

**THE TAXATION OF LEGAL ACCOUNTS IN THE SMALL CLAIMS COURT OF
NOVA SCOTIA**

**W. Augustus Richardson, QC
Huestis Ritch (Halifax)**

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INTRODUCTION

1. I have been asked to provide a presentation on the assessment (or "taxation") of legal accounts in the Small Claims Court of Nova Scotia. Lawyers need to understand this procedure, because only those accounts which have first been certified through taxation as being "reasonable and lawful" can be enforced against a client. Accounts which are found to be unreasonable can be reduced; and indeed, a lawyer may be required to repay monies already paid by the client prior to the taxation.²
2. In what follows I will attempt to provide a brief guide to taxation, broken into four main parts:
 - a. jurisdiction;
 - b. the law and principles of taxation;
 - c. the practice of taxation; and
 - d. a "10 second guide" to taxation.

² As was the case, for example, in *Zollinger v. Leahey* [2003] NSJ No. 316 (N.S. Small Cl. Ct.).

PART I: JURISDICTION

3. To understand the current jurisdiction of an Adjudicator on a taxation it is necessary to understand a bit of the history of taxations in Nova Scotia.
4. Taxations were formerly carried out by officials known as Taxing Masters. These were lawyers who were appointed as Taxing Masters under the *Taxing Masters Act*.³ They had the power to assess the reasonableness of a lawyer's account.
5. In 2000, as the result of various recommendations made by committees of the bar and bench in the late 1990s, the Legislature enacted significant changes to what was then the *Barristers and Solicitors Act* ("BSA")⁴ and the *Small Claims Court Act* ("SCCA").⁵ (The *BSA* has been repealed by the *Legal Profession Act* ("LPA").⁶ The taxation of accounts (including fees and disbursements) is now governed by Part VI of the LPA,⁷ but in my view nothing in the LPA changes the principles that govern the taxation of accounts.)
6. The design and intent of these changes⁸ was to enlarge and rationalize the system of taxation in Nova Scotia by transferring the taxing jurisdiction to adjudicators of the small claims court. However, there may be some issue as

³ RSNS 1989, c.459.

⁴ RSNS 1989, c.30, as amended. The BSA has since been repealed by the *Legal Profession Act*, SNS 2004, c.28 ("LPA"), Part IV of which now governs the taxation of accounts (including fees and disbursements). In my view nothing in the LPA changes the principles that govern the taxation of accounts.

⁵ RSNS 1989, c.430, as amended.

⁶ SNS 2004, c.28.

⁷ See s.71(3) of the LPA.

⁸ Which came into effect November 30, 2000, being the date the *Justice and Administration Reform (2000) Act*, SNS 2000, c.28 (the *Reform 2000 Act*) came into effect.

to the scope of an Adjudicator's jurisdiction when hearing cases involving claims on legal accounts.

7. First, it is clear that an Adjudicator does have "all the powers that were exercised by taxing masters" appointed under the *Taxing Masters Act* before the repeal of that Act,⁹ and in particular may carry out "any taxation of fees, costs, charges or disbursements" that a taxing master had jurisdiction to perform pursuant to any enactment or rule.¹⁰
8. Second, it is also clear that the monetary limit normally imposed on Small Claims Court proceedings (which is currently \$15,000) does not apply in the case of taxations.¹¹
9. Accordingly, an Adjudicator may tax an account *regardless* of its amount; and accounts in the several hundreds of thousands of dollars have been assessed in the Small Claims Court.
10. There is a question, however, as to the scope of an Adjudicator's jurisdiction when accounts are in excess of the court's monetary jurisdiction. The question arises because of the fact that taxing masters under the old law did not have the power to do anything other than assess an account's reasonableness. They did not, for example, have the power to determine questions of law;¹² or

⁹ The *Taxing Masters Act* was repealed by s.97 of the *Reform 2000 Act*. Following that Act's repeal, anyone holding appointments under the Act were appointed adjudicators of the SCCNS "only for the purpose of conducting taxations of bills for fees, costs, charges or disbursements pursuant to the *Barristers and Solicitors Act*: s.98, *Reform 2000 Act*."

¹⁰ Section 9A(1) of the SCCA, as enacted by s.92 of the *Reform 2000 Act*. Section 67 of the LPA provides that a lawyer's account may be taxed by an adjudicator or a judge.

¹¹ Section 9A(2), SCCA.

