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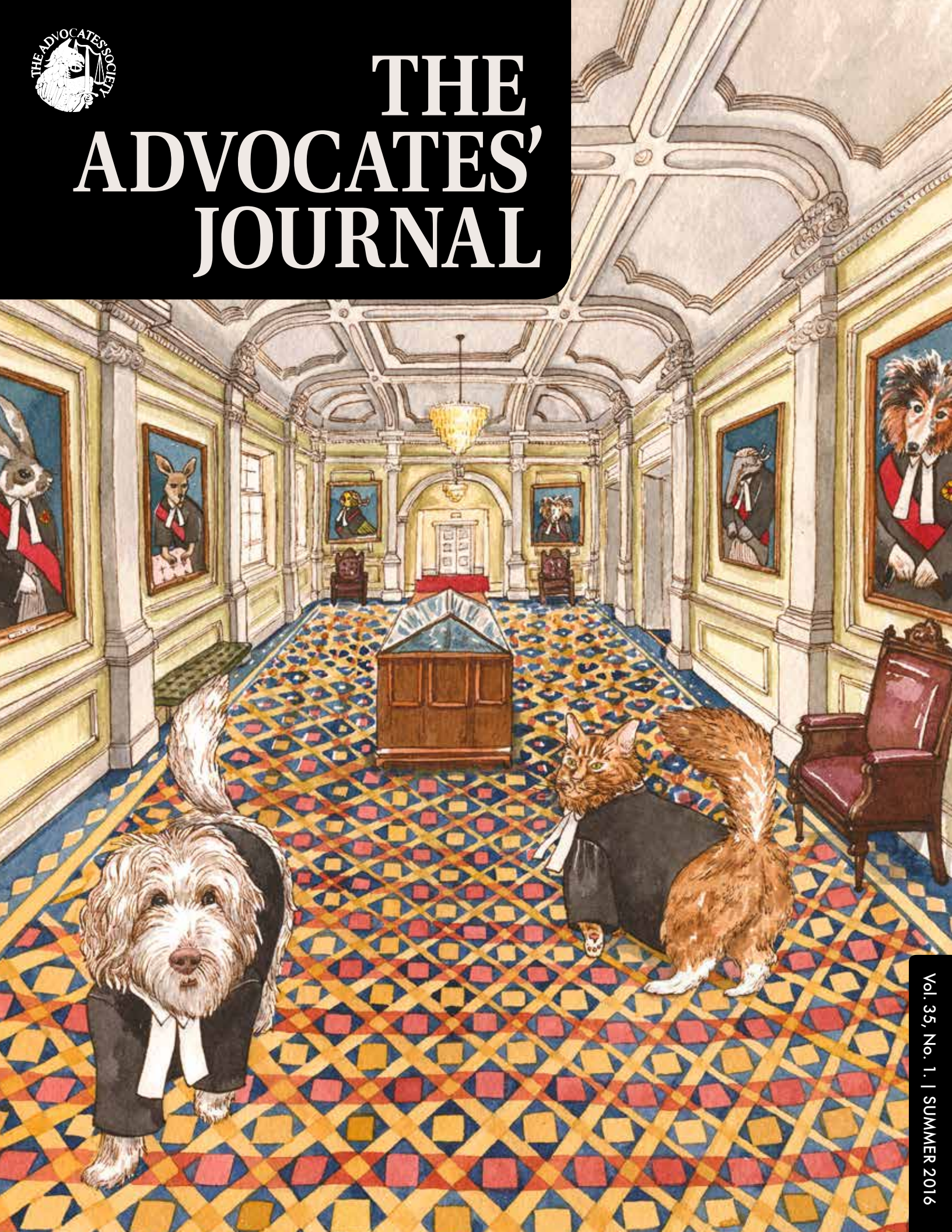

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The billable hour is dead.

Long live the billable hour

Paul Fruitman

Once upon a time, before the 1960s, lawyers did not bill by the hour. They did not count time in six-minute intervals. They did not even keep docket sheets.

Advocates of the day employed various means of charging for their services, but the most common were prescribed tariffs and "value billing." The latter allowed the advocate to make a subjective determination of the value of the service provided, taking into account various factors, including work done, market rates, client outcome and client means.[1]

The rise of the billable hour has been linked to deregulation, client demands for transparency and a demystification of the lawyer's role in society.[2] But the historical review below shows that, more than anything else, what drove the billable hour was a desire for greater incomes. Lawyers first began tracking their time, then using it as the measurement of their worth, and then leveraging the time of junior lawyers in the same way.

The resulting profits did not come without costs. A recent article in the *Atlantic* summarized the frequent criticisms of the billable hour: "inefficient, needlessly punitive and subject to abuse"; and "a living hell" for lawyers.[3] The *Atlantic* joined a chorus predicting and celebrating the billable hour's pending extinction.

