

**BILLING ETHICS:  
A STUDY OF THE USE OF TIME-BASED  
BILLING BY PRIVATE LEGAL  
PRACTITIONERS IN FIJI**

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**BILLING ETHICS:**  
**A STUDY OF THE USE OF TIME-BASED BILLING BY**  
**PRIVATE LEGAL PRACTITIONERS IN FIJI**

by

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A supervised research project submitted in  
fulfillment of the requirements for the degree  
of Master of Laws

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School of Law  
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September, 2012

## DECLARATION OF ORIGINALITY

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I, Sherlin Krishna Raj, declare that this thesis is my own work and that, to the best of my knowledge, it contains no material previously published, or substantially overlapping with material submitted for the award of any other degree at any institution, except where due acknowledgement is made in the text.

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## **DEDICATION**

In memory of my Dad...

## **ACKNOWLEDGEMENT**

I wish to express my heartfelt gratitude to the following persons and organisations without whom this research would not have seen its completion:

My supervisor, Ms. Carolyn Penfold for her immaculate feedback and guidance throughout the duration of this research. I thank her whole heartedly for her invaluable insights, words of advice and encouraging spirit. It was truly an honour to work under her supervision.

The University of the South Pacific for sponsoring my Master of Laws degree.

The Office of the Chief Registrar of the High Court of Fiji, particularly the Legal Practitioners Unit for providing me with the necessary data.

The law firms and legal practitioners who participated in the interview process and shared their thoughts and experiences. A special thank you to all the interviewees for their precious time.

My dear friend Radhika Naidu who has served as my link between academia and legal practice. I wish to thank her for the time which she took out to attend to my queries.

My colleagues and friends from the School of Accounting and Finance (USP) who lent a listening ear or a helping hand whenever possible. A special mention to my dear friend Joycelyn Devi for her tremendous support and assistance with my Information Technology (IT) queries.

My family, especially my husband for his patience and understanding and my mum, for her kindness and support through the long nights.

Finally, I wish to thank the Almighty above from whom I derive my strength and will.

## ABSTRACT

In the United States (US) and Australia, the practice of time-based billing by lawyers has been subject to great scrutiny by legal scholars as well as members of the Bar. Critics in these jurisdictions argue that time-based billing is open to abuse and that it creates and promotes a culture of unethical and illegal behaviour on the part of legal practitioners. Studies have also been undertaken in both these jurisdictions to demonstrate how lawyers are abusing this system of billing.

In Fiji no such research has been undertaken and there is little if any literature available regarding lawyers' billing practices. The aim of this study therefore was to determine whether time-based billing is prevalent amongst Fiji legal practitioners and if so, whether this billing system is also subject to similar abuses to those observed in the US and Australia.

Data for the purpose of this study was gathered through semi-structured and confidential interviews with twenty Fiji legal practitioners. The Principal Legal Officer of the Legal Practitioners Unit was also interviewed to obtain data on billing complaints against legal practitioners. Reported cases where the courts have assessed or taxed costs were also examined to obtain information about billing abuses dealt with by the judiciary.

The billing provisions under the *Legal Practitioners Decree 2009* (Fiji) were also examined and compared with the billing provisions under the American Bar Association (ABA) *Model Rules of Professional Conduct 2002* (as revised in 2009) and the *Legal Profession Model Laws Project Model Provisions (Model Laws) 2006* (Australia). Given that the ABA *Model Rules* and the Australian *Model Laws* have seen extensive revisions to regulate the ethical conduct of practitioners, such analysis was thus undertaken to seek legislative guidance for Fiji.

The researcher found that time-based billing is the most widely used method of billing for the interviewee firms. The data also suggested that the use of time-based billing either resulted in unethical billing practices, or had the potential to encourage such behaviour. The decided cases on costs assessment and taxation also confirmed that unethical practices by lawyers are occurring where time-based billing is used.

The researcher concludes that current regulatory provisions are inadequate to regulate the practice of time-based billing. Preliminary recommendations are thus made for improving the ethical aspects of lawyers' billing practices in Fiji. The original data collected in this study will contribute significantly to an understanding of law firm billing in Fiji and provide a firm basis for future research. The data and the preliminary recommendations will also be of practical significance to legal practitioners, regulatory bodies and consumers of legal services in Fiji.

## ABBREVIATIONS

ABA	American Bar Association
CLE	Continuing Legal Education
FLS	Fiji Law Society
ILSC	Independent Legal Services Commission (Fiji)
KPI	Key Performance Indicator
LPU	Legal Practitioners Unit (Fiji)
NSW	New South Wales
OAG	Office of the Attorney-General (Fiji)
OLSC	Office of the Legal Services Commissioner (NSW)
VAT	Value Added Tax

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## 1 INTRODUCTION

Over the past few decades, the practice of time-based billing<sup>1</sup> (hereafter “time billing”) for legal services has come under intense scrutiny by legal scholars and practitioners in two jurisdictions, the United States (US) and Australia. Time billing is the predominant form of billing for legal services in both these jurisdictions. Initially adopted for its simplicity where clients are billed on the basis of the hours worked multiplied by the standard hourly rate<sup>2</sup>, this method of billing has invited much scholarly attention for its potential to encourage unethical billing practices.<sup>3</sup>

Criticisms of time billing surfaced in the late 1980s and early 1990s in the US and later spread to Australia as well as other common law jurisdictions.<sup>4</sup> Critics argue that this method of billing encourages overcharging<sup>5</sup> and deliberate inflation of billable hours<sup>6</sup>, promotes unrealistic billing targets<sup>7</sup>, encourages unnecessary research<sup>8</sup> and diminishes incentives for expeditious work.<sup>9</sup> Researchers have

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<sup>1</sup> Various interchangeable terms are used to refer to this method of billing, such as time billing, hourly billing or the billable hour.

<sup>2</sup> American Bar Association, *Commission on Billable Hours Report* (2001-2002) 7.

<sup>3</sup> William G. Ross, ‘The Ethics of Hourly Billing by Attorneys’ (1991) 44(1) *Rutgers Law Review*; Lisa G. Lerman, ‘Scenes From a Law Firm’ (1998) 50 *Rutgers Law Review* 2153; Lee. A. Watson, ‘Communication, Honesty and Contract: Three Buzzwords for maintaining Ethical Hourly Billing’ (1998) 11 (2) *Georgetown Journal of Legal Ethics* 189; Donald C. Massey and Christopher A. D’Amour, ‘The Ethical Considerations of Alternative Fee Billing’ (2001) 28 (2) *Southern University Law Review*; American Bar Association, above n 2, Steve Mark, ‘The Cost of Justice or Justice in Costs- The Experience of the OLSC in Handling Costs Complaints’ (2004) 27 (1) *University of New South Wales Law Journal* 225; Legal Fees Review Panel, *Legal Costs in New South Wales*, Report (December 2005) ; Steve Mark, ‘Analysing Alternatives to Time-Based Billing and the Australian Legal Market’ (Paper presented at the Finance Essentials for Practice Management Conference, Sydney, July 2007) ; Chief Justice Wayne Martin, ‘Billable Hours- past their use-by date’ (Address given at the Launch of Law Week 2010 at Frasers Function Centre, Kings Park, Western Australia, 17 May 2010) ;

<sup>4</sup> Legal Fees Review Panel, above n 3, 14.

<sup>5</sup> Lee. A. Watson, above n 3, 189; Steve Mark, ‘Billing Complaints- Are You Overcharging’ (Speech given at the Best Billing Practice Legalwise Seminar 24 March 2009).

<sup>6</sup> William G. Ross, above n 3, 12 citing Chief Justice Rehnquist, ‘Dedicatory Address: The Legal Profession Today’ (1987) 62 *Indiana Law Journal* 151, 155.

<sup>7</sup> Lisa G. Lerman, above n 3, 2156.

<sup>8</sup> William G. Ross, above n 3, 40.

<sup>9</sup> William G. Ross, above n 3, 92.

attempted to demonstrate this through data gathered from confidential interviews with practitioners<sup>10</sup>, administration of surveys<sup>11</sup> and by examining billing complaints lodged with the relevant disciplinary body.<sup>12</sup>

Conversely, the subject of time billing has received little, if any attention in Fiji, although practitioners in Fiji use time billing as one of the methods to bill clients, especially in contentious matters.<sup>13</sup> Other methods of billing include charging according to the relevant scale of costs as prescribed by legislation<sup>14</sup>, fixed-fee for transactional work<sup>15</sup> and contingency fees.<sup>16</sup> Currently there is no literature in Fiji dealing extensively with billing practices of legal practitioners and no studies have been undertaken on the matter. A few members of the Bar have voiced concerns on

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<sup>10</sup> Lisa G. Lerman, 'Lying to Clients' (1989-1990) 138 *University of Pennsylvania Law Review* 659.

<sup>11</sup> William G. Ross above n 3, Susan Saab Fortney, 'The Billable Hours Derby: Empirical Data on the Problems and Pressure Points' (2005-2006) 33 *Fordham Urban Law Journal* 171; Christine Parker and David Ruschena, 'The Pressures of Billable Hours: Lessons From a Survey of Billing Practices Inside Law Firms' (Social Science Research Network Working Paper Series, March 2011).

<sup>12</sup> Steve Mark, 'The Cost of Justice or Justice in Costs- The Experience of the OLSC in Handling Costs Complaints' (2004) 27 (1) *University of New South Wales Law Journal* 225.

<sup>13</sup> Subhas Parshotam, 'How to Build a Successful and Profitable Practice in Fiji' (Speech given at the Fiji Law Society Convention 2005).

<sup>14</sup> *Magistrates' Courts Rules* [Cap 14] (Fiji); *High Court Rules 1988* (Fiji); *High Court (Amendment) Rules 1998* (Fiji); *Legal Practitioners (Magistrates' Courts Scale of Costs) Regulations 2006* (Fiji) and the *Legal Practitioners (High Court Costs) Regulations 2006* (Fiji).

<sup>15</sup> Subhas Parshotam, above n 13.

<sup>16</sup> Subhas Parshotam and Peter Knight, 'The Highs and Lows of a Commercial Practice in Fiji' (Speech given at the Fiji Law Society Convention 2007). Where a lawyer enters into a contingency fee agreement with the client, the lawyer agrees to be paid only in the event of a successful judgment or outcome for the client. Thus, contingency fee agreements are also referred to as 'no-win, no-fee' agreements. Both in Fiji and in the US, lawyers are able to collect (as their fees) a percentage of the award recovered. In Fiji, contingency fee agreements are recognized under section 78(1) of the *Legal Practitioners (Amendment) Decree 2012* (Decree No. 53) pursuant to which the fee 'is calculated by reference to the amount of any award or settlement or the value of any property that may be recovered in any proceeding or claim by or for on behalf of the client...' However, the amount which the practitioner or firm could take as fees is capped at 10 percent of the total amount awarded or the value of any property recovered. Conversely, contingency fees are prohibited in Australia under section 3.4.27 of the *Legal Profession Model Laws Project Model Provisions (Model Laws) 2006*. However, lawyers may enter into an agreement with their clients to collect fees only in the event of a successful outcome for the client. In the latter case, lawyers may then only collect their normal fees (depending on the method used to bill) and charge up to 25% of the normal fees as an addition or 'uplift' to the normal fee (Section 3.4.26 (1),(4) (a) (b) of the *Model Laws*).

exorbitant billing practices of lawyers, however, there has been no discussion as to whether the system of time billing is subject to abuse.<sup>17</sup>

This research therefore sought to determine whether time billing is prevalent amongst Fiji practitioners and whether this billing method is also subject to similar abuses as reported in the US and Australian literature. In doing so, it draws upon data gathered from three sources: semi-structured and confidential interviews conducted with twenty legal practitioners from firms around Fiji, billing complaints lodged with the Legal Practitioners Unit (LPU) of the Office of the Chief Registrar of the High Court of Fiji and cases where costs have been assessed or taxed by the Fiji courts.

This study also sought to determine if the current legal framework on billing is adequate to regulate the practice of time billing by Fiji practitioners. For this purpose, the billing provisions of the *Legal Practitioners Decree 2009* (Fiji) have been compared with the provisions of the American Bar Association (ABA) *Model Rules of Professional Conduct 2002* (as revised in 2009) (“*Model Rules*”)<sup>18</sup> and the *Legal Profession Model Laws Project Model Provisions 2006* (Australia) (“*Model Laws*”).<sup>19</sup>

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<sup>17</sup> Subhas Parshotam and Peter Knight above n 16; Mosmi Bhim, ‘Fiji’s Legal Profession not healthy’ *USP Beat* Vol. 4 (4) 22 March 2004.

<sup>18</sup> The ABA *Model Rules of Professional Conduct* were first adopted by the ABA House of Delegates in 1983 and serve as models for the ethics rules of nearly all states in the United States. Currently, California is the only state that has not adopted the *Model Rules*. Since its adoption, the Rules have seen a number of revisions starting from 2002 through to 2009: The ABA Center for Professional Responsibility, ‘ABA *Model Rules of Professional Conduct*’ [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html) (Accessed 3 October 2011).

<sup>19</sup> The *Legal Profession Model Laws Project Model Provisions (Model Laws)* were developed by the Standing Committee of Attorneys-General (SCAG), with the Law Council of Australia and forms the basis for the Legal Profession Acts in all jurisdictions except South Australia. These *Model Laws* were initially released in 2004 and revised in July 2006: The Australian Law Reform Commission, ‘Discovery in Federal Courts (ALRC CP2)- Ensuring Professional Integrity: Ethical Obligations and Discovery’ <http://www.alrc.gov.au/publications/4.%20Ensuring%20Professional%20Integrity%3A%20Ethical%20Obligations%20and%20Discovery/sources-legal-eth> (Accessed 3 October 2011).

The US has been chosen for comparative purposes as that is where criticisms of time billing first surfaced. Australia has also been chosen for comparative analysis as both Fiji and Australia are common law jurisdictions and current legal reforms in Fiji are greatly influenced by Australian states such as New South Wales and Queensland. For example, Fiji's relatively recently formed disciplinary body, the Independent Legal Services Commission (ILSC), was modelled on these states' practices.<sup>20</sup>

This study is divided into 8 parts. Part 1 has introduced the study. Part 2 outlines the research questions and methodology together with the limitations of the research. Part 3 reviews the American and Australian literature on time billing. Part 4 analyses the data collected from interviews with private legal practitioners and discusses the findings. Part 5 discusses the billing complaints lodged against private legal practitioners. Part 6 examines the cases on costs assessment and taxation while Part 7 discusses the legal framework on billing. Part 8 concludes the study by providing preliminary suggestions to reform the practice of time billing.

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<sup>20</sup> South Pacific Lawyers Association, 'Independent Legal Services Commission for Fiji', (30 January 2010) <http://www.southpacificbars.org/independent-legal-services-commission-fiji> (Accessed 14 August 2010).

## **2 RESEARCH QUESTIONS, METHODOLOGY AND LIMITATIONS OF STUDY**

### **2.1 RESEARCH QUESTIONS**

This study sought to address the following research questions:

1. Is time billing prevalent in private legal practice in Fiji?
2. Is the time billing system also subject to similar abuses by Fiji Legal practitioners as identified in the American and Australian literature?
3. Is the current legal framework adequate to regulate the practice of time billing by Fiji legal practitioners?
4. Is there a need to reform the practice of time billing?

### **2.2 METHODOLOGY**

Data for the purpose of this study was collated in five phases:

#### **Phase 1**

This phase involved a collection of law review articles, legislation, reports, commentaries and speeches on the subject of time billing in the US, Australia and Fiji. These documents were then analyzed to determine the various abuses of the time billing system.

#### **Phase 2**

In this phase I conducted semi-structured and confidential interviews with twenty private legal practitioners from twenty different law firms operating in the central and western divisions of the main island of Viti Levu. The interviews were aimed at

gaining an insight into the billing practices of Fiji legal practitioners and to determine if the time billing system is also subject to similar abuses as identified in the American and Australian literature. These interviews each lasted for thirty to forty minutes.

The sample consisted of twelve males and eight females and was comprised of one legal consultant, one managing partner, two principals, five senior associates, eight associates and three solicitors. These practitioners had been admitted to the Bar between 1977 to 2010. The practice areas of the interviewees included Commercial Law, Civil Law, Criminal Law, Family Law, Insurance Law and Conveyancing.

The twenty practitioners who formed the sample were selected from firms having two or more practitioners. Thirteen of the twenty firms had three or more practitioners and rank among those firms which have a large client base. According to data obtained from the Office of the Chief Registrar of the High Court, currently there are a total of 113 law firms operating in Fiji. A number of firms have branch offices in Suva, Sigatoka, Nadi, Lautoka and Ba. Of these 113 firms, only 42 firms have two or more practitioners while the remaining 71 are sole practitioners.<sup>21</sup> Hence, my sample of twenty lawyers from twenty firms includes representation from approximately 48% of the law firms having two or more practitioners in Fiji.

### **Phase 3**

In this phase I sought to obtain data on the nature of billing complaints received against legal practitioners by the Office of the Chief Registrar of the High Court of Fiji. For this purpose I conducted a semi-structured interview with the Principal Legal Officer of the Legal Practitioners Unit (LPU). The latter Unit was set up by

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<sup>21</sup> Email from Raveena Prasad, Legal Practitioner's Unit - Office of the Chief Registrar, List of Legal Practitioners with valid Practising Certificates as at 21 September 2011 <[raveena.prasad@judicial.gov.fj](mailto:raveena.prasad@judicial.gov.fj)> to the author 27 September 2011.

the Judicial Department to assist the Chief Registrar in handling complaints against legal practitioners. The aim of the interview was to determine the extent to which billing abuses were reported against practitioners and whether or not the use of time billing encouraged unethical behaviour on the part of Fiji legal practitioners.

#### **Phase 4**

This phase involved a review of cases on costs assessment and taxation by the Fiji courts to determine whether or not legal practitioners are engaging in unethical or abusive billing practices. A review of cases on the PacLII database showed that courts had only been called upon to assess or tax party and party costs, so it is only cases on those costs which formed part of this study.

#### **Phase 5**

In this phase I sought to determine if the legal framework on billing in Fiji is adequate to regulate the practice of time billing. To determine its adequacy, the billing provisions under the *Legal Practitioners Decree 2009* (Fiji) were compared with the provisions under the *ABA Model Rules of Professional Conduct 2002* (as revised in 2009) ('*Model Rules*') and the *Legal Profession Model Laws Project Model Provisions (Model Laws) 2006* (Australia).

Having gathered and analysed the above-mentioned data, preliminary proposals for the future were then made.

### **2.3 LIMITATIONS OF STUDY**

This study had its limitations. The sample size for the interviews which were conducted with private legal practitioners was limited. However, given the time limitations, it would have been practically impossible to obtain responses from all

private practising members of the Bar. The study therefore, included practitioners from firms which handle the bulk of legal transactions in Fiji. Due to geographical limitations, the sample of practitioners did not include firms operating in Vanua Levu. While the interview questions could be sent to the latter via post, this was not feasible as due to the sensitivity of the matter, personal interviews were required.

This study was not intended to be exhaustive and was carried out to fit the confines of a supervised research project. With more time and resources the study could be broadened to include other law firms and other parts of Fiji for an in-depth analysis of the subject matter.

### 3 LITERATURE REVIEW

#### 3.1 A BRIEF HISTORY OF TIME BILLING

This section provides a brief history of how time billing became the dominant form of billing for legal services in the US and later spread to Australia and other English-speaking countries. To determine how time billing evolved, the starting point is the billing practices of lawyers in Colonial America.