¹² *Synder v. M. E. Edwards Take-Out Food Ltd* (1988) 1988 CarswellNS 619 (NS Co. Ct.) at para.2.

questions concerning retainer (that is, *who* was liable to pay).¹³

11. The question then becomes this: *if* an Adjudicator's jurisdiction is *only* that of the former Taxing Masters under the *Taxing Masters Act*, then any taxation in which a client disputes a retainer in respect of an account over the Small Claims Court's monetary jurisdiction cannot be heard in that court; it must be heard in the Supreme Court.¹⁴
12. However, it is arguable that an Adjudicator's jurisdiction is in fact broader than that of a Taxing Master; and that any question pertaining to a legal account (not just its reasonableness) can be determined by an Adjudicator, regardless of the amount involved.
13. The argument is based on a reading of the provisions of the SCCA which establish an Adjudicator's general jurisdiction and his or her taxing jurisdiction.
14. Section 9(a) of the SCCA provides that "[a] person may make a claim under this Act seeking a monetary award in respect of a matter or thing arising under a contract ... where the claim does not exceed fifteen thousand dollars." Section 29(1)(a)(ii) then authorizes an Adjudicator to make an order "requiring a party to pay money ... in a total amount not exceeding fifteen thousand dollars."
15. These two provisions establish the general jurisdiction of an Adjudicator, which clearly include any questions of law or fact necessary to adjudicate a claim and grant an order.
16. However, as part of the transfer of the taxation power to Adjudicators, s.9A(2) of the SCCA provides that "[t]he monetary limits on the jurisdiction of the Court over claims made pursuant to section 9 and on orders made pursuant to section 29 do not apply to taxations." This section has the effect of removing the only limit established on an Adjudicator's jurisdiction to determine claims in respect of contracts (and to make orders for the payment of money in respect of the same). That being the case, it is now

¹³ *MCR Holdings Ltd. v. Colchester Young Men's Christian Association* [1998] NSJ No. 448 (CA) at para.14.

¹⁴ See, for example, *Merrick Holm v. Wind Driven Inc* [2003] NSJ No. 417 (N.S. Small Cl. Ct.).

arguable that an Adjudicator has the power to determine a claim *in respect of a legal account* and to make an order to pay in respect of such an account *in excess of the normal Small Claims limit*. In short, an Adjudicator's taxation jurisdiction is broader than that considered by the Court of Appeal in its decision in *MCR Holdings Ltd v. Colchester Young Men's Christian Association*.¹⁵

17. In practice the issue of the scope of an Adjudicator's taxation jurisdiction does not arise often, inasmuch as most of the taxations we see are within the monetary limits of the Small Claims Court. And ultimately the question can only be answered by higher authority.

¹⁵ [1998] NSJ No. 448 (CA). This argument was accepted in *Jovcic v. Garson, Knox & MacDonald* 2005 CarswellNS 406 (N.S. Small Cl. Ct.), where the earlier decision in *Merrick Holm v. Wind Driven Inc* [2003] NSJ No. 417 (N.S. Small Cl. Ct.) on this point was not followed.

PART II: THE LAW OF TAXATION

Introduction: Basic Principles

18. The common law, legislation and practice all make clear that a solicitor not entitled to *any* fee, cost, charge or disbursement. Rather, he or she is only entitled to charge "*reasonable and lawful*" fees, costs, charges and disbursements.¹⁶ This provision merely codifies the common law position, for as noted by Haliburton, Co. Ct. J. (as he then was), "[w]hile tradesmen such as plumbers or carpenters may be entitled to be paid in accordance with the terms of their employment, a lawyer's right to be paid is subject to judicial review."¹⁷
19. A lawyer undertaking such a "judicial review" must also understand two fundamental points.
20. First, the fact that the lawyer is entitled only to *reasonable and lawful* accounts means that the onus is always *on the lawyer* to establish, on a balance of probabilities, that his or her account *is* reasonable and lawful.¹⁸ A lawyer who simply puts their account before the court, without making any effort to establish that the account was "reasonable," risks having the amount of the account substantially reduced.
21. Second, and flowing from the first, the taxation is not and cannot be viewed as a "rubber stamp" process. The

¹⁶ BSA, s.41; emphasis added; the same wording was carried through to s.66 of the LPA, which provides that a lawyer "may sue to recover the lawyer's *reasonable and lawful* account" (emphasis added).

¹⁷ *Llewellyn v. Cook* [1991] NSJ No. 665 (Co. Ct.), per Haliburton, Co. Ct. J at para.5. By way of example, in *Prince v. Sonsini* [2002] OJ No. 2607 (CA), a lawyer billed \$133,350 over 12 months in a family law litigation matter. The client paid a total of \$75,500 before falling out with his lawyer. The taxing officer reduced the total account to \$47,819, meaning that the lawyer had to repay the client \$19,712 plus interest and costs.

