

**SOLICITOR AND CLIENT ASSESSMENTS:  
HOW TO AVOID THEM,  
HOW TO MAXIMIZE RECOVERY**

Presentation for Lincoln County Law Association

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## Biography

### Edwin G. Upenieks

Ed Upenieks is a partner in the Brampton law firm of Lawrence, Lawrence, Stevenson LLP. He has been involved as counsel in some of Ontario's leading costs cases, having represented over 50 law firms on costs matters. He is certified as a Specialist in Civil Litigation and has extensive trial and appellate experience before the courts and specialized administrative tribunals.

Ed has lectured on costs to the Ontario Bar Association, LawPro, the Law Society of Upper Canada, The Advocates Society, the Ontario Trial Lawyers Association, the Peel Law Association, Osgoode Professional Development, the Simcoe Law Association, the Young Lawyers' Division East - Ottawa, and the Institute of Law Clerks of Ontario.

Ed co-authored *Enforcing Judgments and Orders*, a standard textbook that includes a section on costs awards, solicitors' liens and charging orders, and is working on a practical costs textbook.

Ed was called to the Ontario Bar in 1983 and is a graduate of Osgoode Hall Law School.

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## **A. HOW TO AVOID HAVING YOUR ACCOUNTS ASSESSED**

It would appear that Notices of Assessment are becoming more common especially for litigators handling family law and Plaintiff's personal injury cases. Litigators in those two areas are particularly at risk for having their accounts assessed.

If you have not yet been served with a Notice of Assessment of Costs, this will unfortunately happen at some stage in your career. Prudence dictates that you follow good file management and communication practices to minimize the likelihood of being assessed and maximizing the chances of a favourable resolution.

### **i) Be Careful Who You Take on as A Client**

There are certain red flags that we should always be mindful of, including the following:

- a chain of previous lawyers acting for the client
- the client having a fee dispute with more than one previous lawyer
- the client repeatedly says "it's a matter of principle"
- the client mentions proposed or pending complaints to the Law Society
- the client comes to you with an urgent matter on the eve of hearing

My hard and fast rule that I have learned to abide by is that I will not take on any new matter for a client where they mention a proposed or pending complaint to the Law Society. In such instances, I always follow up with the client to confirm that I have not been retained and that I do not have any portion of their file.

ii) **Have a Retainer Agreement**

You should have a Retainer Agreement in every file, not just one from a client for whom you are acting on multiple matters since the Retainer Agreement itself should, at a bare minimum, specify your hourly rates and other factors taken into account in arriving at the fee, the requirement to replenish the retainer and your entitlement to get off the record if the accounts are not being paid. There is case law suggesting that it is necessary to advise your client of hourly rate changes as they occur.

iii) **Monitor Accounts Receivable**

Especially during these recessionary times, it is important that you do not let accounts receivable build up – growing accounts receivable are sometimes an early indicator of a problem client and it is often these clients who turn on the lawyer.

It is better to deal with accounts receivable when they first arise.

iv) **Keep the Client Informed**

It is wise to advise the client in writing about risks, costs and likely outcomes and to do so on a regular basis since this is particularly the case for lawyers acting on family law files or Plaintiff's counsel in personal injury files. If the client does not accept your recommendations and is insisting on a certain course of action, send a letter confirming your advice, their refusal to follow your advice, and have them sign off and return the letter to you.

## **B. PREPARATION FOR THE ASSESSMENT OF COSTS**

Based on my extensive experience at solicitor-client assessments, I would recommend the following steps be undertaken to prepare for the assessment.

### **i) Speak to Another Lawyer or Retain Legal Counsel**

- the old adage about the person who acts for himself has a fool for a client is particularly true for assessments of costs
- lawyers acting alone frequently respond emotionally and inappropriately and hurt themselves in the pocketbook and also damage their reputation
- at the very least, speak to another lawyer familiar with the assessment process
- it is important to not be emotional but to be dispassionate

### **ii) Prepare Your File**

You and your assistant should begin organizing your file as soon as possible for your own benefit and for the benefit of your counsel.

- one of the first steps should be to prepare a summary of all of the accounts to this client broken down by date, account number, fee amount, disbursement amount and what is outstanding (for example, see Tab 1 to this brief)
  - all too often we hear from assessment officers that lawyers do not even know the total of their accounts or what has been paid and this not only wastes court time, but is embarrassing to the lawyer
- your accounting staff should ensure that the trust ledger is correct and complete
  - they should double-check all the figures and especially look for any errors that may have been made in favour of the lawyer

- review all dockets checking for any docketing or billing errors, which should be corrected as soon as possible
  - a lawyer who prepares properly on behalf of a client will find these errors and it is far better to bring them to the forefront than to be confronted during cross-examination
  - whether the file has already been organized in such a fashion or not, the file should be organized into sub-headings such as:
    - Accounting Information
    - Correspondence
    - Pleadings
    - Research
    - Memoranda to File

In reviewing the file in preparation for the assessment, pay special attention to any correspondence or telephone communication with the client in relation to the accounts and to any complaints or praises from the client.

Prepare a file summary for your counsel, with a thumbnail sketch of the work that was undertaken, commentary on the nine factors (described below) and a separate section on potential problems or issues with the accounts.

### iii) **Identifying the Issues**

Together with your legal counsel, you will review the file and the file summary and assist the counsel to try to identify the issues.

- to do so, counsel may write to the client or the client's lawyer to obtain a list of complaints or concerns
  - this is very important because there are no pleadings in Assessments of Costs and it is imperative to know the complaints with some particularity,

rather than that the accounts are too high or the number of hours are too high

- your counsel will try to get an agreement on disbursements or at least to find out which ones are being challenged
- your counsel should serve an *Evidence Act* notice for the dockets and the accounting records
- your counsel should prepare an Assessment Brief, described below

iv) **Assessment Brief**

The Assessment Brief should contain at a minimum, the summary sheet of the accounts (example as attached at Tab 1 herein), the Order for Assessment, the accounts themselves, all docketing entries, all disbursement entries that are in issue, the Retainer Agreement, all correspondence about fees, correspondence about complaints and select portions of the work done.

