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Solicitor/Client Assessments
How to try and Avoid and What to Know if Unavoidable

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I. INTRODUCTION

The Solicitors Act, R.S.O. 1990, c. S. 15, as amended, is the statutory authority by which clients and solicitors can have a solicitor's account subject to an assessment by an assessment officer. A solicitor and client bill, ie, one that is delivered by a solicitor to his or her client, arrives at the assessment office in various ways:

- on requisition of the solicitor or the client, pursuant to section 3 of the *Solicitors Act*;
- on application of the solicitor or the client, under section 4 of the *Solicitors Act*;
- under the inherent jurisdiction of the Superior Court of Justice, [*Re: Peel Terminal Warehouses Ltd. and Wooten, Renaldo & Rosenfield* (1978), 21 O.R. (2nd) 857 (C.A.)];
- on reference in an action; or
- on application of a person liable to pay other than the client, pursuant to section 9 of the *Solicitors Act*.

The most common form for an assessment of a solictor's account is either by way of an application of the solicitor or of the client under sections 3 or 4 of the *Solicitors Act*.

Section 3 of the *Solicitors Act* provides:

> 3. Where the retainer of the solicitor is not disputed and there are no special circumstances, an order may be obtained on requisition from a local registrar of the Superior Court of Justice,
>
> (a) by the client, for the delivery and assessment of the solicitor's bill;

(b) by the client, for the assessment of a bill already delivered, within one month from its delivery;

(c) by the solicitor, for the assessment of a bill already delivered, at any time after the expiration of one month from its delivery, if no order for its assessment has been previously made.

Section 4 of the *Solicitors Act* provides:

> 4. (1) No such reference shall be directed upon an application made by the party chargeable with such bill after a verdict or judgment has been obtained, or after twelve months from the time such bill was delivered, sent or left as aforesaid, except under special circumstances to be proved to the satisfaction of the court or judge to whom the application for the reference is made.

Another section of the *Solicitors Act* that addresses the entitlement to assess a paid account is Section 11. It provides that:

> 11. The payment of a bill does not preclude the court from referring it for assessment if the special circumstances of the case, in the opinion of the court, appear to require the assessment.

Should a solicitor wish to start an action for the recovery of unpaid fees, charges or disbursements, the *Solicitors Act* provides under section 2(1):

> 2. (1) No action shall be brought for the recovery of fees, charges or disbursements for business done by a solicitor as such until one month after a bill thereof, subscribed with the proper hand of the solicitor, his or her executor, administrator or assignee or, in the case of a partnership, by one of the partners, either with his or her own name, or with the name of the partnership, has been delivered to the person to be charged therewith, or sent by post to, or left for the person at the person's office or place of abode, or has been enclosed in or accompanied by a letter subscribed in like manner, referring to such bill.

It should be noted that under section 6(4) of the *Solicitors Act*:

> 6 (4) The solicitor shall not commence or prosecute any action in respect of the matters referred pending the reference without leave of the court or a judge.

What this means is that if there is an assessment proceeding underway by way of an order having been taken out either upon requisition from the local registrar or pursuant to a judge's order directing a solicitor's account be subject to assessment, the solicitor shall not commence or prosecute any action in respect of the matters referred, pending the reference so that the solicitor cannot start a civil action for payment on account of any fees and/or disbursements outstanding.

What is also of interest to note is that, although the *Solicitors Act* deals with contingency fee agreements between solicitors and clients, section 28.1(3) of the *Solicitors Act* provides:

> 28.1 (3) A solicitor shall not enter into a contingency fee agreement if the solicitor is retained in respect of,
>
> (a) a proceeding under the *Criminal Code* (Canada) or any other criminal or quasi-criminal proceeding; or
>
> (b) a family law matter.

Therefore, any fee agreement in a family law matter that involves payment of legal fees as a percentage of the amount or of the value of the property recovered in an action or proceeding, or provides for a percentage by way of a premium or bonus that could be interpreted as being determinative upon the outcome of the proceeding or action will not be allowed by an assessment officer if it is determined to be either a contingency fee or tantamount to a contingency fee.

These statutory procedures set the parameters of when and how an assessment under the *Solicitors Act* is brought. This paper will not address the procedure for getting an assessment underway, nor will it address the process of appealing the Report and Certificate of Assessment that the assessment officer delivers at the conclusion of an assessment. These two procedural matters are for another programme.

This paper will speak to how one can attempt to avoid being subjected to an assessment proceeding under the *Solicitors Act* but in spite of one's best efforts you are still brought into an assessment proceeding, how to best deal with it in order to try and minimize the pain and suffering of having your accounts reduced by the assessment officer.