¹⁸ *Gorin v. Flinn Merrick* (1994) 131 NSR (2d) 55 (SC) at para.8; *aff'd* (1995) 138 NSR (2d) 116 (CA).

adjudicator is under a positive duty in law to assess the account for its reasonableness. As noted by Stewart, J, "notwithstanding an agreement between the parties, a taxing master has a *duty to the public* to determine whether the fee charged was reasonable."¹⁹ That duty exists even if the client does not show up at the taxation.²⁰

22. The factors to be considered on a taxation (or in a lawsuit or claim based on that account) are set out in CPR 63.16(1), which provides that a solicitor "is entitled to such compensation from a client ... *as is reasonable for the services performed*, having regard to:
- a. The nature, importance and urgency of the matters involved;
 - b. The circumstances and interest of the person by whom the costs are payable;
 - c. The fund out of which they are payable;
 - d. The general conduct and costs of the proceeding;
 - e. The skill, labour and responsibility involved; and
 - f. All other circumstances, including, to the extent hereinafter authorized, the contingencies involved."²¹
23. *Lindsay v. Stewart, MacKeen & Coverl*²² contains an important summary by our Court of Appeal of the

¹⁹ *Gorin v. Flinn Merrick* (1994) 131 NSR (2d) 55 (SC) at para.7 (emphasis added); aff'd (1995) 138 NSR (2d) 116 (CA).

²⁰ *Smith Field's Manor Development Ltd v. Campbell* [2002] NSJ No. 492 (TD) at para.33.

²¹ CPR 63.16(1), emphasis added. One might also look to *Cohen v. Kealey & Blaney* [1985] OJ No. 160 (CA) to the same effect.

²² [1988] NSJ No. 9 (CA).

principles that should govern the taxation of a solicitor's bill:²³

- a. The provisions of CPR 63.16(1) and s.42 and s.43 of the BSA²⁴ are "primarily for the protection of the client and must be enforced;"
 - b. Such protection is not ensured by a "cursory examination" of the solicitor's bill;
 - c. The "ultimate test" in all cases, *even where there is an express agreement regarding the basis of remuneration*, is whether the account is "reasonable;" and
 - d. Any suggestion that a lawyer "may charge what the traffic will bear is contrary" to that principle.²⁵
24. The incorporation of these principles means that a taxing officer's assessment is not restricted to determining whether the work billed was actually performed. He or she may also consider "the fruits of professional labour as it relates to the benefit achieved by the client."²⁶
25. Having said that, it should also be noted that a client is not entitled to "perfection" from his or her lawyer. A taxing

²³ Justice Jones at p.7 noted that there were "few decisions in this province setting out the principles applicable to the taxation of solicitor and client costs," and then went on to discuss the law in other provinces as well as Nova Scotia.

²⁴ Which would now be s.66 and s.67 of the LPA.

²⁵ *Ibid.*

²⁶ *Tannous v. Halifax (City)* [1995] NSJ No. 422 (TD), per Goodfellow, J at para.23. The case involved an expropriation matter that eventually resulted in an "award" of \$20,000 to the property owner. The property owner's solicitor submitted an account for \$19,400, which the taxing officer reduced to \$14,000. Justice Goodfellow stated that the taxing officer was "not in error in stating that as a generalization, legal charges must bear some reasonable relationship to the value of the matter in issue:" para.24.

master ought not to measure and examine each individual step taken with the benefit of hindsight, since that would be to measure the steps taken against a scale of perfection. "The test is whether the acts [of the solicitor] were reasonable in the circumstances at the time they were done."²⁷

Fees: Factors to Be Considered by An Adjudicator in Assessing An Account's Reasonableness

26. It must always be borne in mind that the overarching question or issue during a taxation is the "reasonableness" of a lawyer's account. The answer to that question will always depend on the facts of an individual case, which means that any list of "factors" can only serve as a set of guidelines rather than rules.

What Was the Agreement Regarding Fees?

27. The first series of questions adjudicator ought to ask on a taxation concerns the nature and extent of the original retainer:
- a. what was the lawyer retained to do?
 - b. was there any discussion or agreement as to what the lawyer was to charge for that service?
 - c. was any estimate or budget provided to the client as to the cost of that service?
28. The answers to these questions can affect the ultimate determination as to whether or not a particular fee is "reasonable and lawful."

Existence (or Absence) of a Written "Agreement"

29. The courts have stressed on innumerable occasions the importance of a written agreement (or at least record) of the scope of the lawyer's retainer and his or her expected

²⁷ *MacLean v. Van Uninen* [1994] NSJ No. 206 (TD), per Grant, J at para.32.

remuneration.²⁸ Such agreements do not and cannot oust the jurisdiction of the court to vary, reduce or disallow a bill;²⁹ but they do provide an important justification for the fee or cost that is being taxed.

