

**ASSESSMENT OF COSTS SEMINAR  
OVERVIEW**

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**PREPARING FOR THE SOLICITOR AND CLIENT ASSESSMENT OF COSTS**  
**Presented by Ed Upenieks**

**1. Introduction**

This paper will outline some of the considerations when preparing for a solicitor and client assessment, whether acting as counsel for the client or counsel for the solicitor, or attending to present your own bill on an assessment of costs.

Although different considerations apply whether acting on behalf of the client or the solicitor, some considerations do overlap. As well, they are reviewed together because it is most important to anticipate challenges that may be made. This is particularly so because there are no pleadings or discoveries during the assessment process, and you can have, in effect, trial by ambush.

**2. Venue**

Consideration should be given to where the appointment should be taken out. Some outlying areas have a much shorter time frame to obtain the assessment date, but on the other hand, the amounts awarded may be somewhat less.

The Solicitors Act no longer requires that the assessment occur in the county in which the solicitor resides.

**3. Return Date of the Assessment**

When acting for the client, determine right away whether the assessment is on the "A" or "B" list and how much time has been set aside. If sufficient time has not been allocated, this is the time to try to agree on new dates.

Always advise the court of any settlement so that the dates can be made available to others. Assessment dates are too precious to be squandered.

**4. Who is the Client?**

Is the client property described? This is really only an issue where work is done for a closely held company. The order for assessment should correspond with the accounts that were rendered. It is not appropriate, for example, to send billings to the company and then take out an appointment for an assessment against the company and/or the individual owner.

**5. Is the Bill Deficient in Form?**

Section 2(3) of the Solicitors Act requires a bill to have:

"... a reasonable statement or description of the services rendered with a lump sum charge therefor together with a detailed statement of disbursements, and in any action upon or assessment of such a bill if it is deemed proper further details of the services rendered may be ordered."

Where acting for the solicitor, consideration ought to have been given in preparing the bill to provide a sufficient amount of information to:

- i) enable the client to exercise his/her judgment as to whether the bill is reasonable;  
Reference: Gould v. Ferguson (1913), 14 D.L.R. 17 (Ont.C.A.)
- ii) enable another solicitor to advise the client whether the bill is reasonable;  
Reference: Petty v. Murphy, [1926] 4 D.L.R. 123
- iii) enable the assessment officer to determine whether the bill is reasonable.  
Reference: Solicitors, [1967] 2 O.R. 691  
Bliss Kirsch v. Jackson, [1979] 9 C.P.C. 238

Where a bill has been rendered and the client or the client's solicitor objects to it as not containing sufficient information, it is advisable to deliver further particulars of the bill. If the client refuses to accept particulars on the basis that a solicitor is not allowed to alter or withdraw his bill after delivery to the client, the solicitor should move for an order granting leave to deliver further details of services rendered or leave to amend the bill *nunc pro tunc*, or leave to deliver a further bill in expanded form.

## 6. **Dispute as to Retainer**

Section 3 of the Solicitors Act provides for an assessment only where the retainer is not disputed. Where the retainer is disputed, the assessment officer has no jurisdiction to proceed.

Reference: Re Solicitor, [1965] 1 O.R. 189

When acting for a client and there is a genuine dispute as to the retainer, you must move to set aside the order obtained on requisition.

Reference: Rule 37.14 of the Rules of Civil Procedure  
Re Solicitor, [1966] 2 O.R. 295 (C.A.)

The motion to dispute retainer is brought before a Master. If the Master determines that there is no *bona fide* dispute as to retainer, the Master will refer the matter to an assessment officer for assessment. If the Master finds that there is a *bona fide* dispute, the order obtained on requisition must be set aside and the matter should proceed by way of action.

Reference: Re Solicitor, [1965] 1 O.R. 189

A written retainer should end any dispute as to retainer and as well, remove any argument about the scope of your services.

## **7. Proper Service**

When acting for the solicitor, it is imperative that the client receives due notice (Section 5).

The appointment should include all accounts, even interim accounts for the same matter that have been paid in full, as the whole series of accounts is subject to assessment.