II. HOW TO TRY AND AVOID A SOLICITOR/CLIENT ASSESSMENT

I. The Retainer

If you have a client who is unhappy with the results obtained, the fees charged, or have simply run out of money and cannot continue to pay for your legal services; you may find yourself in the unenviable position of having to participate in a solicitor/client assessment. However, there are some steps that you can take to try and avoid an assessment. The first is to ensure that you have a properly executed retainer agreement or have sent to the client a comprehensive letter of engagement. It is critical that, before you undertake any work on behalf of a client that you define the parameters of the work to be done and the terms by which you are being retained. That includes a precise description of the nature of the work for which you are being retained by the client, and a clear and unambiguous breakdown of how the fees are

to be calculated. That means that in any retainer agreement or letter of engagement, you must set out the names and positions of various individuals in your firm who might be providing services on behalf of the client and the hourly rates that will be charged to the client for those services. It is not enough to simply set out the hourly rate of the lawyer who is in charge of the file. If associates, paralegals, law clerks or students are going to be performing services on the file, then it is important that the client knows at the beginning of the file that more than one member of your firm will be working on the file and what it is going to cost the client for those services.

The importance of a well drafted retainer agreement or letter of engagement cannot be under stated. If there is a dispute between the client and the lawyer about what the lawyer was retained to do or about the hourly rates to be charged for the services to be performed, and there is no retainer agreement or letter of engagement, then in an assessment proceeding, the evidence of the client will most often be preferred to that of the solicitor. As Justice Hoilett stated in the *Ellyn-Barristers v. Stone,* 2006 CanLII 9703 (ON SC) (affirmed 2007 ONCA 565):

> That observation is particularly true given the now trite law that where a solicitor fails to reduce his or her retainer to writing, and a dispute arises, there is a heavy onus on the solicitor to satisfy the court that his/her version of its scope ought to be preferred. (ref. *Griffiths v. Evans*, [1953] 2 All E.R. 1364).

If the party to be charged with the payment of the fees is not the client, but is a relative or friend of the client, then a retainer agreement should set that out as well so that there is no misunderstanding at the end of the day who is to pay for your services, and it also helps to protect against the possibility that you may have to pursue the client and the party to be charged with payment if there is an outstanding balance owing and the client is no longer prepared to attend to payment or cannot afford to do so.

It is still in the public interest that the court retains a supervisory role to ensure that the fee agreements are fair and reasonable, and it is for that reason that the *Solicitors Act* confers access to the court and establishes a mechanism or protocol for the determination of a reasonableness of a solicitor's fee.

The *Solicitors Act* does not express a prohibition against contracting out of a right to an assessment and a retainer agreement or letter of engagement can contain a provision that allows the parties to arbitrate a fee dispute, rather than submit a fee dispute to an assessment under the *Solicitors Act*. However, public policy prevents the parties from contracting out of the statutory protections contained in the *Solicitors Act* and any arbitration must be conducted in accordance with them. See *Jean Estate v. Wires Jolley*

LLP, 2009 ONCA 339 *(On. C.A.).* Therefore, any arbitration proceeding must be conducted as if it were an assessment.

A retainer agreement cannot limit the time period within which the client can seek an assessment pursuant to section 3(b) of the *Solicitors Act*. See *Javornich v. McCarthy*, 2007 ONCA 484. As stated in *Javornich*:

> The *Solicitors Act* begins with s. 1 reflecting the legal profession's monopoly status. This beneficial status or privilege of the profession is coupled with corresponding obligations set out in the Act and which make clear that the rendering of legal services is not simply a matter of contract. This is not to say a contract to pay a specific amount for legal fees cannot prevail. It may. But even that kind of agreement can be the subject of review for fairness

Therefore, a retainer agreement or letter of engagement is a critical aspect of any solicitor-client relationship, and something that ought to be in place on every file from its inception.

Further, any retainer agreement or letter of engagement that provides for billing on a monthly basis and describes all accounts, including interim accounts, as final as a means of by which to limit the number of accounts that would be subject to an assessment, may very well be set aside by a court if challenged by the client. The courts have held, including the Ontario Court of Appeal, that all accounts, whether interim or final, ought to be subjected to assessment so long as there has either been compliance with the *Solicitors Act*, or it is in the interests of justice under the court's inherent jurisdiction to order all accounts to be subject to assessment.

A retainer agreement or letter of engagement should also include a paragraph that describes the client's right to submit an account(s) to an assessment under the *Solicitors Act* within 30 days from the delivery of such account. Under the commentary to rule 2.08 of the *Rules of Professional Conduct of the Law Society of Upper Canada,*"a lawyer should inform a client about his or her rights to have an account assessed under the *Solicitors Act*." In that regard, the retainer agreement, or letter of engagement, should provide that if there is a dispute, the client can take that dispute to an assessment office and obtain an order for assessment on requisition if the client does so within 30 days of receipt of the final account.