30. Moreover, in the absence of any such *written* agreement or record the burden will be on the lawyer to establish the scope of his or her retainer and the basis for remuneration; and where there is a conflict in the evidence "weight must be given to the version advanced by the client rather than that of the lawyer."³⁰
31. This precept is of course easy to say in theory, and difficult to put into effect in practice. Lawyers often fail to discuss fees at the beginning of a retainer; or to commit such discussions to writing. However, counsel who fail to spell these things out in writing will find it much more difficult to defend their account on a taxation.

Fee Estimates

32. A lawyer has a duty to keep his or her client adequately advised as to the projected and actual fees. Coupled with this duty is a duty to provide reasonably accurate, and timely, estimates of the fees to be charged. A lawyer "is obliged to advise the client without delay of any developments that are likely to increase the fee beyond

²⁸ See, for example, *Gorin v. Flinn Merrick* (1994) 131 NSR (2d) 55 (SC), aff'd at (1995) 138 NSR (2d) 116 (CA).

²⁹ CPR 63.16(2).

³⁰ *Ross, Barret & Scott v. Simanic* [1997] NSJ No. 357 (TD), per Moir, J at para.25; see also *Gorin v. Flinn Merrick* (1994) 131 NSR (2d) 55 (SC), aff'd at (1995) 138 NSR (2d) 116 (CA); and *MacGill & Grant v. Chin Yow You* 19 BCLR 241 (BCCA), cited in *Lindsay, supra.*, at p.7. This rule does not mean that the lawyer's version "never prevails;" but it does mean that the onus is on the lawyer to establish that the client's version is, for whatever reason, mistaken: *Ross, Barret, ibid.*, per Moir, J at para.28.

the estimate."³¹ Lawyers are not bound by their estimates, but they cannot ignore them; their estimates will be considered by the taxing officer in determining whether an account is "reasonable."³² A lawyer who fails to warn his or her client that the fees are surpassing the estimate risks a substantial reduction of their account.³³

³¹ *Cohen v. Kealey & Blaney* [1985] OJ No. 160 (CA), per Robins, JA at p.3.

³² *Re Cogen and Irving Weisdorf & Co Ltd* (1984) 28 ACWS (2d) 153 (Ont SC, Taxing Officer). In *Re Meagher, Shaw and Kirsch* (1981) 12 ACWS (2d) 288 (Ont SC, Taxing Officer) a law firm estimated that two property transactions would cost \$500 if uncomplicated. In the end two lawyers submitted two accounts, totalling \$4,040. While the transactions ended up being a little more complicated than anticipated, the client was entitled to be warned, especially when the fee surpassed the estimate by a substantial amount. The account was reduced to \$1,600. See also *Atlantic Nurseries Ltd v. McInnes Cooper & Robertson* [1991] NSJ No. 190 (TD), per Roscoe, J (as she then was) at p.5.

³³ For example, in *Atlantic Nurseries, ibid.*, the solicitor had estimated the cost of an appeal to be in the range of \$10,000; it ended up costing in the range of \$33,000. When the client complained, the solicitor reduced his bill to \$25,000. The client still complained and the solicitor had his account taxed. The taxing officer taxed the account at that amount, but on appeal Roscoe, J (as she then was) reduced the account to \$15,000. See also *Vanek v. Baughen* (Ont Sup Ct, Lawyers Weekly, 25 Jan 2002, 2135-024), where the court noted that a solicitor is not entitled to estimate fees in a thoughtless or careless matter, since such estimates often form an important part of the client's decision to proceed with retention of the solicitor. Here the court cut the lawyer's bill of \$36,000 in half; and ordered him to pay the client \$4,000 in costs and disbursements on the taxation and subsequent appeal. See also *Torken, Manes, Cohen & Arbus v. Stendel* (1991) 28 ACWS (3d) 720 (Ont Assessment Officer); and *Boyne Clarke v. Steel* [2002] NSJ No. 186 (N.S. Small Cl. Ct.).

33. The existence of estimates is an important element in the establishment of the reasonableness of a lawyer's fees. Many lay clients have little or no understanding of the potential expense of legal services, particularly if litigation is involved. Without such an understanding clients may end up "authorizing" services that he or she would have not requested had they had some idea of the potential cost involved.³⁴
34. So, for example, it is difficult to see how an account in excess of \$15,000 could be "reasonable" in respect of a case involving no more than \$8,500, at least in the absence of any warning that such fees might be involved.³⁵ On the other hand, such advice may not be necessary where the client is sophisticated and well-versed in the cost of legal services; or in fact already knows from that experience or from other sources what the services will probably cost.³⁶

Time Dockets

35. A lawyer who seeks to justify his or her account as "reasonable" should be expected to provide some explanation and detail of just what he or she did on the file to justify the fee claimed. The best evidence (though not in and of itself determinative) may be found in time dockets.
36. A lawyer should keep accurate and detailed records of the services provided and the time required for such services. This statement comes close to being a rule of law, and applies "[n]o matter what the fee arrangements,

³⁴ See the discussion in *Boyne Clarke v. Steel* [2002] NSJ No. 186 (N.S. Small Cl. Ct.) and *Jovcic v. Garson, Knox & MacDonald* 2005 CarswellNS 406 (N.S. Small Cl. Ct.).