When acting for the client, check to see whether the accounts are properly signed by a partner and that interest is properly being claimed.

## **8. Negligence or Other Claims**

There have been occasions in the past where counsel for a client took out an appointment for an assessment of costs, and planned to use the transcripts for the basis of a future claim against the solicitor. Quære whether the solicitor can raise *res judicata* or issue estoppel.

The assessment officer does, however, have authority to investigate questions of carelessness and negligence insofar as they effect the question of costs, but not the client's loss or damages due to such carelessness or negligence.

If the solicitor has been negligent, the assessment officer has a duty to disallow the bill or that portion of the bill where services were rendered useless by negligence.

## **9. Organize Your File**

When acting for the solicitor, it is important that the file taken to the assessment is fully and completely organized. It doesn't matter what state the solicitor's file is in when the appointment is secured, it must be properly organized for the assessment of costs.

In my view, the whole file should be brought to the assessment, to show the extent of the undertaking.

As well, prudent counsel acting for the client would wish to see the solicitor's whole file, and wish to do this as early as possible, so it is important to make sure that an organized file is available from the outset.

#### **10. Production of the File**

When acting for the client, in addition to the dockets, you want to review the solicitor's whole file. Disputes often arise on this score, but whether by agreement or court order, the client always has access to his file.

A review of the file should include any memoranda and research.

#### **11. Factors to be Considered on an Assessment of Costs**

The leading case is the Court of Appeal decision in Cohen v. Kealey & Blaney (1985), 26 C.P.C. (2d) 211, which states the following are factors to be considered:

1. the time expended by the solicitor;
2. the legal complexity of the matters dealt with;
3. the degree of responsibility assumed by the solicitor;
4. the monetary value of the matters in issue;
5. the importance of the matters to the client;
6. the degree of skill and competence demonstrated by the solicitor;
7. the results achieved;
8. the ability of the client to pay; and
9. the expectation of the client as to the amount of the fee.

In preparing for the assessment of costs, as the file is prepared, points for each of the factors should be made.

## **12. Rules of Evidence**

The rules of evidence apply to assessments; it is not enough to simply file docketts in support of the work done.

Whether requested or not, the client should be provided copies of the docketts. The principal solicitors involved in the file should attend to give evidence on behalf of the law firm, but for solicitors who were not involved in much of the file or for law clerks, the Evidence Act Notice for the docketts should be relied upon.

## **13. Docketts**

Docketts are not required to prove the solicitor's account, but it is self-evident that proper docketts can be an excellent tool to use when presenting your case. When acting for the solicitor, ensure that:

1. the docketts are accurate;
2. that they identify the solicitors working on the file;
3. that they indicate the rates charged per hour;
4. that they indicate the type of work performed; and
5. they show the time spent.

Docketts should be recorded contemporaneously.

When acting for the client, it is important to obtain the solicitor's docketts as early as possible, and then to scrutinize them carefully to check to see whether they were, in fact, made contemporaneously, whether they are reliable, and to carefully review any interlineations. It is important, for example, to see the computer sequence in which the

dockets were entered into the system and to compare docket dates to the work performed. Sometimes the commentary is very useful, particularly when portions of the docket descriptions are deleted or expanded.

Most firms now have computerized dockets, but some still have a manual system that pre-dates the computer dockets. Where both systems are used, there may be a request to see the handwritten dockets to ensure that they are consistent with the computerized dockets.

There may be occasion when the solicitor for the clients wishes to see the solicitor's diary or other docket entries for the same day that work was being performed for this client on this file.

On an assessment of costs, most of the time spent in preparing and attending on the assessment is a very detailed review of the dockets.

Counsel for the client should look for docketing errors, duplication or triplication of effort, extensive in-house conferences, extensive memo writing or research time, different time-docketers and failure to supervise those lawyers, and the amount of time spent on telephone calls.

For a case dealing with excessive dockets, see Swadron Associates v. Daniel F. O'Hanley in the Appendix.

When acting for the solicitor, it is important that you review the dockets as though acting for the client and be prepared for attack on all items.