In addition, the retainer agreement or letter of engagement should try to give the client a meaningful estimate of the total fees and disbursements that the client might anticipate being charged for the services performed. If it is impossible to give a meaningful estimate of the total fees or disbursements

then the retainer agreement or letter of engagement should say so and explain why it is impossible to give an estimate.

A retainer agreement or letter of engagement cannot contain any clause that would indicate that failure to pay the accounts of the solicitor in full will entitle the solicitor to contact a credit bureau or advise a credit bureau of any outstanding account or in any way affect the client's credit rating. This would be contrary to Rule 2.09(8) of the *Rules of Professional Conduct*, which provides as follows:

> (8) When a lawyer withdraws, the lawyer shall try to minimize expense and avoid prejudice to the client and shall do all that can reasonably be done to facilitate the orderly transfer of the matter to the successor legal practitioner.

Although the statute governing assessments is titled the *Solicitors Act*, the courts have interpreted the *Act* to be more a statute to protect clients, even with the discrepancy in the limitation periods as set out in sections 3 and 4.

In the case of *Andrew Feldstein v. George Keramidopulos,* 2007 CanLII 40202 (ON SC) Justice Murray said at paragraph [60]:

> The *Solicitors Act* is designed to give some protection to clients against unreasonable accounts rendered by their solicitors. The provisions of the *Solicitors Act* that allow a client to assess the accounts of his law firm are, in essence, consumer protection provisions designed for the protection of the public. To permit contracting out of the provisions of the *Solicitors Act* would defeat the whole purpose of those legislative provisions enacted in the public interest and designed to allow a client protection against unwarranted or unreasonable legal fees.

II. <u>Other Basic Practices</u>

In addition to a very well drafted and comprehensive retainer agreement or letter of engagement, a solicitor can also try to avoid an assessment proceeding by following some additional basic practices. They are as follows:

a) ensure that all accounts rendered to your client are legible and follow the form as provided under the *Solicitors Act*, including setting out the date the service is performed, a description of the service performed, the time spent performing that service, and the hourly rate charged for the service that was performed;

b) ensure that docket entries are easily understood and have a reasonable description of the service performed;

c) make sure that all ledger statements or financial records of the client's file are up to date and accurate at all times;

d) make sure that the file itself is always organized and kept in pristine condition. Lawyers often subdivide their files with various colour coded file folders to segregate various aspects of the material that form the lawyer's file;

e) regularly render an account, even if it is for a modest fee, so that the client has an ongoing appreciation of the fees that are being charged for the work being done and can determine on a cumulative basis what it is costing for the legal services;

f) report to the client on a regular basis as to the progress of the file;

g) write down time if it is appropriate to do so since not every service justifies the amount of time spent, and inform the client if such a write down has been given;

h) remember the proportionality test, namely, are the fees charged in proportion to the amounts in issue;

i) if you are going to charge a premium at the end of a file, after the results achieved have been determined, notify the client at the beginning of the file and put that in the retainer agreement or letter of engagement that a premium or bonus will be considered as part of the final account;

j) when something unusual or unforeseen occurs that may substantially affect the amount of the fee or disbursement, you should give the client an immediate explanation and, if necessary, enter into a new retainer agreement or letter of engagement;

k) resolve any fee disputes or criticisms by the client over the services being performed as quickly as possible.

This list is not exhaustive, but taking these steps at the beginning and throughout the management of the file will go a long way towards helping to avoid an assessment proceeding, or, alternatively, if involved in an assessment proceeding, will go a long way in assisting in putting forth a presentation that may very well receive a favourable result from an assessment officer.

III. WHAT IF YOU ARE UNAVOIDABLY INVOLVED IN AN ASSESSMENT PROCEEDING?

I. Evidentiary Issues at an Assessment Hearing

In an assessment under the *Solicitors Act*, the procedure before the assessment officer is in the form of a trial. Evidence is presented under oath, both in chief and in cross examination. Documents must be proven and admissible, according to law. The lawyers who performed the bulk of the services on the file must attend at the assessment proceedings and give evidence to substantiate the work and time spent

on the file. The client need not testify or offer any evidence. In all cases, the onus is on the solicitor to prove that his or her accounts are fair and reasonable. There is no onus on the client. In all cases, the solicitor presents his or her evidence first because of this onus on the solicitor. This applies even if the client took out the requisition to assess or obtained a court order to assess the billed fees and disbursements delivered by the solicitor. The solicitor has the burden of proof and the standard is on a balance of probabilities. See *MacLean v. Van Duinan* (1994), 30 C.P.P. 191.