³⁵ *Boyne Clarke v. Steel* [2002] NSJ No. 186 (N.S. Small Cl. Ct.).

³⁶ See *Jovcic v. Garson, Knox & MacDonald* 2005 CarswellNS 406 (N.S. Small Cl. Ct.) at paras.25-30.

contingency,³⁷ flat fee, [or] hourly service charge."³⁸ The account "must disclose in detail the name of each person who rendered services, the dates on which those services were rendered, the time expended each day, the rate charged, and the total charge for each item of services actually rendered."³⁹

37. The account details, and the supporting time docket (if there are any), must be sufficiently "identified to the client so the bill can be intelligently appraised by the client and/or someone on his or her behalf to determine if they are fair and reasonable."⁴⁰
38. Indeed, there is some suggestion that to conduct a taxation without billing records of some kind would be to deny natural justice to the client.⁴¹

³⁷ Note that in *Cook (Guardian ad litem of) v. Mission Memorial Hospital* 1996 ACWS (3d) 962 (BCSC) Oliver, J stated that "any lawyer [on a contingency] who hereafter fails to keep records when undertaking contingency fee litigation where there is a possibility of his bill being taxed is foolhardy—for lack of detailed time records deprives the court of important information necessary to protect the interests of the provider of legal services."

³⁸ *Binder v. Murrant* [2001] NSJ No. 251 (TD) at paras.17-18.

³⁹ *The Toronto-Dominion Bank v. Park Foods Limited* (unreported, 1986, SH No.55800), per Nathanson, J at p.2, cited in *Lindsay v. Stewart, MacKeen & Covert* at p.10. See also, generally, *Ormrod (Litigation Guardian of) v. Goodall* [2002] NSJ No. 487 (TD) at paras.23, 26.

⁴⁰ *Re Toulany*, per Grant, J at p.4. See also *Binder v. Murrant* [2001] NSJ No. 251 (TD), Schedule "A".

⁴¹ See the comments of Justice Goodfellow in the first taxation appeal in *Binder v. Murrant*, which appears as Schedule "A" to *Binder v. Murrant* [2001] NSJ No. 251 (TD). The comment is significant, because a denial of natural justice is a ground of appeal from the decision of a taxing officer.

39. It should be emphasized that dockets do not by themselves alone justify an account.⁴² They should in ordinary course be supported by evidence from the solicitor of record. Law firms who tax accounts without presenting the lawyer who docketed the time may fail to satisfy the enquiry that is required under CPR 63.16(1);⁴³ and in such a case the account may be reduced even where there are supporting dockets for the time.⁴⁴
40. This is not to say that the absence of time dockets, or other form of computerized time records, will in and of itself justify the reduction of a solicitor's account. "There are many ways to record time expended on a file," and as long as some form of *accurate* accounting is kept, whether by computerized time docket or written notes in the file, the solicitor's obligations in this regard will have been met.⁴⁵
41. However, where the failure to keep time dockets forces the court to retain an independent expert to provide it with

⁴² For example, time dockets cannot support an account if the adjudicator is of the view that the time recorded was a function of the lawyer's disorganization; or the exploration of irrelevant issues; or his arguments with his client: see *Zollinger v. Leahey* [2003] NSJ No. 316 (N.S. Small Cl. Ct.).

⁴³ For example, in *Fraser Beatty v. Banting* (1991) 29 ACWS (3d) 920 (Ont Assessment Officer), only the solicitor of record attended the taxation. The client was not able to cross-examine the work of other lawyers in the firm who had done work on the file, which resulted in a reduction of the account of \$8,000 by \$2,220.

⁴⁴ See, for example, *Roebuck, Garbig v. Albert* (1992) 33 ACWS (2d) 1021 (Ont Assessment Officer), where an account of \$44,105 was reduced by \$8,000 because the firm only presented the lawyer's dockets on the taxation.

⁴⁵ *Goodman MacDonald Patterson v. Fraser (Guardian of)* [1998] NSJ No. 350 (TD), per Scanlon, J at para.3.

evidence as to what the bill ought to be, the cost of that expert must be borne by the solicitor.⁴⁶

42. There is no requirement that a taxing officer review every individual item on an account, at least in a case where he or she accepts that the work was done.⁴⁷
43. What all of this means, of course, is that counsel should make an effort to keep reasonably detailed time records and dockets. Such a practice does two things. First, it enables a lawyer two or three years after the fact to reconstruct and detail what happened on a file. Second, it provides support for the account being taxed. Time dockets, while not of course proof conclusive, do at least help establish the starting point for the assessment of the account.