Before the advent of time billing, the American colonies sought to regulate legal fees through ‘numerous fee schedules’<sup>22</sup>, the earliest of which can be traced back to the 1640s.<sup>23</sup> Legal fees were governed by various statutes prescribing the amount a practitioner could charge a client as well as what fees could be recovered as costs from a defeated adversary.<sup>24</sup> Practitioners, however, were able to collect sums in excess of the prescribed statutory amounts through gifts from clients<sup>25</sup> or ‘by placing themselves on retainer.’<sup>26</sup>

This practice of statutory fee regulation continued through the early years of the American Republic. Many States enacted fee regulations and provided penalties for practitioners who charged in excess of the prescribed amounts<sup>27</sup>. However, these fee regulations were met with opposition by lawyers who found the prescribed amounts to be inadequate.

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<sup>22</sup> William G. Ross, above n 3, 8: Among the colonies which established fee schedules were Virginia, Massachusetts, New Hampshire, New York, North Carolina and Pennsylvania.

<sup>23</sup> William G. Ross, above n 3, 8: where the author notes that as early as 1640s, Virginia had established fee schedules for attorneys, which had fixed rates payable in tobacco.

<sup>24</sup> John Leubsdorf, ‘Toward a History of the American Rule on Attorney Fee Recovery (1984) 47 (1) *Law and Contemporary Problems* 9, 10.

<sup>25</sup> John Leubsdorf, above n 24, 11.

<sup>26</sup> William G. Ross, above n 3, 8 citing L. Kinvin Wroth and Hiller B. Zobel (eds), *The Legal Papers of John Adams* (Vol.1 1965) lxxi-lxxii.

<sup>27</sup> William G. Ross, above n 3, 8 citing Anton-Hermann Chroust, *The Rise of the Legal Profession in America* (1<sup>st</sup> ed, 1965) 90.

Thus, as the mid-nineteenth century approached, lawyers began to generate most of their income from what they received from their clients rather than from what they could recover as costs from the defeated party.<sup>28</sup> Leubsdorf notes that the lawyers were becoming ‘private profit-seekers’ and the regulatory environment during such time began to ‘appear [*sic*] as oppressive government control.’<sup>29</sup>

By the mid-nineteenth century, lawyers challenged the statutory limits on their fees to such an extent that the fee schedules began to be either ‘evaded’<sup>30</sup> or ‘repealed’.<sup>31</sup> Courts began to recognize the right of lawyers to collect fees in excess of the statutory amounts<sup>32</sup> by upholding fee contracts as legitimate.<sup>33</sup> As the twentieth century approached, lawyers adopted various alternative methods to bill their clients and around the 1930s, ’40s and ’50s, clients were charged in one of the following ways:<sup>34</sup>

- a) a fixed fee bargained for in advance
- b) a contingency fee<sup>35</sup>
- c) a percentage fee based upon a percentage of dollars involved in a transaction (e.g. one percent of the amount involved in a real estate closing)
- d) retrospective fees- one set at the conclusion of a matter based upon the amount of work done and what the lawyer had accomplished.<sup>36</sup>

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<sup>28</sup> Charles N. Geilich, ‘Rich Man, Poor Man, Beggar Man, Thief: A History and Critique of the Attorney Billable Hour’ (2010-2011) 5 *Charleston Law Review* 173, 176.

<sup>29</sup> John Leubsdorf, above n 24, 13.

<sup>30</sup> John Leubsdorf, above n 24, 13.

<sup>31</sup> John Leubsdorf, above n 24, 13.

<sup>32</sup> John Leubsdorf, above n 24, 16.

<sup>33</sup> The first such decision where a fee contract was upheld was the 1840 case of *Bayard v McLane* 3 Del. (3 Harr.) 139.

<sup>34</sup> F. Leary Davis, ‘Back to the Future: The Buyer’s Market and the Need for Law Firm Leadership, Creativity and Innovation’ (1994) 16 *Campbell Law Review* 147, 150.

<sup>35</sup> This involved an agreement between the client (plaintiff) and the lawyer, where the lawyer agreed to represent the client free of charge until a settlement or successful judgment had been obtained at which time the lawyer was to receive a percentage of the award: Peter Karston, ‘Enabling the Poor to Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940’ (1998) 47 *DePaul Law Review* 231, 231.

All the above methods were value-based rather than time-based. However, as early as 1914, a Harvard law graduate, Reginald Heber Smith began to devise a system to manage the finances of a legal aid society.<sup>37</sup> He developed a system of cost accounting which required lawyers to keep detailed records of the time they spent on various cases in order to determine the cost of legal services. Five years later, when Smith joined a law firm, he took his system of cost accounting with him with an added invention – the Daily Time Sheet. However, his new invention was despised by the firm.<sup>38</sup> The time had not yet come for time costing to rule the billing practices of law offices.

Meanwhile, given the various ways in which lawyers had begun to charge for their services, by the 1940s attempts were again made at achieving ‘uniformity in billing practices’<sup>39</sup> with State Bar Associations publishing minimum fee schedules which set standard prices for different services.<sup>40</sup> Geilich observes that such fee schedules were misrepresented as being voluntary, whereas in fact the fees prescribed often became mandatory and were ‘enforced by disciplinary action’<sup>41</sup> where a Bar Association found a lawyer to be charging *less* than the minimum amounts.

These minimum fee schedules functioned as price floors. In other words, a lawyer could charge in excess of the prescribed amounts but could not charge less. Conversely, the fee schedules of the Colonial era and those used in the early years of

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<sup>36</sup> Under this method of billing neither the client and nor the lawyer knows the amount of the fee until the matter is concluded. The fee is a reasonable estimate and is based upon the value given to the client in terms of the ‘quality of the client’s result’ and the ‘quality of the [lawyer’s] effort’: New York State Bar Association Corporate Counsel Section, ‘Report on Outside Counsel Bills for Corporate Clients’ (1999-2000) 23 *American Journal of Trial Advocacy* 79, 117.

<sup>37</sup> Douglas McCollam, ‘The Billable Hour: Are Its Days Numbered?’ *The American Lawyer* 28 November 2005 <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1132653918886> (Accessed 2 July 2011).

<sup>38</sup> Douglas McCollam, above n 37.

<sup>39</sup> Katherine L. Brown and Kristin A. Mendoza, ‘Ending the Tyranny of the Billable Hour: A Mandate for Change for the 21<sup>st</sup> Century Law Firm’ (2010) *New Hampshire Bar Journal* 66, 66.

<sup>40</sup> Niki Kuckes, ‘The Hours: The short, unhappy history of how lawyers bill their clients’ *Legal Affairs* September 2002, 2.

<sup>41</sup> Charles N. Geilich, above n 28, 177.

the Republic functioned as price ceilings, such that a lawyer could charge less than but not more than the prescribed ceiling.

Kuckes explains that as the practice of law became more complex, the minimum fee schedules and other flat fee arrangements became increasingly unworkable.<sup>42</sup> Problems as to the latter emerged with the 1938 reform of the *Federal Rules of Civil Procedure*, which introduced a ‘radical system of broad pre-trial discovery’,<sup>43</sup> that led to uncertainties in the cost of litigation:

Discovery substantially increased the unpredictability of the amount of legal services that a case would require. No one would know whether a case would remain quiet or whether it would explode into a long, time-consuming discovery battle... in addition to elevating cost uncertainty, discovery directly increased the expected cost of litigating a case, including the value of the lawyer’s time.<sup>44</sup>

This new system of wide-open discovery led to a decline in the income levels of litigators who had placed heavy reliance on fixed fee agreements to litigate cases. As Shepherd and Cloud note, the ‘price stickiness’<sup>45</sup> prevented lawyers from increasing their fixed fees quickly enough to match the sharp rise in litigation expenses that resulted from the new discovery regime. Something had to be done to overcome this problem of uncertainty in legal costs and the resulting decline in income levels of lawyers.

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<sup>42</sup> Niki Kuckes, above n 40, 2.

<sup>43</sup> George B. Shepherd and Morgan Cloud, ‘Time and Money: Discovery Leads to Hourly Billing’ (1999) *University of Illinois Law Review* 91, 94.

<sup>44</sup> George B. Shepherd and Morgan Cloud, above n 43, 96.

<sup>45</sup> George B. Shepherd and Morgan Cloud, above n 43, 96.

In 1940, Smith returned with his new system of cost accounting through publication of his work ‘Law Office Organization’.<sup>46</sup> Smith believed that law firms should no longer fool themselves into believing that the practice of law was a profession and not a business.<sup>47</sup> According to Smith ‘[t]he statement that a law office needs an accurate cost accounting system seems revolutionary, but if every business concern has to know its costs, why should the law office be immune?’<sup>48</sup>

It must be stressed that Smith was not suggesting time costing should be adopted as a method of billing, rather his system of cost accounting was designed to determine the *cost* of the service provided, the *price* being another matter. This time however, his new system of costing legal services did appeal to some lawyers who began to gradually shift to time billing.

Nonetheless, time billing did not gain much popularity until 1958 when the ABA published (in the form of a pamphlet) the findings of a study entitled: ‘The 1958 Lawyer and His 1938 Dollar.’<sup>49</sup> This document revealed that lawyers who recorded their time and used this as a means to bill their clients were earning more than lawyers who did not.<sup>50</sup> As such, law firm consultants began to advocate the practice of time billing. By the late 1960s, most mid-to-large firms had embraced time billing.<sup>51</sup>

The shift to time billing was also hastened by the 1975 landmark decision of the Supreme Court of the United States in *Goldfarb v Virginia State Bar*<sup>52</sup> which led to

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<sup>46</sup> Reginald Heber Smith, ‘Law Office Organization’ (1940) 26 *American Bar Association Journal* 393.

<sup>47</sup> Reginald Heber Smith, above n 46, 393.

<sup>48</sup> Reginald Heber Smith, above n 46, 393.

<sup>49</sup> Charles N. Geilich, above n 28, 174: the author explains that previous researchers were unable to find this publication even after contacting the American Bar Association which in turn could not locate the document.

<sup>50</sup> Stephen W. Jones and Melissa Beard Glover, ‘The Attack on Traditional Billing Practices’ (1997-1998) 20 *University of Arkansas at Little Rock Law Journal* 293, 294.

<sup>51</sup> American Bar Association, above n 2, 3.

<sup>52</sup> (1975) 421 U.S. 773.

the abolition of minimum fee schedules.<sup>53</sup> In this case, the petitioners were a couple who contracted to buy a home in Fairfax County. The lender required the couple to obtain title insurance for which purpose a title examination became necessary. The latter service could only be performed by a lawyer.

The couple contacted thirty-seven lawyers in total, requesting quotes for their fees for a title examination. Of the lawyers who responded, none agreed to charge anything below the minimum fee schedule prescribed by the Fairfax County Bar Association. That is, one percent of the value of the property in question.<sup>54</sup> The couple engaged the first lawyer they had contacted to perform the service and thereafter commenced legal action against the Fairfax County Bar Association and the Virginia State Bar alleging that the minimum fee schedule amounted to price-fixing and was in violation of the *Sherman Antitrust Act 1890*.<sup>55</sup>

Although the fee schedules appeared merely to recommend the minimum prices and was published by the Fairfax County Bar (a voluntary association of lawyers with no formal powers to enforce it), enforcement was in fact provided by the Virginia State Bar.<sup>56</sup> The Virginia State Bar had apparently issued an ethics opinion which stated that ‘evidence that an attorney habitually charges less than the suggested minimum fee schedule adopted by his local bar Association, raises a presumption that such a lawyer is guilty of misconduct...’<sup>57</sup>

The Supreme Court of United States found that the fee schedule and its enforcement through the prospect of disciplinary action by the State Bar constituted price-fixing<sup>58</sup> as it prevented lawyers from engaging in competition. The Court also held that by discouraging a deviation from the fee schedules through disciplinary action, the

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<sup>53</sup> Stephen W. Jones and Melissa Beard Glover, above n 50, 295; F. Leary Davis, above n 34, 161; Charles N. Geilich, above n 28, 177-178.

<sup>54</sup> Above n 52, 776.

<sup>55</sup> Above n 52, 778.

<sup>56</sup> Above n 52, 776.

<sup>57</sup> Above n 52, 777-778.

<sup>58</sup> Above n 52, 781-783.

State Bar had joined in a ‘private anti-competitive activity’ which was in violation of the *Sherman Act*.<sup>59</sup>

The *Goldfarb* decision through its abolition of fee schedules removed the final obstacle from the path of time billing. The method which was initially intended to determine the cost of legal services was now used to price them.<sup>60</sup> Time billing since then has become the life-blood of law firm billing in the US.

Thereafter time billing also spread to Australia and Fiji. According to Chief Justice Wayne Martin of the Supreme Court of Western Australia, just as time costing was promoted in the US by management consultants, a similar process took place in Australia with time costing being introduced in the mid to late ’70s.<sup>61</sup> Consultants as well as accountants visited private law firms in Australia showing them the American system of time costing ‘which was going to revolutionize the way’<sup>62</sup> the lawyers worked. The new billing system initially created some anxiety amongst lawyers but was later embraced with ‘enthusiasm’.<sup>63</sup>

Prior to the introduction of time billing in Australia however, legal fees for litigation and other legal services such as conveyancing and probate were prescribed by minimum fee schedules which were fixed either by the courts or professional organizations (Law Societies).<sup>64</sup> Although ‘recommendatory [in] character’<sup>65</sup>, these fee schedules greatly influenced the charging for legal services and functioned as price floors. As such, these fee schedules were finally abolished in the 1990s as they too were considered anti-competitive.<sup>66</sup>

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<sup>59</sup> Above n 52, 792.

<sup>60</sup> Legal Fees Review Panel, above n 3, 11.

<sup>61</sup> Chief Justice Wayne Martin, above n 3.

<sup>62</sup> John Chisholm, ‘A Billing Discussion Worth Its Time’ *Lawyers Weekly* 1 February 2010.

<sup>63</sup> John Chisholm, above n 62.

<sup>64</sup> Chief Justice James Spigelman ‘Are Lawyers Lemons? Competition Principles and Professional Regulation’ (The 2002 Lawyer’s Lecture, Sydney 29 October 2002).

<sup>65</sup> Chief Justice James Spigelman, above n 64.

<sup>66</sup> Christine Parker and Adrian Evans, *Inside Lawyers’ Ethics* (2006) 185.

Courts in the federal jurisdiction, the High Court of Australia, the Federal Court of Australia and the Family Court of Australia have however, continued to publish fee scales to assess the costs to be paid to the successful party pursuant to a costs order as well as to determine the default amount the client pays for legal services in the absence of a costs agreement.<sup>67</sup> While practitioners also base their fees upon the ‘court scales,’<sup>68</sup> and use these in conjunction with time billing, the latter serves as the principal form of billing for legal services.<sup>69</sup>

In the case of Fiji, there is no record of when time billing was first introduced, but it could not have been any earlier than its introduction in Australia. During the colonial era, the fees and costs which could be recovered by practitioners were based upon court scales.<sup>70</sup> As the colony progressed towards independence, the right of practitioners to collect fees other than the prescribed scales was recognized under the *Legal Practitioners Ordinance 1965*, which allowed practitioners to enter into costs agreements with their clients.<sup>71</sup> As is the case in Australia, court scales<sup>72</sup> continue to exist in Fiji and while practitioners also use these scales as the basis upon which to bill clients, these are primarily used for assessing costs where a costs award has been made by Fiji courts.<sup>73</sup>

Thus, in all three countries the introduction of time billing was a gradual matter, with developments occurring firstly in the US and later in Australia and Fiji. In all three countries time billing was preceded by other forms of billing, which continue to be used, but to a lesser degree.

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<sup>67</sup> Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report 89 (February 2000) 362.

<sup>68</sup> Christine Parker and Adrian Evans, above n 66, 185.

<sup>69</sup> Legal Fees Review Panel, above n 3, 11.

<sup>70</sup> The *Supreme Court Ordinance (No. XIV) 1875* provided for the Chief Registrar to make rules concerning the fees of Counsel and the costs of Attorneys subject to approval by the Legislative Council; the *Magistrates Court Ordinance (No. 20) 1944* also empowered the Chief Justice to prescribe ‘tables’ for fees and costs which could be recovered by legal practitioners.

<sup>71</sup> O.15 (1) of the *Legal Practitioners Ordinance (No. 23) 1965*.

<sup>72</sup> Above n 14.

<sup>73</sup> Section 76 (1) of the *Legal Practitioners Decree 2009*.

The next section of the study examines the various ways in which this system of billing is abused.

### 3.2 TIME BILLING AND ITS POTENTIAL FOR ABUSE

I come neither to bury the billable hour nor to praise it. It is here and will be with us for a long time to come; with that I have no quarrel. My quarrel, rather, is with the singularity of its use as a measure of value of legal services. Because this ubiquitous practice is like judging a speech's value solely by its length...<sup>74</sup>

This section of the research discusses the ethical objection to time billing and the ways in which the system is abused as highlighted by American and Australian critics. The American and Australian literature on the subject is discussed together as many of the same concerns relating to time billing have been identified in both jurisdictions.

#### 3.2.1 What Critics Say In America and Australia

In the US, the subject of time billing did not get much attention from critics until an ABA publication in 1989<sup>75</sup> which acknowledged that time billing encouraged unethical billing practices. Following this publication a huge body of literature developed on this issue which drew out the 'inherent problems'<sup>76</sup> of billing on the basis of time.

The principle objection and ethical concern with time billing is that it puts the clients' and the lawyer's interest in direct conflict. As Ross notes:<sup>77</sup>

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<sup>74</sup> John A. Beach, 'The Rise and Fall of the Billable Hour' (1995-1996) 59 *Albany Law Review* 941, 941.

<sup>75</sup> Richard C. Reed (eds), *Beyond the Billable Hour: An Anthology of Alternative Billing Methods* (1989) in William G. Ross, above n 3, 3.

<sup>76</sup> Jeff Tolman, 'Let's Ban Billing By the Hour' (1988) 14 *Legal Economics* 49, 49.

<sup>77</sup> William G. Ross, 'The Ethics of Time Based Billing by Attorneys' (1998) *Professional Lawyer Symposium Issues* 81, 82.

Time-based billing creates an inherent conflict of interest between the client's interest in the efficient disposition of his business and the lawyer's interest in racking up hours.

It is to be stressed that the lawyer-client relationship is one which is 'predicated on trust.'<sup>78</sup> It is a fiduciary relationship 'which binds the [lawyer] to the highest order of ethical behavior.'<sup>79</sup> In *Clark v Barter*<sup>80</sup>, the fiduciary nature of this relationship is explained as follows:

It is well settled that a [lawyer] has a fiduciary duty to his or her client. That duty carries with it two presently relevant responsibilities. The first is the obligation to avoid any conflict between his duty to his client and his own interests- he must not make a profit, or secure a benefit, at his client's expense. The second arises when he endeavours to serve two masters and requires...full disclosure to both.

The fiduciary duty owed to clients is such that the lawyer is to place their client's interests above their own. Under the time billing system, on the one hand, lawyers desire to maximize their own economic interest by generating more billable hours<sup>81</sup> while on the other hand, they owe a fiduciary duty to the client to act in the client's best interest. Altman argues, that under such circumstances 'the client usually walks away the loser.'<sup>82</sup>

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<sup>78</sup> John S. Pierce and Beverly A. Brand, 'Recent Developments in Attorney Fee Disputes' (1994-1995) 7 *U.S.F. Maritime Law Journal* 205, 205.

<sup>79</sup> John S. Pierce and Beverly A. Brand, above n 78, 205.

<sup>80</sup> (1989) NSW Conv R 55-483.

<sup>81</sup> Elizabeth A. Kovachevich and Geri L. Waksler, 'The Legal Profession: Edging Closer to Death With Each Passing Hour' (1990-1991) 20 *Stetson Law Review* 419, 426.