II. Factors the Assessment Officer or Arbitrator Must Follow

Under the *Solicitors Act*, and even if the issues about the solicitor's account are referred to arbitration, the assessment officer or the arbitrator determines whether the solicitor's fees are fair and reasonable based on a quantum meruit analysis supported by the appropriate evidence. In order to assist the assessment officer in determining what would be the appropriate fee, the Ontario Court of Appeal has identified nine factors to be applied. Those nine factors are:

1. The time expended by the solicitors;
2. The legal complexity of the matter to be dealt with;
3. The degree of responsibility assumed by the solicitor;
4. The monetary value of the matters at issue;
5. The importance of the matter 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;
9. The client's expectation as to the amount of the fee.

See *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2nd) 211 (Ont. C.A.)

Every solicitor/client assessment before an assessment officer or before an arbitrator is determined by the application of these nine factors. Therefore, in presenting evidence at the assessment hearing, you must present the evidence to address each of these nine factors. No one factor is more important than the other. The factor that ordinarily takes up much of the time at a solicitor/client assessment is "the skill and competence demonstrated by the solicitor". Many clients take exception to the solicitor's fees on the basis that the solicitor did not manage the file properly or failed to do something that ought to have been done, or did something that ought not to have been done. In that regard, the client often

looks at the results achieved by the solicitor to emphasize their position that the solicitor fell down in exercising skill and competence.

III. Negligence

Under this factor, namely the skill and competence demonstrated by the solicitor, it is within the jurisdiction of the assessment officer to make findings of negligence and, if so found, to disallow the whole or such part of the accounts as were occasioned or rendered useless by the negligence. See *Miller v. Cline* (1887), 12 P.R. (Ont) 155. Although the assessment officer can make findings of negligence against the solicitor, the assessment officer does not have the jurisdiction to award any damages flowing from such negligence. All the assessment officer can do is determine the fairness and reasonableness of the accounts under assessment, and to reduce the accounts accordingly. However, an error in judgment is not a factor that the assessment officer may necessarily use to reduce the solicitor's account. Where a client raises the issue of negligence in an assessment and also brings an action against the solicitor for negligence, the general practice is to stay the assessment proceedings until the negligence action has been disposed of because of the wider scope of the negligence proceedings, and also to avoid inconsistent findings of fact. Similarly, if there are allegations made against the solicitor that go beyond negligence and include allegations that would be tantamount to criminal conduct, such as conspiracy, bribery, theft or fraud, then the assessment officer cannot conduct an assessment as those issues are outside the jurisdiction of the assessment officer and must be determined by a judge. Accordingly, it is recommended that at an early stage of the assessment process, the issues that the client wishes to bring to the assessment proceeding be fleshed out in order to determine if the matter is going to be within or outside of the jurisdiction of the assessment officer. If the client brings an assessment proceeding, it is appropriate to request of the client upon receiving the order for assessment to indicate the nature of the dispute that the client has with the accounts under assessment. It may be that the issues are not that difficult to resolve and it is better to attempt to try to resolve them sooner than later. Alternatively, if, as stated, some of these issues involve allegations of negligence and other serious allegations, then it is important to know of those allegations as soon as possible, not only because it is important to know in preparing for the assessment proceeding, but also, if need be, to notify your insurer.

IV. Directions

The proceedings before an assessment officer are conducted as a Reference pursuant to rules 55 and 56 of the *Rules of Civil Procedure*. Therefore, the assessment officer can issue directions as to procedures, productions, number of witnesses, length of time for the hearing, to name a few. The assessment officer

controls the process, so long as the directions are within his or her jurisdiction. There are no discoveries and no affidavits of documents are required. Any motions are to be brought before the assessment officer unless the motions are to challenge jurisdiction or to ask the court to give directions to the assessment officer.

If the client asks to see the solicitor's file prior to the assessment, the solicitor should cooperate and allow the client access to the file. Access should take place at the solicitor's office and the client should be given an opportunity to obtain copies of the documents the client wishes to secure with few exceptions. Failure by a solicitor to provide the client with copies of documents when requested only goes to reflect badly on the solicitor and can result in a motion before the assessment officer for production. However, there may be portions of the client's file that are not to be made available to the client that are strictly the work product of the solicitor, such as solicitor's notes (unless these notes bear directly on advice given to the client or are relevant to any discussions about fees) and possibly some inter-office communications that may not be relevant to the services performed by the solicitor in the course of representing the client. Therefore, before allowing the client access to your file, you should go through the file and determine whether there is anything in the file that does not relate specifically to the work that was being performed and for which the client was not billed.

V. Dockets

The maintenance of accurate dockets cannot be understated. Dockets are evidence and should be made available to the client, whether or not client requests same. This is so, even if the accounts to the client are an exact duplication of the docket entries on your computerized docket keeping system. Dockets should be produced in a legible form. The absence of dockets does not in and of itself mean that the solicitor's bills cannot be proved, however, it becomes much more difficult for a solicitor to prove the amount of time spent on a file if accurate dockets are not kept. Dockets that are not legible, incomplete, or are not recorded close to or contemporaneous with the services performed are given little or no weight by an assessment officer.