Some counsel include in the Assessment Brief as much of the lawyer's file as possible, but I believe it is more effective to select important documents, since in my view it is not necessary for the purposes of a court record to enter into evidence the solicitor's entire file.

An example of an index for an Assessment Brief is included at Tab 2.

What is important is to organize the file and the accounting records. First impressions before the assessment officer are of paramount importance. Counsel need to put their best foot forward when they attend at the assessment office since, as the lawyer being assessed, you have to project preparedness, thoroughness and an organization level that to the Assessment Officer suggests that you are worth the hourly rate that you charge to the client and then some.

### **C. ATTEMPTS TO SETTLE THE ASSESSMENT OF COSTS**

Whether at the first appearance or at mediation or before the evidence is called at the actual assessment, Assessment Officers always encourage parties to settle. It is in the best interest for both parties to try to settle and to do so at an early stage. This is even more the case for the lawyer, as the lawyer will not be paid for time to prepare for and attend on the assessment. Counsel can be paid for their time, but the lawyer will not be reimbursed for time to attend at the assessment (being in the position of party to the assessment).

The Offers to Settle rule, *Rule 49*, applies equally to assessments of costs.

However, unlike a typical Plaintiff's claim, where the Plaintiff is awarded some costs if there are no offers to settle and the Plaintiff has some recovery, this is not always the case in assessments of costs.

There are no cases reporting on the percentage of reduction that entitles lawyers or clients to costs, though there is a decision frequently cited, which speaks to entitlement to costs to the lawyer or the client based on the size of the reduction. In *Re Solicitor* (see Tab 3), Master McBride summarized the costs applicable, as follows:

*"On a reference as to fees payable by a client to his solicitor, the costs of the reference will normally be awarded as follows:*

*If the bill is patently excessive – payable by the solicitor;*

*If excessive but not patently so – payable by the solicitor;*

*If reasonable but apparently excessive – no costs;*

*If patently reasonable – payable by the client."*

In my experience, it is best to take the initiative and the prepare an offer to settle early in the process particularly as if the matter proceeds to an assessment as the costs are often as much as the monies in dispute at the assessment.

#### **D. TIPS FOR THE ASSESSMENT HEARING**

An assessment of costs is like a mini-trial, with sworn testimony, cross-examination, etc.

However, unlike a trial, there are no pleadings and no examinations for discovery. Hence, the added importance of preparing for the assessment, and knowing the complaints or concerns of the client to avoid a “trial by ambush”.

Counsel should bring to the assessment not only a summary of the accounts, but also a comparison of how the hours docketed compared to the time billed, and likewise, how the disbursements incurred compared to the disbursements billed. It is prudent to bring along interest calculations.

Counsel do not seem to appreciate that whether the assessment process is started by the client or the lawyer, the lawyer is always the applicant and has the obligation to prove his or her accounts. The lawyer goes first in proving the accounts and is subject to cross-examination. Depending on the work involved, it may be necessary to call other lawyers, clerks or students who did work on the file to the extent that their evidence will be challenged and to the extent that their time cannot be accounted for solely by the *Evidence Act* notice.

Especially for small firms, taking time out from a busy practice and involving more than one or two of the professionals can be disruptive and expensive.

The client then calls its witnesses, but the client is not required to give evidence.

More than in other types of files, there seems to be a lot of bad blood between the parties and a lot of emotion and animosity. The lawyer has to resist the temptation of becoming emotional or lodging into personal attacks. In our experience, it is far better to describe the client as a very “demanding” or “difficult” client without saying more. Such a client, especially one that is self-represented, will make emotional outbursts and show their true colours during the assessment, without the necessity of the lawyer launching into any personal attacks.

For a simple straightforward matter, the Assessment Officer will often provide oral reasons immediately following the assessment, but in matters that take more than one day, the Assessment Officer may seek written submissions and may, as well, require transcripts of the evidence to be provided to counsel before written submissions are made. In such a case, written submissions are usually followed by written reasons.

#### **E. THE ONE CASE YOU HAVE TO KNOW**

The leading case in the area is a Court of Appeal decision in *Cohen v. Kealey & Blaney* (see Tab 4), which states the following are factors to be considered on the assessment of costs:

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 values of the matters in issue
5. the importance of the matters to the client;
6. the degree of skill and competence demonstrated by the solicitors;
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.

Since that decision, there has emerged a tenth and unofficial factor, being credibility, which is probably more important in assessments of costs than in other civil proceedings.

Of the nine factors, the two that seem to be the most important in typical assessments are the time expended and the results achieved.

As the file is prepared, points for each of the factors should be listed and the closing arguments should focus on the nine factors.

**F. INTEREST**

Section 33 of the *Solicitors Act* provides for interest being charged on the account at a rate established by the *Courts of Justice Act* calculated from a date that is one month from the date the bill is delivered. The same section also provides for repayment to the client of interest on the overpayment, but calculated from the date when the overpayment was made.

Section 33 also provides that the assessment officer may, where he or she considers it just to do so in the circumstances, disallow interest or fix a rate of interest that is less than the maximum authorized.

Where there are long series of accounts being assessed, and the Assessment Officer provided a global reduction, it is sometimes difficult to determine precisely the amount of interest that should be repaid to the client. Often the Assessment Officers use a mid-point in the continuum and calculate interest from that point in time based on a percentage reduction across the board.

