee earners' performance is published, knowledge of bonuses for exceeding billing targets is much less consistent. Perhaps lawyers only know for sure how their own bonuses, if they receive one, are calculated. Thus, knowledge of bonuses for exceeding billable hours targets could be a matter of rumor and jealousy rather than transparency.

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82. This comprised 43% of male respondents and 36% of female respondents. The difference was not quite statistically significant. Pearson Chi-square = 5.52;  $p = 0.062$ .

83. As with the previous table, the coding of firms as to whether they publish a list is based on visual inspection of what individual respondents in that firm said. The result in each case was unanimous or close to unanimous.

#### IV. BILLABLE HOURS AND ETHICAL PRESSURES AND CONCERNS

In this part, we examine respondents' experiences of unethical practices and their perception of ethical pressure within the firm at which they work. The important question is whether there is a link between the billing practices in lawyers' firms and either their observation of unethical practices or their perception of ethical pressure. We analyze our data to determine whether such a link exists at both the individual and firm level. Finally, we report on respondents' reactions to two hypothetical scenarios—one involving bill padding and the other involving time billing—in order to flesh out these issues.

##### A. *Ethical Concerns*

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

Thirty-four percent of respondents reported concerns about the billing practices of other legal practitioners in their firm, and 23% reported having observed one or more instances of "padding" bills for work not actually performed (although only 2% reported that padding occurred regularly).<sup>84</sup> As an overall figure, this is a sizeable proportion of the respondents.<sup>85</sup>

There does, however, seem to be a substantial difference between individuals' experiences in different firms. In eleven of the twenty-five firms, more than half of the lawyer-respondents reported having concerns about the billing practices of others within the firm.<sup>86</sup> In these firms, perceptions that unethical billing practices were possibly used appear to be rife. In a further five firms, more than 20% of the lawyers reported concerns about others' billing practices. There were only two firms where no lawyers reported having concerns about the billing practices of others in the firm.

In eleven of the twenty-five firms, more than 20% of the lawyers reported that they had actually observed instances of bill padding.<sup>87</sup> In five

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

85. See also Ross, *Ethics of Hourly Billing*, *supra* note 2, app. A at 93 (finding that 12.3% of private lawyers responded that lawyers "frequently" pad their hours and 38% of private lawyers responded that lawyers "occasionally" pad their hours).

86. The highest instance of concerns about billing practices occurred in one firm where three-quarters of the lawyers said they had concerns about the billing practices of others in the firm.

87. These were the same firms where more than half of the lawyers had concerns about others' billing practices.

TABLE NINE: PROPORTIONS OF INDIVIDUAL LAWYERS WITH ETHICAL CONCERNS ABOUT BILLING

	Proportion of Lawyers with Concerns
<b>Have you ever had concerns about the billing practices of other legal practitioners/staff in your firm?</b> (n = 317)	34%
<b>During your employment at the firm have you ever observed any instances of “padding” bills for work not actually performed?</b> (n = 318)	23% <i>Regularly</i> – 2% <i>Occasionally</i> – 16% <i>Once</i> – 6%

such firms, more than 40% of the lawyers said they had observed bill padding. In no firm, however, had more than half of the lawyers observed bill padding.

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

Those lawyers reporting ethical concerns about billing or who had observed bill padding were asked how they had handled those concerns. Seven percent of those who answered this question reported doing nothing.<sup>88</sup> Fourteen percent reported discussing the matter with their supervisor, 11% reported discussing the matter with another legal practitioner, and 9% discussed the matter with the legal practitioner in question. Other responses mentioned in open-text comments included having the matter dealt with by the managing partner (two instances) or the partners generally (three instances), writing off the time without taking further action (three instances), and dealing with the conduct as a training issue (four instances). As one respondent said,

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

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

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88. One hundred-twenty respondents answered this question—37% of the total 324 respondents—showing that the 34% and 23% in Table Nine are not completely overlapping groups.

Padding goes on throughout the firm and it is like an unwinnable war. I regularly get into trouble because I am not one of the big billers of the firm, even though my work is always done and my clients are happy. I refuse to pad my time sheet and I left a previous employer where time sheet padding was blatant and rife. . . . Where the only way you ever get ahead is by making the firm lots of money, the pressure to pad time sheets will always be there.

On the other hand, some responses indicated skepticism about whether double charging is always ethically questionable. Especially where their work related to the production and use of template documents, respondents appeared to believe they were entitled to recoup the time and effort spent on the template by charging more than strict time-based billing would allow:<sup>89</sup>

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

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

### B. Ethical Pressure

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

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89. See also Steve Mark, *The Cost of Justice or Justice in Costs—The Experience of the OLSC in Handling Costs Complaints*, 27 U.N.S.W. L.J. 225, 229–30 (2004) (discussing the negotiating process necessary for “value billing” to be effective); Webb, *supra* note 18, at 41–42 (discussing the ethical pros and cons of value billing).

even less dismissive of the proposition that time billing is the only realistic way to bill for most legal work (mean response of 3.1).

There is a significant difference between partners and other lawyers on a number of statements related to the sense of ethical pressure that time billing creates in lawyers' minds. These are noted in Table Ten.<sup>90</sup> Partners' responses to the statements were marked by the same comparative optimism as their views about the matters relevant to performance assessment. They were significantly less likely than employed lawyers to agree that time billing creates greater competition, corner cutting, excessive duplication of effort, and so on. The strongest difference regards the statement that time billing adversely affects the quality of mentoring, with partners much less likely to believe this is so than employed lawyers. Particularly relevant for the purposes of this study is the statement, "It feels as if there is pressure to bill from the management of the practice." While even the majority of partners agreed with this statement, they expressed a lower level of agreement than other lawyers.<sup>91</sup>

There are also large differences between firms in the average response of their lawyers to this question. The average response was 4.0 or above in seven firms, indicating that the vast majority of lawyers agreed or strongly agreed that they felt pressure to bill. There was only one firm with an average response to this question under 3.0, indicating that those lawyers mostly did not feel pressure to bill. In all other firms, the balance of lawyers' opinions was that they felt pressure to bill.