VI. Hourly Rates

If the hourly rate of the solicitor changes over the course of the file, it is incumbent upon the solicitor to notify the client in writing that there has been an increase in the hourly rate and to indicate what that increase is and for what period of time the increase is going to take effect. If you fail to do so, the assessment officer will roll back all of the time that was spent at the increased hourly rate to the original hourly rate quoted to the client. See *Fireman, Regan v. Julia P. Palvolgyi, et al,* 98/04/25, Court file no.

94-MU-9811 (Ont. Assessment Officer); *Quart v. Martin,* 98/09/15, Court file no. 97-CV-125059 (Ont. Assessment Officer).

VII. Notice under the *Evidence Act*

If, during the currency of a file, more than one lawyer or other docket keeper performed services on the file and the client is being charged for those additional services, then in preparation for the assessment hearing, it is recommended that a notice under the *Evidence Act*, R.S.O. 1990, C.E. 23, as amended, be served upon the client well in advance of the assessment process to ensure that documents in the solicitor's file can be admitted into evidence if they conform to section 35 (Business Records). The value in doing this is to allow the solicitor to testify as to the work done by other members of the firm without having to call those members of the firm to corroborate the solicitor's testimony, except in cases where the services were substantially performed by other members of the firm. The notice under the *Evidence Act* is best used for members of the firm who performed a modest amount of services on the file. The lawyers, paralegals, law clerks, associates and students who put a substantial amount of work on the file will still have to be called to testify as the assessment officers generally do not permit the solicitor in charge of the file to testify as to the work and time spent by others when the amounts in issue are substantial. What constitutes "substantial" depends on the total overall billings in respect to the file. It is possible for the solicitor to take the position that the work performed by these other docket keepers is not substantial enough to justify calling them to testify. It comes down to a judgment call and the better practice is to err on the side of caution and call these other docket keepers to testify if their time involved more than a modest portion of the work done on the file.

VIII. Costs

At the conclusion of the assessment proceedings, the assessment officer may call for oral or written submissions. Once submissions have been made, the assessment officer will then consider the fairness and reasonableness of the accounts in question, and eventually will release his or her decision. Once the decision has been released, the assessment officer will invite submissions with respect to interest if money is to be paid by one party to the other, and costs of the assessment. The assessment officer has the jurisdiction to award costs in favour of the client or the solicitor depending upon the outcome of the assessment. In fixing the costs of an assessment, the assessment officer applies the same criteria as when assessing the costs of an action in accordance with rule 58.06(1) of the *Rules of Civil Procedure,* which provides:

> 58.06 (1) In assessing costs the assessment officer may consider,

(a) the amount involved in the proceeding;

(b) the complexity of the proceeding;

(c) the importance of the issues;

(d) the duration of the hearing;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted; and

(h) any other matter relevant to the assessment of costs.

In addition to these other criteria, the assessment officer can also take into consideration any offers to settle, made in writing, and that includes any offers to settle under Rule 49 of the *Rules of Civil Procedure.* Assessment officers are not uniform in their interpretation of the application of Rule 49 of the *Rules of Civil Procedure* to assessment proceedings. Some assessment officers accept that Rule 49 does apply and apply the rule accordingly. Other assessment officers simply look at any offers to settle in determining whether the costs should be awarded, and if so, in what amount and do not follow Rule 49. In Toronto, assessment officers do not, as a practice, make significant cost awards.

In addition to rule 58.06(1) of the *Rules of Civil Procedure,* the assessment officer can also take into consideration, when determining costs, rule 57.01, which is a more comprehensive list of factors to be taken into consideration and includes any other matter relevant to the question of costs. Therefore, when arguing costs, make sure to reference Rules 58.06(1) and 57.01 as well as the relevant factors that would or might apply to your matter.

If the solicitor is self represented, the solicitor may ask for costs to be awarded to him or her, pursuant to the Ontario Court of Appeal decision of *Fong v. Chen* (2000), 46 O.R. (3rd) 330 (Ont. C.A.). The Ontario Court of Appeal has done away with any distinction between solicitor's fees and counsel fees. The Court of Appeal has held that the modern cost rules are designed to foster three fundamental purposes:

1. to indemnify successful litigants for the cost of the litigation;

2. to encourage settlements;
3. to discourage and sanction inappropriate behaviour by litigants.

The Court of Appeal went on to find that self represented litigants, be they legally trained or not, are not entitled to costs calculated on the same basis as those of the litigant who retains counsel. A self-represented litigant should not recover costs for the time and effort that any litigant would have spent to devote to the case. These principles apply whether the client is self-represented or the lawyer is self-represented.