**G. "APPEALING THE ASSESSMENT"**

As an assessment is a reference, the procedure to dispute the Assessment Officer's decision is by bringing a motion to oppose confirmation to a Judge of the Superior Court, as set out in section 6(9) of the *Solicitors Act* and Rule 54.09 of the *Rules of Civil Procedure*. As such, there is no "appeal". As for references, there is a 15-day period to bring the motion to oppose confirmation from when the assessment is confirmed. Often times, a transcript is not yet available, but will be required for the motion to oppose confirmation. The prudent course is for the lawyer to serve the Notice of Motion with either an early date and the understanding that the matter will be adjourned *sine die* until after a reasonable time after the transcripts are available or alternatively, to choose a distant return date when it is anticipated that the transcripts will be available.

Thereafter, there is an automatic right of appeal to either the Divisional Court or the Court of Appeal, depending on the amount in issue.

Please note that the standard of review can be found in *Kelleher, Hoskinson v. Knipfel* (see Tab 5 herein) which states:

*“The Court will not interfere with the discretion of the assessment officer unless his decision is so unreasonable as to suggest an error in principle.”*

It is particularly difficult to upset the decision of an Assessment Officer as the Judge will not substitute his or her own view of the appropriate figure unless there has been an error in principle. This highlights the importance for properly preparing and presenting your best case at the assessment of costs.

## **H. CONCLUSION**

By good written communication with your client, including on the matter of costs, by carefully screening who you take on as a client and closely monitoring your accounts receivable, hopefully you will only require one attendance on an assessment of costs in your career. If you follow the steps outlined in this paper, the preparation and attendance at the assessment of costs will not be as horrifying an experience as originally thought.

TAB 1

**Law Firm v. Client**

**Summary of Accounts**

<b>Tab No.</b>	<b>Date</b>	<b>Invoice No.</b>	<b>Fees</b>	<b>Disbursements</b>	<b>GST</b>	<b>Total</b>	<b>Payments Made</b>	<b>Time Docketed</b>
1	March 31, 2005	10/10182	6,905.00	39.48	486.11	7,430.59	7,430.59	6,896.00
2	May 31, 2005	10/10410	4,675.00	74.32	332.45	5,081.77	5,081.77	4,661.50
3	June 30, 2005	10/10683	2,625.00	81.82	189.48	2,896.30	2,896.30	2,598.00
4	July 31, 2005	10/10886	4,610.00	31.16	324.88	4,966.04	4,966.04	4,594.00
5	August 31, 2005	10/10919	2,355.00	299.74	185.83	2,840.57	2,840.57	2,349.00
6	September 30, 2005	10/11237	4,125.00	468.13	321.52	4,914.65	4,914.65	4,106.00
7	October 31, 2005	220/11297	974.00	44.61	71.30	1,089.91	1,089.91	974.00
8	November 30, 2005	220/11378	4,565.00	213.51	334.50	5,113.01	5,113.01	4,565.00
9*	December 31, 2005	220/11588	16,133.00	636.72	1,173.88	17,943.60	17,984.59	16,763.00
10	January 31, 2006	220/11733	4,065.00	6,025.00	706.30	10,796.30	10,796.30	4,065.00
11*	February 28, 2006	220/11856	20,907.50	1,800.35	1,589.55	24,297.40	24,304.05	20,907.50
12	March 31, 2006	220/11926	<u>8,087.50</u>	<u>427.20</u>	<u>596.03</u>	<u>9,110.73</u>	<u>9,110.73</u>	<u>8,087.50</u>
<b>TOTALS</b>							<b>\$96,528.51</b>	<b>\$80,566.50</b>
							<b>\$26,480.87</b>	<b>\$6,311.83</b>
							<b>\$10,142.04</b>	<b>\$80,027.00</b>

\*payment includes interest -- total interest charged \$47.64

TAB 2

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN:

**LAW FIRM**

Lawyer

- and -

**CLIENT**

Client

**I N D E X**

<b>TAB NO.</b>	<b>DOCUMENT</b>
1	Summary of Accounts
2	Order for Assessment dated February 4, 2005
3	Account dated November 30, 2001
4	Account dated September 26, 2002
5	Account dated November 27, 2002
6	Account dated January 24, 2003
7	Account dated February 21, 2003
8	Account dated June 24, 2004
9	Lawyer's Dockets
10	Disbursement Back-Up
11	Retainer Agreement dated November 1, 2001
11	Chronology
12	Statement of Claim dated November 8, 2001
13	Statement of Defence dated December 6, 2001
14	Reasons for Judgement of Smith, J. dated June 2, 2004
15	Various correspondence from Client to Law Firm regarding accounts
16	Email from opposing lawyer praising Law Firm's work in court dated June 9, 2004

TAB 3

[1969] 2 O.R. 823

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Solicitor, Re

Re Solicitor

Ontario Assessment Officer

Taxing Officer (McBride)

Judgment: July 31, 1969

Docket: None given.

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Counsel: C.L. Rotenberg, for solicitor

H.J. Bliss, for client

Subject: Civil Practice and Procedure

Practice --- Costs -- Practice on taxation or assessment of costs -- Costs of taxation or appeal

Costs of taxation -- Entitlement.

Where on a taxation reference the solicitor's bill is patently excessive or excessive but not patently so, the client will usually be entitled to the costs; is reasonable but apparently excessive, there will usually be no costs; is obviously reasonable, costs will be awarded to the solicitor.

Taxing Officer (McBride):

1 During the course of this taxation reference, I have taxed nine bills delivered by the solicitor to the client. These bills were referred for taxation by five *praecipe* orders, all of which were issued on the application of the solicitor. I have already given my reasons in writing for the disposition I have made of five of the nine bills, including all the large bills. I did not reserve my taxation of the other four bills and I do not propose to give any reasons for my disposition of those bills other than those I gave orally at the time the bills were taxed.

2 The nine bills as submitted for taxation totalled \$17,072.29, including disbursements. I have taxed and allowed those bills at \$11,395.99. The total amount taxed off is \$5,676.30. In the result, therefore, the bills have been allowed in total, at almost exactly two-thirds of the amount at which they were delivered to the client.