Billable Time and Disbursements vs Overhead

44. It has been said that a solicitor is not entitled "to make an additional charge to the client, over and above the solicitor's normal charges, for items which properly form part of office overhead."⁴⁸

⁴⁶ *Boyne Clark v. Nofzell (Guardian ad litem of)* [1994] NSJ No. 604 (TD) at paras.46-51. The law firm had not kept time dockets, or any other form of account, because the matter had been taken on a contingency agreement. Justice Grant strongly disapproved of this practice, stating that in his view "there was a duty on the solicitors to have an account which they could present to the court in a form which the court could readily analyze:" see para.46.

⁴⁷ *Tannous v. Halifax (City)* [1995] NSJ No. 422 (TD) at para.25.

⁴⁸ Mark Orkin, *The Law of Costs* (Toronto, 2nd ed., 2000), §311.12; note as well that "a solicitor shall not, in any way whatever, in respect of the subject of any transactions in the relations between him and his client, make gain to himself at the expense of his client, beyond the amount of the just and fair professional remuneration to which he is entitled." -*Tyrrell v. Bank of London* 10 H.L. Cas. 26, at p. 44 cited in *Knock v. Owen* 35 SCR 168 (on appeal

45. The line between overhead (which is not billable) and work which replaces (at a lesser rate) work normally done by a solicitor is difficult to determine. One measure might be to ask oneself what the division would have been between a lawyer and an assistant in a sole practitioner's office. If the work is traditionally work that would have been done by a lawyer it may be charged out; if, on the other hand, it is work that would ordinarily have been done by his or her assistant, it is overhead and cannot be billed out.
46. So, for example, word processing charges may be disallowed as being part of normal overhead.⁴⁹ Similarly, work that is done by the lawyer's secretary; or which ought to have been done by that secretary, may not be charged to the client.⁵⁰

Law Clerks, Students and Junior Associates

47. The time of a law clerk or student may be charged as a separate fee *if* that clerk or student has "the brains or experience, or both, to successfully undertake certain

from NS), per Davies, J.

⁴⁹ *Shrum Liddle & Hebenton v. Seagull Ventures Inc* (1990) 19 ACWS (3d) 132 (BCSC Master); *Goodman and Carr v. Tempra Management Ltd* (1991) 25 ACWS (3d) 169 (Ont Assessment Officer).

⁵⁰ *Blaier & Albert v. Iuglio* (1992) 35 ACWS (3d) 772 (Ont Assessment Officer), where an account of \$7,052 was reduced to \$3,302 for this and other reasons; and see *Goodman and Carr v. Tempra Management Ltd* (1991) 25 ACWS (2d) 169 (Ont TO) to the same effect. See also *Re Brookes and Alpine Foods Ltd* (1982) 14 ACWS (2d) 457 (TO), where taxing master stated that the cost of a secretary was solicitor's overhead and a charge for her time could not be charged to the client; and see *Shrum Liddle & Hebenton v. Seagull Ventures Inc* (1990) 19 ACWS (3d) 132 (BCSC), where word processing charges were disallowed.

services normally or traditionally performed by solicitors.⁵¹ On the other hand, a client should not be required to pay for the learning experience of a junior.⁵² The test is simply whether the charge for their time is "fair and reasonable and stand the test of taxation, if requested."⁵³

Erroneous or Different Accounts

48. A solicitor who submits an account cannot, once the client requests taxation, submit a new and higher account, absent some mathematical slip or error, or absent some "exceptional circumstances."⁵⁴ The fact that the solicitor practices on his own, or has been under stress, does not constitute such an exceptional circumstance.⁵⁵
49. One suspects that the concern here in part is to prevent solicitors from attempting to discourage their clients from requesting a taxation of their fee account by submitting a higher account on that taxation.⁵⁶

⁵¹ *Re Solicitors* (1971) 3 OR 470 at p.473, cited in *Re Toulany* [1989] NSJ No. 99 (TD) at p.3.

⁵² *Goodman and Carr v. Tempra Management Ltd* (1991) 25 ACWS (3d) 169 (Ont Assessment Officer).

⁵³ *Re Toulany* [1989] NSJ No. 99 (TD) at p.4.

⁵⁴ *Binder v. Murrant* [2001] NSJ No. 251 (TD) at para.4. See also *Re Solicitor* (1977) 22 NSR (2d) 168 (Cowan, CJTD) at para.26, and *Shute v. Nova Scotia* (1977) 27 NSR (2d) 521 (SC).