When determining who should be awarded costs, or if costs should even be awarded, the assessment officer often takes into consideration the guidelines set out in the case of *Re: Solicitor [1969]* 2 O.R. 823 (S.C.O. Taxing Officer) which held:

1. if the solicitor's bill is patently excessive, legal costs are payable by the solicitor to the client;
2. if the solicitor's bill is excessive but not patently so, legal costs are payable by the solicitor to the client;
3. if the solicitor's bill is reasonable, but apparently excessive, no legal costs are awarded to either the solicitor or the client;
4. if the solicitor's bill is reasonable, legal costs are payable by the client to the solicitor.

Although these are not hard and fast rules in terms of determining how costs are to be awarded, as costs are always within the discretion of the assessment officer, nevertheless, these are guidelines that are often invoked by the assessment officer in determining how costs are to be dealt with.

IV. LIMITATION PERIODS

An issue that periodically arises in respect to assessment of solicitors' accounts is the limitation periods provided for under sections 3 and 4 of the *Solicitors Act*. Once again, this paper will not address the issue of special circumstances as that is a separate topic in and of itself. However, as a general statement, what may constitute "special circumstances" in the context of a request for assessment of a solicitor's accounts cannot be exhaustively pronounced. The meaning of the phrase has been interpreted to include any circumstances of an exceptional nature affecting the matter of costs or the liability of a solicitor's client which a judge, in the exercise of judicial discretion, in each particular case, may consider to justify a taxation. Essentially, so long as the judge is of the view that the solicitor's accounts

ought to be subject to assessment, a judge will find special circumstances to justify sending the accounts to an assessment officer.

Oftentimes, clients want to assess a solicitor's account well past the 30 day period as provided for in section 3 of the *Solicitors Act*. Historically solicitors would take exception to a client trying to assess an account after the timeframe within which to do so had passed. More recently, in a series of cases, the Ontario Court of Appeal has effectively mandated that solicitors should consent whenever a client wishes to submit a solicitor's account(s) to assessment. In the Ontario Court of Appeal decision of *Price v. Sonsini* (2002), 60 O.R. (3d) 257, it states:

> [19] Public confidence in the administration of justice requires the court to intervene where necessary to protect the client's right to a fair procedure for the assessment of a solicitor's bill. As a general matter, if a client objects to a solicitor's account, the solicitor should facilitate the assessment process, rather than frustrating the process. ... In my view, the courts should interpret legislation and procedural rules relating to the assessment of solicitors' accounts in a similar spirit. As Orkin argues, "if the courts permit lawyers to avoid the scrutiny of their accounts for fairness and reasonableness, the administration of justice will be brought into disrepute". The court has an inherent jurisdiction to control the conduct of solicitors and its own procedures. This inherent jurisdiction may be applied to ensure that a client's request for an assessment is dealt with fairly and equitably despite procedural gaps or irregularities.

In the more recent case of *Guillemette v. Doucet,* 2007, ONCA 743, 48 C.P.C. (6th) 17, 287 D.L.R. (4th) 522, the Ontario Court of Appeal addressed the applicability of the two year limitation period set out in section 4 of the *Limitations Act*, R.S.O. 2002, c 24, Sch B, to an application for an order directing the assessment of a solicitor's accounts brought pursuant to section 4 of the *Solicitors Act*. The Ontario Court of Appeal held that:

> ... the interaction of the *Limitations Act* and the *Solicitors Act* means that there is no absolute time bar against applications for the assessment of lawyers' accounts. This result may seem inconsistent with the purpose underlying the *Limitations Act*. However, solicitors' accounts have always been treated differently than other debts and even other professional accounts. A superior court has an inherent jurisdiction to review lawyers' accounts entirely apart from any statutory authority. That inherent jurisdiction was not subject to a time limit.

The Court of Appeal went on to state that:

> The passage of time, particularly a lengthy time period after a bill has been paid, will be a significant consideration in exercising the "special circumstances" discretion in both ss. 4 and 11 of the *Solicitors Act*. Time alone will not, however, preclude the examination of the suitability of a lawyer's accounts where other circumstances compel a review of those accounts.