3 This taxation reference, or rather series of five references, has occupied a total of about 19 hours consisting of

[1969] 2 O.R. 823

all or parts of seven days as follows: two hours on the first day, the afternoon of the second day, an hour and a half on the third day, an hour in the morning and the whole afternoon of the fourth day, the whole of the fifth day, the morning of the sixth day, and one hour on the seventh day. These days did not run consecutively but were spread between January 28th and April 16th.

4 I have set out the results of this taxation reference and the time it has occupied as an indication to some extent that this proceeding was of substantial importance, at least to the parties concerned, and made considerable demands on the time and energy of the counsel involved. The revelation of this fact is, in turn, of significance only because the sole matter now before me is that of the costs of the reference. As I have already mentioned this was, in fact, a series of five references, but I propose to deal with the matter of costs as if it were one reference only.

5 The general question of costs of a taxation reference seems to have long been beset by uncertainty and the absence of consistency both as to the quantum of those costs and, perhaps more surprisingly, as to whether, in a given case, they should be awarded to the solicitor or to the client. Whether the costs should be awarded to one party or the other is a matter in the discretion of the Taxing Officer. In this respect his position is similar to that of a Judge or Officer presiding at a trial or other proceeding. Fortunately, the manner in which that discretion ought to be exercised by the Taxing Officer with respect to a taxation reference does not seem to have become as conventionalized as it appears now to be generally in the case of the awarding of costs of a trial. The result is that the discretion to be exercised in awarding the costs of a taxation reference remains something more than merely an interesting euphemism. I propose to record my views on the proper method of determining to which party the costs should be awarded. However, I preface those views with the observation that nothing I say is intended to influence my colleague, Master Saunders, the other part-time Taxing Officer of this Court, at Toronto, or any local Taxing Officer, in the exercise of their discretion in similar cases. It is perfectly obvious that I have no status or jurisdiction to attempt to do that. It may, nevertheless, be some guide to those solicitors whose lot is to appear before me at some future time in connection with a solicitor-and-client taxation reference.

6 Let me say at the outset that I do not think that the applicant for the order referring a bill for taxation occupies in any material sense a position similar to that of a plaintiff in an action. For this reason, it is not my practice always to award the costs of the reference to the applicant should he achieve partial success. I defend my position in this regard by pointing out that whereas a trial is an adversary proceeding, a reference has generally been considered to be of an inquisitorial nature, an inquiry by the Court or referee into the matters referred. Strictly speaking, therefore, there are no adversaries in a reference proceeding, but I might say, as a matter of experience, that not a few solicitors and former clients, when facing each other across the table in the taxing office, have regrettably given every indication of having adopted the adversary approach to the reference, and with some enthusiasm. There is also the fact that during the period of 30 days after delivery of his bill, a solicitor cannot apply for an order of reference for taxation, and after that period has elapsed, a client cannot do so on *praecipe*. Accordingly, as a matter of procedure, neither the solicitor nor the client is as free to assume the role of applicant in a taxation reference as the parties to a dispute are to assume the position of plaintiff in an action. For these reasons it would be unfair to adopt the procedure of awarding costs generally to the applicant where he has achieved complete or partial success, as an analogy to the position of the plaintiff in an action. I might also mention that I have held firmly to the view that at the opening of the reference hearing the onus is always on the solicitor to justify his bill, quite irrespective of which party took out the order of reference. In this sense, the solicitor always occupies a position analogous to that of a plaintiff.

7 It seems to me that the bill a solicitor delivers to his client will usually fall into one of four categories -- patently excessive; excessive, but not obviously so; apparently, but only apparently, excessive; and patently reasonable. One might reasonably expect that those bills that are patently excessive, and they are not as rare as might be supposed, will be suitably adjusted in the taxing office. I should think it would be beyond argument that the client would be entitled to the costs of the taxation of such a bill. The same disposition of costs should be made on the taxation of the second category of bill, one that is excessive in fact, but not obviously so. With respect to the third category, a bill that is reasonable but appears on its face to be excessive, there would generally be no award of costs to either party. If the bill is apparently excessive, the client would be justified in refusing to pay it and in taking out an order

[1969] 2 O.R. 823

for taxation or waiting for the solicitor to do so, but on the other hand, if it were in fact reasonable, the solicitor would be justified in expecting it to be paid. The fact that the bill appeared to be excessive would almost invariably have arisen because of some defect in or omission from the bill through the fault or neglect of the solicitor. The taxation of a bill in the fourth category, one that is on its face reasonable, would generally warrant the award of costs to the solicitor.

8 It has often been argued by solicitors that they should be awarded the costs of the taxation reference even if their bill is reduced substantially but the client, in fact, has paid nothing before the reference. A not very exhaustive examination of this proposition impels one to the conclusion that it is sheer nonsense. By way of illustration, suppose a solicitor delivers his bill to his client and included in it is a fee of \$1,500. The client, under the shackling influence of a more modest view of the solicitor's worth than that entertained by the solicitor himself, does the only thing he can think to do in the circumstances, he simply does not pay the bill. In the fullness of time he appears in the taxing office in response to a notice served on him, usually by personal service for some reason, and he discovers his assessment of the solicitor's fee was not entirely in error when it is allowed at \$1,100. The solicitor then argues that the client refused to pay, at least the fee of \$1,100, and he, the solicitor, should be awarded his costs of the reference. The short and complete answer to that is that if the solicitor, the only one in a position to know in detail what his services were, missed the mark by about \$400, always assuming that \$1,100 is the mark, how could the client, usually with knowledge of only parts of the solicitor's services and no dockets, be expected to know, or guess, that the right fee would be \$1,100? In my view, a solicitor whose bill has been substantially reduced on taxation is not, under any circumstances, entitled to the costs of the taxation reference.