<sup>82</sup> Adam C. Altman, 'To Bill, or Not to Bill? Lawyers Who Wear Watches Almost Always Do, Although Ethical Lawyers Actually Think About It First' (1997-1998) 11 *Georgetown Journal of Legal Ethics* 203, 207.

Critics therefore argue that such conflict of interest between the lawyer and client coupled with law firm emphasis on billable hours<sup>83</sup> have led to unethical and abusive billing practices. Whether the system is abused out of pure greed is arguable<sup>84</sup>, however, in some instances as will be explained below, the abuse arises out of the need to survive at the firm.

The various ways in which time billing is abused are explained below.

*a) Overcharging, Padding and Double-billing*

US critics of time billing, Ricker<sup>85</sup>, Gharakhanian and Krywyj<sup>86</sup>, Watson<sup>87</sup> and Altman<sup>88</sup> have all condemned time billing for its potential to lead to overbilling and outright billing fraud. Australian scholars, Parker and Evans also note that ‘potential overcharging’ is one of the concerns with time billing.<sup>89</sup> Further support for this view comes from the New South Wales (NSW) Young Lawyers Civil Litigation Committee which has acknowledged that time billing ‘is open to abuse through unethical practices such as overcharging...’<sup>90</sup> Overcharging also remains a serious concern for the Office of the Legal Services Commissioner (OLSC) in NSW. Commissioner Mark has placed part of the blame on the continued use of time billing as the preferred method of billing.<sup>91</sup>

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<sup>83</sup> Dennis Curtis and Judith Resnik, ‘Teaching Billing: Metrics of Value in Law Firms and Law Schools’ (2002) 54 (6) *Stanford Law Review* 1409, 1418.

<sup>84</sup> Adam C. Altman, above n 82, 206.

<sup>85</sup> Darlene Ricker, ‘Greed, Ignorance and Overbilling’ (1994) 80 *American Bar Association Journal* 62.

<sup>86</sup> Andre Gharakhanian and Yvonne Krywyj, ‘The Gunderson Effect and Billable Mania: Trends in Overbilling and the Effect of New Wages’ (2000-2001) 14 *Georgetown Journal of Legal Ethics* 1001.

<sup>87</sup> Lee A. Watson, above n 3.

<sup>88</sup> Adam C. Altman, above n 82.

<sup>89</sup> Christine Parker and Adrian Evans, above n 66, 197.

<sup>90</sup> New South Wales Young Lawyers Civil Litigation Committee, *Submission to the Legal Fees Review Panel* (2004).

<sup>91</sup> Steve Mark, above n 5.

Kuckes explains that under the time billing system lawyers are expected to bill a certain number of hours, often known as the billing quota or target.<sup>92</sup> Following an increase in associates' salaries in the mid-1980s, firms in the US increased associates' billing targets from 1600 hours to around 2000 hours per annum.<sup>93</sup> The 2002 American Bar Association Commission on Billable Hours (hereafter "the ABA Commission") notes that during the 1990s the billable hour commitments of firms continued to increase<sup>94</sup> with the current targets for associates ranging between 1700 and 2300 hours.<sup>95</sup>

Watson observes that evidence of overbilling 'is based on a common sense understanding of human limitations.'<sup>96</sup> The author pointed out dubious billing practices of practitioners in the US recording 4,000 billable hours annually when meeting the 2000-hour quota has been argued to be a challenging task. Richmond recalls an instance where a lawyer had claimed to bill 6,022 hours in a year!<sup>97</sup> Experts on the matter conclude that '[i]f one is expected to bill more than 2,000 hours per year, there are bound to be temptations to exaggerate the amount of hours actually put in.'<sup>98</sup>

In Australia the billing targets of private practitioners are expressed in terms of the day. Targets vary depending on the firm size. For Large firms the daily target is 7 to 7.5 hours while the target for smaller firms is 5 to 6.5 hours.<sup>99</sup> Scholars have attempted to express the daily target in terms of an annual target:

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<sup>92</sup> Niki Kuckes, above n 40, 3.

<sup>93</sup> Andre Gharakhanian and Yvonne Krywyj, above n 86, 1002.

<sup>94</sup> American Bar Association, above n 2, 3.

<sup>95</sup> Iain Campbell, Jenny Malone and Sara Charlesworth, 'The Elephant in the Room: Working-Time Patterns of Solicitors in Private Practice in Melbourne' (Working Paper No. 43, Centre for Employment and Labour Relations Law, The University of Melbourne, May 2008) 26.

<sup>96</sup> Lee A. Watson, above n 3, 191.

<sup>97</sup> Douglas R. Richmond, 'Professional Responsibility and the Bottom Line: The Ethics of Billing' (1995-1996) 20 *Southern Illinois University Law Journal* 261, 262.

<sup>98</sup> William G. Ross, above n 6.

<sup>99</sup> Iain Campbell, Jenny Malone and Sara Charlesworth, above n 95, 27.

If we assume six billable hours per day over a year of 230 working days, that is Monday to Friday each week with four weeks' annual leave and ten days of public holidays, then this amounts to a target of 1380 billable hours per annum. If we assume seven billable hours per day, this amounts to a minimum 1610 billable hours per annum, closer but still apparently short of the US target.<sup>100</sup>

This however, does not provide a wholistic view. It is argued that 'honest counting' of billable hours requires one to spend a significant amount of time at the office as 'not every minute is chargeable to the client.'<sup>101</sup> Lawyers are after all humans and will be taking breaks for tea, lunch, smoke and to chat with colleagues. Thus, it is argued that to generate six billable hours per day, one would actually need to put in nine to ten hours of work daily.<sup>102</sup>

Commissioner Mark<sup>103</sup>, and Curtis and Resnik<sup>104</sup> note that billable hours are not only used as a means to bill clients but also serve as a determinant for salary levels, increments, bonuses and promotions. This adds to the pressure to bill. The minimum billing requirements within firms, competition, peer pressure and firm ethos serve as incentives to practitioners not to lag behind and 'to do whatever is necessary to bill' and perhaps even to 'pad' their hours.<sup>105</sup>

Lerman provides further support for this view. In her essay 'Scenes From a Law Firm' she revealed some shocking billing practices of a particular firm as witnessed by an associate of the firm.<sup>106</sup> The associate was assigned the fictitious name of Nicholas Farber. Farber explained that associates in his firm were required to bill at

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<sup>100</sup> Iain Campbell, Jenny Malone and Sara Charlesworth, above n 95, 27.

<sup>101</sup> Dennis Curtis and Judith Resnik, above n 83, 1412.

<sup>102</sup> Iain Campbell, Jenny Malone and Sara Charlesworth, above n 95, 29.

<sup>103</sup> Steve Mark, 'Analysing Alternatives to Time-Based Billing and the Australian Legal Market (Paper presented at the Finance Essentials for Practice Management Conference, Sydney, July 2007), 1.

<sup>104</sup> Dennis Curtis and Judith Resnik, above n 83, 1412.

<sup>105</sup> Dennis Curtis and Judith Resnik, above n 83, 1418.

<sup>106</sup> Lisa G. Lerman, above n 3, 2155.

least 2000 hours on an annual basis and while the partners would say ‘[i]f you fall short it’s no big deal’, this ‘was a lie’ as those who fell short of the target did not qualify for a merit bonus and were shamed into billing more hours. For this associate and others in the firm survival depended on how ‘profitable’ they were for the firm which meant ‘churning out as many billable hours as [they] could.’<sup>107</sup> In response to the pressure to bill, the associate admitted to padding his bills so as not to get fired.

In some instances, while associates may bill honestly, their supervising seniors inflate their bills. Koppel reports the experience of an associate who had discovered some 60 instances of bill padding by a partner in-charge of billing at his firm. The associate recalled a specific incident where he had spent only 15 minutes attending to a particular matter and the partner in question had recorded 6.5 hours on the client bill. The associate also believed that the partner in question had not only inflated his time but had also done so for three other lawyers of the firm by more than 450 hours, resulting in ‘an overcharge’ that exceeded \$100,000.<sup>108</sup>

According to Fox, it is common knowledge that time records are intended only to be ‘reasonable estimates’<sup>109</sup> of time spent on a client’s matter. Ross notes that because there is no practical means to verify the accuracy of time records, ‘every attorney who has billed time knows that time billing creates rich opportunities for fraud.’<sup>110</sup> Australian scholars have also questioned the accuracy of time records stating that the system is open to human fallibility.<sup>111</sup>

There is also the problem of rounding off minutes and hours. As time is usually recorded in six-minute units or intervals, a six-second phone-call could be billed as full six minutes.<sup>112</sup> If a practitioner gets twenty such calls during the day this would

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<sup>107</sup> Lisa G. Lerman, above n 3, 2156.

<sup>108</sup> Nathan Koppel, ‘Lawyer’s charge opens window on bill padding’ (August 2006) *The Wall Street Journal*, 1.

<sup>109</sup> Lawrence J. Fox, ‘Save Us From Ourselves’ (1997-1998) 50 *Rutgers Law Review* 2189, 2194.

<sup>110</sup> William G. Ross, above n 3, 12.

<sup>111</sup> Christine Parker and Adrian Evans, above n 66, 197.

<sup>112</sup> Christine Parker and Adrian Evans, above n 66, 197.

result in two hours of billable time. Needless to state, the lawyer has not worked the full two hours. Fox further argues that lawyers engage in creative billing and design ‘systematic schemes’<sup>113</sup> to pad or inflate billable hours. Firms have gone as far as creating false time-sheets,<sup>114</sup> and programming computers to automatically inflate or pad client bills.<sup>115</sup>

According to Phillips, time padding and task padding are the ‘twin evils’ of unethical billing.<sup>116</sup> Time padding occurs when a client is billed for time that was not actually spent on the client’s matter. Task padding on the other hand, occurs when a lawyer undertakes unnecessary tasks ‘to run up the time billed.’<sup>117</sup> Practitioners may either deliberately engage in padding of bills or do so subconsciously. Some commentators believe that ‘bill padding is the sort of activity that many lawyers do, but few will admit to.’<sup>118</sup>

So, how does one determine whether a lawyer has engaged in bill padding? According to Richmond, a careful examination of the bill of costs could help reveal such questionable billing practices. For example, entries on bills such as ‘check status’ or ‘work on discovery issues’ or ‘reviewing of documents, tasks or matters’ all suggest padding of bills.<sup>119</sup> Koppel reports one such instance where ‘fictitious narratives’ such as ‘review key documents’ and ‘analyze defense strategy’ were used to describe work done by a partner of a firm when in fact the partner had not performed such work.<sup>120</sup>

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<sup>113</sup> Lawrence J. Fox, above n 109.

<sup>114</sup> Andre Gharakhanian and Yvonne Krywyj, above n 86, 1007.

<sup>115</sup> Donald C. Massey and Christopher A. D’Amour, above n 3, 112.

<sup>116</sup> Gerald F. Phillips, ‘Time Bandits: Attempts by Lawyers to Pad Hours Can Often be Uncovered by a Careful Examination of Billing Statements (2001-2002) 29 *Western State University Law Review* 265, 267.

<sup>117</sup> Gerald F. Phillips above n 116, 267 citing William G. Ross, *The Honest Hour: The Ethics of Time-Based Billing by Attorneys* (1996).

<sup>118</sup> Helen Coster, ‘The Inflation Temptation’ *The American Lawyer*, 1 October 2004.

<sup>119</sup> Douglas R. Richmond, above n 97, 263.

<sup>120</sup> Nathan Kopel, above n 108, 1.

Added to the problem of bill padding is the practice of double billing by practitioners. The latter occurs when a lawyer bills more than one client for the same piece of work<sup>121</sup> or bills two clients for two separate tasks performed at the same time.<sup>122</sup> Richmond notes that the practice of double billing is not uncommon amongst lawyers.<sup>123</sup> The author explains how double billing or even triple billing is made possible by lawyers seeking to generate billable hours:

Consider the [lawyer] who schedules court appearances for three clients on the same morning docket and then spends three hours in court, just as he would have for any one of the clients had he not been able to schedule the three matters on the same day. He therefore bills each of the clients for the full three hours, meaning that he has billed a nine hour day before lunch. Or perhaps [a lawyer] spends eight hours preparing a research memorandum that will benefit three clients. The [lawyer] then puts a copy of the memorandum in each client's file and bills each client for the full time spent preparing the memorandum, generating twenty-four billable hours.<sup>124</sup>

Lerman in yet another piece of work on the subject<sup>125</sup> reports the experience of a young associate who realized that 'the partners who were billing the largest numbers of hours were not the ones who were working the hardest.'<sup>126</sup> The associate was faced with a dilemma as to whether or not to bill more than the work he put in. He was advised by a partner of the firm that if he was to survive in the firm, he was to 'learn how to double bill'.<sup>127</sup>

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<sup>121</sup> Andre Gharakhanian and Yvonne Krywyj, above n 86, 1007.

<sup>122</sup> Lee A. Watson, above n 3, 192.

<sup>123</sup> Douglas R. Richmond, above n 97, 268.

<sup>124</sup> Douglas R. Richmond, above n 97, 269.

<sup>125</sup> Lisa G. Lerman, 'Gross Profits? Questions About Lawyers Billing Practices' (1993-1994) 22 *Hofstra Law Review* 645.

<sup>126</sup> Lisa G. Lerman, above n 125, 645.

<sup>127</sup> Lisa G. Lerman, above n 125, 645.

Commissioner Mark reports that such billing practices are also occurring in Australia. During the 2006-2007 reporting period, the OLSA came across an instance where a lawyer had acted for three plaintiffs under circumstances where the matters were heard together. The lawyer charged each client for the full costs of each conference he held and each day he spent in court. According to the OLSA, this constituted overcharging.<sup>128</sup>

The ABA Standing Committee on Ethics and Professional Responsibility (hereafter “the ABA Standing Committee”) in its *Formal Opinion 93-379* has placed a ban on double-billing.<sup>129</sup> Richmond’s hypothetical scenarios defined above would, according to the ABA Standing Committee, generate unreasonable fees for the lawyer as these fees have not truly been *earned* by the lawyer.

*b) Research*

Billing for time spent on research also has its share of concerns. Ross observes that law firms tend to spend an ‘infinite amount of time’ to research even minute legal issues.<sup>130</sup> Ross further contends that some lawyers deliberately use unnecessary research to inflate a client’s bill. However, he also recognizes that in some instances excessive research is undertaken under a genuine belief that this would further the client’s interest.<sup>131</sup>

Fox explains that research is an area which can be used by practitioners to their advantage; if a lawyer only worked for 3.6 hours on research but notes 3.9 hours of billable work ‘who will ever discover it?’<sup>132</sup> Lerman also reports experiences of lawyers who had witnessed questionable billing practices such as billing significant hours for research when either the research was not needed or no research was in

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<sup>128</sup> Steve Mark, above n 5, 9.

<sup>129</sup> American Bar Association Standing Committee on Ethics and Professional Responsibility, *Formal Opinion 93-379 Billing for Professional Fees, Disbursements and other Expenses*, December 1993) 6.

<sup>130</sup> William G. Ross, above n 3, 40.

<sup>131</sup> William G. Ross, above n 3, 40.

<sup>132</sup> Lawrence J. Fox, above n 109, 2194.

fact carried out.<sup>133</sup> Lerman recounts the experience shared by one interviewee who discussed the billing habit of a partner in a firm he worked as follows:

[He] would brag about how a client asked him a question, and he knew the answer, so he wrote the answer in a letter and billed ten hours for research time. This was a guy who thought the goal was to work less and bill more hours.<sup>134</sup>

An additional issue which has attracted much controversy is whether a lawyer should be allowed to bill two or more clients for research that was undertaken for the first client and could be recycled for the second client. This issue was highlighted in Richmond's hypothetical scenarios described above. The ABA Standing Committee's opinion on this is clear: 'A lawyer who is able to reuse old work product has not re-earned the hours previously billed and compensated when the work product was first generated.'<sup>135</sup> However, the argument for the lawyer would be that they are hired for their very expertise and if they are not compensated for this then subsequent clients would be receiving a 'windfall'.<sup>136</sup>

### *c) Overstaffing and Use of Paralegals*

According to the ABA Commission, the time billing system does not encourage partners of firms to limit the number of lawyers or paralegals assigned to a file.<sup>137</sup> Overstaffing a client's matter could generate more billable hours for the firm. Phillips believes that this is yet another example of task padding.<sup>138</sup> In a lawsuit in which Phillips was retained as an expert on billing procedures, at least nine individuals had worked on the client's matter- three partners, three associates, and

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<sup>133</sup> Lisa G. Lerman, above n 125, 647.

<sup>134</sup> Lisa G. Lerman, above n 125, 647.

<sup>135</sup> American Bar Association Standing Committee on Ethics and Professional Responsibility, above n 129.

<sup>136</sup> Dennis Curtis and Judith Resnik, above n 83, 1416.

<sup>137</sup> American Bar Association, above n 2, 6.

<sup>138</sup> Gerald F. Phillips, above n 116, 268.

three or more paralegals or assistants, and at least seven people had billed for time spent on the case on the very first day of trial!<sup>139</sup> To make matters worse, the bill sent to the client did not disclose who had charged for the time spent on the matter and what their rates were.<sup>140</sup>

Lawyers who had shared the billing experience of their firms with Lerman also reported other questionable billing practices such as lawyers' names appearing on the client bill even though they had not worked on that particular client's file.<sup>141</sup> In other instances, where paralegals had worked on the file, their work would be billed at practitioner rates.<sup>142</sup>

Parker and Evans similarly point out some 'notorious practices' for increasing the time billed to clients.<sup>143</sup> These include the use of more senior lawyers than necessary whose billing rates are relatively higher, and charging a client for work done by a team of junior lawyers who do work that may not be necessary and which eventually has to be checked by a senior lawyer.<sup>144</sup> Chief Justice Martin has also observed overstaffing and sums up this practice as follows:

'Four lawyers might attend a meeting where one would do. Teams of lawyers go to court, some just sitting and watching.'<sup>145</sup>

According to the ABA Standing Committee, overstaffing client matters for the purpose of generating billable hours is also not properly considered 'earning' one's fees.<sup>146</sup>

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<sup>139</sup> Gerald F. Phillips, above n 116: As the author was retained as an expert on the billing procedures in the lawsuit, the author kept the names of the parties to the dispute confidential.

<sup>140</sup> Gerald F. Phillips, above n 116, 273.

<sup>141</sup> Lisa G. Lerman, above n 125, 646.

<sup>142</sup> Lisa G. Lerman, above n 3, 2162.

<sup>143</sup> Christine Parker and Adrian Evans, above n 66, 199.

<sup>144</sup> Christine Parker and Adrian Evans, above n 66, 199.

<sup>145</sup> Chief Justice Wayne Martin, above n 3, 14.

*d) Inefficiency and Prolonging of the Matter*

In 2004, Justice Spigelman, the then Chief Justice of the Supreme Court of NSW, while recognizing that time billing has become a universal practice, pointed out that ‘...it is difficult to justify a system in which inefficiency is rewarded with high remuneration.’<sup>147</sup> Efficient lawyers, on the other hand, who complete a task in much less time and much more efficiently than their inefficient counterparts, are ‘penali[zed]’<sup>148</sup> as they are not properly compensated.

Geilich<sup>149</sup> and Massey and D’Amour<sup>150</sup> strongly believe that the time billing system indeed lends itself to inefficiency. This system shifts the lawyer’s focus from the results of the case to the amount of time it takes to complete a particular task. As such, it also provides an incentive for a lawyer to prolong litigation,<sup>151</sup> as the more the matter drags the more billable hours could be generated. Chief Justice Martin states that as far as litigation is concerned, while the client has an interest in minimizing the steps and the time between the commencement and completion of the matter, the lawyer’s interest is in maximizing these.<sup>152</sup>

Chief Justice Martin further observes that complex litigation requires careful planning if the service is to be provided efficiently.<sup>153</sup> To borrow the words of the ABA Commission, ‘[l]ack of planning often leads to inefficiencies that can result in excessive billing.’<sup>154</sup> Firms could maximize their efficiency through project management techniques. However, firms again do not have the incentive to be

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<sup>146</sup> American Bar Association Standing Committee on Ethics and Professional Responsibility, above n 129.