Respondents' opinions of time billing varied according to whether they had a daily billable hour target or not. Those with no daily billable hour target were significantly less likely to report feeling pressure to bill.<sup>92</sup> Perhaps unsurprisingly, they are also significantly less likely to think that time is the only realistic way to bill for most legal work.<sup>93</sup> In fact, they are significantly more likely to think that time billing discourages project or case planning than those who have a target.<sup>94</sup>

### C. *Relationship Between Firm Billing Practices and Ethical Pressures and Concerns: Individuals*

Do lawyers who feel that time-based billing is more important for their firms or who feel that billable hours dominate their performance assessment<sup>95</sup> also have greater concerns about the ethical practices in their firm

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90. These were calculated using Analysis of Variance (ANOVA) between groups. Full statistics are available from the first author upon request.

91. The mean for partners is 3.5 and for other lawyers is 3.8. The difference in variation between the two groups is statistically significant. Between groups ANOVA  $F = 6.2$ ;  $p = 0.01$ .

92. Mean of 3.1 compared with 3.8. Significance tested using ANOVA.  $F = 9.983$ ;  $p = .000$ .

93. Mean of 2.7 compared with 3.2. ANOVA:  $F = 5$ ;  $p = .007$ .

94. Mean of 3.2 compared with 2.8. ANOVA:  $F = 4.2$ ;  $p = .016$ .

95. See discussion *supra* Section III.

TABLE TEN: INDIVIDUAL LAWYERS' SENSE OF SUPPORT OF AND PRESSURE FROM TIME BILLING (N = 316)

	<b>Mean</b> (1 to 5: Strongly Disagree to Strongly Agree)		
	<b>Partners</b> (n = 237)	<b>Other Lawyers</b> (n = 80)	<b>All Lawyers</b> (standard deviation shown in brackets) (n = 316)
<b>Statements Supportive of Time Billing</b>			
Time billing is the most realistic way to bill for most legal work.	3.0	3.2	3.1 (1.2)
Time billing is the only accurate way to give lawyers fair remuneration for the work they put in.	2.8	2.6	2.7 (1.1)
Time billing is the only valid way to measure a fee earner's performance.	2.4	2.1	2.2 (1.0)
<b>Statements About Ethical Pressures Arising from Time Billing</b>			
It feels as if there is pressure to bill from the management of the practice.	3.5	3.8†	3.7 (1.1)
Time billing results in lawyers competing against each other within the practice.	3.0	3.6‡	3.4 (1.1)
Time billing fails to discourage excessive duplication of effort.	3.1	3.4†	3.3 (1.0)
Time billing adversely effects the quality of mentoring.	2.6	3.3‡	3.1 (1.2)
Time billing encourages cutting corners when there is pressure to meet a budget.	2.6	3.1†	2.9 (1.1)
Time billing does not encourage project or case planning.	2.7	2.9	2.9 (1.1)

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

‡ Indicates there is a difference in responses between partners and other lawyers that is significant to p = 0.001 or less.

and feel under greater ethical pressure themselves? If so, this might be because they feel that the firm values maximization of billable hours to the exclusion of ethical concerns.<sup>96</sup>

Table Eleven shows the differences in perceptions of ethical pressure for lawyers who have a daily billable hours target compared with lawyers who do not. As might be expected, there is a dramatic difference in whether they feel “pressure to bill from the management of the practice”: 74% of those who have daily targets feel pressure compared with 35% of those who do not.<sup>97</sup> Having a billable hour target also influences, albeit to a lesser degree, whether lawyers had observed any instances of padding bills for work not actually performed and whether they had concerns about the billing practices of others in their firms.<sup>98</sup>

Table Twelve shows a similar analysis, this time between those lawyers who report that they work in a firm that publishes a ranking list of fee earners and those who do not. Lawyers in firms with ranking lists are more likely to feel pressure to bill.<sup>99</sup> The difference is not as dramatic as that, however, between those who have daily billable hour targets and those who do not. Similarly, lawyers in firms where rankings occur are also more likely to have observed instances of padding and had concerns about the billing practices of others in their firm compared with lawyers in firms that did not rank fee earners.<sup>100</sup>

#### D. *Relationship Between Firm Billing Practices and Ethical Pressures and Concerns: Firms*

The above section considers the relationship between perceptions of billing practices and ethical outcomes at the individual level, but it is equally important to consider this relationship at the level of the whole firm and how it impacts individuals. We would expect that if billable hours are the source of ethical concerns, then those firms where lawyers report higher billable hours and greater use of them in performance assessment would also be firms in which lawyers have more ethical concerns and feel greater pressure to bill. Therefore, we tested whether there is any statistical associa-

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96. See discussion *supra* Section IV.A–B.

97. The statistical significance could not be tested because of the relatively low number of respondents who have no daily billable hour targets—still, the difference is so large it is clear that it is important.

98. Twenty-four percent of those with a target had observed padding, compared with only 9% who did not have a target. Thirty-six percent of those with a target had concerns, compared with 19% of those who did not have a target. Statistical significance could not be tested. See *supra* note 97.