9 I think it is worth remembering that taxation references are not proceedings between two citizens, dealing with each other at arm's length, and very often represented by solicitors. They are rather disputes between a citizen and his former solicitor, the solicitor often armed with complete records of his services to the client, and the client usually quite unaware of what the solicitor has done for him. Except in the case of corporate clients or very large bills, the client usually attends on the reference without the benefit of counsel, his financial enthusiasm for legal advice and guidance having waned, no doubt, during the period following receipt of the bill under taxation. For these reasons, where the matter is in doubt, my general bias is in favour of awarding the costs of the reference to the client. These, of course, are usually nominal where the client does not retain counsel.

10 Turning now to the taxation reference under consideration, I think the bills taxed fall generally into the category of those that are patently excessive. I say this, notwithstanding the fact that the two smallest bills were allowed without reduction and two others suffered only moderate reductions. However, these four bills, as delivered, totalled only \$1,273.35, only about 7% of the total of all the bills, so this factor is of no significance in the general consideration of all the bills. That the bills were demonstrably excessive is a conclusion to be drawn from two distinct characteristics of most of them. There were charges for services that were in fact not performed and the charges made for some of the other services actually rendered were on their face clearly excessive. The reduction of about one-third in the fees charged in all the bills, including those small bills that were not reduced on taxation, is, I think, eloquent evidence that the solicitor's fees, in total, were manifestly excessive. For these reasons, I have no hesitation in awarding the costs of the taxation reference to the client.

11 I have already indicated the monetary characteristics of this taxation reference and its duration. I allow the client his costs thereof in the amount of \$1,200.

12 *Judgment accordingly.*

END OF DOCUMENT

TAB 4

26 C.P.C. (2d) 211, 10 O.A.C. 344

▷ 1985 CarswellOnt 376

Cohen v. Kealey

COHEN v. KEALEY & BLANEY

In the Matter of the Solicitors' Act, R.S.O. 1980 Chapter 478

In the Matter of Kealey & Blaney, Solicitors of the Supreme Court of Ontario  
and Suzanne Cohen, Client

Suzanne Cohen, Appellant v. Kealey & Blaney, Respondents

Ontario Supreme Court, Court of Appeal

Howland C.J.O., Lacourcière and Robins JJ.A.

Heard: June 13, 1985

Judgment: June 28, 1985

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Counsel: James Chadwick, Q.C., for appellant.

William Riley, for respondent.

Subject: Civil Practice and Procedure

Costs -- Practice on taxation or assessment of costs -- General principles -- Factors to be considered -- Amount assessed being inordinately and unfairly high in relationship to maximum fee agreed upon -- Account reduced on appeal.

The solicitor and the client agreed that fees and disbursements payable after a successful trial would not exceed \$50,000. In the event of an unsuccessful trial, fees and disbursements would not exceed \$20,000. The solicitor accepted a retainer of \$10,000 and then demanded an additional retainer of \$30,000. The client treated this as a repudiation of the agreement and terminated the solicitor-client relationship. The client retained new counsel who settled the action prior to trial. At the assessment of costs, the solicitor was allowed \$40,000 for fees plus \$5,777.82 for disbursements. The client unsuccessfully appealed. The client further appealed.

Held:

The appeal was allowed; the bill was reduced to \$25,000 plus disbursements.

26 C.P.C. (2d) 211, 10 O.A.C. 344

The learned Assessment Officer correctly listed the considerations applicable on an assessment:

- (a) the time expended by the solicitor;
- (b) the legal complexity of the matters to be dealt with;
- (c) the degree of responsibility assumed by the solicitor;
- (d) the monetary value of the matters in issue;
- (e) the importance of the matter to the client;
- (f) the degree of skill and competence demonstrated by the solicitor;
- (g) the results achieved;
- (h) the ability of the client to pay; and
- (i) the client's expectation as to the amount of the fee.

The learned Assessment Officer failed to attach sufficient weight to the agreement between the parties. The agreement was not an estimate but rather was a firm understanding as to the maximum fee depending on the success of the proceedings. Even in the case of an estimate, a solicitor was required to advise the client without delay of any developments that were likely to increase the fee beyond the estimate.

The account should be reduced. The amount allowed by the Assessment Officer was so inordinately and unfairly high in relationship to the maximum fee agreed upon as to constitute an error in principle.

Statutes considered:

Solicitors Act, R.S.O. 1980, c. 478

#### **Annotation**

This 1985 judgment is of significant importance to merit being reported; it has been receiving frequent judicial consideration.

APPEAL by client from dismissal by Southey J. on October 3, 1984 of appeal from report of Assessment Officer dated August 13, 1984.

**The judgment of the Court was delivered by *Robins J.A.* (orally):**

1 This is an appeal by the client, Suzanne Cohen, from the order of Mr. Justice Southey dated October 3, 1984, dismissing her appeal from the report of the taxing officer taxing the solicitors' account in the sum of \$40,000 for fees (representing a reduction of \$20,000) and \$5,777.82 for disbursements.

2 The solicitors were retained with respect to the following matter. The client had entered into a separation agreement with her husband dated July 6, 1977 which was based upon information provided by him that his net as-

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set position was \$76,202. The couple was subsequently divorced by decree nisi dated December 20, 1977 and made absolute May 2, 1978. The decree nisi incorporated the terms of the separation agreement. In December 1980, stories appeared in local newspapers in which the client's former husband was said to have a net worth in excess of \$3 million. This prompted her to seek legal advice. She was referred to Mr. Glen Kealey, a solicitor experienced in the area of matrimonial law, and retained him to act on her behalf.

3 The client was extremely concerned about fees from the commencement of her relationship with the solicitor. There were detailed discussions about fees and letters were exchanged on the subject. On December 30, 1980, confirming previous conversations, the solicitor wrote:

I have told you that the total expenses that you may incur for legal fees and disbursements including chartered accountant and real estate appraiser fees will certainly exceed \$10,000 and may be as high as \$50,000. You have given me today a retainer in the amount of \$10,000 which I will put into my trust account and account to you on a regular basis. You will be kept fully advised at all times of all legal steps and settlement negotiations. If at any time you have the slightest concern or anxiety please do not hesitate to ask for further information.