<sup>147</sup> Chief Justice James Spigelman, ‘Opening of the Law Term 2004’ (Address given at the Opening of Law Term Dinner, Sydney 2 February 2004).

<sup>148</sup> Steve Mark, above n 12, 228.

<sup>149</sup> Charles N. Geilich, above n 28, 182.

<sup>150</sup> Donald C. Massey and Christopher A. D’Amour, above n 3, 117.

<sup>151</sup> Donald C. Massey and Christopher A. D’Amour, above n 3, 113.

<sup>152</sup> Chief Justice Wayne Martin, above n 3, 12.

<sup>153</sup> Chief Justice Wayne Martin, above n 3, 14.

<sup>154</sup> American Bar Association, above n 2, 6.

efficient as their reward is ‘simply a function of time’ irrespective of whether the time is spent efficiently or productively or not.<sup>155</sup>

Parker and Evans have called this billing method ‘opaque’ and one which is increasingly regarded by clients as ‘inefficient and ‘unfair’ as there is no upper limit to the number of hours appearing on a lawyer’s time-sheet.<sup>156</sup> Time billing would ideally serve a client’s interest if the lawyer is able to accomplish the task quickly and thereby charge lesser fees. But as Beach notes, ‘[w]hy strain in the service of indefinable ‘efficiency’, when even inefficiency- especially inefficiency- was paying off’,<sup>157</sup>

The above discussion has highlighted the major abuses of the time billing system in the US and Australia. To what extent are the claims made above true? Parker and Evans note that although the use of time billing results in ethical flaws one cannot generalize that *all* lawyers abuse this billing system.<sup>158</sup> The next section therefore, reviews the previous studies undertaken on this subject to determine how widespread the issue really is.

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<sup>155</sup> Chief Justice Wayne Martin, above n 3, 14.

<sup>156</sup> Christine Parker and Adrian Evans, above n 66, 186.

<sup>157</sup> John A. Beach, above n 74, 947.

<sup>158</sup> Christine Parker and Adrian Evans, above n 66, 186.

### 3.3 PREVIOUS STUDIES AND FINDINGS

Although critics of time billing are many, limited studies have been conducted in the US and Australia to demonstrate its abuses. There have been at least three studies conducted in the US,<sup>159</sup> as well as a relatively recent study conducted in Australia.<sup>160</sup>

Amongst the first of these studies, is the work of Lerman<sup>161</sup> who carried out an informal survey through confidential interviews of twenty American lawyers. Lerman tried to identify instances of lawyers deceiving their clients. Although Lerman's study was based on a relatively small number of interviewees, her report provides some useful insights into unethical behaviour arising in the use of time billing. Of the lawyers interviewed, *nearly all* reported instances of deceptive billing practices such as: failing to keep a running log of time and simply estimating the number of hours worked for the client<sup>162</sup>, performing unnecessary work and then billing for it<sup>163</sup> and inflating or padding the bills of wealthy clients<sup>164</sup> including the practice of double-billing.

Lawyers apparently undertook research depending on the amount the client wished to claim from the opposing party and how deep the client's pockets were. If the stakes were high and the client had the resources this would result in the lawyers engaging in 'unnecessary background work.'<sup>165</sup> Bill padding and inflation of hours were reported to be one of the most significant forms of billing deception. In some instances lawyers 'boast[ed] about having billed two clients for the same work, and about the amount of billing they could fabricate.'<sup>166</sup>

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<sup>159</sup> Lisa G. Lerman, above n 10; William G. Ross, above n 3 and Susan Saab Fortney, above n 11.

<sup>160</sup> Christine Parker and David Ruschena, above n 11.

<sup>161</sup> Lisa G. Lerman, above n 10.

<sup>162</sup> Lisa G. Lerman, above n 10, 705: The author also noted that most lawyers believed that there was nothing necessarily wrong about making such estimates of hours.

<sup>163</sup> Lisa G. Lerman, above n 10, 706.

<sup>164</sup> Lisa G. Lerman, above n 10, 709.

<sup>165</sup> Lisa G. Lerman, above n 10, 706.

<sup>166</sup> Lisa G. Lerman, above n 10, 710.

Based on her findings, Lerman recommended that ethical codes and rules governing the conduct of lawyers needed to provide specific guidance on time billing practices to address billing abuses such as padding and fabrication of hours. Lerman further recommended that the ethical codes and rules should also require lawyers not only to keep contemporaneous time records, but also to inform clients of the avenues available to them should they have any concerns about the bills they receive.

Following Lerman's work, in 1991 Ross carried out a survey in the US to explore the ethical aspects of time billing. His study incorporated data and comments from 272 private practitioners and 80 corporate counsel from around the nation who used time either as the principal basis or the exclusive basis to bill clients.<sup>167</sup> Ross' findings support the view of critics that fraudulent billing is a serious problem, but his study did not find the problem to be 'endemic' or 'epidemic'.<sup>168</sup> As far as fraudulent billing is concerned, 27.4% of practitioners reported that time billing 'moderately' encouraged fraudulent billing, while a little over 7% of practitioners stated it 'substantially' or 'very substantially' encouraged fraud.<sup>169</sup>

On the issue of bill padding, 38% of private practitioners stated that lawyers 'occasionally' pad their hours deliberately to bill clients for work which they have not performed. Surprisingly however, a disturbing 58.9% of private practitioners stated that they personally knew of 'some' instances of padding while about 6% of practitioners reported that they knew of 'many' such instances.<sup>170</sup> Ross also found evidence of double-billing with 17.4% of private practitioners admitting to such practice.<sup>171</sup> Moreover, 27.4% of practitioners stated that time billing diminishes incentives for expeditious work while 7% believed that it substantially or very substantially did so.<sup>172</sup>

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<sup>167</sup> William G. Ross, above n 3, 5.

<sup>168</sup> William G. Ross, above n 3, 16.

<sup>169</sup> William G. Ross, above n 3, 92

<sup>170</sup> William G. Ross, above n 3, 93.

<sup>171</sup> William G. Ross, above n 3, 92.

<sup>172</sup> William G. Ross, above n 3, 92.

Based on his findings, Ross concluded that the time billing system does indeed lead to serious abuses even if these abuses are not significantly widespread. In recognizing that ‘lawyers seem loathe to abandon hourly billing’, Ross suggested that a viable system of billing would be a system in which hours are used as the basis of the bill but are ‘adjusted to reflect the quality of the work’<sup>173</sup> produced by the lawyer.

In 2005 Fortney<sup>174</sup> conducted a national study through surveys and interviews of supervised and managing practitioners in US law firms. Her study attempted to determine the effect of billable hours upon the working life of legal practitioners. Fortney found that 82.8% of managing practitioners and 85.6% of supervised practitioners reporting that their firm had a minimum billable hour expectation.<sup>175</sup> A majority of the managing practitioners and a staggering 83% of the supervised practitioners reported that bonuses were largely based on billable hours production.<sup>176</sup>

Fortney’s study also found that working long hours had adverse effects on morale, job satisfaction and retention of practitioners.<sup>177</sup> At least 37% of the respondents stated that they were interested in changing their jobs, and the dominant reason for this was the high billable hour requirements.<sup>178</sup> Some supervised attorneys also recommended eliminating the billable hour minimums while many urged that the requirements be lowered.<sup>179</sup> In order to improve the quality of life for practitioners, Fortney strongly recommended that firms should lower the ‘onerous billable hours practice’ and discontinue linking bonuses to billable hours production.<sup>180</sup>

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<sup>173</sup> William G. Ross, above n 3, 86.

<sup>174</sup> Susan Saab Fortney, above n 11, 173.

<sup>175</sup> Susan Saab Fortney, above n 11, 175.

<sup>176</sup> Susan Saab Fortney, above n 11, 176-177.

<sup>177</sup> Susan Saab Fortney, above n 11, 184.

<sup>178</sup> Susan Saab Fortney, above n 11, 184-185.

<sup>179</sup> Susan Saab Fortney, above n 11, 180.

<sup>180</sup> Susan Saab Fortney, above n 11, 192.

Previously, Australia lacked empirical data on the abuses of the time billing system. However, in 2011, Parker and Ruschena conducted an empirical study to determine whether billing targets subject lawyers to pressures which encourage unethical practices.<sup>181</sup> Parker and Ruschena conducted a survey of 324 solicitors from 25 private law firms in Queensland. Of the 324 respondents, 86% reported that they were subject to billing targets<sup>182</sup> while 71% reported that their performance was primarily assessed on the basis of the amount billed.<sup>183</sup> In 19 firms, 60% or more of the lawyers stated that their firm did give bonuses to those who exceeded their targets.<sup>184</sup> At least 23% of the lawyers also reported observing instances of bill padding within their firms.<sup>185</sup>

Parker and Ruschena argued that the pressure to bill more hours was only one facet of the billing pressures placed upon lawyers. Their findings showed that those who were subject to billing targets were also greatly concerned about the unethical billing practices of others in the firm. Hence, the authors concluded that even without excessive billing targets lawyers may engage in unethical behavior if they *perceive* that everyone within the firm is engaging in such behavior and that in order to succeed in the firm, there was no other option. Parker and Ruschena suggested that one means to remedy this would be to establish ethical infrastructure through clear billing policies at firm level and to enforce these.

In Fiji, no prior studies have been undertaken on the billing practices of legal practitioners, and the issue of whether time billing encourages unethical billing on the part of practitioners. In fact, no such study has been undertaken in the South Pacific region. Hence, this research is the first study to explore this issue in the South Pacific region and serves to fill that gap in the literature on this subject.

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<sup>181</sup> Christine Parker and David Ruschena, above n 11.

<sup>182</sup> Christine Parker and David Ruschena, above n 11, 20.

<sup>183</sup> Christine Parker and David Ruschena, above n 11, 22.

<sup>184</sup> Christine Parker and David Ruschena, above n 11, 24.

<sup>185</sup> Christine Parker and David Ruschena, above n 11, 25.

The next section discusses the data and findings from interviews conducted with twenty private legal practitioners.

## 4 EMPIRICAL RESEARCH: DATA AND DISCUSSION

### 4.1 INTERVIEWS WITH PRIVATE LEGAL PRACTITIONERS

This section of the study reports on my findings from semi-structured and confidential interviews conducted with twenty private legal practitioners from twenty different firms around Fiji. The interview results are discussed in two parts. The first part presents data gathered from the interviews while the second part engages in an analysis of the data and reports on my findings. To preserve the anonymity of the interviewees I have assigned them codes ranging from LP1 to LP20.

#### 4.1.1 Data

##### *a) Billing Methods of Law Firms*

To gain an insight into the billing practices of the interviewees' firms, I first asked the interviewees to identify the billing methods employed by their firms. Table 1 contains a summary of the responses:

**Table 1: Billing Methods Employed by Law Firms**

<i>Question: What billing methods are used by practitioners in your firm? Is time-based billing/hourly billing one of these methods?</i>																					
Reported Billing Methods	Practitioner Responses																				
	LP1	LP2	LP3	LP4	LP5	LP6	LP7	LP8	LP9	LP10	LP11	LP12	LP13	LP14	LP15	LP16	LP17	LP18	LP19	LP20	
Time billing	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Contingency Fees			*	*	*						*			*					*	*	
Scale of Costs - Conveyancing	*	*	*	*	*	*								*							
Fixed Fees/Quotes		*	*			*							*	*	*	*	*				

The table above shows that all twenty firms use time billing as one of their billing methods. Six firms bill exclusively on the basis of time. Five of the twenty practitioners reported that their billing method also depended upon the type of client and the nature of the legal matter upon which the practitioner’s service was sought.

LP9 explains this as follows:

At times a lot depends on the type of clients we have... we will not bill a client who comes to us for [a] distress for rent [matter] the same as we would bill a client for an employ[ment] termination issue.

I next sought to determine whether time billing was the prevalent billing method for the interviewees’ firms. Table 2 reports on the responses gathered:

**Table 2: Prevalent Billing Method of Firms**

<i>Question: In your firm how prevalent is time-based billing compared to other forms of billing?</i>																					
Prevalent Billing Methods	Practitioner Responses																				
	LP1	LP2	LP3	LP4	LP5	LP6	LP7	LP8	LP9	LP10	LP11	LP12	LP13	LP14	LP15	LP16	LP17	LP18	LP19	LP20	
Time billing			*	*	*	*	*	*	*	*	*	*			*		*	*	*	*	
Contingency Fees																					
Scale of costs - Conveyancing	*	*																			
Fixed Fees/Quotes														*							
LP13 had recently joined his firm and reported that he could not make an assessment of the most prevalent billing method. LP16 also could not make an assessment of the most prevalent billing method in his firm.																					

The table above shows that fifteen of the twenty firms use time billing more than other forms of billing. The firms in which LP1 and LP2 were employed largely handled conveyancing matters and thus used the scale of costs for conveyancing more frequently to bill clients. LP16 reported that billing in his firm depended upon

agreement with clients which would ultimately result in the client being charged by the hour or being given a fixed quote.

***b) Training on Billing Methods***

The interview also sought to determine whether the practitioners had received any training on the billing methods employed by their firms. Table 3 shows the nature of responses gathered from the interviewees:

**Table 3: Training on Billing Methods Employed by Firms**

<b>Question:</b> <i>Did you receive any training on the billing methods employed by your firm upon joining the firm?</i>	
<b>Nature of Responses</b>	<b>No. of LPs</b>
Yes	3
No formal training but gradually picked up from practice	7
No formal training but assistance received from partners/senior clerks	5
Induction programme for new practitioners	1
Awareness of the billing practice from previous experience	3
<b>Total</b>	<b>19*</b>
*LP16 was only asked selected questions due to time restrictions and did not form part of the sample for this question.	

The table above shows that only four firms provide formal training for new practitioners while there is no formal training in the other firms. In most cases, practitioners learnt how to bill gradually through their practice in the firm. In cases where practitioners received assistance from their partners, such assistance was usually given only on an *ad-hoc* basis. The response gathered from LP4 shows the implication of a lack of training on the billing process:

‘Previously clients had arguments about my billing because I was not aware of the billing process when I joined.’

*c) Specific concerns:*

*i) Determination of time spent on client's matter/file*

The practitioners were also asked to explain how they determined what amount of time was spent working on a particular client's file or matter. Sixteen of the twenty interviewees reported that they kept actual time records either on individual client files or used time-sheets to record all work done on a daily basis. Four practitioners reported that they estimated their time for work done on client files. The following response was obtained from LP3 on this issue:

...we don't always fill in the time-sheet...time is estimated for preparation of certain documents, [for] example letters.

*ii) Billing targets*

The interview next sought to determine whether the respondents as well as other practitioners in their respective firms were subject to billing targets. Table 4 contains a summary of the responses:

**Table 4: Billing Targets within Firms**

<i>Question: Are practitioners in your firm subject to billing targets? (If not in terms of hours, then on the number of clients handled or the amount of revenue raised for the firm).</i>	
<b>Nature of responses</b>	<b>No. of LPs</b>
No billing targets	7
Yes, in terms of hours per day	3
Yes, in terms of revenue raised for the firm (weekly/monthly/ annually)	10
<b>Total</b>	<b>20</b>

The table above shows that thirteen of the twenty firms do have billing targets either expressed in terms of billable hours or in terms of revenue generated for the firm. Of the practitioners who were subject to hourly billing targets, one practitioner

(solicitor) reported a target of four billable hours during the course of a work day while the other two (an associate and a senior associate) reported a target of six billable hours per day. The time-sheet of one interviewee provides further insight on this issue. LP8 who is subject to a billing target of six hours per day commented as follows:

I should have brought you my time-sheet. I've got a time-sheet that goes from 9 a.m. in the morning till 7 p.m. in the evening. I've got to record every six-minute unit...<sup>186</sup>

According to LP8, the fact that practitioners in her firm had to generate six billable hours per day did not mean that 'you [could] come in and muck around between the hours.' She reported that there were things which could not be classified as billable work such as opening up a client file, sending out bills to clients and chit-chats with colleagues. When asked whether she was able to meet her targets, she reported that normally it was not a problem meeting the targets but when things started to slow down then 'everyone's out there trying to look for work...'

Those practitioners who were subject to a billing target in terms of revenue generated for the firm had to raise X amount of dollars either on a weekly, monthly or annual basis. One practitioner reported that they even had 'memos going out' stating that 'there is a target to meet'. Some practitioners revealed they had to annually generate three times the amount paid to them as salary.

LP11 reported as follows:

The normal practice for firms is salary times three annually. One third goes to the principal, one third is our salary and one third

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<sup>186</sup> This suggests that practitioners in the firm were given a ten hour spread to generate six billable hours during the course of the work day.

covers the overhead of the firm. But different firms have different practice[s].

What if the targets are not met? The interviewees responded that there were no drastic consequences of failing to meet the target. However, LP1 reported that if the target is not met ‘you personally feel guilty so [you] must work harder to make up for it.’ For at least one firm, the failure to meet the target meant that the practitioner would not qualify for a bonus.

The interview also sought to determine whether the target system was tied into the promotion of practitioners in their respective firms. A majority of the interviewees reported that their promotion depended upon a number of factors such as experience, the number of clients, the revenue raised for the firm as well as the ability to produce outstanding work. However, LP9 reported that apart from these factors, promotion in her firm mainly depended upon the ‘income [they brought] into the company’. LP17 also revealed that promotion in his firm depended on ‘meeting targets’ and the firm’s Key Performance Indicators (KPIs). Table 5 summarizes the response gathered from the interviewees:

**Table 5: Basis for Promotion in Firms with and without Targets**

<i>Question: What is the basis for promotion of practitioners in your firm? (i.e. Experience, number of clients handled, revenue raised for the firm, other?)</i>																				
Practitioner Responses	Firms with Billing Targets										Firms with no Billing Targets									
	LP1	LP4	LP5	LP8	LP9	LP10	LP11	LP15	LP16	LP17	LP18	LP19	LP20	LP2	LP3	LP6	LP7	LP12	LP13	LP14
Experience	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Revenue Raised	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
No. of Clients / Volume of Work	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Outstanding legal work/ Practitioner Efficiency				*			*													*
Performance of the Firm									*					*						

LP13 had newly joined his firm and could not offer any comments on this issue. LP16 was asked selected questions due to time restrictions and did not form part of the sample for this question.

The table above shows that for a majority of firms with billing targets, the amount of revenue generated for the firm serves as the most common basis for promotion. Additionally, in four of the seven firms where no billing targets were imposed, the amount of revenue generated still serves as a factor to be considered for promotion.

To determine if the target system led to unethical billing practices, I asked the interviewees to comment on the disadvantages of having a target system in law firms. LP7, who was not subject to any billing targets in his current firm, reported the pressure he felt in his previous firm:

In my previous firm we did have targets. The disadvantage of the target system... [you need to] bring X dollars in the office per month. I feel you end up billing your client more. Sometimes billing hours are exaggerated if you are a junior practitioner; you are under pressure to perform.

LP9 commented on the disadvantages of the target system as follows:

For a particular month's target, solicitors can rush through files and not do a thorough job on it, simply because the more files they work on, the more clients they attend to, the more income they get into the office.

LP 12 reported as follows:

If [you have a] target system then it would lead to unfair billing and no room for compromise. The lawyer may spend more time on the file than necessary.