Whether rumours of the billable hour's demise are exaggerated, it is losing traction as cost certainty has replaced transparency as the client's chief demand. Alternative fee arrangements (AFAs) may in fact fix at least some of the billable hour's client-side problems.

But we will still need to measure our own productivity, in part to know whether the block fees and capped fees we offer make sense for our own bottom lines. We will do so by tracking our hours. What else are we to measure? A lawyer's stock in trade – as Abraham Lincoln said – is advice and time. Advice, like pre-1960s value billing, is a subjective concept that does not lend itself to quantification. Time is (at least superficially) objective and easy to measure.

The billable hour was not an invention unique to the legal practice. It was part of a broader societal trend toward efficiency and management of the means of production. That trend shows no signs of abating.

Birth of the billable hour

The origins of the billable hour can be traced to the beginning of the 20th century and a lawyer named Reginald Heber Smith. Smith was a Harvard graduate hired to head Boston Legal Aid in 1914.[4] He incorporated the concepts of Taylorism into the legal profession.

Taylorism is named after Frederick Winslow Taylor, an American mechanical engineer whose theory of "scientific management" focused on efficiency in the use of labour in manufacturing.[5] Smith used Taylorism to better serve his legal aid clients who could not afford the opaque billing practices of private counsel. Smith measured his efficiency with time sheets that broke down each hour into 10 six-minute units.[6]

The billable hour beats regulation

It took decades for private law firms to adopt the billable hour. In Smith's time, the idea of time-billing was anathema to both the profession and the courts. A 1911 decision of the Ontario Supreme Court summarized the prevailing mood as follows:

> When a solicitor is employed to adjust a matter of difficulty, nothing more injurious to the client could be suggested than that the solicitor's remuneration must depend upon the length of time taken and the number of interviews had. One may grasp a situation with great rapidity, and his skill and experience may lead to its satisfactory solution in a way that after the event appears easy. Another, lacking the necessary skill and experience, may plod away at great length and in the end fail to reach as satisfactory a result, but an itemised bill would give him greater remuneration.[7]

Lawyers in Canada and the United States instead used five different methods for quantifying their services: fixed fee arrangements, monthly or yearly retainers, percentage fees, and the value billing and tariffs referred to above.

Through most of the 20th century, provincial and state law societies and bar associations set tariff fees for typical tasks, including wills, liens, leases, agreements and even correspondence. Lawyers were urged to use these tariffs, where applicable, and threatened with professional discipline if they undercut the tariffs to attract business.[8]

By the late 1950s, however, there was a growing feeling among lawyers that they were underpaid, at least when compared with other professionals.[9] In 1958, the American Bar Association published a pamphlet entitled *The 1958 Lawyer and His 1938 Dollar*, which excoriated lawyers as poor businessmen and poor record keepers. The ABA recommended lawyers diligently record their time to maximize income:

> There are only approximately 1300 fee-earning hours per year unless the lawyer works overtime. Many of the 8 hours per day available for office work are consumed in personal, civic, bar, religious and political activities, general office administration and other non-remunerative matters…[so] chargeable time will average 5 hours per day [for 260 days per year].[10]

Provincial law societies in Canada also extolled the virtues of proper time-keeping.[11]

Initially, lawyers recorded their time only to measure productivity. However, use of the timesheet as the means of setting fees became widespread as value billing was being questioned for its lack of transparency,[12] tariffs were being challenged as anti-competitive[13] and law firms were increasing in size. The billable hour became an indispensable tool in assessing the performance of a large number of associates.[14]

The new standard

The billable hour's ubiquity came with increasing expectations on the number of hours lawyers were expected to bill and the amount charged for each of them. Neither our time nor our advice is scalable.[15] The only way to increase income is to work more and charge more.

Hourly rates increased significantly in the early 1980s, when lawyers working on large corporate takeovers learned that their counterparts in investment banking had significantly higher incomes, and steadily grew from there as pressure mounted to enhance profitability.[16] The 1,300 annual billable hour target rose to 2,000 and above for large firms in major centres, and every 0.1 was now caught with docketing software.

Reginald Heber Smith's system for helping impecunious clients became a tool for measuring and growing unprecedented profits.

The more things change …

Since the Great Recession of 2008–2009, predictions of the death of the billable hour have been growing, coupled with a hope that its demise may lead to a better life for lawyers[17] – in particular associates, who apparently have the "unhappiest job" in America.[18]

Support for the billable hour on the client side is indeed fading. The 2014 *Canadian Lawyer* Corporate Counsel Survey reported a drop in those using the billable hour as their primary arrangement from 55.2 to 47.3 percent.[19] The 2015 survey reported a further, if lesser, drop, to 46.8 percent.[20]

Will the replacements be any better? AFAs can take various forms: contingency fees, reverse contingency fees (based on an avoidance of exposure to liability), graduated percentage fees, fixed fees and flat fees. But none of these means we will measure our own productivity any differently. Even if we manage to work fewer hours, we will still be assessing how much we are able to accomplish in each of them. The billable hour as a productivity metric predated *billing* by the hour and will survive the rise of new AFAs.