I cannot now exactly determine the total fee for legal services since this primarily depends upon the results and on the time. At this point I cannot exactly predict the results because we simply do not know what your ex-husband's financial position was at the material time. Moreover, I cannot predict the exact time since if the matter does not settle before trial the trial itself I would estimate would take at least three days.

4 It was acknowledged on the taxation that the \$50,000 figure was inclusive of all fees and disbursements to the completion of trial. In response to that letter, the client wrote under date of January 9, 1981:

You have stated that fees for my claim, inclusive of accountants, real estate appraisers and legal, would be a minimum of \$10,000 and maximum of \$50,000, including trial. I am concerned by this fact.

You have, firstly, stated verbally that I will have a monthly statement, of expenses incurred with the monies from the \$10,000 retainer I have paid you.

In addition to this, since there is quite a discrepancy between \$10,000 and \$50,000, and because I have little past experience and knowledge in legal matters, I would further like some indication as to costs at the various stages you have outlined to me, that we must go through in this procedure.

.....

I have expressed to you the fact, that while I am in a position to pay you \$10,000, I am certainly in no financial position to pay you \$50,000.

It is, therefore, our understanding, as discussed, that I am unable to pay the maximum fee indicated. Such fees would have to be taken from a successful judgement that I might obtain.

You have also indicated that it is also understood that in the event that we are unsuccessful, that the trial of this matter would cost me \$20,000 maximum, and no more, as I would have to borrow even that, and I would be unable to pay any greater sum.

5 The solicitor replied on January 16, 1981, confirming the \$20,000 limit if the action proved unsuccessful at trial and set forth his hourly rate as being between \$100 and \$150 per hour.

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6 Upon retaining the solicitor the client paid \$10,000 by way of retainer fee and later paid a further \$10,500 by way of interim retainer accounts to November 1982.

7 In November 1982, the solicitor adopted a position with respect to fees contrary to the arrangement set forth in the correspondence. By letter dated November 11, 1982 he demanded an additional retainer of \$30,000 payable by post-dated cheques in four monthly instalments of \$7,500 each commencing November 1982 and stated that he required that sum to proceed with the pending actions. The client treated this as a repudiation of "our original agreement" and terminated the solicitor-client relationship.

8 The solicitor had commenced two separate actions, one by way of originating notice of motion seeking to vary the decree nisi; the other, by way of writ claiming deceit and fraudulent misrepresentation against the former husband. There were a considerable number of motions in the proceedings and undoubtedly much time and effort was expended by the solicitor in seeking to advance these matters to trial. However, at this stage, that is, by November 1982, examinations for discovery had not yet been held. The matter was subsequently settled before trial by other solicitors.

9 In June 1983, the solicitor submitted the account which is the subject-matter of these proceedings. A lengthy taxation hearing was conducted by the local taxing officer in Ottawa at the conclusion of which, in brief reasons, he reduced the account from \$60,089 to \$40,000 and allowed disbursements of \$5,777.82. The client's appeal from that decision to Southey J. sitting in Motions Court was dismissed.

10 With the greatest of deference to the learned Motions Court Judge, we are unable to agree with his conclusion that the taxing officer made no error in principle that would justify interference with the taxation.

11 It is conceded that the understanding upon which the solicitor was retained fixed the maximum fee, inclusive of disbursements, that the solicitor was entitled to receive for his services through to trial at \$50,000. The range of fees originally quoted by the solicitor was a wide one, between \$10,000 and \$50,000 including disbursements. The taxing officer properly listed the considerations normally applicable to the taxation of a solicitor's account, namely, the time expended by the solicitor, the legal complexity of the matters to be dealt with, the degree of responsibility assumed by the solicitor, the monetary value of the matters in issue, the importance of the matter to the client, the degree of skill and competence demonstrated by the solicitor, the results achieved, the ability of the client to pay and the client's expectation as to the amount of the fee. He did not, however, appear to fully appreciate the significance of the understanding reached by the parties on the basis of which the solicitor was hired or attach sufficient weight to that understanding. He treated the understanding as an estimate rather than a firm understanding as to the maximum fee he was entitled to charge depending on the success of the proceedings. Even in the case of an estimate, a solicitor is obliged to advise the client without delay of any developments that are likely to increase the fee beyond the estimate and that was not done in this case.

12 The client here had an understanding with the solicitor that the fees payable after a successful trial would not exceed \$50,000 including disbursements. When the solicitor in breach of that understanding demanded a further \$30,000 retainer thereby causing his services to be terminated, the fee to which he is entitled for the services rendered to the date of termination of his retainer should bear an appropriate relationship to the overall fee to which he would have been entitled had he carried the litigation through trial.

13 In this case, if the report of the taxing officer were to stand the client would be required to pay \$45,777 for legal services rendered to a stage before discoveries when her maximum fees, assuming a successful trial (and the length of trial has been estimated by the solicitor as being at least 3 days), could not have exceeded \$50,000. In our opinion, that amount is so disproportionate to the maximum fee agreed upon as to be unreasonable.

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14 A question was raised during argument with respect to the settlement which was eventually reached between the client and her former husband the terms of which have not been disclosed. We can assume, as did the Courts below, that the settlement was a good one and that the solicitor is entitled to be paid for the "groundwork" contributed by him to the settlement. Indeed all of his service can be considered groundwork leading to the ultimate settlement of the actions. Nonetheless, notwithstanding the reduction ordered by the taxing officer, in the circumstances of this case the account as taxed remains so inordinately and unfairly high in relationship to the maximum fee agreed upon as to reflect error in principle and in our view cannot be justified.

15 This has been a protracted and expensive matter. All of the testimony adduced at the taxation hearing is before us. We see no reason to remit the matter for another taxation. Having regard to the applicable considerations in taxation matters and to the evidence in the case, it is our view that to reflect properly the agreement to which the solicitor committed himself at the time he was retained, his bill of costs should be reduced a further \$15,000 to \$25,000 plus disbursements of \$5,777.82.