99. Seventy-eight percent of ranked lawyers feel under pressure to bill compared with 64% of non-ranked lawyers.

100. Again, parameters for tests of significant difference were not met and therefore they cannot be calculated.

TABLE ELEVEN: ASSOCIATIONS BETWEEN WHETHER LAWYERS HAVE A DAILY BILLABLE HOUR TARGET AND ETHICAL PRESSURES AND CONCERNS

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

TABLE TWELVE: ASSOCIATIONS BETWEEN WHETHER FIRM PUBLISHES A RANKING LIST OF FEE EARNERS AND ETHICAL PRESSURES AND CONCERNS

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

tion between various billing practices and ethical pressures and concerns at the firm level.

We did not find any significant correlation between the percentage of lawyers in the firm reporting that their firm always or mostly uses time-based billing and the level of ethical pressures and concerns lawyers in those firms felt.<sup>101</sup> Nor did the use of set billable hour targets,<sup>102</sup> the award-

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

102. In firms without a billable hours target, 25% of lawyers indicated concerns about other lawyers’ billing practices, 10% reported having observed bill padding, and the mean response when questioned about feeling pressure to bill was 3.4. In firms with a billable hours target, 39%

ing of bonuses for exceeding targets,<sup>103</sup> or the circulation of lists ranking billing performance<sup>104</sup> make a difference to firm lawyers' overall perceptions of ethical pressures and concerns. Thus, we find no evidence that firms' use of billable hours directly leads to higher ethical concerns and pressures.

There is, however, a series of correlations between solicitors perceiving pressure from management to bill, solicitors having concerns about the billing practices of other fee earners in their firm, and solicitors observing instances of bill padding for work not performed (see Table Thirteen). Firms with more solicitors who have concerns about billing practices also have more solicitors who agree that there is pressure to bill and that they have observed bill padding. On a firm-wide basis, however, a higher average sense of pressure to bill among the lawyers does not correlate with observed instances of bill padding. In some firms, then, there is a shared perception of pressure to bill associated with concerns about billing practices—but this does not mean that lawyers have in fact observed unethical practice. Nor does it relate directly to the fact that those firms formally use billable hours in particular ways. Rather, it is a matter of perception and perhaps rumor and suspicion among lawyers in those firms.

### *E. Hypothetical Scenarios*

A more in-depth way to understand how billing pressures affect lawyers' day-to-day practices is through their responses to a series of realistic hypothetical scenarios that were included in the Survey.<sup>105</sup>

The first scenario is as follows:

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

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of lawyers indicated concerns about other lawyers' billing practices, 22% reported having observed bill padding, and the mean response when questioned about feeling pressure to bill was 3.7. Although figures suggesting ethical problems are uniformly higher for firms with billable hours targets, none of the comparisons were statistically significant or approached significance. There was also no significant association between firms with respondents reporting higher billable hours and firms with respondents reporting lower billable hours.

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

104. Because lawyers were fairly unanimous about whether their firms published a ranking list or not, it was possible to divide the firms into those that did publish a ranking list and those that did not (on the basis of what the vast majority of lawyers in each firm reported). On this basis six firms did publish a ranking list and nineteen firms did not.

105. There were five scenarios included in the Survey. We briefly discuss two here.

TABLE THIRTEEN: SIGNIFICANT ASSOCIATIONS BETWEEN THE THREE ETHICAL OUTCOMES

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

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

In open-text comments, twenty-seven people stated that they responded “maybe” because they did not know the answer; a further eight expressly indicated that they were unsure of the ethical acceptability of the billing practice because they did not know the firm policy. This result is consistent with Fortney’s survey, in which one-quarter of respondents did not know about the relevant billing guidelines—which Fortney noted was the same as having no guidance at all.<sup>106</sup> Other open-text comments disputed whether charging the \$9,000 really was unethical on the basis that it might reflect the value of the work.<sup>107</sup> But, as some recognized, the prob-

106. Fortney, *Soul for Sale*, *supra* note 2, at 253.

107. One respondent commented:

TABLE FOURTEEN: RESPONSES TO FIRST HYPOTHETICAL SCENARIO

	Partners (n = 81)			Others (n = 237)		
	Yes	No	Maybe	Yes	No	Maybe
<b>Billing practice is ethically appropriate</b> (n = 318)	7%	78%	15%	10%	75%	15%
<b>Culture in firm encourages this practice</b> (n = 317)	7%	80%	12%	14%	75%	12%

lem is that it may not have been agreed upon with the client before the bill was rendered.<sup>108</sup>

The second scenario was as follows:

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

Respondents were asked whether they would bill both client A and client B for two hours and whether the culture in their firm encouraged the practice. Again, around three-quarters of respondents stated that it would be ethically inappropriate to bill both clients and that the culture in their firm did not encourage the practice (see Table Fifteen). Partners were again more optimistic than employee-lawyers in their belief that the culture of the firm discouraged the practice, and again, twenty-five of forty-three respondents who responded “maybe” and provided additional comments indicated that they were unaware of a firm policy on the appropriate charging practices.<sup>109</sup>

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I answered ‘maybe’ because the client thought they would be charged at an hourly rate, which they obviously have not been given the premium bill. However, if the work was worth \$10,000 as quoted (and I understand that is subjective) and the client agreed to that quote, I do not think there is an ethical issue in charging the client \$9k. The problem arises, as I said, with the fact that the client thought they would be charged at an hourly rate for work done.

Another commented:

Lawyers fall victim to undercharging for their IP. Some matters should be ‘value’ billed rather than time billed, particularly if the lawyer involved is particularly efficient and the general estimate is more than the time incurred. Also, with long term clients it is a matter of ‘swings and roundabouts’ where there are substantial write offs on other matters or work provided without time being charged to the file.