When acting for the client, sometimes it is useful to prepare a chart of the number of in-house conferences, and the total time docketed to the in-house conferences, and as well, a listing of the total number of lawyers involved, and especially, a listing of the number of different students.

#### **14. Other Witnesses to Prove the Account**

Sometimes experts are called in complex cases to give evidence as to the complexity of the issues, the results achieved, the manner in which the matter was handled, and typical hourly rates. The expert, however, cannot give evidence on the amount of the fee or the value of the work.

Reference: Richards v. Bittenbinder (1979), 10 C.P.C. 291

#### **15. Disbursements**

Section 2(3) of The Solicitors Act requires a detailed statement of disbursements. With computerized accounting systems, disbursements are typically very detailed.

For larger disbursements, such as examination for discovery transcripts and experts reports, etc., when acting for the solicitor, you should always have invoices available and provide them to your opponent early. When acting for the client, you want to carefully scrutinize these.

It is the solicitor's onus to prove the bill, and this cannot be done by simply filing an expert's invoice for say, \$10,000. It would be necessary to prove an expert's bill by calling the expert to testify as to the time spent and his hourly rate, etc. Counsel for solicitors often overlook this. This would, likewise, apply for a disbursement for a legal opinion; it has to be proven in the normal course.

When acting for the solicitor, you should try to find out what dispute, if any, there exists with the disbursements and try to iron this out. Assessment officers do not appreciate lengthy hearings on photocopy disbursements.

**16. Should the Client Testify**

This is obviously a difficult judgment call, but certainly in a case where the solicitor is alleging that the client was difficult, unless the solicitor is clearly wrong, it could be a mistake to call the client. There is no obligation to call the client and often more can be gained by effective cross-examination of the solicitor than by calling the client and exposing the client to cross-examination.

**17. Brief of Important Documents**

Whether acting for the solicitor or the client, it is usually very helpful to prepare a brief of important documents. Certainly, if there can be agreement as to the contents of the brief, that is preferable, but often the opposing sides wish totally different material in the brief.

When acting for the solicitor, you would consider including any correspondence to or from the client concerning fees, compliments from the client, if any motions or the judgment itself were reported, the actual reported case, or in the case of a corporate matter, an organizational chart or some such document that would be very useful.

From the client's standpoint, any letters of complaint or concern should be included in the brief.

As well, it is useful to prepare a Chronology for the benefit of the assessment officer.

**18. Your Retainer**

Especially when acting for the client, it is important to have a written retainer and a firm understanding as to your billing for fees and arrangement for payment of the same. Remember that the client has already had problems with payment with one lawyer. Also, bear in mind that the better you do on behalf of the client at the assessment, the more likely the client is to assess your account.

**19. Interest**

Section 33 of the Solicitors Act provides for interest, as follows:

- "(1)" A solicitor may charge interest on unpaid fees, charges or disbursements, calculated from a date that is one month after the bill is delivered under Section 2.
- (2) Where, on an assessment of a solicitor's bill of fees, charges and disbursements, it appears that the client has overpaid the solicitor, the client is entitled to interest on the overpayment calculated from the date when the overpayment was made.
- (3) The rate of interest chargeable under subsection (1) or (2) shall not exceed the rate that is established for the purpose of section 128 of the *Courts of Justice Act* in respect of an action that is commenced on the day the bill is delivered, or the overpayment is made, as the case may be.
- (4) The rate of interest applicable to a bill shall be shown on the bill delivered.
- (5) On the assessment of a solicitor's bill, the assessment officer may, where he or she considers it to be just to do so in all the circumstances,
  - (a) disallow interest; or
  - (b) fix a rate of interest that is less than the maximum rate authorized by this section,in respect of the whole or any part of the amount allowed on the assessment."

When acting for the solicitor, prepare in advance a listing of all of the accounts, the amounts outstanding, the number of days the amount is outstanding, and an interest calculation. If it is separately prepared for each account, it is easy to adjust if interest is awarded at a different rate.

## **20. Trust Accounting**

Early on, the solicitor's office should prepare their trust accounting and ensure that they have double checked the total amount of the bills, the amount paid and the amount outstanding. The trust accounting should be agreed upon well before the assessment.