According to LP14, the target system not only creates pressure to bill, but the system shifts the lawyer’s focus from the client to ‘how much you earn’. Both LP18 and LP19 believed that the target system may encourage lawyers to ‘make-up hours’ to meet the target. LP19 provided an example of how a lawyer could get away with fabricating billable hours:

Put it this way, over here we are required to have six hours of billable work. I already did four for example. I pick up a Sale and Purchase Agreement, I need another two. Put two hours there, although I may have just done it for an hour. There’s always that. The target system has its own disadvantages.

*iii) Overcharging*

I next sought to determine if overcharging was an issue of concern for the firms bearing in mind that for fifteen of the twenty firms, time billing was found to be the prevalent form of billing.

**Table 6 : Client Complaints about Bill of Costs**

<b>Question: Were there any incidents of clients complaining about the Bill of Costs presented to them?</b>																				
<b>Practitioner Responses</b>	<b>LP1</b>	<b>LP2</b>	<b>LP3</b>	<b>LP4</b>	<b>LP5</b>	<b>LP6</b>	<b>LP7</b>	<b>LP8</b>	<b>LP9</b>	<b>LP10</b>	<b>LP11</b>	<b>LP12</b>	<b>LP13</b>	<b>LP14</b>	<b>LP15</b>	<b>LP16</b>	<b>LP17</b>	<b>LP18</b>	<b>LP19</b>	<b>LP20</b>
Yes				*		*	*			*	*	*				*		*	*	
Once								*							*					
Few	*													*						
Not too often		*																		
Often					*															
Sometimes									*				*							
Always			*														*		*	
<b>Question: If so, how does the firm generally handle such complaints?</b>																				
The bill is explained and discount is given	*		*	*	*		*		*	*	*		*		*	*	*	*	*	*
The bill is explained and the client understands		*				*		*				*		*						

The table above shows that for all twenty firms there have been incidences where clients have complained about their bills. For a few firms, client complaints were more frequent than others. LP3 reported that her firm mainly received complaints from those clients who were charged on the basis of time. All billing complaints reported by the interviewees related to overcharging by practitioners in the firm, and on most occasions the firms had tried to resolve the matter through discounting the bill.

*iv) Fraudulent Billing and Padding/Inflation of Bills*

In addition to the issue of overcharging, I inquired if time billing encourages fraudulent billing by Fiji legal practitioners. A summary of the responses appears in Table 7:

**Table 7: Perspectives of Practitioners on Fraudulent Billing**

<i>Question: According to American literature, time-based billing encourages fraudulent billing of clients. Do you agree?</i>																				
<b>Practitioner Responses</b>	<b>LP1</b>	<b>LP2</b>	<b>LP3</b>	<b>LP4</b>	<b>LP5</b>	<b>LP6</b>	<b>LP7</b>	<b>LP8</b>	<b>LP9</b>	<b>LP10</b>	<b>LP11</b>	<b>LP12</b>	<b>LP13</b>	<b>LP14</b>	<b>LP15</b>	<b>LP16</b>	<b>LP17</b>	<b>LP18</b>	<b>LP19</b>	<b>LP20</b>
Yes	*		*	*	*		*		*	*	*	*	*	*	*		*	*	*	*
No		*				*		*								*				

The table shows that sixteen of the twenty practitioners agree that time billing does encourage fraudulent billing of clients. According to LP4 Fiji lawyers are engaging in fraudulent billing to generate ‘more hours’ and ‘more bills’. LP11 commented that fraudulent billing ‘can happen and must be happening’. However, LP20 stressed that ‘not all lawyers do this’. According to LP18 fraudulent billing results from ‘young practitioners trying to impress the boss.’ LP5 supported this view and commented that where practitioners have targets to meet ‘[t]hey will bill fraudulently.’

Those practitioners who agreed that time billing encourages fraudulent billing also believed that unethical billing largely depended upon the ethical conduct of the individual practitioner and the ethical structure of the firms in which they are employed. As LP17 commented:

...this falls back to ethics. If you have a strong ethical base, it won't happen. Depends on the people, the partners running the place. It comes down to how high the standards are ethically.

Those practitioners who believed that time billing does not encourage fraud, stressed that the billing method is transparent, provides a descriptive narration of the work done against the time spent on the client's matter and encourages accountability in the billing process.

The interviewees were also asked to comment on whether legal practitioners in Fiji engaged in deliberate inflation of billable hours. The following table summarizes the data:

**Table 8: Perspectives of Practitioners on Deliberate Inflation of Billable Hours**

<i>Question: Do you believe practitioners deliberately inflate their hours to bill clients for work that they do not actually perform?</i>																				
Practitioner Responses	LP1	LP2	LP3	LP4	LP5	LP6	LP7	LP8	LP9	LP10	LP11	LP12	LP13	LP14	LP15	LP16	LP17	LP18	LP19	LP20
Yes	*		*	*	*		*		*	*		*		*	*	*	*	*		*
No								*			*		*						*	
Cannot comment		*				*														

The table shows that fourteen of the twenty practitioners agree that practitioners deliberately inflate their billable hours to bill for work which has not been performed for the client. Four interviewees stressed that lawyers in Fiji do not

engage in deliberate inflation of billable hours while two others stated that they could not offer any comments on this issue.

LP9 believed that inflation of billable hours is happening ‘to a large extent’ in Fiji and ‘that is why now we have so many complaints against solicitors before the ILSC.’ A few other practitioners stated that where billing targets are a hard and fast rule, this encourages practitioners to engage in bill inflation.

Practitioners were also asked to identify instances where they had come across bill inflation either in their firms or elsewhere. The interviewees gave cautious responses. For example, LP20 responded as follows:

I know of some stories of how so and so has ripped off clients.  
Stories circulating in our lawyer circle.

According to LP18:

I know of some practitioners, I cannot name any names, who bill clients for one whole day, but half day you see they are drinking in the bar. People also say I’ve billed one hour, but may only take 20 minutes on the task.

LP5 commented that new clients often shared their experience of how their previous solicitors had billed them excessively. LP16 revealed that he had come across instances of excessive billing practices of firms in his capacity as a Receiver attending to the winding up of law firms.

It will also be recalled from Part 3.2.1 that there are instances where associates may bill honestly, but their supervising seniors tend to inflate their bills.<sup>187</sup> LP3 who is employed as an associate in a firm reported that when she joined her firm, she was given ‘bills to do and was supervised’. Her bills were checked and signed off by the supervising partner of the firm. She reported that there were many instances where the bills were either increased or decreased by the supervising partner. An evaluation of the experience shared by LP3 appears in the discussion below.

v) *Double-billing*

As far as double-billing is concerned, none of the lawyers reported this to be an issue of concern. Even where lawyers attend court for two or three clients on the same day, each client is billed only for the time spent on that client’s matter. In some cases firms equally divide the time spent between the clients. LP18 reported the practice of his firm as follows:

We average it. If we go to court for three clients for four hours, we will bill four hours divide by three clients.

vi) *Billing for unnecessary tasks*

The interview also sought to determine if lawyers engaged in unnecessary tasks that would not benefit the client but would generate more billable hours. At least twelve interviewees agreed that the prospect of billing additional hours influenced a practitioner’s decision to proceed with work which they otherwise might not perform.

According to LP9:

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<sup>187</sup> See footnote 108 and accompanying text.

...I think it's not fair...what if the solicitor feels that claim should not be filed, or feels that it's a losing case, but just because he has to impress the boss, and do the ground work, he will research and prepare the documents, to make up his hours and bill. This is not fair on the client as a true picture is not given to them.

According to LP6:

Some lawyers are doing this in Fiji. Either the lawyer is not doing much work or [is] doing too much.

At least three practitioners explicitly agreed that research could be one area which is not necessarily needed for the client but may appear as an item on the bill of costs. LP6 reported that the time billing system is open to abuse and attempted to explain this further:

...you have an unproductive hour at court through no fault of the lawyer. How do you account for this? [You] justify by showing you did research for an hour. This is premium billing.

Conversely, the response of LP11 was that there are times when lawyers have spent a considerable amount of time undertaking necessary research for the client but are unable to bill for this fully. According to LP11 some complex matters could take two days of research but 'you can't charge the client for eight hours of research'.

vii) *Recycled Research*

On the issue of billing for recycled research, I designed a hypothetical scenario to determine how the practitioners would bill their clients if faced with such a situation:

*Suppose Client A came to see you regarding a specific matter for which you were required to undertake 3 hours of research and you bill Client A accordingly. If Client B comes up with a similar matter where you can simply 're-cycle' the research work undertaken for Client A, would you bill Client B for the same three hours?*

Eleven of the twenty interviewees reported that they would only bill Client B for the actual amount of time spent drafting the legal documents for Client B. These practitioners also believed that to bill Client B for the same three hours would be an unethical practice. Nine practitioners however, reported that they would bill Client B for the recycled research. LP4 explained why he would bill both Client A and B similarly:

I will bill both for three hours. Bill [them] for intellectual property. It's my work, so I can bill it.

*viii) Overstaffing and use of Paralegals*

According to the interviewees, given the size of law firms in Fiji, overstaffing of client matters is not an issue of concern. Only one practitioner reported that he has observed some large firms engaging in such practice:

An example is where more than one practitioner appears in court when there is no need for the others. The others would be simply carrying files for the seniors and doing nothing else.

Billing for work done by paralegals however, was reported to be a common practice in firms. For a majority of the firms, work done by paralegals such as drafting of

conveyancing and security documents and various other documents such as subpoenas, notices to produce, acknowledgements of service, follow-up letters and in some cases research are all billed at solicitor's rates. LP19 provides further insight into this practice:

In this particular law firm, there's work allocated to paralegals. They prepare all the security documents. I just review it. So, in fact my time is a whole lot less than theirs. Say, five minutes of my time. At the end of the day when the client looks at the bill he doesn't look at who has done it. It doesn't appear on the initial bill.

According to LP18 it is justified for paralegal-work to be billed at solicitor's rates because 'paralegals are not that efficient' and that '[t]hey make errors' which have to be checked by the practitioner. A few lawyers explained that because the ultimate risk and responsibility of the client matter lay upon them, it was justified that paralegal-work be billed at practitioner rates.

*ix) Inefficiency and Prolonging of the Matter*

Thirteen of the twenty interviewees agreed that time billing rewards the non-efficient and penalizes the efficient. The experience shared by LP18 shows how time billing could penalize an efficient lawyer:

I have found that I can do things fast so I can move onto the next file. It actually increases my speed...a new guy has to do more reading. What I do in ten minutes, another person does in one hour. Yeah I do realize that this way my hours are less.

LP18 is subject to a yearly target in terms of revenue generated for the firm. He reported that if a practitioner in his firm exceeded the target, he or she would be

entitled to a bonus. Having worked for the firm since 2004, he has never exceeded the target and never received a bonus.

Thirteen interviewees also agreed that the practice of time billing diminishes incentives for expeditious work. LP15 reported that he personally knew of ‘some practitioners who are greedy and tend to drag files’. LP3 stated that when dealing with civil claims, if the fee is contingency-based then matters are ‘wrap [ped]’ up quickly. If however, the fee is time-based, then the matter is dragged on by the plaintiff’s lawyers.

A few lawyers however, stated that sometimes client matters drag on through no fault of the lawyer but due to factors such as failure of the client to provide the required information or the back-log of cases in Fiji courts.

#### **4.1.2 Discussion**

##### ***a) Billing Methods of Law Firms***

From the above data I found that although the interviewees’ firms employ various other billing methods such as contingency fees, scale of costs (for conveyancing matters) and fixed fees or quotes, time billing is the most frequent form of billing for these firms. Given that the data was collected from law firms which rank amongst those having a large client base and thus handling a huge volume of legal transactions, it can be surmised that time billing is the most prevalent form of billing clients in Fiji.

##### ***b) Training on Billing Methods***

Data gathered from the interviews also shows that a majority of the interviewees’ firms did not offer any formal training on billing to practitioners upon joining the firm. On most occasions practitioners had to gradually learn how to bill through

observation and practice in the firm. Thus, although billing forms an integral part of law firm operations, practitioners are often left to “figure out on their own” how a client is to be charged.

Such a system of learning through “trial and error” could serve as a cause for disputes and have adverse effects upon the solicitor-client relationship. The experience shared by LP4 confirms that a failure to understand the billing process of the firm does lead to billing disputes.

*c) Specific concerns:*

*i) Determination of time spent on client’s matter/file*

Based on the data, a majority of the interviewees do keep actual time records to determine the amount of time spent on a client’s matter and the bill of costs is prepared accordingly. However, there are a few practitioners who either do not keep contemporaneous time records or keep no records at all. When preparing the bill to be sent to clients, these practitioners tend to estimate their time for work done for the client or as the interviews revealed a figure is ‘plucked from the air.’ Hence, in the guise of time billing, these practitioners are engaging in “guessed” or “made-up” billing.

It will be recalled that the problem with estimating time spent on any particular matter is that it can result in either an under-estimation or over-estimation of time. Australian and American literature has pointed out the dangers of estimating time records which can result in billing for time not actually spent on a client’s matter.<sup>188</sup>

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<sup>188</sup> See footnotes 109-112 and accompanying text.

ii) *Billing Targets*

From the data it is clear that the practice of imposing billing targets upon practitioners is common within law firms in Fiji. The billing targets appear to be mostly expressed in terms of the amount of revenue generated for the firms rather than in terms of billable hours.

However, for those practitioners who are subject to hourly targets, their daily billing target of six hours is similar to that of practitioners in Australia. It has been pointed out in the earlier discussion that if a practitioner is to generate six billable hours per day, he or she may actually have to work a nine or ten hour day.<sup>189</sup> This is in excess of a normal work day of eight hours and shows the pressure upon practitioners to bill.

It is also clear that the target system is tied into the promotion of practitioners in their respective firms. Interestingly the amount of revenue generated for the firm served as the most common basis for promotion for firms with billing targets and also served as one of the determining factors for promotion in firms with no billing targets. Such firm culture on promotion could also create additional pressure upon practitioners to bill, as what matters at the end of the day for most firms is not the hard work or efficiency of the practitioner but the amount of revenue brought into the firm.

Data gathered from the interviews also shows that the pressure generated by the target system is such that it may lead practitioners to engage in unethical billing practices such as an exaggeration or fabrication of billable hours, as well as shifting the lawyer's focus away from the client's best interests to how much the lawyer could collect in revenue. Such findings on the target system are consistent with the concerns expressed in the US and Australian literature.

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<sup>189</sup> See footnote 102 and accompanying text.

*iii) Overcharging*

The data shows that for all twenty firms, client complaints regarding the bill of costs concerned overcharging and that a majority of the firms resolved the dispute with their clients through discounting the bill. It is to be noted that fifteen of the twenty firms use time billing as the most prevalent billing method with six firms billing their clients solely on the basis of time.

Thus, the data shows that overcharging is an issue of concern for the interviewees' firms and that time billing is a contributing factor to this. Indeed while LP3's firm bills clients using various billing methods (Table 1), she reported that her firm mainly received complaints from clients who were time-billed.

*iv) Fraudulent Billing and Padding/Inflation of bills*

The data gathered supports a finding that time billing either actually encourages fraudulent billing of clients or has the potential to encourage such behaviour. Indeed, a vast majority of the interviewees agreed that time billing does encourage such unethical conduct due to factors such as the pressure generated by billing targets, the desire of young practitioners to appear to be productive in the eyes of the partners or the principal of the firm, and the weak ethics of the firm or the practitioner.

As far as bill padding and inflation is concerned, I encountered great difficulty in getting a response from the practitioners on this issue. Many practitioners were reluctant to comment on this issue due to the sensitivity of the matter. However, after repeated assurances of anonymity the practitioners provided cautious insights. Based on the personal observations and encounters reported by the interviewees, I find that at least some practitioners in Fiji are engaging in deliberate inflation of billable hours and billing for work not performed for the client. Given the reluctance of the interviewees to openly discuss this issue, the true extent of such unethical billing practice cannot be easily determined.

Moreover, the experience shared by LP3 of her bills being reviewed and the amounts being increased or decreased at the discretion of the supervising partner also provides some useful insights. If the bills are decreased, there may be a whole host of contributing factors such as past dealings or business with the client and the financial position of the client. However, if the bills are increased, the supervising partner has no way of determining *actually* how much time was spent on the client's matter, only the associate attending to the matter is privy to this information. If the associate has recorded the time taken for particular tasks, the bill should be prepared in accordance with those records and not in accordance with what the partner estimates to be justified. The latter practice may suggest bill inflation.

v) *Double-billing*

None of the interviewees reported that double-billing was practiced by their firms. Hence, unlike the concerns expressed on double billing in the US and Australian literature, this does not appear to be an issue for the interviewees' firms.

vi) *Billing for unnecessary tasks*

Data shows that a majority of the interviewees agree that time billing does influence practitioners to undertake unnecessary tasks for their clients to generate more billable hours. The push factor for this was again reported to be the pressure to meet the billing targets or a desire to impress the partners or the principal. Consistent with US and Australian literature, the interviewees also identified research as one area which could be exploited by practitioners to make up for non-productive hours, and one that may appear on the bill although the research may not really have been necessary for the client.

vii) *Recycled research*

Data shows that while a majority of the practitioners find billing for recycled research to be an unethical practice, nine practitioners did not agree that this is so. The justification offered by these interviewees was that the research undertaken for the first client (Client A) is classified as intellectual property and that the lawyer should therefore be able to bill subsequent clients similarly.

The 'intellectual property argument' does make sense. The problem is not that the lawyer wishes to bill for research previously undertaken. Indeed subsequent clients would be receiving a windfall if not billed. The problem is the method used to bill. If practitioners choose to bill on the basis of time then billing Client B for recycled research is not considered as properly earning one's fees as that time was not actually expended on Client B's matter. Thus bills for 'knowledge' should be reflected in the practitioner's hourly rate as an experienced and knowledgeable practitioner, rather than being billed as 'research' undertaken for the client.

viii) *Overstaffing and use of paralegals*

Overstaffing of client matters and billing for work done by paralegals at solicitor's rates have been identified by American and Australian critics as tactics used by lawyers to generate billable hours. The issue of overstaffing does not appear to be of concern to firms in Fiji due to limitations in firm size and firm personnel. This is not to suggest that firms do not engage in such practice at all. The observation shared by LP7 is that for firms which have the resources in terms of staffing, such tactics may yet be used.

The data however, shows that the issue of paralegal-work being billed at solicitor rates is indeed of grave concern. The interviewees reported that although paralegals carry out the tasks assigned to them, the practitioners ultimately have to review and

sign-off the documents prepared by them. Hence, they saw it as justifiable for work done by paralegals to be billed at the solicitor's rate.

The concern with this argument is the choice of the billing method. If firms choose to bill on the basis of the lawyers' time, they should not then be charging lawyer's rates for time the lawyer has not actually spent on drafting the documents or researching. The "review" or "checking" of documents may only take a fraction of time. Thus, it is not justified that clients pay solicitor's rates; work done by paralegals and others should be billed at lower or paralegal rates.

*ix) Inefficiency and prolonging of the matter*

Critics of time billing have argued that time billing penalizes an efficient lawyer, rewards the non-efficient, and provides incentives to prolong client matters. Data gathered from the interviews does support such a contention.

On the issue of inefficiency, the experience shared by LP18 was that because he was able to complete a task in less time (ten minutes) than an inefficient and a junior colleague (one hour), his billable hours were less and did not allow him to exceed his billing target so as to earn a bonus. LP18 is a senior associate in his firm. It could be argued that the charges per hour for an experienced practitioner would be higher than a junior practitioner for the very reason that the experienced practitioner does in 10 minutes what an inexperienced practitioner would do in an hour and hence level out the bill.