108. One respondent comments:

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

109. As shown in Table Fifteen, junior lawyers were a little more likely to have answered “maybe” than partners.

TABLE FIFTEEN: RESPONSES TO SECOND HYPOTHETICAL SCENARIO

	Partners (n = 81)			Others (n = 236)		
	Yes	No	Maybe	Yes	No	Maybe
<b>Bill both client A and client B</b>	4%	93%	4%	14%	77%	9%
<b>Culture in firm encourages this practice</b>	7%	90%	3%	14%	67%	19%

V. FIRM ETHICS POLICIES AND THEIR EFFECTS

Finally, we consider whether lawyers are aware of systems their firms have in place aimed at preventing ethical misconduct related to billing and whether these have any effect on ethical pressures and concerns.

A. *Firm Ethics Policies and Ethical Pressures and Concerns: Individual Lawyers*

Some firms put measures in place to educate lawyers about their ethical obligations related to billing and to uncover and punish unethical billing practices. Table Sixteen shows the responses to a question asking whether respondents’ firms had policies and/or procedures in place specifically for ensuring ethical practices in relation to billing.<sup>110</sup> The vast majority of lawyers reported that reactive monitoring practices were in place: measures to deal with complaints and concerns clients and employees raise. Far fewer respondents reported that their firms utilized more proactive measures. A smaller majority reported policies or procedures to “monitor” or “review” billing practices, and lower proportions of lawyers reported that their firms had specific measures in place to review all accounts and time sheets regularly. Partners tended to be more aware of policies and procedures for monitoring billing practices than junior lawyers were.<sup>111</sup> There is one exception: employed solicitors are more aware that their billing practices are directly reviewed.<sup>112</sup>

Similarly, in a separate question, respondents were asked whether their firms audited fee earners’ billing practices before the firm paid bonuses:

110. There were also a number of further, even more specific, questions about policies and procedures in relation to billing practices in the firms that are not reported here. Full results of the survey are available at Queensl. Legal Servs. Comm’n, *Ethics Checks for Law Firms – the Survey Results*, LEGAL SERVS. COMM’N (2011), <http://www.lsc.qld.gov.au/554.htm> (last accessed Oct. 11, 2011).

111. The difference is statistically significant for all items: Pearson Chi-square: p = .000 for all items. The results also differ significantly by gender, but we expect that the explanation for this difference is the difference in seniority in the firm. Therefore, we only show the breakdown by seniority.

112. This difference confirms previous research on differences between partners and other lawyers in relation to workplace culture policies. See Parker, *Learning from Reflection*, *supra* note 46.

TABLE SIXTEEN: INDIVIDUAL LAWYERS' AWARENESS THAT THEIR FIRM HAS ETHICS POLICIES FOR BILLING, BY ROLE

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

only 18% responded affirmatively.<sup>113</sup> There was a large difference between partners and employed lawyers: 41% of partners said their firms audited a fee earner's billing practices before paying a bonus compared to only 10% of employed lawyers. The vast majority of employed lawyers (75%) did not know whether auditing occurred, while only 13% of partners said they did not know.<sup>114</sup>

Policies and procedures specifically related to billing practices are not the only measures that might be important in controlling unethical billing: more general systems and procedures for ethics training and discussion might also have an effect. Table Seventeen, therefore, shows results to a question that asked whether various avenues for ethical awareness and raising ethical concerns were available in the firm. In no case did more than half the respondents report that their firm had employed the measure. The highest responses were for ethics training, which 44% of respondents stated took place in their firms. Partners are more likely to report that their firms have a designated ethics partner or solicitor than employed lawyers (46% compared with 35%) are and that their firms schedule in-house meetings to

113. Twenty-three percent reported that their firm did not audit billing practices, and 59% did not know either way. Three hundred and nineteen respondents answered the question.

114. The difference is obviously statistically significant. Pearson Chi-square:  $p = .000$ .

address ethical concerns and queries (41% of partners compared with 27% of employed lawyers).<sup>115</sup>

TABLE SEVENTEEN: INDIVIDUAL LAWYERS’ AWARENESS THAT FIRM HAS GENERAL ETHICS POLICIES

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

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

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

I’m not sure if we have a formal “policy.” The partners have an open door policy about pretty much everything, including employees’ concerns about ethics, relating to billing or otherwise. If any employee, whether it be a solicitor or support staff member, was unsure about the amount of an account, they are always encouraged to talk to the supervising solicitor or one of the partners to put their concerns forward and resolve the issue.

A number also mentioned encouraging use of the professional association, the Law Society of Queensland, to answer ethical queries: “The staff are encouraged to approach a partner with ethical concerns and they don’t know if the partners approach the Law Society.” Some lawyers, however, did mention more specific and proactive firm procedures or policies to ensure ventilation and resolution of ethical concerns, such as regular emails requesting issues be identified with supervising partners and escalated as necessary and practice-support lawyers in the firm conducting regular file audits.

The question most critical to our inquiry is whether firm ethics policies actually alleviate lawyers’ perceptions that they are under ethical pressure related to billing and reduce actual unethical practices. Statistical testing showed no relationship between individual lawyers reporting that their

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115. Parameters for testing statistical significance do not apply.

firms have policies in place to encourage ethical billing practices and whether they felt under more or less pressure to bill.<sup>116</sup> There is, however, a statistical relationship between firm policies to ensure ethical billing and lawyers reporting both fewer observed instances of bill padding and a lower level of ethical concerns about the billing practices of other lawyers within their firms (see Tables Eighteen and Nineteen).<sup>117</sup> Thus, monitoring did not reduce lawyers' perceptions that management pressured them to bill, but it did ease perceptions that their colleagues were engaging in bill padding.