16 For these reasons the appeal is allowed and the order of Southey J. is set aside. The certificate of the taxing officer is varied so that the bill of costs as taxed by the taxing officer is reduced by \$15,000 to the sum of \$30,777.82. The appellant shall have her costs of this appeal on a party and party basis and her costs of the application to Southey J. on the same basis.

*Appeal allowed.*

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TAB 5

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Kelleher v. Knipfel

Re Knipfel; Kelleher, Hoskinson v. Knipfel

Ontario Court of Appeal

Lacourcière, Blair and Cory JJ.A.

Heard: January 20, 1982

Judgment: March 8, 1982

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Counsel: Kenneth L. Sherman, for appellants.

H. Thompson, for respondents.

Subject: Civil Practice and Procedure; Estates and Trusts

Estates --- Passing of accounts and remuneration of personal representatives -- Remuneration -- Measure of compensation -- Solicitor as personal representative.

Costs -- Taxation of costs -- Practice on taxation -- Other cases -- Solicitors for estate -- Amount to be taxed in respect of amount of estate in excess of \$300,000 -- Surrogate Courts Act (Ontario), Reg. 143/78, s. 85(1).

Costs -- Taxation of costs -- Appeals from or review of taxation -- Principles governing review -- Judicial review of taxation of bill of costs -- Principles to be followed by Appellate Court.

The respondents acted as solicitors for the appellants, who were executors of an estate which was large in value but relatively simple to administer. They prepared the application for probate, paid a charitable bequest, attended meetings and engaged in written and telephone correspondence, and transferred shares in a closely held corporation to the widow. The respondents did not keep detailed records of their services, nor did they record time spent (estimated at 50 to 75 hours). The deputy local Taxing Officer awarded the respondents \$15,000. The appellants' appeal to a Judge in Weekly Court was dismissed. The appellants appealed to the Court of Appeal.

Held:

The appeal was allowed.

The respondents calculated their bill in accordance with the tariff set forth in the regulations made pursuant to the Surrogate Courts Act (Ontario). The fee for the value of the estate in excess of \$300,000 was calculated at 1 per cent

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of that excess, in apparent conformity with usual practice. The local Taxing Officer erred in principle in adopting that calculation, thereby allowing a fee which was inordinately high.

Fees for services for an estate in excess of \$300,000 ought to be assessed on a quantum meruit basis by considering, inter alia, the amount and character of the services rendered, the labour, time and trouble involved, the character and importance of the services rendered, the amount of money or value of the estate, the professional skill and experience called for, the character and standing in the profession of the solicitors involved, the results obtained and the ability of the clients to pay.

An Appellate Court will intervene in a taxation where the amount taxed is so unreasonably high so as to reflect an error in principle on the part of the Taxing Officer.

Cases considered:

Cook, Re (1975), 10 O.R. (2d) 61 (M.C.) -- followed

Smith, Re, [1972] 2 O.R. 256 (Surr. Ct) -- considered

Solicitors, Re (1912), 27 O.L.R. 147, 7 D.L.R. 323 (C.A.) -- followed

Statutes considered:

Surrogate Courts Act, R.S.O. 1970, c. 451.

Surrogate Courts Act, R.S.O. 1980, c. 491.

Rules considered:

Ont. Surr. Ct. Rules, App. B.

Regulations considered:

Surrogate Courts Act, R.S.O. 1970, c. 451

Reg. 143/78, s. 85(1)

Authorities considered:

Macdonnell, Sheard and Hull, Probate Practice (3rd ed., 1981), p. 417.

Orkin, The Law of Costs (1968), p. 128.

**Annotation**

See, generally, cases in Holmsted and Gale, Ontario Judicature Act and Rules of Practice, s. 80, §68, and R. 516.

Appeal from a decision of a Weekly Court Judge which dismissed an appeal from a decision of a local Taxing Officer.

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**The judgment of the Court was delivered by Blair J.A.:**

1 This appeal is concerned with the application of the Surrogate Court tariff of fees and the principles governing the judicial review of the taxed bill of costs of a solicitor for an estate. The appellants (the Executors) appeal from a decision of a Judge in Weekly Court which dismissed an appeal from the certificate of taxation of a deputy local Taxing Officer.

2 The will of the deceased had been drawn by a solicitor (the Solicitor), who was employed by the appellants when he performed all the legal services covered by the bill rendered to the Executors. The will was not complicated. It directed the Executors to pay debts, funeral and testamentary expenses; to forgive the debt of a son who was one of the Executors; to pay a charitable bequest of \$8,000 to a religious organization; and to transfer the residue of the estate to the widow who was also an executor. The estate, valued at \$1,316,511.56, although large, consisted of only a few assets, namely, three notes receivable totalling \$253,123.82; a bank account at one bank of \$159,378.74; and 127 shares of a closely held corporation valued at \$889,000. The Solicitor had little to do with the realization and disposition of the assets. The deceased's accountant prepared the inventory, attended to the valuation of the shares and the preparation and clearance of income tax returns. No conveyances of real estate were required and the Solicitor had nothing to do with the forgiveness of the debt, the collection of the notes receivable or the transfer of the bank deposit.

3 The Solicitor kept no detailed record of his services nor of the time spent on the estate which he estimated to be between 50 and 75 hours. He was, however, able to establish that he had performed the following services: preparation of application for probate; payment of the charitable bequest to the religious organization after he had disposed of some minor complications; participation in six meetings with the Executors in addition to an unknown number of telephone conversations in which advice was given to them; preparation and dispatch of 20 to 30 letters and the receipt of 15 to 20 letters; and the transfer of the shares in the closely held corporation to the widow.