⁵⁵ *Ibid.*, at para.5.

⁵⁶ See, for example, *Re Solicitor* (1977) 22 NSR (2d) 168 (TD), per Cowan, CJTD at p.177, paras.12-13.

Excessive Preparation, and Duplicitous or Worthless Work

50. CPR 63.33(1) provides that the taxing officer "*shall not allow* the costs of any proceedings:
- a. Unnecessarily taken;
 - b. Not calculated to advance the interests of the party on whose behalf the proceedings were taken;
 - c. Incurred through overcaution or mistake;
 - d. That do not appear to have been necessary or proper for the attainment of justice or defending the rights of the party."
51. This rule, as well as longstanding case law, requires the taxing officer to determine not just whether the work was done; but whether it should have been done – and hence whether it is "reasonable" for the solicitor to seek payment for it.
52. If the taxing officer is satisfied that too much time has been spent on a file the account may be reduced.⁵⁷ A taxing officer is entitled to consider whether the issues warrant the amount of time spent on them. For example, a charge of more than 100 hours to research the law respecting an issue that is "completely uncomplicated" and found in three decisions of the Court of Appeal (*to wit*, summary judgment applications) will not be accepted as "reasonable" on a taxation.⁵⁸ Similarly, a solicitor who spent "an extensive amount of time briefing damages before receiving a final medical report in an accident case

⁵⁷ See *Roebuck, Garbig v. Albert* (1992) 33 ACWS (2nd) 1021 (Ont Assessment Officer), where \$3,500 was deducted from an account for excessive preparation; see also CPR 63.16(1)(d) and (e); see also *Re Mark and Mark* (1981) 8 ACWS (2d) 495 (Ont SC, Taxing Officer), where an account of \$15,000 was reduced to \$8,250 in a case where the matter was not complex and the counsel spent excessive time in preparation.

⁵⁸ *Canada Trustco Mortgage Co. v. Homburg* [1999] NSJ No. 382 (TD) at paras.17-18, where an account of \$69,515 was reduced to \$40,000.

would likely have a difficult time justifying such a position.⁵⁹

53. An account that demonstrates that a large number of lawyers, law clerks or students have worked on it will be closely scrutinized to ensure that the client is not being billed for duplicitous work.⁶⁰
54. An account that contains time charges stemming from a lawyer's disorganization; tendency to explore irrelevant issues; or argue with his client will be reduced to reflect only those charges reasonably calculated to advance the client's case.⁶¹
55. As well, the solicitor's account may be reduced where he or she pursues a course of action that is not only of no benefit to the client, but may even be harmful to her case.⁶²

⁵⁹ *Tannous v. Halifax (City)* [1995] NSJ No. 422 (TD), per Goodfellow, J at para.22.

⁶⁰ See, for e.g., *Canada Trustco Mortgage Co v. Homburg* [1999] NSJ No. 382 (TD), where Davison, J noted, as a factor in his decision to reduce an account from \$69,515 to \$40,000, the fact that "there was an abundance of staff working on this file," including a total of nine lawyers; four of whom engaged in research on summary judgment applications: see para.16; see also *Coleman Fraser Whittome & Parcels v. Canada (Dept of Justice)* [2003] NSJ No. 272 (N.S. Small Cl. Ct.) at paras.97-101.

⁶¹ See *Zolliinger v. Leahey* [2003] NSJ No. 316 (N.S. Small Cl. Ct.).

⁶² *Carruth v. Singleton Murphy* 1998] NSJ No. 163 (TD) at paras.15-18. Strictly speaking, given the decision in *Carruth* that the small claims court adjudicator lacked jurisdiction to tax the solicitor's account, the decision may be *obiter* on this point. However, the issue was raised before Justice MacAdam, and His Lordship was at pains to emphasize that the adjudicator's only error was in assuming jurisdiction; and that her findings on the taxation did not amount to an error of law: see para.18.

Results

56. Solicitors, as professionals, must accept that their accounts, regardless of the amount of time expended, will be measured in part by the ultimate value or benefit of that work to the client. A matter that is worth \$20,000 to the client may not support an account of \$19,000, even where all the work billed was done.⁶³ Indeed, it is an error in principle on the part of a taxing officer to fail to consider the total recovery in relation to the full solicitor's fee.⁶⁴ In other words, merely considering whether the line by line entries for time and services are reasonable, without looking at the overall account in relation to the overall recovery, is an error.⁶⁵
57. That is not to say that an account cannot be rendered for services that do not result in a "win" for the client; but it does mean that an adjudicator must carefully consider whether, in all the circumstances, including the extent or degree of success, the account is reasonable. So, for example, where a client, fully apprised of the risks and costs of a particular course of action, instructs his or her client to proceed "at all costs," then the resulting account will in all likelihood be a "reasonable" one.⁶⁶

Taxation of Accounts Which Have Already Been Paid

58. It was said of section 42 of the BSA, which formerly governed the taxation of legal accounts, that it "confers the widest possible right on a client to have a bill taxed in Nova Scotia," and a client is not deprived of that right "simply

⁶³ *Tannous v. Halifax (City)* [1995] NSJ No. 422 (TD) at paras.22-23.