TABLE EIGHTEEN: OBSERVED PADDING, BY EXISTENCE OF POLICIES  
DETECTING IMPROPER BILLING PRACTICES

		Observed instances of Padding?	
		Yes	No
<b>Firm has a policy in place to detect improper billing practices?</b>	Yes ( <i>n</i> = 161)	19%	81%
	No ( <i>n</i> = 46)	45%	55%
	Don't know ( <i>n</i> = 108)	20%	79%
	Total ( <i>n</i> = 315)	23%	77%

*B. Firm Ethics Policies, Ethical Pressures, and Concerns: Firms*

Ethics policies and procedures are intended to ensure consistent perceptions and practices throughout the whole firm, yet respondents from the same firm often answered these questions differently. In many firms there was no clear majority as to whether a particular ethics policy or procedure was in place.<sup>118</sup> In most cases, it is unlikely that ethics policies or procedures would exist in only part of the firm. Therefore, these results suggest

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

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

118. If we consider a clear majority to be either 25% or less or 75% or more reporting the same way, then respondents from eighteen of the twenty-five firms could not agree about whether an internal discipline policy for improper billing existed. Fourteen of the twenty-five firms could not agree whether the firm had a policy in place for detecting improper billing practices. That is, between 25% and 75% of the respondents from these fourteen firms agreed that there was a policy in place to detect improper billing practices. Respondents from eleven of the twenty-five firms could not agree about whether a specifically designated ethics partner had been appointed. Respondents from eleven of the twenty-five firms also could not agree about whether the firm offered scheduled training on ethics issues.

either significant ignorance that the ethics policy or procedure exists or significant disagreement about whether it fits within the definition given.

TABLE NINETEEN: CONCERNS ABOUT IMPROPER BILLING PRACTICES, BY EXISTENCE OF POLICIES DETECTING IMPROPER BILLING PRACTICES<sup>119</sup>

		Concerns about the billing practices of other practitioners in your firm?	
		Yes	No
<b>Firm has a policy in place to detect improper billing practices?</b>	Yes (n = 161)	24%	76%
	No (n = 46)	57%	44%
	Don't know (n = 108)	40%	60%
	Total (n = 315)	34%	66%

There are also no correlations between the proportion of lawyers in a firm reporting that certain ethics policies or procedures are in place and ethical outcomes. This is hardly surprising given that there is very little agreement within firms about the existence of such policies and procedures.

It may be that the main impact of ethics policies and procedures is indirect and relates to lawyers' perceptions of their work environment rather than directly to lawyers' behavior. That is, if an individual lawyer feels that the firm is monitoring his or her colleagues' behavior, he or she will feel comforted that those colleagues are not behaving unethically (see the section immediately above)—but this does not mean that ethics policies necessarily have any direct, independent effect consistently throughout the whole firm.<sup>120</sup> There is evidence from studies of rule-following behavior that people are more likely to comply with rules if they believe that their colleagues and competitors will be caught and punished if they do not follow the rules.<sup>121</sup> Psychological studies also suggest that people feel others need to be deterred from breaking the rules, but that they themselves will

119. Pearson Chi-square p = 0.000: value = 18.795, df = 2.

120. The whole question of what impact law firm ethical infrastructures (and internal business ethics and compliance programs) have on actual ethical behavior is a complex and contested one. It is safe to say, however, that evidence, theory, and common sense all suggest that the impact of such systems will be variable and contingent. See Christine Parker, Adrian Evans, Linda Haller, Suzanne Le Mire & Reid Mortensen, *The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour*, 31 U.N.S.W. L.J. 158, 161–72 (2008); Christine Parker & Sharon Gilad, *Internal Corporate Compliance Management Systems: Structure, Culture, and Agency*, in EXPLAINING COMPLIANCE: BUSINESS RESPONSES TO REGULATION 170 (Christine Parker & Vibeke Lehmann Nielsen eds., 2011).

121. See Sally Simpson & Melissa Rorie, *Motivating Compliance*, in EXPLAINING COMPLIANCE, *supra* note 120.

behave ethically without the need for rules because it is the right thing to do.<sup>122</sup> Indeed, deterrence measures might prove to be counterproductive.<sup>123</sup>

## VI. ANALYSIS AND POTENTIAL INTERVENTIONS

The problems of billable hours have triggered a debate regarding the merits of time-based billing over, for example, value-based tenders or event-fee substitutes. There is no consensus as to which ought to prevail.<sup>124</sup> In reality, lawyers face an insoluble conflict of interest when billing their clients;<sup>125</sup> time-based billing arguably rewards inefficiency,<sup>126</sup> while fixed fee agreements may encourage fee earners to perform work with minimum effort.<sup>127</sup> As Bartley points out, “there is nothing inherently wrong with billing on the basis of time spent—provided the time is productive, recorded fairly and charged at an appropriate rate.”<sup>128</sup>

The results of our survey confirm that “many of the legal profession’s contemporary woes intersect at the billable hour.”<sup>129</sup> We have uncovered a series of clear phenomena that influence lawyers’ working environments in a way that can push lawyers towards unethical behavior. These factors include not only billable hours but also the culture of competition and lawyers’ assumptions about other lawyers.<sup>130</sup> Lawyers and the firms for which they work need to address these factors. It seems clear that unethical behavior would continue to exist—albeit perhaps less acutely—if an alternate billing method replaced billable hours. Firms can, however, counter the perceptions that influence a lawyer to engage in unethical billing by correcting the cultural disconnect and clarifying that lawyers can achieve high status by honest means.