However, assuming that the hourly rate for an experienced practitioner is \$500 per hour and \$200 for a junior lawyer, if the latter spends an hour drafting a particular document, it would generate a bill of \$200. For the experienced lawyer who may achieve the task in 10 minutes, this would result in a bill of \$ 83.33. This demonstrates how time billing could penalize an efficient lawyer, and shows that

care must be taken to ensure that appropriate billing rates are set for the various groups of workers.

A majority of the interviewees also agreed that time billing does encourage lawyers to prolong client matters to generate more billable hours. While client matters could be prolonged due to other factors such as a failure of the client to furnish required information or a back-log of cases in the courts, the experience shared by at least two practitioners, LP3 and LP15, shows that they had personally observed lawyers intentionally engaging in such practice. LP3 particularly stressed that lawyers tend to prolong civil litigation if the matter is billed on the basis of time as opposed to contingency-fee matters. The data therefore shows that time billing may well penalize an efficient lawyer and may result in matters being prolonged, or at least create an incentive to prolong client matters.

On the whole, the results show that the time billing system is subject to similar abuses by Fiji practitioners to those reported in the US and Australia, although the concerns may be less widespread. The interviewees' responses show that unethical billing practices such as overcharging, bill inflation, billing for unnecessary tasks, billing for recycled research, overstaffing, billing for paralegal-work at solicitor's rates, and prolonging of client matters are either *actually* taking place within Fiji law firms or at the least that time billing creates an *incentive* for this to occur.

The next section of the study examines billing complaints lodged with the Legal Practitioners Unit of the Office of the Chief Registrar of the High Court of Fiji to determine the extent of complaints about unethical billing practices by Fiji Practitioners who bill on the basis of time.

## **5 BILLING COMPLAINTS AGAINST PRIVATE LEGAL PRACTITIONERS**

This section of the study reports on the nature of billing complaints received against private legal practitioners by the Office of the Chief Registrar of the High Court of Fiji (hereafter “the Chief Registrar”). The section is divided into two parts. The first part provides a brief overview of the complaints-handling procedure of the Chief Registrar’s Office. The second part discusses the results of an interview conducted with the Principal Legal Officer of the Legal Practitioners Unit (LPU) which functions as the complaints-handling arm of the Chief Registrar’s Office.

### **5.1 A BRIEF OVERVIEW OF THE COMPLAINTS-HANDLING PROCEDURE**

Prior to the commencement of the *Legal Practitioners Decree 2009* (“the Decree”), the Fiji Law Society (FLS) was the main body responsible for disciplining its members. However, immediately upon commencement of the Decree on 22 May, 2009<sup>190</sup>, the Chief Registrar was empowered to take over all unresolved complaints against legal practitioners from the FLS.<sup>191</sup> The Decree also requires the FLS to refer all complaints received against legal practitioners to the Chief Registrar for action in accordance with the provisions of the Decree.<sup>192</sup>

Upon receiving a complaint against a legal practitioner or a law firm, the Chief Registrar after conducting the relevant investigations has the power to summarily dismiss the complaint, make efforts to resolve the matter as he or she deems fit, or commence disciplinary proceedings before the Independent Legal Services

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<sup>190</sup> s.1 of the *Legal Practitioners Decree 2009*.

<sup>191</sup> s.131 (1) of the *Legal Practitioners Decree 2009*.

<sup>192</sup> s.102 of the *Legal Practitioners Decree 2009*.

Commission (ILSC).<sup>193</sup> The ILSC is a body newly formed under the Decree which conducts disciplinary hearings on charges filed before it by the Chief Registrar.

In June 2009, the Judicial Department of the Ministry of Justice, Electoral Reform and Anti-Corruption set up the LPU to assist the Chief Registrar in receiving, investigating and processing complaints against legal practitioners. The LPU functions under the control and direction of the Chief Registrar.

## **5.2 INTERVIEW WITH THE PRINCIPAL LEGAL OFFICER OF THE LPU**

To determine the nature of billing complaints received against legal practitioners, I conducted a semi-structured interview with the Principal Legal Officer (PLO) of the LPU. The interview sought to determine the nature of complaints received against legal practitioners, the proportion of complaints relating to billing abuses, whether overcharging is an issue of concern, and whether time billing contributes to this.

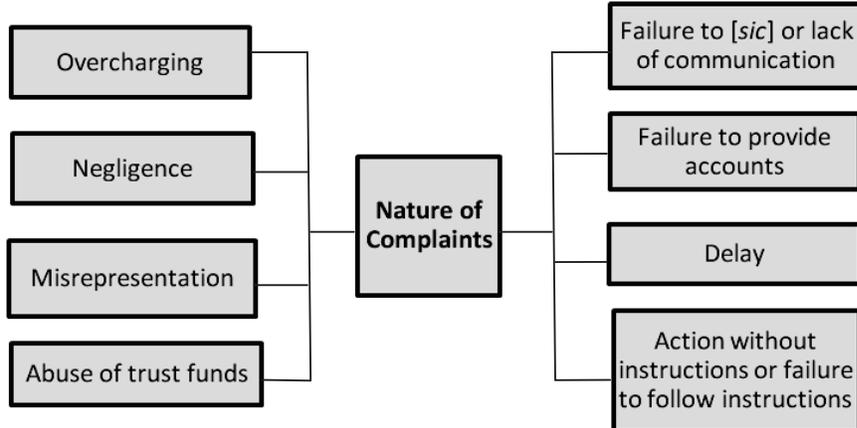
### *a) Nature of complaints received against legal practitioners*

In order to allow for the proper registration of complaints and to obtain the necessary details for each complaint so received, the Chief Registrar's Office has developed a standard Complaint Form which a complaining party is required to submit. The complainant must specify the nature of the complaint and may select from a list of categories of complaints as specified in Figure 1 below:

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<sup>193</sup> s.109 (1) (a) (b) (c) of the *Legal Practitioners Decree 2009*.

**Figure 1: General Categories of Complaints against Legal Practitioners**

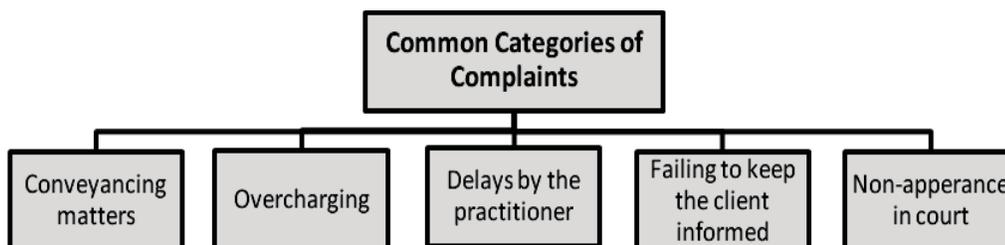


The PLO however, stated that the complaints are not necessarily limited to the above categories. She explained that:

Where the complainants are people who are not well-educated, there is a misunderstanding as to what [these] categories are.

According to the PLO, ‘a whole range’ of complaints are lodged by the public against legal practitioners. The complaints ‘are not necessarily limited to the practice of law’ but also relate to private matters between the lawyer and the complaining party. Complaints range from how the lawyer handled the client’s matter to how the lawyer conducted himself in the client’s presence. The interview results also show that conveyancing matters generated the most complaints. The PLO stressed that ‘[t]he sale and purchase of land generates all sorts of complaints.’ The figure below summarizes the common categories of complaints received against legal practitioners.

**Figure 2: Common Categories of Complaints against Legal Practitioners**



*b) The proportion of complaints relating to billing abuses*

Having obtained information on the nature of complaints received against legal practitioners, the interview next sought to determine the proportion of these complaints which related to billing abuses on the part of the practitioners. Since its inception, the LPU has received between 1000 and 1300 complaints including the complaints transferred from the FLS. Of these complaints approximately 200 to 300 have been disposed off.

According to the PLO, it is difficult to quantify the proportion of billing-related complaints from the complaints received to date. Given its relatively recent formation, the LPU has not yet developed a database which would allow for such information to be readily available. The PLO explained this as follows:

We don't really have the kind of database like what we [are] ideally supposed to have where we [do] not just identify the number of complaints but also specify the nature of complaints.

The PLO has however, kept her own records for the files which she has personally dealt with. Of the 111 files which the PLO has handled, approximately 13% of these

matters related to overcharging. This percentage could however, increase given the number of complaints received by the LPU.

*c) How widespread is the issue of overcharging and is time billing a contributing factor to unethical billing?*

My preliminary inquiries with the FLS had revealed that before the Chief Registrar took over the complaints-handling function from the FLS, billing-related complaints such as overcharging by lawyers was one of the most common complaints received by the Society.<sup>194</sup> This was put to the PLO who confirmed that overcharging indeed ranks as one of the most common complaints received against legal practitioners by the LPU.

When asked how widespread the problem of overcharging is, the PLO stated that the issue 'is quite significant'. She stated that her office mostly received complaints relating to conveyancing matters and that 'a large number of them will have some element of overcharging allegation.' This implies that overcharging could also form an aspect of other complaints categorised differently (Figure 2). This also suggests that many lawyers are not basing their charges on the scale of costs prescribed by legislation.<sup>195</sup>

According to the PLO, only 'a small minority of lawyers' follow the scale of costs which suggests that lawyers are adopting other methods to bill clients. Indeed my findings in Part 4 of the study showed various billing methods being employed by firms such as time billing, fixed costs and contingency fees. The question is *which billing methods* have resulted in most allegations of overcharging being brought against lawyers?

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<sup>194</sup> Email from the Secretary of the Fiji Law Society, Vanita Singh <[vanita@fls.org.fj](mailto:vanita@fls.org.fj)> to the author 23 April 2010.

<sup>195</sup> Above n 14.

To ascertain whether time billing is one of the factors contributing to overcharging, the PLO was asked to identify which billing methods were used by practitioners against whom billing complaints were filed. According to the PLO, the overcharging matters which were reported against practitioners basically involved *all billing methods*. From this it can be deduced that time billing may be a factor contributing to overcharging but it is unclear just how significant a factor it is in the absence of appropriate billing data. The PLO further explained that:

...because the complaint relates to overcharging, we don't really go into too much detail as to the method. It's simply whether X+Y+Z equals whatever is at the end of the bill...I've seen very few cost agreements. The only ones that are quite common are in relation to contingency agreements. Other than that, generally and I'd say 50% of people who go to lawyers, don't really have a clear idea of what they would expect to be billed at the end of the work.

The method used to bill clients was not an issue of concern for the LPU, although if a complaint relates to overcharging, one would want to determine *how* the figure billed was arrived at. The PLO however, provided three reasons as to why the billing methods for billing-related complaints were not readily determinable:

*i) Client lack of awareness of the billing method*

From past complaints on billing, the LPU has discovered that the clients themselves are unaware of the billing method used either because the lawyer had an 'ambiguous conversation as to billing' with the client or did not communicate the billing method at all. The PLO also revealed that most clients who have complained of overcharging report that their lawyer was reluctant to communicate about fees:

[For] most of them, the most common answer is, we asked [about the fees] and the lawyer said, ‘Oh don’t worry about it, we’ll take care of it.’

ii) *Non-disclosure of the billing method in the Bill of Costs*

The bill of costs sent to clients does not disclose the method used to bill clients. A disturbing practice was reported on the part of lawyers against whom overcharging complaints were registered:

[For] many complaints ... there’s just some one page document stating, ‘To all our attendance to all your instructions’, just one general paragraph with a chunk of information and voila! You get something more than \$20,000...I can give you a specific example...I had to write to [a lawyer] three times asking, please explain how your disbursements are arrived at. They just gave a lump sum for disbursements, \$1,500 with no itemization whatsoever.

The PLO referred to the above practice as ‘block billing’ and stated this to be a common practice among lawyers. Such ‘lumped up’ billing leaves the clients and even the disciplinary bodies with no means to ascertain the costs to be allocated to individual items or tasks or *how* the final amount in the bill was arrived at.

iii) *Overcharging matters being referred for taxation*

The PLO disclosed that when clients complain about overcharging, they are advised to submit their bills for taxation to the Taxing Master. Hence, complaints relating to overcharging are not resolved by the Chief Registrar’s Office. The difficulty with prosecuting lawyers accused of overcharging as reported by the PLO is that:

There are no real standards by which we can measure whether the bill is excessive or not. So our best advice to the client who is complaining is you need to have the bill taxed.

In at least one matter before the ILSC, *Chief Registrar v Haroon Ali Shah*<sup>196</sup>, the PLO tried to prosecute the practitioner for overcharging. The view of the Commissioner was:

The issue is to determine what is 'excessive'. In some other jurisdictions the relevant legislation provides that an expert be engaged to furnish a report as to the reasonableness of the fees charged. No such provisions exist in the Legal Practitioners Decree...It is my opinion that for the Applicant to show that the fees or costs charged in any particular matter are excessive it is necessary to qualify an expert to furnish a report and give evidence in that regard. Without such evidence allegations of charging excessive fees cannot be proved.<sup>197</sup>

According to the PLO, Fiji currently lacks billing experts who could assist with the successful prosecution of those practitioners engaging in overcharging. Thus, such matters are left to be determined by the Tax Master.

For the above reasons it is not readily determinable which billing method (or methods) has most commonly led to allegations of overcharging against lawyers. However, commenting on whether time billing encourages practitioners to engage in fraudulent billing, the PLO agreed that time billing serves as a 'temptation' for lawyers to engage in unethical behaviour:

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<sup>196</sup> (Unreported, Independent Legal Services Commission, Matter no. 008/2009 , 30 September 2010, Commissioner John Connors)

<sup>197</sup> Above n 196, paragraphs 37-39.

...there is a greater opportunity there. Not necessarily it leads to that, because the opportunity is there and personally I think that there are more greedy lawyers than those who are not greedy. The temptation is greater.

To sum up the discussion in this section, given that the LPU was established fairly recently and has not yet put in place a complaints database, billing data is not readily accessible from the office. However, information gathered from the interview with the PLO, suggests that overcharging is an issue of concern and that it ranks amongst the most common complaints lodged against legal practitioners. While time billing appears to be a possible factor contributing towards overcharging, the LPU lacks statistical data to substantiate such a claim.

## **6 CASES ON COSTS ASSESSMENT AND TAXATION**

This section of the research examines evidence of unethical billing on the part of Fiji legal practitioners through a review of cases concerning costs assessment and taxation by the Fiji courts.

### **6.1 THE PROCESS OF FEE RECOVERY, COSTS ASSESSMENT AND TAXATION**

There are generally two ways for practitioners to seek payment of their legal fees for services rendered to their clients. The first is through direct payment of legal fees by the client themselves, known as solicitor-client costs. The second and indirect means of fee recovery is through a costs award by the courts in respect of litigation, known as party and party costs. The latter involves awarding of costs by the court to the successful party in litigation and is governed by Order 62 of the *High Court (Amendment) Rules 1998* (Fiji). This is not to suggest that the losing party in litigation is to meet the legal bill of the successful party. Rather, the costs awarded to the successful client *may* later be applied by the client to pay his or her own solicitor for legal services rendered.

A practitioner's bill which is prepared for recovery of solicitor-client costs or party and party costs may both be subject to taxation, that is, verification by the courts that the amount being charged is in accordance with the prescribed scale of costs for the matter in question. Order 62 Rule 15 provides for the taxation of a practitioner's bill to his own client. Order 62 Rule 8 (5) stipulates that where an order as to costs is made by the court, the order may either specify the amount of costs allowed or state that the costs shall be assessed by the court itself or direct that the costs be subject to taxation.

Order 62 Rule 12 provides for the costs which have been awarded to the winning party to be taxed either on a standard basis or on an indemnity basis. The difference

between these two bases of taxation is that in the former any uncertainties as to the reasonableness of the costs which have been incurred ‘shall be resolved in favour of the paying party’,<sup>198</sup> and in case of the latter it ‘shall be resolved in favour of the receiving party’.<sup>199</sup> However, Order 62 Rule 7 (4) also empowers the High Court to award a ‘gross sum’ in lieu of taxed costs.

Cases where clients have sought to have solicitor/client bills taxed are few. This is due to reasons such as:

- i) The client may not be aware of the right accorded by the law to have their bills taxed.<sup>200</sup>
- ii) Disputes as to legal fees may be resolved through the complaints resolution process of the legal firm itself. It is to be noted that all legal practitioners who were interviewed for the purpose of this study stated that their firms had internal dispute resolution mechanisms in place to handle client complaints.

Hence, this section of the study will focus on cases where party and party costs have been assessed or taxed by the courts. It is understood that taxation of bills prepared on a party-party basis is a fundamentally different matter to taxation of a practitioner’s bill to his or her own client. This is because when preparing bills for taxation on a party-party basis, the practitioner seeks to recover as much costs as possible on behalf of the client. However, whether the bill is prepared for taxation on a party-party basis or for taxation of a practitioner’s own bill to the client, a careful examination of the bill of costs by the courts could help reveal whether practitioners are engaging in unethical or abusive billing practices.

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<sup>198</sup> Order 62 Rule 12(1) of the *High Court (Amendment) Rules 1998*.

<sup>199</sup> Above n 198, Order 62 Rule 12(2).

<sup>200</sup> During the interview with LP3, she disclosed that clients are not aware of the taxation procedure and that practitioners also do not discuss this procedure with clients.

## 6.2 SPECIFIC BILLING ABUSES EVIDENCED BY CASES

The cases discussed below provide an insight into billing abuses such as overcharging, billing for research time without undertaking any research, duplication of legal costs and unnecessary court attendances by practitioners who bill on an hourly basis.

### *I. Overcharging, Research and Duplication of Costs*

In *Nalave v State*<sup>201</sup> which concerned a criminal appeal matter, the legal practitioner who represented the appellants was found to have grossly overbilled for his services. The practitioner had also claimed an excessive sum for research when in fact no research was undertaken.

In that case, the appellants were jointly charged with one count of murder, had pleaded guilty to the charge and were convicted on trial. An Appeal was later filed with the Court of Appeal which ordered that in accordance with section 30 of the *Court of Appeal Act* [Cap 12] (Fiji) and in the interest of justice the appellants be represented by legal counsel.<sup>202</sup> Section 32 of the Act provides that where a counsel is appointed under section 30, the legal fees and disbursements ‘shall be defrayed out of the Consolidated Fund up to an amount allowed by the Court’.

Counsel claimed \$19,566.78 in legal fees. In assessing the costs the court noted that the Appeal had two parts to it. The first was the Motion to adduce fresh or additional evidence. The second was the substantive appeal. A large portion of the bill comprised of costs for conducting legal research on substantive issues of appeal.

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<sup>201</sup> [2009] FJCA 59.

<sup>202</sup> Section 30 of the *Court of Appeal Act* [Cap 12] (Fiji) provides as follows: ‘The Court of Appeal may at any time assign counsel to an appellant in any appeal or proceedings preliminary or incidental to an appeal in which, in the opinion of the Court, it appears desirable in the interests of justice that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid’.

However, the Court pointed out that the primary or substantive submissions were filed by the appellants in person prior to the appointment of the legal counsel to represent them. How then could counsel claim for research on these issues? The Court was of the view that an appropriate discount ought to be given for work which was not actually undertaken by the counsel but was claimed to be done by him.

The Motion to call fresh evidence also formed a large part of the bill. Counsel claimed that there was a separate hearing for the Motion, however no such record appeared from the case file. The matter was called for hearing on a specified date, but the date was vacated. Yet, counsel had claimed a sum of \$2,000 for the hearing. For the Motion itself, counsel had billed a ‘colossal sum’<sup>203</sup> of \$9,100. According to the Court the Motion was a fairly straightforward one and did not involve complex legal issues. The Court was of the opinion that the total sum billed by counsel was excessive:<sup>204</sup>

Mr. Singh’s total bill is \$19,566-78. He charges at an hourly rate of \$200.00. On that basis, Mr. Singh is supposed to have spent 97.83 hours on the case. That is equivalent to 12.2 days of work at 8 hours per day. That by any measure of standards is excessive. Mr. Singh specializes in Criminal Law and is thus quite familiar with the law. For that reason alone he should not take long to prepare the case.