It is worth noting that flat fees, fixed fees and percentage fees, or variations thereof, were all in use before billing based on time spent became the default. Initially, clients liked hourly billing because it offered transparency into what the lawyer was actually doing to justify the fee being charged. If, several decades from now, our clients are again demanding transparency into the value of AFAs, we may well return to charging them using the metric by which we measure our own productivity: the billable hour.

Notes

1. Alice Woolley, "Evaluating Value: A Historical Case Study of the Capacity of Alternative Billing Methods to Reform Unethical Hourly Billing" (2005) 12:3 Int'l J Legal Profession 339 at 343–345; Edward Poll, "How to Develop Alternatives to the Billable Hour" (22 October 2014), Canadian Bar Association, online: <cba.org/Publications-Resources/CBA-Practice-Link/2015-(1)/2014/How-to-Develop-Alternatives-to-the-Billable-Hour?lang=fr-CA>.
2. Woolley, ibid at 347–348 and 350–351; Abe Krash, "The Changing Legal Profession" *Washington Lawyer* (January 2008), online: <dcbar.org/bar-resources/publications/washington-lawyer/articles/january-2008-law-changes.cfm>.
3. Leigh McMullan Abramson, "Is the Billable Hour Obsolete," *The Atlantic* (15 October 2015), online: <theatlantic.com/business/archive/2015/10/billable-hours/410611>. See also critiques of the impact of the billable hour summarized by Woolley, *supra* note 1 at 349–352, and further commentary by US Supreme Court Justice Stephen Breyer in his foreword to the 2002 *ABA Commission on Billable Hours Report*, online: <ilta.personifycloud.com/webfiles/productfiles/914311/FMPG4_ABABillableHours2002.pdf>.
4. E.M. Dimock "Reginald Heber Smith, 1889–1966," ABA J 52 (December 1966) 1138 at 1138.
5. F W Taylor, Expert in Efficiency, Dies, *The New York Times*, 22 March 1915, online: <nytimes.com/learning/general/onthisday/bday/0320.html>.
6. Earl Johnson Jr, *To Establish Justice for All: The Past and Future of Civil Legal Aid in the United States*, vol 1 (Santa Barbara, CA: Praeger, 2014) at 21 and 314n17.
7. *Re Solicitors*, [1911] OJ No 751 (HCJ) at para 5; Woolley, *supra* note 1 at 342–343. See also *Lynch-Staunton v Somerville*, [1918] OJ No 52 (CA) at paras 24–27; and *Yule v Saskatoon (City)*, [1955] SJ No 64 (CA).
8. 1920 Canadian Bar Association's Canon of Legal Ethics, Canon 3(9), as cited by Woolley, *supra* note 1 at 344; *Goldfarb v Virginia State Bar*, 421 US 773 (1975) at 776–777.
9. Woolley, *supra* note 1 at 346; Thomas D Morgan, *The Vanishing American Lawyer* (New York: Oxford University Press, 2010) at 52–53.
10. As cited by Thomas D Morgan, *ibid* at 53. That 1,300 number is not a typo.
11. Woolley, *supra* note 1 at 346.
12. Woolley, *supra* note 1 at 347–348.
13. *Waterloo Law Association v Attorney General of Canada*, [1986] OJ No. 1365 (Sup Ct); *Goldfarb v Virginia State Bar*, 421 US 773 (1975).
14. Woolley, *supra* note 1 at 346.
15. Except in the most generic sense; for example, LegalZoom.
16. Abe Krash, *supra* note 2.
17. Katherine L. Brown and Kristin A. Mendoza, "Ending the Tyranny of the Billable Hour: A Mandate for Change for the 21st Century Law Firm" (Summer 2010) New Hampshire Bar J 66 at 68–69; Lyndsie Bourgon "Blazing Trails" *National*, October–November 2012, online: <nationalmagazine.ca/Articles/October-November-2012/Blazing-trails.aspx>.
18. Online: <forbes.com/pictures/efkk45ehff1/no-1-unhappiest-job-associate-attorney>.
19. Jennifer Brown, "Billable Hour Morphing into Alternative Arrangements" *Canada Lawyer in House* (30 March 2015), online: <canadianlawyermag.com/5529/Billable-hour-morphing-into-alternative-arrangements.html>.
20. Jennifer Brown, "Testing the AFA Waters" *Canadian Lawyer* (November/December 2015) 34 at 34.