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122. See Yuval Feldman & Orly Lobel, *Individuals As Enforcers: The Design of Employee Reporting Systems*, in EXPLAINING COMPLIANCE, *supra* note 120; Yuval Feldman & Orly Lobel, *The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality*, 88 TEX. L. REV. 1151, 1190–91 (2010).

123. Feldman & Lobel, *The Incentives Matrix*, *supra* note 120, at 1182 (citing a finding that fines can act as a price for purchasing the right to perform the undesirable behavior).

124. See, e.g., Webb, *supra* note 18, at 39; Gibbs, *supra* note 3, at 18–19 (reporting the challenges faced by Australian firms seeking to respond to client discomfort with time-based billing); see also Steve Mark, Comm’r, NSW Legal Servs. Comm’n, Address at the Sydney Finance Essentials for Practice Management Conference: Analysing Alternatives to Time-Based Billing and the Australian Legal Market (July 18, 2008), available at [http://www.lawlink.nsw.gov.au/lawlink/olsc/l\\_l\\_olsc.nsf/vwFiles/Analysing\\_Alternatives\\_to\\_Time-Based\\_Billing\\_July\\_2007.pdf/\\$file/Analysing\\_Alternatives\\_to\\_Time-Based\\_Billing\\_July\\_2007.pdf](http://www.lawlink.nsw.gov.au/lawlink/olsc/l_l_olsc.nsf/vwFiles/Analysing_Alternatives_to_Time-Based_Billing_July_2007.pdf/$file/Analysing_Alternatives_to_Time-Based_Billing_July_2007.pdf) (describing various alternative billing methods and the market pressures forcing firms to adopt them).

125. Webb, *supra* note 18, at 40; Ross, *Ethics of Hourly Billing*, *supra* note 2, at 24–25.

126. See Spigelman, *supra* note 3.

127. Bartley, *supra* note 18, at 12. See Richmond, *supra* note 5, at 69 n.41, for a list of cases in the United States involving misconduct relating to fixed fees.

128. Bartley, *supra* note 18, at 12.

129. Hirshon, *supra* note 4, at ix.

130. *Id.*

### A. *Cultural Disconnect*

First, junior lawyers labor under the strong and consistent impression that the value of their work is assessed primarily on the basis of the fees that they earn. When given the opportunity to nominate “other” issues which would count toward lawyers’ performance reviews, one respondent to the Survey commented: “This firm is all about the money and while they say and like to pretend that other things matter, in reality they don’t. It is all about how much money you make the partners.” This view is incorrect to the extent that partners are considerably more optimistic about the extent to which other aspects of a lawyer’s work are considered when management assesses that lawyer’s performance. These responses are consistent with Fortney’s report of “a disconnect between partners and associates [whereby many] associates do not feel committed to their firms and partners do not feel committed to associates.”<sup>131</sup>

Lawyers who perceive that their firms are only interested in revenue production may feel a direct pressure to bill and a reduced motivation to deal with files efficiently. Less directly, lawyers’ reduced loyalty to the firm may cause declining loyalty to the firm’s reputation. Especially where several lawyers work on one matter, and any individual lawyer’s billable hours are merged with other lawyers’ charges, the client’s dissatisfaction with excessive billing is likely to be directed at the firm, rather than the lawyer individually. As a result, unethical lawyers are somewhat shielded from the possible consequences of their actions. Firm leaders therefore need to know what employed lawyers are thinking and talking about instead of feeling comfortable that they are sending the right messages from on high.

### B. *Ethical Confusion*

Second, a subset of lawyers do not have strong views about the inherent ethical character of bill padding. To them, allegations that padding is unethical beg the question of why they should only be entitled to charge for their marginal costs. Instead, they look to their firm’s policy for guidance on these issues. This can be problematic, not least because employees at many firms cannot agree whether a policy even exists.

Disagreement about whether a policy exists and what a policy requires has a cascading effect. Some lawyers—who have not derived an ethical judgment from first principles—might engage in questionable practices because they are unaware of a policy that seeks to prevent unethical behavior. There is also evidence that when the answer is ambiguous or unclear, people will choose the response that is self-serving. The perception that some lawyers engage in such practices might cause other lawyers, who have arrived at an ethical judgment and previously refrained from such practices,

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131. Susan Saab Fortney, *Leaks, Lies, and the Moonlight: Fiduciary Duties of Associates to Their Law Firms*, 41 ST. MARY’S L.J. 595, 616 (2010).

to change their behavior, if not their minds, simply because they now need to “keep up.”

### C. Interventions

These results suggest that, as discussed above, the appropriate locus for remedial action is the firm itself. Firms also have the greatest ongoing need to develop appropriate interventions as they will suffer most from the negative publicity or poor reputation<sup>132</sup> that unethical billing practices generate.

Commentators who argue that competition and greed are the primary causes of billable hour fraud suggest eliminating minimum billing requirements; changing the compensation culture amongst lawyers to avoid creating incentives to commit billing fraud; rewarding people for the quality of their work, not the quantity; rewarding other activities, such as mentoring; providing reduced-hour incentives that still provide the possibility of making partner; installing professional management personnel to administer and audit firm billing practices; and using alternative billing methods.<sup>133</sup> These commentators suggest that clear billing guidelines, training on billing, and monitoring of guidelines are insufficient.<sup>134</sup> As one respondent noted:

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

It is nevertheless clear that policies, as well as their discussion and enforcement, do have some role to play in preventing or decreasing the temptation to engage in unethical billing practices. This paper has shown that the existence of ethical infrastructure may not affect lawyers’ perceptions of a pressure to bill. It can, however, reduce their suspicions that other lawyers are billing unethically and reduce direct observations of unethical billing. Policies should inform staff about which practices are considered ethical or unethical, put processes in place to detect and investigate unethi-

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132. See Fred C. Zacharias, *Effects of Reputation on the Legal Profession*, 65 WASH. & LEE L. REV. 173 (2008); see also Webb, *supra* note 18, at 58 (showing how lawyers and firms can send quality signals to clients in order to prevent clients from receiving low quality service and to ensure that clients who have received quality service will pay for that service).