The third case decided by the Ontario Court of Appeal is the very recent case of *Echo Energy Canada Inc. v. Lenczner Slaght Royce Smith Griffin LLP, McCarthy Tétrault LLP and Voorheis & Co. LLP,* 2010 ONCA 709. The issue in the Echo Energy case was the meaning of "special circumstances" which, under section 11 of the *Solicitors Act* was a precondition a client must show where the client seeks to have the solicitor's accounts that have already been paid referred for assessment. The application judge found there were no special circumstances with respect to any of the accounts and refused to direct the references. The Court of Appeal allowed the appeal in relation to Lenczner, Slaght and Voorheis, and directed a reference, but dismissed the appeal with respect to McCarthy Tétrault. The Ontario Court of Appeal held that section 11 of the *Solicitors Act* has been interpreted as giving the court a broad discretion to be exercised on a case by case basis. The Court held that clients cannot be expected to bring assessment applications while a solicitor is still representing them for fear of alienating the solicitor. The Court of Appeal was critical of the lawyer focused approach to such applications and found that the approach should be client focused. As the Court of Appeal said at paragraph 36:

> [36] In my view, the starting point was not the perspective of the lawyers. Section 11 of the *Solicitors Act* attempts to strike a balance between a solicitor's legitimate interest in finality and the client's interest in access to an independent process for review of accounts for legal services. However, the starting point ought to be the perspective of the client.

The Court of Appeal then went on to quote and adopt the comments from Justice Murray's decision in *Feldstein v. George Keramidopulos* at paragraph 63:

> [63] At a time when access to justice is such an important issue, and when lawyers' fees are getting so far out of reach for many ordinary people, it is crucial that an individual's right to a fair procedure for assessment of lawyers' fees exists. As Justice Sharpe said in *Price v. Sonsini*, public confidence in the administration of justice requires the court to intervene where necessary to protect the client's right to a fair procedure for assessment of a solicitor's bill. His admonition that solicitors should facilitate the assessment process when a client objects to a solicitor's

account rather than frustrating the process is more than just a guideline for law firms. It is essential. Clients must be able to assess their lawyers' accounts or they will be or will perceive themselves to be powerless in the face of unfair billing practices. There can be little doubt that if the courts permit lawyers to avoid scrutiny of accounts in appropriate cases, the administration of justice will be brought into disrepute.

The Court of Appeal went on to state that:

> Were it not for the fact that these accounts had been paid, the appellant would have had an absolute right to have their accounts assessed, provided they brought the application within two years: see *Guillemette v. Doucet* (supra).

The case law also supports the fact that a client has the right to have all the solicitor's accounts that were rendered to the client subject to assessment and not just the final or unpaid accounts. If the client wants to have all the accounts that were rendered to him assessed, then the court will support that request. A solicitor can challenge the client's right to do so, but the likelihood of success in such a challenge is modest, at best, even if the paid accounts go back several years. So long as the solicitor continues to work on the file and render interim accounts on a periodic basis, the courts will generally, and in most cases, allow all accounts to be subject to assessment if the client asks that all accounts be included.

In fact, in a recent decision of Justice Lederer, he awarded costs against a Toronto area law firm for holding up an application for an assessment of accounts by a former client unhappy with the services she received. In May 2010, Justice Lederer awarded the client almost $7,000 in costs and admonished the law firm of Heydary Hamilton PC for failing to respond to the application by the client in a reasonable timeframe and then attempting to have proceedings adjourned on short notice. Justice Lederer wrote:

> Lawyers and judges do not act in a vacuum, they function within a society. The actions they take and decisions they make should bear in mind the public impact of what they are.

Justice Lederer went on to state that:

> Parties who wish to question accounts should not be prevented from doing so by the cost of the process of assessment. This is especially so where costs are occasioned by the firm failing to respond or move with reasonable speed."

Justice Lederer then said:

> With the costs of litigation being so expensive, it's so easy to allow costs of the litigation to quickly exceed the benefit of that litigation, and in the context of an assessment hearing, that is extremely true. It sends a message that we need to put our clients first at all times.

V. MEDIATION

In Toronto and in other jurisdictions including Newmarket, the assessment office encourages the solicitor and the client to participate in mediation at no cost for the mediator or the facility. The mediation process is conducted by an experienced assessment officer. In some jurisdictions, such as Brampton, there is no such mediation service available, however that does not mean that the parties cannot engage in mediation with a private mediator, or in some instances, the Toronto assessment office may be willing to provide the assistance of an assessment officer to act as a mediator even if the process was not commenced out of the Toronto office. The best time to request mediation is at the pre-assessment hearing.

VI. PRESENTATION OF EVIDENCE

If, by some chance, you do find yourself at an assessment hearing, it is recommended that the following steps should be taken in preparation for giving your evidence:

1. Make copies of all dockets and ledger statements or financial records of the client's accounts;
2. Prepare an assessment brief consisting of the Order for Assessment, the accounts in chronological order (including the dockets that relate to each of the accounts), the pro forma or prebills that may have been prepared in each of the accounts, the ledger statements and, if there is a retainer agreement or letter of engagement, a copy of it;
3. The assessment brief should also contain a chart. At the front of the brief, a chart should be prepared that lists all of the accounts by date and separate columns with the amount charged on each account for fees, disbursements and taxes, and then a total amount. A separate chart should also be prepared for the payments made by the client against the accounts. This way, the assessment officer can have a snapshot of how much was billed, when it was billed and how much was paid
4. A second brief should be prepared for the assistance of the assessment officer that sets out all of the correspondence between the solicitor and the client, whether it relates to the work being done by the solicitor or complaints or commendations by the client. The correspondence would include emails, faxes and letters. This will assist the assessment officer in appreciating the extent of client involvement in the course of the file. It also helps in defeating a client's allegation that they were unaware of how the file was progressing. It also allows the solicitor to point out that the client had every opportunity to raise complaints or objections to the services and/or the fees and failed to do so during the currency of the file.
5. There should also be a brief prepared that contains any memorandum to the file prepared by the solicitor based on any contact with the client by way of telephone conversations or meetings that address instructions or other matters relevant to the services performed or the fees charged.

6. Another brief should be prepared containing all of the pleadings and financial statements, including any drafts of same, or drafts of separation agreements, marriage contracts, cohabitation agreements, or whatever documents were prepared in respect to the work for which the solicitor was retained. In this way, the assessment officer has an appreciation of the complexity of the matter and the amount of work that went into preparing the documents.

All these briefs should be served on the client and brought to the assessment with sufficient copies for the witnesses, the assessment officer and as a courtesy, the court reporter. In attending at the assessment hearing, the solicitor should bring the entire file with him or her. There may be documents that need to be referred to during the course of the assessment hearing that are not contained in the briefs referenced above. The entire file will also provide the assessment officer with an appreciation of the amount of work that went into the file. As can be seen from the quotes by the Court of Appeal above, the courts are very aware of the client's rights in assessment proceedings. To ignore those rights or to treat them with disrespect will only go to the benefit of the client and to the prejudice of the solicitor, especially if issues of credibility arise during the assessment proceedings.

When testifying at an assessment proceeding, do not maintain an air of hostility or arrogance. Do not embark upon client bashing. You are an officer of the court and must always maintain dignity and professionalism and refrain from sarcasm, anger, accusations, evasiveness or sudden loss of memory. It is to be remembered that the onus is always on you to prove your accounts are fair and reasonable.

You should also meet with your witnesses in advance of the assessment proceeding in order to prepare them for testifying in the same way as the solicitor prepares himself or herself to give evidence.

VII. CONCLUSION

There is an impression within the profession that the solicitors' accounts assessed under the *Solicitors Act* are routinely reduced by the assessment officer and that, as a rule of thumb, the accounts are reduced somewhere between 15% - 25%. This is not necessarily so. Assessment officers approach each assessment proceeding with an even hand and an open mind without any assumptions or preconceived ideas as to how the accounts are to be assessed. The assessment proceeds entirely on the evidence presented. Notwithstanding the foregoing, according to a former assessment officer, Mr. Gramlow, he examined 100 contested solicitor and client assessments at random in Toronto and it was discovered by him that:

- 22% were assessed as billed
- 26% were reduced by up to 10%

- 20% were reduced from 11% – 20%
- 6.4% were reduced from 21% to 30%
- 6.3% were reduced from 31% to 50%
- 11.6% were reduced from 51% to 60%
- 7.7% were reduced from 61% to 100%[1]

It can therefore be seen from this random sampling that the profession's concerns may have some justification but it is not necessarily a presumption that a solicitor's account will be reduced on assessment. Therefore, if one is to try and ensure his or her accounts are not reduced and are assessed as billed, or reduced by a modest amount, then one has to properly prepare for the assessment as one would prepare for any adversarial process before the court.

If at all possible, it is preferable to try to meet with the client over a disputed account and try to negotiate a settlement and avoid an assessment. Not only will the solicitor be left with a moderately content client, as opposed to a discontent client, but the solicitor will be able to have avoided what could be a time consuming and non-billable exercise. Spending non-billable time preparing for and attending upon an assessment to have each and every aspect of the file examined closely is not a particularly pleasant experience for any solicitor and one that should be avoided.

Assessment hearings are taken seriously by the assessment officer. They strike at the very heart of the work done by the solicitor, namely, payment for his or her services, as well as challenges to the competency and expertise that the solicitor brought to the file. Assessment proceedings can be very expensive and can result in a significant adjustment in the fees billed, resulting, in some instances, in solicitors having to return to the client money that has been paid, deposited and spent, together with interest and costs. In addition, if an assessment officer is required to provide a decision, that decision becomes public and can be embarrassing to a solicitor if the findings of the assessment officer are of such a nature such as to be critical of the solicitor in the management of the file.

With good practices at the beginning of the file, as set out in the beginning of this paper, and as the file progresses, your chances of avoiding an assessment proceeding are greatly enhanced and if unavoidable, then your chances of success can be significantly improved.

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[1] "The Nature of the Process for Assessing Solicitor& Client Bills", Gramlow and Linton, RWG Consulting Ltd., July, 2000