## **21. Offers to Settle**

Offers to settle apply to assessment for costs.

When acting for the solicitor, as soon as you are retained, seek dockets and consider advising in your first letter that once you have the dockets and an opportunity to review the solicitor's file, you will be submitting an offer to settle. Likewise, when acting for the solicitor, there is no reason that an offer to settle can't be put in early on.

I strongly urge all sides to submit an offer to settle as early as possible.

## **22. Attempts to Settle**

Although an assessment of costs can be a trial by ambush, there is no reason that counsel for the client and for the solicitor cannot attempt to resolve in advance the trust accounting, disbursements, interest, and at least try to identify the contentious matters.

## **23. Summary**

Hopefully, this paper has highlighted some of the considerations to be taken into account regardless of whether you are acting for the client or the solicitor.

It has been my experience that, too often, solicitors, when they are served with an Appointment for Assessment of Costs, just hope the situation goes away, never prepare adequately, and then get embarrassed at the assessment. Likewise, too often, clients use the assessment of costs forum out of a sense of vengeance, with the result that the client, if the solicitor properly prepares, gets gravely disappointed.

## TIPS

### Acting for the Client

▶ Are all related accounts included in the assessment?

▶ Read the client's file

▶ See the solicitor's whole file

▶ Obtain all dockets and scrutinize dockets:

- docketing errors
- duplication of effort
- excessive in-house conferences
- time spent
- research time

### Acting for Either

▶ Is time set aside sufficient?

▶ Prepare arguments on the 9 factors

▶ Brief of Important Documents

▶ Written Retainer

▶ Interest Calculations

▶ Serve Offers to Settle

▶ Attempt to resolve disbursements

### Acting for Solicitor

▶ Fully and completely organize the file

▶ Read the solicitor's file

▶ Serve Evidence Act notice

▶ Line up experts to prove disbursements

Court file No. RE 1575/92

ONTARIO COURT OF JUSTICE  
(GENERAL DIVISION)  
COUR DE L'ONTARIO (DIVISION GENERAL)  
IN THE MATTER OF THE SOLICITORS ACT

B E T W E E N:	)	
	)	
SWADRON ASSOCIATES	)	<u>E.-A. Johnson</u>
	)	
Solicitors	)	for the solicitors
	)	
- and -	)	
	)	
DANIEL F. O'HANLEY	)	<u>B. P. Bellmore</u>
	)	
	)	for the Ontario
Client	)	Legal Aid Plan

ASSESSMENT OFFICER D. MCNEILL

REASONS FOR DECISION

This is an assessment of costs pursuant to an order dated August 14, 1992, issued on behalf of the local registrar with respect to three bills delivered by the solicitor to the client. The assessment hearing was a full day on December 21, 1992, and a half day on December 30, 1992. Counsel filed written submissions and a reply on behalf of their clients.

The bills are dated July 15, 1991, in the amount

of \$1,712.00, November 25, 1991, in the amount of \$1,341.78 and July 14, 1992, in the amount of \$26,389.73, and represent \$27,408.00 for fees, \$109.30 for disbursements and \$1,926.21 for G.S.T., for a total of \$29,443.51. The client has paid on account \$3,700.00, leaving a balance of \$25,743.51. The solicitor's dockets, (Exhibit #2) indicate the bills are for the period from March 1, 1991 to February 7, 1992. I am assessing fees for all services provided by the solicitor during this period as shown on the dockets. On February 7, 1992, a settlement was reached with the Ontario Legal Aid Plan under which the client's solicitor and client costs as assessed by an assessment officer would be paid. The client signed a release dated April 9, 1992 in this regard. (Exhibit #4)

The solicitor was retained to act for the client in respect of the client's detention on February 24, 1991, by the Elliot Lake Police Force and his contact by telephone on that date and on March 5, 1991, with duty counsel for the Ontario Legal Aid Plan at Elliot Lake. The first contact by the solicitor with the client was during the latter part of February, 1991. The client's evidence was that he had visited eight or nine lawyers before being referred to the solicitor. The client was called as a witness by the solicitor at the assessment hearing.