133. See, e.g., Lerman, *supra* note 23, at 916–21; Susan Saab Fortney, *I Don’t Have Time to Be Ethical: Addressing the Effects of Billable Hour Pressure*, 39 IDAHO L. REV. 305, 316–18 (2003) [hereinafter Fortney, *Time to be Ethical*]; Fortney, *Soul for Sale*, *supra* note 2, at 292–98; La Rue, *supra* note 12, at 495–99.

134. Lerman, *supra* note 23, at 916–21; Fortney, *Time to be Ethical*, *supra* note 133, at 316–18; Fortney, *Soul for Sale*, *supra* note 2, at 292–98; La Rue, *supra* note 12, at 495–99.

cal practices, and set out penalties for employees who engage in unethical behavior. Clear, well-publicized and well-enforced policies should provide guidance for well-meaning but ill-advised lawyers by helping them resist informal pressure (real or perceived) to lower their practice standards.<sup>135</sup>

Firm policies need to be detailed enough to authoritatively instruct lawyers as to what factors constitute proper billing. The policies should start with how time is to be recorded but go on to include such matters as: (1) whether it is necessary to take contemporaneous notes of time spent on files; (2) whether, if travelling for a client, efforts will be made to use the time spent travelling to do work on the client's behalf (preferably on the same file); (3) the impermissibility of recording fictitious hours or double-billing; (4) the necessity of keeping more detailed time entries to make it easier for clients and management to assess a lawyer's efficiency;<sup>136</sup> and (5) that if lawyers wish to charge a premium for work performed, they should charge an hourly rate greater than the normal rate.<sup>137</sup> These policies must address the challenge discussed above—that lawyers are producing a product, not providing a service and can therefore bill on the basis of the overall value to the client or the overall costs to the firm. Lawyers will view ethical guidelines that do not engage with this challenge as circular. Accusations of misconduct will be more persuasive if they analyze the agreement between the lawyer and the client. If the agreement specifies that the lawyer will charge on the basis of time, then the lawyer is acting fraudulently by padding his or her bill, no matter what work has been done previously.

If firms institute such policies, they must ensure their staff is aware of them. This paper supports previous literature clearly showing that many employee-lawyers are not aware of such policies.<sup>138</sup> Partners and directors who assume that their employees are aware of the firm's ethical infrastructure risk their firm's reputation with their complacency.

#### D. Clients

Regulators considering the problem of unethical behavior should also consider empowering clients to challenge such behavior and excessive billing. It is clear that "less sophisticated consumers of legal services" have difficulty assessing whether lawyers' bills are fair and reasonable.<sup>139</sup> Client empowerment should therefore occur through procedures aimed at ensuring that otherwise unsophisticated legal consumers are in the best position to develop an informed understanding of the product they should receive from

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135. Elizabeth Chambliss & David B. Wilkins, *A New Framework for Law Firm Discipline*, 16 GEO. J. LEGAL ETHICS 335, 338 (2003); Nelman, *supra* note 9, at 730.

136. See Richmond, *supra* note 5, at 83, 111.

137. See Lerman, *supra* note 10, at 866.

138. Fortney, *Soul for Sale*, *supra* note 2, at 253 (noting that 24% of the 1999–2000 Associate Survey respondents did not know whether the firm had any written billing guidelines).

139. See Fortney, *Time to be Ethical*, *supra* note 133, at 314.

a given firm. The first stage in this process requires the lawyer to inform the client of both the material elements of the fee agreement (that is, the services for which the lawyer charges and how much the lawyer charges for each service) and the lawyer's billing practices (that is, how the lawyer plans to calculate the amount owed for each service).<sup>140</sup> An attorney should warn prospective clients, for example, if the attorney customarily bills a minimum of a quarter of an hour for any activity, even for a one-minute call.<sup>141</sup>

The second stage in this process requires the lawyer to provide the client with information to enable the client to make appropriate comparative assessments. This might involve:

1. Information about how much of the total time billed to a file was actually billed to the client (known as the realization rate). The realization rate is a measure of a lawyer's overall efficiency; if a law firm charges its clients for every single minute that its lawyers spend on the client's file, that suggests either perfectly efficient lawyers or a failure to scrutinize the effectiveness of the lawyers' actions.
2. Current and past costs of handling similar projects.
3. A detailed summary of what needs to be done on the client's matter and what problems might arise.
4. Statistics setting out the usual time lawyers spend on different types of cases.
5. Asking firms to address some kind of standardized problem, such as a contract, which the firm could process and cost out.
6. More sophisticated clients going to tender on legal services could also seek information about tenderers' ethical monitoring and auditing practices.<sup>142</sup>

### E. Future Research

We have concluded that lawyers in private practice would likely compete on matters associated with their budgets, even if they were not subject to set billable hours requirements. It may be, for example, that a list of earnings would operate to undermine ethical practices, even if there were no billable hour budgets. This conclusion is inferential and not based on clear responses. The billable hours system is so pervasive that it is difficult to

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140. Richmond, *supra* note 5, at 74, 77 (citing judicial interpretations of Model Rule 1.5 established by *In re Disciplinary Proceedings Against Boeltner*, 985 P.2d 328, 336–37 (Wash. 1999) (en banc) and *In re Discipline of Dorothy*, 605 N.W.2d 493, 501 (S.D. 2000), respectively).