Counsel had also claimed \$7,000 for *three days* of hearing. The Court observed that at Counsel’s billing rate of \$200 per hour, a fee of \$7,000 would mean that the hearing lasted for 35 hours, that is, an *entire week*. According to the Court records this was not the case. Thus, after taking into account the above issues, the Court considered it just and fair to allow a total of 40 hours of work for both the Motion and the substantive appeal.

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<sup>203</sup> Above n 201, paragraph 11.

<sup>204</sup> Above n 201, paragraphs 19 and 20.

Given counsel's hourly rate of \$200, this amounted to \$8,000. After allowing for Value Added Tax (VAT) and disbursements, the total costs were fixed at \$8,174.36. This resulted in a reduction of \$11,392.42 from the amount claimed by counsel, a reduction of 58.2%. It is possible that counsel had increased the bill given that it was to be paid from the Consolidated Fund and not by the appellants. However, regardless of how the bill was to be paid, the fact remains that the counsel had billed excessive sums for work which he had not undertaken.

In another case, the Fiji Court of Appeal found the respondent solicitors' bills to be inflated through overcharging and duplication of legal fees. The case of *Yanuca Island Ltd v Markham*<sup>205</sup> concerned a personal injury matter where the High Court of Fiji had ruled in favour of the respondent and made an order for costs (excluding damages) in the sum of AUD\$597,459.40 together with FJ\$68,080.40. The appellant company appealed against this award.

Upon an examination of the respondent solicitors' bill of costs the Appeal Court found instances of duplication and overcharging. As for duplication, a sum of AUD\$177,000.00 had been claimed as the respondent's Sydney solicitors' costs and a sum of AUD\$283,673.00 had been claimed in Counsels' fees. The sum of AUD\$177,000.00 had been duplicated in Counsels' fees.

As for overcharging, the respondent claimed an additional FJ\$68,080.40 being the costs of the respondent's Fiji solicitors. This meant that the respondent's Fiji solicitors had claimed a fee of \$1850 per day for 20 days in respect of the trial as well as a sum of \$500 for appearance on the date of judgment. The Court found such claim to 'be well in excess of those prescribed in the scale rates'<sup>206</sup> and awarded a sum of FJ\$30,580.40 only. The total costs were assessed to be AUD\$376,325.11 and FJ\$30,580.40. This resulted in a reduction of the costs by a massive sum of AUD\$221,134.29 and FJ\$37,500 respectively.

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<sup>205</sup> [2005] FJCA 67

<sup>206</sup> Above n 205, paragraph 49. See also above n 69: When assessing the costs to be payable by one party to another the courts are guided by the prescribed scale of costs.

Instances of duplication resulting in an overcharge were also found in the case of *Giesbrecht v Cross*<sup>207</sup>. In that case, the plaintiff had claimed a sum of USD\$66,877.80 from the defendants and as no defence had been filed, a Default judgment was entered against the defendants. The defendants later filed a Summons to Set Aside the Default Judgment and were successful in their action. On the question of costs, the High Court ordered that the Respondent Plaintiff pay the costs of the application on a party-party basis which if not agreed between the parties would be determined by the Court.

The parties failed to reach agreement as to costs and the matter was brought before the Court for determination. The Applicant Defendants had filed a Bill of Costs in the sum of \$19,811.25 while the Respondent Plaintiff's bill had amounted to \$1475.00.<sup>208</sup> Although the Court was cognisant of the fact that the bill for the Applicant Defendants would indeed be slightly higher as they had to 'take the running'<sup>209</sup> in the application, the enormous disparity between the two bills could not be ignored. The Court also noted some instances of duplication but the judgment did not provide specific details as to the nature of the duplication.

The Court sought to award what it considered to be a reasonable sum. A total of \$7,800 (26 hours at a rate of \$300 per hour) was considered to be reasonable for the Summons filed by the Applicant Defendants. The Court allowed two-thirds of this sum, that is, \$5,200 together with disbursements of \$500 to result in a costs award of \$5,700. This meant a reduction of \$14,111.11 from the amount claimed as per the Applicant Defendants' Bill of Costs.

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<sup>207</sup> [2009] FJHC 87

<sup>208</sup> The ruling on costs by the High Court of Fiji did not provide details as to the itemization of the bill of costs for both parties.

<sup>209</sup> Above n 207, paragraph 15.

## *II. Unnecessary Attendances*

In *Re Shabu Shabu Restaurant Co Limited*<sup>210</sup> the High Court of Fiji found the legal fees of counsel for the Petitioner to have exceeded the debt alleged in the winding up petition due to unnecessary court attendances. That case concerned an uncomplicated winding up matter. On 21<sup>st</sup> July 2009, counsel for the Petitioner, Yees Cold Storage Seafood Limited (“Yees”) had presented a Petition on behalf of Yees to wind up Shabu Shabu Restaurant Company Limited (“Shabu Shabu”). The total debt as alleged in the petition was \$3,168.53. Within six days after the Petition was presented, the defendant company, Shabu Shabu sent a cheque to Yees to settle the full debt.

On 7<sup>th</sup> August, 2009 the Court was advised by counsel for Shabu Shabu that the debt had been paid off and the two parties were now discussing the costs. As the parties could not reach an agreement as to costs, the matter was adjourned to 29<sup>th</sup> September 2009 for mention. However, on 28<sup>th</sup> August 2009, counsel for Yees proceeded with the winding up application and advertised the Petition in the Fiji Times and in the Fiji Government Gazette.

The Court questioned the need to press on with advertising the Petition when the cheque to clear the debt had been presented to Yees. Counsel for Yees conceded that Shabu Shabu had indeed sent the cheque to settle the debt, however Yees had advised Shabu Shabu that the cheque would not be cashed until the latter settled the legal fees incurred by Yees.

To allow the Court to assess the costs of the matter, counsel for the Petitioner filed a Bill of Costs for taxation in the sum of \$7,819.58. The Court noted that this sum was ‘almost double the debt’<sup>211</sup> alleged in the Petition. The court also noted that various attendances were made by counsel for the Petitioner after the presentation of the

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<sup>210</sup> [2009] FJHC 252

<sup>211</sup> Above n 210, paragraph 13.

cheque to Yees and questioned whether these attendances were necessary. According to the court these appearances were not called for:<sup>212</sup>

What Yees should have done was to simply cash the cheque immediately upon receiving it and then [instruct] its lawyers to withdraw the Petition once the cheque is cleared and after the Court has assessed its costs up to that point. Had Yees taken that step, the superfluous expenses incurred by its lawyers would have been avoided.

The Court therefore summarily assessed the cost at \$850. This resulted in a reduction of \$6969.58 from the Bill submitted for taxation. It could be argued that although the costs that were incurred by the Petitioner's counsel were not recoverable against the Respondent, such costs would have been recoverable against the Petitioner itself. However, what is to be noted is that if the bill of costs had not been submitted for taxation, the unnecessary work done by the Petitioner's counsel would have gone unnoticed.

The cases discussed above provide a window into unethical billing practices on the part of Fiji legal practitioners who bill by the hour. Although the problems are confined to a few cases, unethical conduct on the part of even a few practitioners may have a damaging effect on the reputation of the entire legal fraternity.

The next section of the study discusses the adequacy of the legal framework on billing in Fiji.

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<sup>212</sup>Above n 210, paragraph 21.

## 7 THE LEGAL FRAMEWORK ON BILLING

This section of the research examines the legislative provisions on legal fees under the *Legal Practitioners Decree 2009* (Fiji) (the “Decree”) and compares those with the *ABA Model Rules of Professional Conduct 2002* (the “*Model Rules*”) <sup>213</sup> and the *Legal Profession Model Laws Project Model Provisions (Model Laws) 2006* (Australia) (the “*Model Laws*”).<sup>214</sup> The Decree provisions are compared with the American and Australian provisions to determine whether such provisions are adequate to regulate the conduct of Fiji legal practitioners as far as time billing is concerned.

### 7.1 BILLING PROVISIONS UNDER THE DECREE, THE MODEL RULES AND THE MODEL LAWS

The Fiji provisions on billing are stipulated in sections 77 to 80 of the Decree<sup>215</sup> and Rule 7.3 and Rule 8.1 of the *Rules of Professional Conduct and Practice* as set out in the schedule to the Decree.<sup>216</sup> The model American provision on billing is Rule 1.5 of the *Model Rules* which specifically concerns legal fees while the Australian model provisions on billing are articulated in Part 3.4 of the *Model Laws* which governs costs disclosure and assessment.

An examination of the Decree (Fiji), the *Model Rules* (ABA) and the *Model Laws* (Australia) has revealed that none of these legislative provisions or billing guides have made specific provisions to regulate the practice of time billing. They have however, made provisions for practitioners to enter into costs agreements with their clients for the rendering of legal services and the collection of fees for such services.

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<sup>213</sup> See footnote 18 for the status of the *Model Rules*.

<sup>214</sup> See footnote 19 for the status of the *Model Laws*.

<sup>215</sup> Section 78 of the Decree concerns contingency fees and will not form part of the discussion for this section.

<sup>216</sup> The *Rules of Professional Conduct and Practice* are made pursuant to section 129 (8) of the Decree.

All three jurisdictions also prohibit lawyers from charging unreasonable or excessive fees irrespective of the billing method as will be explained in the following discussion.

Section 77(1) of the Decree (Fiji) which concerns costs agreements provides as follows:

A practitioner may make a written agreement with that practitioner's client in relation to the amount and manner of payment for the whole or any part or parts of any past or future services fees, charges or disbursements in respect of business done or to be done by such practitioner, either by a gross sum or otherwise howsoever.

The general wording of the latter part to this section: 'either by a gross sum or otherwise howsoever' appears to capture all billing methods and permits practitioners to collect fees other than those prescribed by the scale of costs. The section has also made provision not only for a practitioner's 'fees' for services rendered but also the 'charges' or 'disbursements' in respect of the services. The phrase 'may make a written agreement' creates some ambiguity. The option is given to the practitioner to decide whether or not to enter into a costs agreement and whether or not it is to be in writing. There is nothing in the language of section 77(1) which would suggest that *written* costs agreements are mandatory.

Rule 8.1 (1) of the *Rules of Professional Conduct and Practice* (Fiji) which deals exclusively with client care has made provision for costs disclosure to clients. Rule 8.1 (1) states that all principals in private practice 'shall' have in place a procedure whereby the client is informed of the basis upon which costs will be charged and if reasonably possible given an estimate of the costs.<sup>217</sup> The practitioner shall also at the earliest reasonable opportunity provide the client with written confirmation of

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<sup>217</sup> Rule 8.1 (1) (a) (ii) of the Decree.

these matters.<sup>218</sup> The question is, does the use of the word ‘shall’ in Rule 8.1 (1) create a mandatory obligation upon firms and practitioners as to disclosure of such information to clients? The reason for such inquiry is because information gathered from the interview with the PLO of the LPU showed that clients are often not aware of the billing processes or the billing methods and that practitioners are generally reluctant to disclose information pertaining to legal fees.

While the Fiji courts have not been called upon to interpret this particular legislative provision, some guidance can be sought from a 1993 decision of the High Court of Fiji in *State v Arbitration Tribunal, Ex parte Air Pacific Senior Staff Association*.<sup>219</sup> In that case, the Court rejected the Applicant’s submission that the use of words such as ‘shall make’ in section 23 of the *Trade Disputes Act* [Cap 97] created a mandatory obligation.<sup>220</sup> The Court held that to accept the Applicant’s submission would defeat the policy of the *Trade Disputes Act* the very purpose of the latter being to settle disputes and to regulate industrial relations. In making its decision the Court observed that:<sup>221</sup>

...over the years the courts have recognised that the question of whether a provision is regarded as mandatory or directory is not easy of resolution. It would have been simple for the courts to have held that words such as "shall", "must", "is required" etc. [*sic*] indicate some sort of an obligation in contrast to words such as "may", "it is lawful", "if he thinks fit" etc. [*sic*] which suggest a discretion resting in the person concerned. This perhaps straight-forward approach has not however been followed. The courts have chosen rather to examine

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<sup>218</sup> Rule 8.1(1) (d) of the Decree.

<sup>219</sup> [1993] FJHC 44; HBJ0001j.1992s (14 May 1993). The case concerned a judicial review of the Arbitration Tribunal’s award in respect of a dispute between Air Pacific Senior Staff Association (the Applicant) and Air Pacific.

<sup>220</sup> Section 23 of the *Trade Disputes Act* [Cap 97] reads as follows:

“A Tribunal shall make its award or, as the case may be, furnish its advice on any matter referred to it under the provisions of this Act without delay and in any case within twenty-eight days from the date of reference thereto...”

<sup>221</sup> Above n 219.

the true effect and intent of legislation in an attempt to decide whether a provision is to be regarded as mandatory or compulsory on the one hand or discretionary or directory on the other.

The Court further noted that:<sup>222</sup>

...if great inconvenience or injustice will follow from requiring strict compliance with a provision a court will be reluctant to rule that the provision imposes an obligation even though it may be couched in mandatory terms.

Thus, in interpreting whether or not the use of the word '*shall*' in Rule 8.1 (1) of the *Rules of Professional Conduct and Practice* (Fiji) creates a mandatory obligation as to costs disclosure upon firms and practitioners, the courts will look at the 'true effect and intent of the legislation.'<sup>223</sup> Additionally, one could argue that no grave 'inconvenience or injustice'<sup>224</sup> would follow from requiring practitioners and firms to strictly comply with the legislative provision. Therefore, it is highly likely for the courts to make a finding that Rule 8.1 (1) does create a mandatory obligation. In such case, those practitioners who choose not to disclose or are reluctant to discuss fee-related matters with their clients, as noted in the interview with the PLO of the LPU, will be in breach of this legislative provision.<sup>225</sup>

The relevant American provision on legal fees is Rule 1.5 (a) of the *Model Rules* which provides as follows:

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<sup>222</sup> Above n 219.

<sup>223</sup> Above n 219.

<sup>224</sup> Above n 219.

<sup>225</sup> Currently the Decree makes no specific provision to regulate non-compliance with such disclosure requirements.

A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.

The rule not only prohibits a lawyer from charging unreasonable legal fees but it also prohibits collection of an unreasonable amount in expenses. Rule 1.5 (b) of the *Model Rules* states that the scope of representation and the basis or rate of the fees and expenses shall be communicated to the client ‘preferably in writing’, except where the client is regularly represented by the practitioner or firm. Hence, unlike the Decree (Fiji) which requires practitioners to provide a written confirmation to clients (at the earliest reasonable opportunity) as to the basis upon which costs will be charged, the *Model Rules* (ABA) are ambiguous as to whether it is mandatory for practitioners to disclose the basis of their fees or charges in writing.<sup>226</sup>

In comparison, the Australian model provision on costs agreements as provided under section 3.4.24 of the *Model Laws* makes it mandatory for costs agreements to be written or to be evidenced in writing.<sup>227</sup> Unlike the Fiji provision where the practitioner is given the option to enter into costs agreement with clients, section 3.4.10 of the *Model Laws* (Australia) provides that the client has the right to negotiate a costs agreement with the law practice and that the law practice must disclose this right to the client.<sup>228</sup>

Additionally, mandatory disclosures as to costs are imposed upon practitioners under section 3.4.10 which states that a law practice must disclose to clients the basis upon which legal costs will be calculated and also disclose any applicable scale of

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<sup>226</sup>The ABA Center for Professional Responsibility in its comment to Rule 1.5 has also not clarified whether or not it is mandatory for costs disclosures to be in writing. According to the Center ‘[g]enerally, it is *desirable* to furnish the client with at least a simple memorandum or copy of the lawyer’s customary fee arrangements that states the general nature of the legal services to be provided, the basis, rate or total amount of the fee and whether and to what extent the client will be responsible for any costs, expenses or disbursements in the course of the representation’ [italics added], The ABA Center for Professional Responsibility, ‘Comment on Rule 1.5’ [http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_5\\_fees/comment\\_on\\_rule\\_1\\_5.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_5_fees/comment_on_rule_1_5.html) (Accessed 2 October, 2011).

<sup>227</sup> Section 3.4.24(2) of the *Model Laws*.

<sup>228</sup> Section 3.4.10(1)(b)(i) of the *Model Laws*.

costs.<sup>229</sup> Such disclosures must be made in writing either before or as soon as practicable after the law practice is retained in the matter.<sup>230</sup>

Hence, unlike the Australian model provisions and the provisions in the Decree (Fiji), the American provision on costs disclosures suffers from ambiguity. That is, it is uncertain whether or not it is mandatory for costs disclosures to be in writing. The greatest benefit of the writing requirement is that it has the potential to minimize misunderstanding between the practitioner and the client regarding the costs of the representation<sup>231</sup> and where conflicts do arise, the written disclosures would serve as the starting point to allow for a resolution.

Further analyses showed that both the Fiji and Australian provisions on costs agreements provide clients with the right to make an application to set aside the agreement. Section 77(2) of the Decree (Fiji) provides that the costs agreement is subject to review by the High Court of Fiji upon an application for review by the client. Where the Court finds the agreement to be ‘unreasonable’ the amount payable may be reduced, or the agreement may be cancelled and the appropriate costs would be determined by the Court.

Rule 7.3 of the *Rules of Professional Conduct and Practice* (Fiji) also states that ‘[a] practitioner shall not charge a client a fee greater than is reasonable in the circumstances.’ In a similar vein, section 3.4.30 of the *Model Laws* (Australia) provides that on an application by the client, the relevant body<sup>232</sup> may order that the cost agreement be set aside if the body is satisfied that the agreement is ‘not fair or reasonable.’<sup>233</sup>

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<sup>229</sup> Section 3.4.10(1)(a) of the *Model Laws*.

<sup>230</sup> Section 3.4.12 (1) of the *Model Laws*.

<sup>231</sup> ABA Center for Professional Responsibility, above n 226.

<sup>232</sup> As the *Model Laws* serves only as the model legislation, the relevant body for each jurisdiction would vary. It may either be the costs assessor, the Supreme Court or any other body or person identified in the relevant legislation governing the conduct of practitioners.

<sup>233</sup> Section 3.4.30(1) of the *Model Laws*.

Section 77(5) of the Decree (Fiji) further lists a number of factors to be considered by the Court when determining the reasonableness of the costs agreement.<sup>234</sup> Interestingly, while time billing appears to be the most widely used method of billing, none of the listed factors specifically require the Court to consider the amount of time spent by the practitioner on the client's matter. Section 77(5) (e) requires the Court to consider the duration of the matter to which the agreement relates, however, this is not necessarily the same as the time spent by the practitioner on the client's matter.

A matter may drag on in the court for years through adjournments and court delays. Even so, the practitioner has not necessarily spent those years working on the client file. Section 77(5) (h), however does provide the Court or judge with wider powers to consider 'any other matters or circumstances' they consider appropriate. Hence, by virtue of this provision, the Court may consider the time spent by the practitioner on the matter to determine the reasonableness of a costs agreement.

The Decree (Fiji) also makes provision for the client to seek from the practitioner, particulars as to how the legal costs were arrived at. This is provided for under section 80 (1) which states that where a practitioner has delivered an account for professional services to the client, 'the client may request of the practitioner particulars of the calculation of those charges.' Thus, for matters where the practitioner has time-billed, this would require the practitioner to provide details as to how the final bill was arrived at, given the practitioner's hourly rate, the nature of work carried out on the client file and the time spent in carrying out such work.