The police were acting on a warrant relating to an unpaid fine of \$60.00 for a liquor violation when they detained the client. The client alleged that he was "pushed around" by the police and when he spoke to the duty counsel by telephone from the police station, he was subjected to foul language by the duty counsel. The duty counsel apparently confirmed the language used on February 24, 1991, when the client subsequently telephoned him on March 5, 1991, and taped the conversation. During the client's conversation with the duty counsel on February 24, 1991, the police phoned the client's mother, who came to the police station and paid the fine releasing the client from custody.

The client wanted the duty counsel accountable for his statements and initially wanted him disbarred, together with compensation for the monies spent in achieving this objective. This would include out-of-pocket expenses and any legal expenses. The client was not seeking damages. The client advised the solicitor of his objectives and that he did not have very much money. The client settled for written apologies from the duty counsel and the Ontario Legal Aid Plan; a promise to pay his solicitor-client fees as assessed; out-of-pocket expenses of \$611.09, and the payment of interest. (Exhibit #4). The client at one point

wanted the solicitor to commence an action against the Elliot Lake Police, but this was not pursued.

The client contacted the Toronto Star, the Toronto Sun, the Globe and Mail and the Elliot Lake Standard because he wanted the story to become public. After retaining the solicitor, the client had him field any calls with the media. The solicitor's dockets show twenty-seven 'telephone attendances with' the media between March 1, 1991, and April 3, 1991, some of which were initiated by the solicitor. The dockets show eighty-one 'telephone attendances' with the client, sixty-one occurring between March 1, 1991, and May 31, 1991. The dockets also indicate fees for an additional seventeen calls to the client's home or office when no contact was made with the client by the solicitor. The solicitor also billed the client when he telephoned other solicitors in these matters and was unable to reach them. The solicitor also met with the client on six occasions which resulted in billings of \$1,700.00. The solicitor knew on May 13, 1991, that the client was not eligible for a Legal Aid Certificate. There was no evidence that the client was quoted any minimum estimate of the fees if the matters were settled. He was told only that it would be very expensive if matters went to trial.

The solicitor gave evidence that the client may have had a case for intentional infliction of mental harm, and many hours were spent on research in this regard. The solicitor stated that the client's claim for damages would be between \$100,000.00 and \$200,000.00. A student spent eight or nine hours drafting a statement of claim which was never issued. (Exhibit #5) The draft statement of claim was not discussed with the client. The solicitor's comments on the statement of claim in giving evidence were "I don't think we're going to see a very good statement of claim" and "It's probably garbage". The first written demand for compensation made by the solicitor was on December 13, 1991. The dockets show forty-one "memoranda to file" between March 1, 1991, and April 11, 1991, and an additional thirty-six to February 7, 1992, for a total of seventy-seven.

A junior solicitor, student-at-law and clerks spent ninety-two hours working on the file for fees of \$5,980.00. None of these persons attended the assessment hearing to give evidence. The solicitor spent eighty-five hours on the file for fees of \$21,427.50. The hours spent on the file totalled one hundred and seventy-seven hours for fees totalling \$27,408.00.

In assessing the accounts before me I have reviewed all of the evidence, giving particular consideration to the nine factors approved by the Court of Appeal in Re: Cohen and Kealey & Blaney, (1985), 26 C.P.C. (2d) 211, as follows:

1. The time expended by the solicitors
2. The legal complexity of the matters dealt with;
3. The degree of responsibility assumed by the solicitor;
4. The monetary value of the matters in issue;
5. The importance of the matters to the client;
6. The degree of skill and competence demonstrated by the solicitor;
7. The results achieved;
8. The ability of the client to pay; and
9. The reasonable expectation of the client as to the amount of the fee.

I am reducing the fees allowed the solicitor for the reasons which follow.

The solicitor charged fees of \$2,123.66 in determining that the client had no cause of action against the Elliot Lake Police Force; fees of \$2,758.05 for pursuing a complaint by the client against the Law Society; fees of \$1,726.70 for his contacts with the media, and fees of \$1,142.00 in determining that the client was not eligible for a Legal Aid Certificate for a total of approximately \$7,700.00. The solicitor spent more time than was necessary on these matters, and the fees are being reduced accordingly.