141. Ross, *Ethics of Hourly Billing*, *supra* note 2, at 71. In Australia, if the practitioner does not disclose the minimum unit of time billing, the courts have held that the practitioner is only entitled to recover charges in accordance with the actual time that has elapsed. See *Moray v Lane* (No. 15084) 1993 NSW LEXIS 8322, at \*4–5 (N.S.W. Sup. Ct. 1993) (Austl.).

142. See Suzanne Le Mire & Christine Parker, *Keeping It In-House: Ethics in the Relationship Between Large Law Firm Lawyers and Their Corporate Clients Through the Eyes of In-House Counsel*, 11 LEGAL ETHICS 201, 202, 211–12, 226 (2008).

find enough lawyers and firms using an alternative system to test the difference with confidence.<sup>143</sup> Further quantitative studies with sufficient data to test the impact of different billing systems on specific unethical behaviors would be useful. Further research might also use qualitative research methods including in-depth interviews, participant observation, analysis of documents to understand how “billable hours” operate in lawyers’ consciousnesses, and practices compared with other billing systems and performance measures. Does the ease of quantification of billable hours mean that time-based billing creates a more one-dimensional technology of control over lawyers’ thinking and behavior than other measures of earnings and performance would? Or are all billing systems and performance measures subject to similar pressures to become one-dimensional exaggerators of competition and greed within the firm? These are also questions for law firm managers to experiment with in trying to create supports for ethical behavior and discussion within their firms.

Empirical research on the issue of billable hours has so far been limited to surveys about respondents’ views of the frequency of unethical behavior and their perceptions about the pressures to engage in such behavior. This method provides a useful start to a discussion about how perceptions can influence behavior. Research based on self-report surveys and interviews, however, can only report respondents’ subjective perceptions of the pressures upon their billing practices and their concerns about unethical conduct in their firms. They do not seek, and cannot provide, objective, verifiable evidence of misconduct. Quasi-experimental research might be useful in order to better test whether partners’ optimism or employee lawyers’ pessimism is more accurate. One possibility for further research would be to provide respondents with a series of archetypes of lawyer behavior (e.g., a high biller who is inefficient, a high biller who may be acting unethically, a low biller who engages in significant pro bono activity, and so on) and ask respondents to predict each archetype’s rate of advancement and likely compensation if employed at the respondents’ firms. Ideally, researchers would gain access inside law firms to conduct in-depth ethnographic research via participant observation to understand both lawyers’ perceptions of conduct and ethics around billing practices and to observe how this emanates in practices.<sup>144</sup>

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143. Sufficient data from firms with different billing systems was not available in this study. See *supra* note 70.

144. For a survey of the different ways of doing empirical research on compliance and non-compliance (which might broadly include ethical and unethical behavior) and their strengths and limitations, see Christine Parker & Vibeke Nielsen, *The Challenge of Empirical Research on Business Compliance in Regulatory Capitalism*, 5 ANN. REV. L. & SOC. SCI. 45 (2009). For an example of the type of ethnographic research suggested here (in relation to compliance with scientific research ethics requirements), see Susan Silbey, Ruthanne Huising & Salo Vinocur Coslovsky, *The “Sociological Citizen”: Relational Interdependence in Law and Organizations*, 59 L’ANNÉE SOCIOLOGIQUE, 201 (2009).

## CONCLUSION

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

The remainder of the paper used data from the Queensland Billing Practices Survey (described in Section II) to provide some empirical evidence from lawyers inside law firms about the role of billing practices in their lives, and the extent to which billing practices create ethical pressure for them.

Section III showed that law firm lawyers who responded to the Survey perceive their firm environments to be dominated by billable hours and perceive their own performance to be assessed primarily by the revenue they generate. Section IV examined their perceptions of unethical billing practices in their firms and the extent to which they personally feel ethical pressure from time-based billing. Unsurprisingly, those subject to billable hour targets feel greater pressure to bill and, to a lesser extent, have greater ethical concerns about their firms. However, we do not find any clear correlation between billable hour targets and a sense of pressure to bill. What we do find is some firms where a high proportion of lawyers feel pressure to bill and have a high degree of concern about the unethical billing practices of others, and other firms where this is not the case.

Section V considered law firms' attempts to establish ethics policies to counter unethical billing practices. We find little evidence that these directly prevent unethical billing, but we do find that they help lawyers feel less concerned that others might be engaged in unethical practices. Therefore, we suggest that these systems can help build a positive ethical environment around billing.

Section VI applied the lessons from the Survey to the interventions commonly suggested as appropriate to reduce unethical billing. We conclude that there is often a "cultural disconnect" in law firms between partners and employee-lawyers in which junior lawyers feel that their firms are only interested in revenue production while senior lawyers feel that they value ethics and quality first. There is also a degree of confusion among some lawyers about the ethical status of various practices in relation to time-based billing which some see as unethical "padding" and others see as appropriate recognition of the value of the service provided. We suggest that firms should set clear policies about appropriate billing practices and ensure that they are appropriately communicated. Moreover, partners should make themselves aware of how junior lawyers perceive the culture and billing practices of their firms, rather than assuming that policies have

been clearly communicated and implemented. Finally, more could be done to ensure that unsophisticated clients receive clear information about billing practices so that they are empowered to prevent unethical behavior.