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<sup>234</sup> a) The complexity of the matter and the difficulty or novelty of the issues involved; b) The experience and standing of the practitioner; c) Whether the practitioner is to carry the costs of any disbursements; d) Whether the practitioner is entitled to charge professional costs only in the event of success in any proceeding; e) The duration of the matter to which the agreement relates; f) The urgency and circumstances in which the business is transacted; g) The value or amount of any property or money involved; h) Any other matters or circumstances which the Court or Judge considers appropriate.

Section 3.4.30 (2) of the *Model Laws* (Australia) also lists a number of factors to be considered by the relevant body when determining whether the costs agreement is fair or reasonable.<sup>235</sup> Section 3.4.30 (2) (c) provides that one of the factors to be taken into account is whether the law practice has failed to comply with any disclosure requirements imposed upon it. Such disclosure incorporates failure to disclose the basis upon which legal costs would be calculated.

Conversely, the Decree (Fiji) does not require the Court to consider any disclosure obligations of practitioners to their clients when determining the reasonableness of costs agreements. As for the American provision, Rule 1.5 (a) also lists various factors<sup>236</sup> to be considered in determining the reasonableness of the fees and unlike section 77(5) of the Decree, ‘time’ is listed as one of the factors to be taken into consideration.

Further, under both the Fiji and Australian provisions, charging of excessive legal fees by a practitioner may result in disciplinary proceedings being instituted against the practitioner. Section 83 (1) of the Decree provides that the following conduct is

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<sup>235</sup> (a) whether the client was induced to enter into the agreement by the fraud or misrepresentation of the law practice or of any representative of the law practice; (b) whether any Australian legal practitioner or Australian-registered foreign lawyer acting on behalf of the law practice has been found guilty of unsatisfactory professional conduct or professional misconduct in relation to the provision of legal services to which the agreement relates; (c) whether the law practice failed to make any of the [required disclosures]; (d) the circumstances and conduct of the parties before and when the agreement was made; (e) the circumstances and the conduct of the parties after the agreement was made; (f) whether and how the agreement addresses the effect on costs of matters and changed circumstances that might foreseeably arise and affect the extent and nature of legal services provided under the agreement; (g) whether and how billing under the agreement addresses changed circumstances affecting the extent and nature of legal services provided under the agreement.

<sup>236</sup> Rule 1.5 (a) provides for the following factors: (1) the time and labor [sic] required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

capable of constituting unsatisfactory professional conduct<sup>237</sup> or professional misconduct.<sup>238</sup>

- (a) ...
- (b) charging of excessive legal costs or fees in connection with the practice of law;
- (c) charging legal costs or fees for work not carried out by the legal practitioner or legal practice or for incomplete work;

The above conduct on the part of the practitioner provides grounds for which the Chief Registrar of the High Court may commence disciplinary proceedings against the concerned practitioner before the ILSC for appropriate disciplinary action.<sup>239</sup>

The relevant Australian provision on the matter is section 4.2.3 (b) of the *Model Laws* which also provides that the charging of excessive legal fees by a practitioner is conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct. Under section 4.9.1 of the *Model Laws*, where charges have been laid against a practitioner for unsatisfactory professional conduct or professional misconduct, disciplinary proceedings may be instituted against the practitioner before the Disciplinary Tribunal for appropriate determination of the matter.

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<sup>237</sup> Section 81 of the Decree provides: ...'unsatisfactory professional conduct' includes conduct of a legal practitioner or a law firm or an employee or agent of a legal practitioner or a law firm, occurring in connection with the practice of law that falls short of the standards of competence and diligence that a member of the public is entitled to expect of a reasonably competent or professional legal practitioner or law firm.

<sup>238</sup> Section 82(1) of the Decree provides: 'professional misconduct' includes-

- (a) unsatisfactory professional conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; or
- (b) conduct of a legal practitioner, a law firm or an employee or agent of a legal practitioner or law firm, whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law, that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice, or that the law firm is not fit and proper to operate as a law firm.

<sup>239</sup> Sections 99(1), 100(1) and 109(1) of the Decree.

## **7.2 ARE THE FIJI DECREE PROVISIONS ADEQUATE TO DEAL WITH UNETHICAL PRACTICES ARISING FROM TIME BILLING?**

It will be recalled that time billing has the potential to lead to overcharging, bill padding, double billing, billing for excessive research, overstaffing, billing for work done by paralegals at practitioner rates as well as inefficiency and prolonging of client matters.

### *a) Overcharging, padding, double billing and research*

Section 77(2) of the Decree as noted from the preceding discussion provides for the High Court to set aside a costs agreement upon an application by the client if such agreement is found to be unreasonable. While the factors to be considered in determining the reasonableness of costs agreements, do not specifically mention unethical conduct with respect to time billing, section 77(5) (h) suggests that the factors to be considered by the Court are not exhaustive. Thus, if the practitioner has engaged in any unethical conduct, the Court may take this into account and set aside the costs agreement.

Section 83(1) of the Decree, as highlighted in the preceding discussion, would also capture unethical conduct such as overcharging, time padding and billing for research when no research was undertaken by the practitioner. It must be noted that unlike the model American and Australian provisions, section 83 (1) (c) of the Decree has made specific provision for instances where a practitioner has billed for work not carried out by the practitioner. While no specific provision is made for bill padding and double-billing, such practices may yet fall under the ambit of section 83(1) as these also result in overcharging. The American and Australian model provisions also do not have specific provisions on bill padding and double billing.

*b) Overstaffing and Use of Paralegals*

As far as overstaffing and billing for paralegal time at practitioner rates is concerned, there are no specific provisions in the Decree (Fiji), the *Model Rules* (ABA) or the *Model Laws* (Australia) to address these issues. If the bill sent to the client does not indicate who worked on the matter and at what rates, it would be difficult to ascertain whether the firm or practitioner has engaged in such conduct.

*c) Inefficiency and prolonging of client matters*

On the issue of inefficiency and prolonging of client matters, the Decree (Fiji) and the *Model Rules* (ABA) have made provisions to regulate such conduct. Rule 3.2 of the *Rules of Professional Conduct and Practice* (Fiji) concerning a practitioner's relationship with the court provides that a practitioner shall at all times 'take all reasonable steps to avoid unnecessary expense or waste of the Court's time'. The focus of this rule however, is not the client but the court. On the other hand, Rule 3.2 of the *Model Rules* (ABA) has focused on the client and provides that '[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.'

All in all, the above provisions will only be useful if a client is aware of them and seeks to invoke them. The client must also be knowledgeable enough to understand or suspect that the practitioner is engaging in illegal or unethical conduct. It is questionable whether clients are really aware of their rights under section 77 of the Decree in respect of cost agreements or their right to know the basis upon which costs will be charged or their rights to lodge a complaint against a practitioner for alleged professional misconduct or unsatisfactory professional conduct. To adequately regulate the billing practices of practitioners and firms, the Decree would need to impose precise and well-enforced duties upon practitioners and firms to disclose such rights to clients in all engagement letters, costs agreements and bills of costs.

## 8 CONCLUSION AND PRELIMINARY SUGGESTIONS FOR REFORM

### 8.1 CONCLUSION

This study has examined the ethical objection to the time billing system and its various abuses. Given that the system has attracted much criticism in the US and Australia, this study sought to determine the prevalence of time billing in private legal practice in Fiji and whether or not the system encourages unethical billing practices such as overcharging, bill padding, double-billing, billing for unnecessary research or recycled research, overstaffing, billing for paralegal-work at solicitor rates, inefficiency and prolonging of the client's matter. The study also sought to determine whether or not the current billing provisions are adequate to regulate the practice of time billing in Fiji.

The data gathered established that time billing is the dominant form of billing for private legal practice in Fiji. A majority of interview responses also showed that the time billing system is open to abuse and that it results in unethical billing practices, or at least provides an opportunity and an incentive to practitioners to engage in such behaviour.

Interview data gathered from practitioners was confirmed through the interview conducted with the PLO of the LPU, who stated that complaints relating to billing abuses such as overcharging are some of the most common complaints received against practitioners. The PLO also noted that it was difficult to prosecute such complaints successfully due to lack of expertise to assist the ILSC in determining the matter.

Cases on costs assessment and taxation also provided evidence of billing abuses on the part of practitioners who billed on the basis of time. In addition, an analysis of the billing provisions under the *Legal Practitioners Decree 2009* (Fiji) showed that

the Decree makes no specific provision for the regulation of time billing and inadequately regulates costs agreements and disclosure of information to clients.

Thus, the results of the study demonstrate the need for efforts to be directed towards addressing the concerns raised by the practice of time billing. Although the concerns may not be as widespread as those in the US or Australia, it is best that the issue be addressed early to guard against the problems becoming any broader.

## **8.2 PRELIMINARY SUGGESTIONS FOR REFORM**

This study has focused primarily on gathering information on the practice of time billing in Fiji and unethical billing conduct resulting from its use. The findings of this research allow some preliminary recommendations to be made to assist in combating some of the concerns raised. Reforms will be required not only at the regulatory level, but also at the level of the profession and the firm.

### **8.2.1 Reforms at Regulatory Level**

It is understood that the billing practices of lawyers cannot be overly regulated and that specific billing provisions cannot be designed to address every concern presented by time billing. The billing provisions however, could impose stringent disclosure requirements upon practitioners and prohibit certain billing practices as outlined below.

On the basis of the literature discussed, the research undertaken and the data collected, the author suggests it is imperative that the *Legal Practitioners Decree 2009* (Fiji):

- I. Make it mandatory for all costs agreements to be in writing or to be evidenced in writing as required under the Australian *Model Laws*.<sup>240</sup>
- II. Make specific provision for practitioners to disclose to clients, if billing on the basis of time, the billing rate of the practitioner and the billing rate for paralegal work as well as secretarial work.
- III. Place a ban on the practice of (non-itemised) block-billing by practitioners and firms.
- IV. Make it mandatory for law firms and practitioners to disclose to their clients the complaints-handling procedure within the firm and the avenues available to the client in the event that the costs agreement is in dispute or a bill is in dispute. Such disclosure must be made in all engagement letters, costs agreements and bill of costs.
- V. Make specific provisions on the practical ramifications of non-compliance with the duties of disclosure imposed by the Decree. Seeking guidance from the *Legal Profession Act 2004* (NSW), the practical ramifications should include:<sup>241</sup>
  - a) Postponement of the payment of legal fees until the costs have been taxed by the Tax Master. In that, the client should not be required to pay the legal costs until the costs have been taxed.
  - b) Bar on recovery until the costs have been taxed by the Tax Master. The practitioner or firm should not be able to maintain proceedings against the client for recovery of legal costs unless the costs have been taxed.

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<sup>240</sup> Above n 227.

<sup>241</sup> Section 317 (1)(2)(3)(4) of the *Legal Profession Act 2004* (NSW).

- c) Setting aside of costs agreement, upon an application by the client to the High Court.
- d) Reduction of legal costs upon taxation. The costs may be reduced by an amount considered by the Tax Master to be proportionate to the seriousness of the failure to disclose.

In addition to the above reforms to the Decree, it is also essential that the disciplinary bodies such as the ILSC retain billing experts to assist with the successful prosecution of practitioners for overcharging related matters. Such expert training is currently not available in Fiji. Hence, the Judicial Department should either recruit overseas experts or sponsor potential local candidates to undertake such training overseas.

### **8.2.2 Reforms at the Level of the Profession**

At the level of the profession:

- I. The FLS should develop billing templates to serve as guides for practitioners and law firms.
- II. The FLS and the Office of the Attorney-General (OAG) should organise workshops and training specifically directed at ethics and law firm billing.
- III. The Board of Legal Education (a division of the OAG) which is responsible for the design and implementation of the mandatory Continuing Legal Education (CLE) programme must require practitioners to complete certain hours of instruction and training on ethics and billing as part of the requirements of the CLE programme.

### 8.2.3 Reforms at Firm Level

At the firm level every law firm must:

- I. Establish clear policies and ethical guidelines for practitioners on the billing practices of the firm, and enforce these. Simply stating that the firm bills all legal work on the basis of time is not sufficient. Such billing policies or guidelines must include the firm's position on issues such as rounding off minutes, billing for recycled work and double-billing.
- II. Provide adequate training on billing to new entrants into the firm to ensure standardized billing within the firm and to minimize the possibility of misunderstandings with clients.
- III. Cease to use billing targets whether expressed in terms of hours or revenue generated for the firm as the basis for promotion or increment within the firm. Firms should instead opt to reward practitioners on the quality of their work, their efficiency in handling client matters and the outcomes produced for clients. This would ensure that a brilliant idea is given its due recognition over a cleverly filled out time-sheet.
- IV. Establish procedures for spot audits of the time-sheets of practitioners to verify the time entries against actual work done. Such procedures should also provide that where there is prima facie evidence of abuse, the practitioner in question shall face immediate suspension and that the matter shall be reported to the LPU for appropriate action.
- V. Inform and explain to clients the firm's billing process. Such information should provide details of the billing rates of the practitioner and others working on the case, and a reasoned estimate of the costs of the matter. Care must be taken to inform the client that an "estimate" does not mean that the

final bill amount would be the same. Firms could inform clients of such matters through brochures on the firms' billing method.

- VI. Include in all costs agreements entered into with clients and in all bills sent to clients a statement as to the client's right to seek redress if the bill or the costs agreement is in dispute. The statement should clearly inform the client of the complaints-handling process within the firm and that if the matter is not resolved then the client has the right to report such matters to the LPU. Such a statement should also inform clients of their legal right to apply to the courts to set aside the costs agreement.
  
- VII. Clearly identify the types of work which would be classified as paralegal-work and secretarial work and specify the billing rates for each.
  
- VIII. Cease the practice of block-billing and provide itemised bills to clients clearly stating the nature of work done, the time spent on the matter, by whom (initials of the person attending to the matter) and at what billing rate.

The above are some suggestions aimed at reforming the practice of time billing by practitioners in Fiji. Any attempt at reforming the billing practice cannot entirely "wipe out" the concerns surrounding time billing; nonetheless efforts must be made to curtail the problems.

This study has served as an initial inquiry into the practice of time billing. Further research on a larger scale is needed to fully understand the implications of time billing in Fiji and to assist the country to develop informed and appropriate law and policy regarding this issue. The data from this research, the findings and the suggestions mark the first steps in that direction.

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**10 APPENDICES**

**APPENDIX A**

**INTERVIEW QUESTIONNAIRE FOR PRIVATE LEGAL  
PRACTITIONERS**

1. When were you admitted into the Bar?
2. What is your present position in your firm?\*
3. What is your principal area of practice?\*
4. Approximately how many practitioners are currently employed by your firm?\*
5. What billing methods are used by practitioners in your firm? Is time-based billing/hourly billing one of these methods?
6. In your firm how prevalent is time-based billing compared to other forms of billing?
7. Did you receive any training on the billing methods employed by your firm upon joining the firm?
8. Which (if any) of the following do you rely on to act as a guide to your billing practices?
  - a) *Legal Practitioners Decree 2009* (Fiji)
  - b) *Legal Practitioners (Magistrates' Courts Scale of Costs) Regulations 2006* (Fiji)
  - c) *Legal Practitioners (High Court Costs) Regulations 2006* (Fiji)
  - d) Other, please specify?
9. Please comment on the advantages and disadvantages of time-based billing.
10. Does your firm keep weekly/monthly/annual records of its billable hours? i.e. If you were to tell me how many hours the firm billed for a particular month/year do you have records to determine this?

11. How do you determine what amount of time is spent working on a particular client file? Are actual time records kept for the time spent on each client file? Is this the general practice of other practitioners in your firm?
12. Are practitioners in your firm subject to billing targets? (If not in terms of hours, then on the number of clients attended or the amount of revenue raised for the firm). Please comment on the advantages and disadvantages of such practice.
13. What is the basis for promotion of practitioners in your firm? (i.e. Experience, number of clients handled, revenue raised for the firm, other?)
14. Were there any incidents of clients complaining about the Bill of Costs presented to them? If so, how does the firm generally handle such complaints? Could you give me an example of one such matter and how it was handled?

In the United States (US) and Australia, the practice of time-based billing by lawyers has been subject to great scrutiny by legal scholars as well as members of the legal profession. In both these jurisdictions, time-based billing or hourly billing has been argued to both create and promote a culture of unethical billing on the part of legal practitioners. Critics of time-based billing in these jurisdictions argue that this method of billing amongst other things rewards inefficiency, encourages overworking of client files, promotes unrealistic billing targets and in some cases results in deliberate inflation of billable hours.

Questions 15-25 relate to American and Australian research on time-based billing. This interview aims to find out whether or not the same concerns apply to practitioners in Fiji.

15. According to American literature, time-based billing encourages fraudulent billing of clients. Do you agree? Why/Why not?

16. According to American and Australian literature the practice of time-based billing diminishes incentives for expeditious work? Do you agree? Why/why not?
17. Have you ever billed two clients for work performed at the same time (e.g. billed one client for drafting a document while travelling for another)?\*
18. In your opinion is the practice of double-billing described in the preceding question an ethical practice?\*
19. According to American literature, the prospect of billing additional hours occasionally influences practitioners' decisions to proceed with work which they otherwise might not perform? Do you agree with this statement?  
  
(This question relates to lawyers undertaking unnecessary tasks for clients which will not benefit the client but helps generate more billable hours).
20. To what extent do you believe practitioners deliberately inflate their hours to bill clients for work that they do not actually perform? Are you aware of any instances where this has happened?
21. Suppose Client A came to see you regarding a specific matter for which you were required to undertake 3 hours of research and you bill Client A accordingly. If Client B comes up with a similar matter where you can simply 're-cycle' the research work undertaken for Client A, would you bill Client B for the same three hours? Regardless of the answer given above, do you think such practice is ethical? Why or why not?
22. Do you think that replacing time-based billing with another method of billing would have an effect on client bills?\*(Will it increase or decrease client bills?)
23. To what extent do you believe that work which is presently performed by practitioners could adequately be performed by secretaries or paralegal staff?\*

24. Do you think the current legislative framework is adequate to regulate the billing practices of legal practitioners? Is it adequate to regulate the practice of time-based billing, in particular?
  
25. What is your overall opinion on time-based billing? Is it a good practice? Is there a need to replace it?

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\* Questions marked with '\*' have been adopted from William G. Ross, 'The Ethics of Hourly Billing by Attorneys' (1991) 44(1) *Rutgers Law Review*.

**APPENDIX B**  
**INTERVIEW QUESTIONNAIRE FOR THE LEGAL  
PRACTITIONERS UNIT (LPU)**

1. Please comment on the nature of complaints received against Legal Practitioners by your office.
2. Approximately how many complaints has your office received to date, including the unresolved complaints from the Fiji Law Society? Over what period of time do these complaints relate to?
3. Approximately how many of these complaints relate to billing abuses on the part of practitioners?
4. a) What type of billing abuses do the complaints relate to?  
  
b) Preliminary enquiries with the Fiji Law Society (FLS) has revealed that before your Office took over the complaints handling function, overcharging by lawyers was one of the most common complaints received against practitioners by FLS. Is this also true for your Office? (i.e. How widespread is the issue of overcharging?)
5. What in your opinion are some of the factors which encourage lawyers to over-charge?
6. With regard to the overcharging matters before your Office, would you be able to state which billing methods were used by the practitioners against whom the complaints were made? (Question 6 may become redundant if the answer to question 5 addresses this).
7. Do you believe that time-based/hourly billing encourages practitioners to engage in fraudulent billing practices?  
  
a) If so, how? (Would you be able to provide any specific examples?)  
  
b) Is there a need to reform this billing practice?
8. With regard to billing abuses, are the complaints more often resolved in favour of the Practitioner or the Complainant?
9. In your opinion, is the current legislative framework adequate to regulate the billing practices of lawyers? If not, how could it be improved?