The client was not seeking damages. The draft statement of claim was never issued or discussed with the client. The solicitor's evidence was "I don't think we're going to see a very good statement of claim" and "It's probably garbage". I am not allowing any fees for the work done on the statement of claim.. The first written demand for compensation made by the solicitor was on December 13, 1991.

The client advised the solicitor that he did not have very much money., The client was not sent interim accounts to let him know what the fees were at various stages of the proceedings. The client should have been advised of the fees by interim bills in respect of the

action against the Elliot Lake Police Force; the contacts with the media and his unsuccessful application for a Legal Aid Certificate. The client was not given any minimum estimate of the fees if all matters were settled but only advised that it would be very expensive if the matter went to trial. The solicitor knew on May 13, 1991 that the client was not eligible for a Legal Aid Certificate and should have "stopped the clock" at the time.

A junior solicitor, a student and clerks worked on the file but did not attend on the hearing to give evidence and be cross-examined as to their degree of skill and to establish the value of the work done for the client. These persons billed for ninety-two hours and fees totalling \$5,980.00 and are being reduced for the reasons given.

The matters the solicitor was handling for the client were not legally complex. The facts were straightforward, and any legal complexity was created by the solicitor's actions. This was a matter of negotiation with the Ontario Legal Aid Plan and the Law Society.

The dockets show twenty-seven 'telephone attendances with' the media by the solicitor, some of which were initiated by the solicitor. Ostensibly, this was to

bring the client's story to the attention of the public. The time spent would have been better utilized by immediately contacting the Law Society and the Ontario Legal Aid Plan after being retained by the client.

The dockets show eighty-one telephone attendances with the client. The solicitor must control the client in this regard and make it very clear to the client how costly such calls are to keep the costs down. The solicitor also made seventeen calls to the client's home or office when he was unable to contact the client. No fees are being allowed for these latter calls or for calls to solicitors in these matters he was unable to contact. The dockets also show forty-seven 'memoranda to file' by the solicitor which are excessive, and should not all be paid for by the client.

Interim bills should have been sent to the client which reflected the fees owing at that time. When the client is paying \$400.00 or \$500.00 per month and has advised the solicitor that he does not have much money, the bills would let the client see how the costs are mounting and enable him to decide whether or not to proceed further. In discussing the three accounts, the solicitor said "the first two accounts were small to take into account the money that had accumulated in trust, and I did not want to send

the final account and create income that I would never get for months and months at least, what ever portion I would get out of it. That was the ... that account was triggered for accounting purposes." When the bill dated July 15, 1991, in the amount of \$1,712.00 was sent the fees to that date were approximately \$14,000.00. When the bill dated November 25, 1991, in the amount of \$1,341.78 was sent, the fees to that date were approximately \$23,000.00. At the date of settlement, February 7, 1992, the fees were approximately \$27,500.00 as shown on the bill dated July 14, 1992. No client could reasonably expect after receiving the first two bills that the final total for fees would be \$27,408.00.

The junior solicitor, student-at-law and clerks who worked on the file but did not attend the hearing to give evidence billed for ninety-two hours and fees of \$5,980.00. The solicitor billed for eighty-five hours and fees of \$21,427.50. The total hours billed was one hundred and seventy-seven hours for fees totalling \$27,408.00. The fees billed indicate unnecessary work done for the client of no substantial value to him; unreasonable time expended and time wasted and needlessly spent. I find the time expended to be manifestly excessive.

For the reasons given above, I am reducing the fees allowed to the solicitor by \$24,000.00 to \$3,408.00. I am not reducing the disbursements of \$109.30. I am allowing G. S. T. of \$246.21. I am assessing the bill of costs at \$3,763.51. Interest is provided for in the release signed by the client. I am not allowing interest. I am allowing the solicitor \$50.00 for the cost of the assessment hearing. The client has paid on account \$3,700.00. There is therefore due to the solicitor by the client the sum of \$113.51.

Donald McNeill

ASSESSMENT OFFICER D. MCNEILL

Dated this 17<sup>th</sup> day of February, 1993

DM:mjd