4 The tariff of fees to be allowed solicitors and counsel is set forth in Appendix B to the Surrogate Court Rules under s. 85(1) of Reg. 143/78 made pursuant to the Surrogate Courts Act, R.S.O. 1970, c. 451 (now R.S.O. 1980, c. 491) which provides:

For the preparation of the application for probate or administration, succession duty schedules and estate tax returns, and all services and attendances in connection therewith, and for all services incidental to the administration of the estate, exclusive of sales and motions in court, up to but not including the first passing of accounts:

On the first \$10,000, or a portion thereof, of the aggregate value of the estate -- 3%;

On the next \$90,000, or a portion thereof, -- 2%;

On the next \$200,000, or a portion thereof, -- 1 1/2%;

On the excess over \$300,000, additional fees may be charged, the amount thereof to be determined by the time spent, the results achieved and the amount involved.

The above scale of fees is to be applied in estates of average complexity, subject to increase or decrease when warranted, and is subject to review by the surrogate court judge on a passing of accounts and by the taxing officer pursuant to the provisions of the *Solicitors Act*.

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5 The Solicitor testified at the hearing before the Taxing Officer that he had computed his account by applying the tariff to the first \$300,000 and adding 1 per cent for the excess value of the estate over that sum. He stated that he had been advised by other solicitors and trust company officers that this was the practice followed not only in his county but elsewhere in Ontario. Macdonnell, Sheard and Hull on Probate Practice (3rd ed., 1981), recognizes that this practice is commonly followed at p. 417:

It would seem from the tariff that in all estates involving more than \$300,000 it would be necessary for the solicitor, if required to do so, to detail his account and justify the amount in accordance with the considerations set out in the tariff. In practice, however, such detailed account is often dispensed with and the percentages in the tariff accepted as a guide.

6 In *Re Cook* (1975), 10 O.R. (2d) 61, Master McBride, in a judgment which I adopt, explained how the tariff applied to estates valued at over \$300,000. He stated at p. 64:

It seems to me that the only effective way of assessing the fee for services in respect of that part of an estate that exceeds \$300,000 is to assess the fee for all legal services in respect of the entire estate, such assessment to be on an essentially *quantum meruit* basis and then subtract from that fee the tariff fee of \$5,100 allowable in respect of the aggregate value of the estate to the amount of \$300,000. The balance of the fee would be that for services in respect of the 'excess over \$300,000.00'. Inasmuch as the tariff percentage allowances seem to be generous in many cases, it could well happen that the total fee for an estate of, say, \$400,000 and of average complexity, assessed on a *quantum meruit* basis, would be less than the \$5,100 allowable under the tariff for the first \$300,000 of aggregate value of the estate. I appreciate that in such a case, the fee would have to be allowed at \$5,100 for the first \$300,000 by virtue of the compulsory percentage allowances but nothing would be added to it in respect of the excess over \$300,000. In this discussion I am, of course, assuming an estate of average complexity.

7 The deputy Taxing Officer in this case followed *Re Cook*. In her written reasons she held that the estate was of average complexity and stated:

I approached the matter on a quantum meruit basis as regards the excess. Mr. Harper estimated that he had between 70 and 75 hours time invested in the matter, I think that perhaps this time is somewhat excessive based on the evidence before me and in the absence of dockets, but time is only one factor to be considered. It was admitted by both solicitors that the will was not complex and I am satisfied that Mr. Harper discharged his duties to the clients with skill and competence. *The fact that the monetary value was greater than ordinary did cause me to give more consideration to this factor when assessing a proper fee.* When applying these factors to the solicitor's participation I allowed the fee at \$15,000.00 and the disbursement of \$99.45. [The italics are mine.]

8 In her oral reasons the learned deputy Taxing Officer made it even more clear that the reason for her award was the greater degree of responsibility assumed by the Solicitor in connection with a large estate. Although she stated she was not bound by the practice of charging 1 per cent for the excess over \$300,000, her award of \$15,000 more closely approximates a fee of 1 per cent on the excess over \$300,000 than the original bill of the Solicitor.

9 The principle to be followed by an Appellate Court in reviewing the decision of a Taxing Officer is well settled and has been stated in innumerable cases. In *Orkin, The Law of Costs* (1968) it is set forth as follows at p. 128:

It is a settled rule that on an appeal from the taxing officer the court is only concerned with questions of principle, and not with mere questions of amount, or the manner in which the taxing officer has exercised his discretion, unless the amounts are so inappropriate or the taxing officer's decision so unreasonable as to suggest an error in principle.

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The Court will not interfere with the discretion of the Taxing Officer where the dispute involves no principle but only a question of amount unless the amount is "so grossly large ... as to be beyond all question improper": *Re Solicitors* (1912), 27 O.L.R. 147 at 159, 7 D.L.R. 323 (C.A.) per Garrow J.A.

10 I have no hesitation in determining that the Solicitor's bill as taxed in this case is so unreasonably high as to reflect an error in principle on the part of the Taxing Officer. Although large in value, the estate was simple and uncomplicated and the standards set forth in the tariff, namely, time spent, results achieved and the amount involved properly applied could not have justified the decision of the Taxing Officer.

11 I am of the opinion that the proper basis for establishing the solicitor's fee in estates exceeding \$300,000 in value is set forth in Macdonnell, Sheard and Hull on Probate Practice, at p. 417 as follows:

The determining of the appropriate fee in these latter cases should be arrived at by applying the considerations normally applied in taxing a solicitor's account, being the amount and character of the services rendered, the labour, time and trouble involved, the character and importance of the services rendered, the amount of money or value of the estate, the professional skill and experience called for, the character and standing in the profession of the solicitors involved, the results obtained and the ability of the clients to pay.

The fixing of a fee of 1 per cent for the value in excess of \$300,000 is only justifiable in cases like *Re Smith*, [1972] 2 O.R. 256 (Surr. Ct.) where the solicitor was able to justify the charge by his dockets and records.

12 For these reasons I would allow the appeal; set aside the certificate of taxation of the deputy local Taxing Officer; and refer the Solicitor's account to the senior Taxing Officer at Toronto for re-assessment.

*Appeal allowed.*

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