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GesmerUpdegrove<sup>LLP</sup>

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## CONSIDER THIS:

### #57 Killing the Cockroach: The Incredibly Illogical, Fundamentally Odious - but Seemingly Ineradicable - Billable Hour

Andrew Updegrove

*The service the lawyer renders is his professional knowledge and skill, but the commodity he sells is time – Reginald Heber Smith, inventor of the billable hour*

*Both reviled and ubiquitous, the billable hour is the cockroach of the legal world - Douglas McCollam, writing in the American Lawyer*



Let's imagine that you would like to have your dilapidated, wood-sided house painted. The southern exposure is peeling, the soffits sport dark Rorschach patterns of mildew, and more than a few window sills have that uncomfortably punky feel to the touch that whispers "*we're rotting – you must help us.*" You know that you can't put off facing the music any longer, and hope that the impact on your wallet will be no more painful than absolutely necessary.

So you do what any rational homeowner would – you get some referrals from people you trust, call the folks they recommend, and tell each of them that you'll be soliciting several bids. While you're at it, you also call the painter who, as luck would have it, had dropped a flyer in your mailbox that very afternoon.

Over the next week each housepainter stops by after work, walks around your house, scribbles a few notes, and promises to get back to you with a quote. Within a week, most of them

actually do. Like any homeowner would, you select the cheapest, failing to note that it came from the painter you found through the flyer. Soon, the job is done,

*How did such an illogical and unequal standard get established, and how does it survive?*

and he drops by to collect the agreed upon amount. Pleased, you pay him on the spot.

What a nice, logical system, especially for the buyer. You know just what you'll have to pay before you commit to pay it, and gain the benefit of competitive bidding as well. You'd be crazy to take on such a large financial commitment any other way, wouldn't you?

Let's say, though, that a year goes by, and the house starts to peel. Calls to the painter go unanswered, so you get in touch with another painter, who stops by and shakes his head pityingly. He informs you that flyer-man applied cheap latex over the old oil paint, didn't wash the mildew off the soffits or stabilize the rot in those windowsills. You'll need to have the whole job repeated - soon.

More calls go unanswered to the original painter, so it's referral time again - for a lawyer. Soon you are sitting in the office of the attorney with the best recommendation, and are recounting your tale of familiar woe.

After you agree to work together, you meekly ask how much it will cost. The answer is, "Oh, well, that's hard to say. It depends on so many things..." Although she gives you a ballpark estimate, that's all it is. She goes on to say that she will bill you monthly, with the amount invoiced based on the new time she has spent on your case. Oh - and the retainer to begin work will be \$1,000, thank you very much.

Welcome to the improbable and seemingly impregnable world of the lawyers' billable hour - perhaps the only pervasive, virtually undisputed commercial standard in existence that puts almost all of the risk on the buyer, and where the cost of the commoditized product goes up, not down, year after year.

How did such an illogical and unequal standard become so well established, and how does it survive? Good questions. The first one is easy. But there's really no good answer for the second one at all, although I invite you to consider the following.

The billable hour traces its origins to one Reginald Heber Smith, a Harvard graduate with a mind that ran to quantification as naturally as water runs downhill (his other lasting contribution was a formula for calculating partner compensation. it's still referred to by some as the "Smith System"). In 1914, Smith was hired to head Boston Legal Aid, and soon decided that its finances were in need of an overhaul. The concept of "Scientific Management" had just been introduced and was all the rage, and Harvard Business School was located conveniently near by. Smith enlisted his alma mater's aid, and soon was applying his brand of scientific principles to the management of the practice of law.

Word spread, and soon Mr. Smith was the managing partner of the (even then) venerable Boston law firm of Messrs. Hale and Dorr (now Wilmer Hale, following its merger with the D.C. firm of Wilmer, Cutler & Pickering). And so the seed of the billable hour came to be planted in the flinty soil of the private practice of law.

The billable hour did not initially propagate, kudzu-like, through the legal world. After all, commoditizing a profession seemed demeaning to many attorneys. And in order to be effective, lawyers needed to submit to another annoying Smith invention: the paper time sheet. On that rigid, ruled rectangle, every lawyer was required to record the time, client name, and task description for everything he did during the day. As if to rub it in, Mr. Smith's time sheet was marked in six minute increments.

Meanwhile, what was taking root in other law firms was another, equally insidious system: the minimum fee schedule. Rather incredibly, in light of the spirit, if not the letter, of antitrust law, bar associations were hard at work creating flat fee schedules for common legal tasks. By the 1940s, it had become an ethics violation under the rules of some states to financially undercut thy fellow attorney. Meanwhile, Reginald Heber Smith's seminal management work, "Law Office Organization," was in its eleventh printing, and the process of litigation, in particular, had become more complex (read: risky – for the law firm) to prosecute on a fixed-fee basis.

When the Supreme Court at last (in 1975!) applied to legal services similar rules to those that had long prohibited price fixing in the sale of products, the billable hour's hour had truly come at last.

Which more or less brings us to today – or almost. For some time now, the billable hour and its many failings have been much commented upon.

Associates and partners alike hate the slavery of the time sheet and the billable hour requirements that, like their billable hourly rates, continue to creep

upwards. Clients resent the uncertainty of the bills they receive and their consequent lack of control over their legal budgets, not to mention the fact that an hour of busy work is charged out at the same rate as an hour of truly valuable advice. And no one denies that the billable hour system sets the best interests of the law firm against those of the client, resulting in a constant temptation for lawyers to over-staff projects, over-research legal issues and over-estimate time spent.

*Why does the much-loathed and unwelcome billable hour, like the cockroach, continue to infest the legal kitchen?*

The result has been an ongoing dialogue in the legal profession over so-called "alternative billing systems," with many opinions offered on what such systems might look like, and how they might work (as if the rest of the professional – or for that matter the house painters' – world doesn't already have enough models from which to choose).

So why does the much-loathed and unwelcome billable hour, like the cockroach, continue to infest the legal kitchen?

The explanation, if not an adequate answer, is pure and simple. On the law firm side, the culprit is unbridled self interest. Keeping time sheets and meeting hourly expectations may demean and oppress hapless associates, but the results are beloved by law firm managers, because they dramatically increase the ability to

budget more reliably and lower risk more consistently (Reginald Heber Smith may have been a number nerd, but he was after all no fool). So the law firms are few and far between that have abandoned the seductive billable hour, once they have succumbed to its siren song.

On the client side, the answer would appear to be mostly one of inertia. Even in-house general counsels that trained in big law firms and should know better continue to tolerate billable hour-based bills, perhaps because the cost and effect are at least trackable, detailed and familiar. Moreover, it's easy to simply ask for a discount off a firm's hourly rack rate, and hourly rates provide a simplistic way to cost-compare between law firms and individual attorneys. Perhaps the fact that lawyers are rarely accused of imagination may factor into the mix as well.

The real genius of Mr. Smith, perhaps, was to apply the principles of "scientific management" to legal services early on in the development of the business management discipline, affording the billable hour a *faux* veneer of respectability, and camouflaged the basic illogicality of a system that values reading email the same as negotiating a multi-billion dollar merger.

Ultimately, though, I expect that the invisible hand of Adam Smith will not remain sprained forever. Surely, some day it will heal, and just as the United Auto Workers in Detroit are finding that the real world has caught up with them, the hard heel of the marketplace will come down on the billable hour as well.

When it does, there will be a crunch that will reverberate around the client world, and the legal kitchen will never be the same again.

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