⁶⁴ *Re Solicitor* [1973] 1 OR 107 (CA).

⁶⁵ *Ibid*; see also *Keel Cottrelle v. Stoneburgh* (1997) 75 ACWS (3d) 555 (Ont Ct (GD)).

⁶⁶ See, for example, *Re Magee & Ottawa Separate School Board* (1962) 32 DLR (2d) 162 (Ont HCJ) at pp.165-66; and see *Boyne Clarke v. Steel* [2002] NSJ No. 186 at para.57.

because he has made payments on account."⁶⁷ It strikes me as unlikely that a court would come to any different conclusion with respect to the scope of review under the LPA. An adjudicator must review all the accounts rendered by a lawyer in respect of a particular retainer, not just the last one, or the one in issue. Only such a complete review will enable the adjudicator to determine whether any particular account; or whether, indeed, all the accounts, were "reasonable."

Disbursements

59. Disbursements are subject to the same requirements of reasonableness and lawfulness,⁶⁸ the onus of proof of which lies on the solicitor.
60. One of the most important distinctions to bear in mind on a solicitor and client taxation is that between office overhead and out-of-pocket expenses incurred on behalf of a client. As a general rule, overhead costs (such as blanket file-opening charges), as opposed to disbursements in furtherance of a particular file, are not taxable.⁶⁹ As noted

⁶⁷ *Lindsay v. Stewart, MacKeen & Covert*, per Jones, JA at p.6. In *Lang, Michener, Cranston, Farquharson & Wright v. Newell* [1985] OJ No. 272 the court held that limitation periods for assessment dealing with a single retainer run from the date of the final account, even if some interim accounts have already been paid; see also *Price v. Sonsini* [2002] OJ No. 2607, 60 OR (3d) 257 (CA), where the observation is made at OR p.262 that interim accounts were "necessary as a matter of commercial reality, even though it may be difficult to assess the value of the legal services before the solicitor's work is completed." However, a rule "that required clients to move for immediate assessment of interim accounts would force clients into the invidious position of straining, if not rupturing, the solicitor-client relationship before the retainer has ended."

⁶⁸ Sections 65(a) and 66, LPA.

⁶⁹ See, for e.g., *Ormrod (Litigation Guardian of) v. Goodall* [2002] NSJ No. 487 (TD), per Gruchy, J at para.34: "Usually administrative costs should be

by Gruchy, J in *Ormrod (Litigation guardian of) v. Goodall*⁷⁰, "[u]sually administrative costs should be included in the lawyer's hourly rate." The trick, however, is to distinguish between office overhead (which is generally not chargeable) and genuine out-of-pocket expenses (which generally are if reasonable)."⁷¹

File Opening Fees

61. A "file opening fee" (that is, a standard charge associated with opening a file) is a charge in respect of overhead and should not generally be permitted on a taxation.⁷²

Postage, Fax and Photocopying Charges

62. Postage is generally a specific out-of-pocket expense incurred on behalf of a client in the furtherance of his or her case; and is one whose amount is readily ascertainable. Hence it would generally be reasonable to allow such charges on a taxation.
63. The reasonableness of fax charges, on the other hand, are more difficult to assess. The use of a fax machine has

included in the lawyer's hourly rate. It is not acceptable, in my view, to charge a blanket amount [for administrative charges] as a disbursement." See also *Bank of Montreal v. Scotia Capital Inc* 2002 NSSC 274, per Goodfellow, J at para.15; and the citations in *Bank of Montreal v. Binder* 2005 CarswellNS 412 (N.S. Small Cl. Ct.) at para.24.

⁷⁰ [2002] NSJ No. 487 at para.34.

⁷¹ See, for e.g., *3664902 Canada Inc v. Hudson's Bay Company* (Ont SCJ), 22 CPC (5th) 102, where it was noted that routine disbursements such as binding and postage are more properly regarded as overhead and not taxable. Other cases, discussed below, have allowed postage as a reasonable disbursement subject to taxation.

⁷² *Boyne Clarke v. Steel* [2002] NSJ No. 186 (N.S. Small Cl. Ct.) at paras.83-84; *Boyne Clarke v. Gosbee* [2002] NSJ No. 29 (N.S. Small Cl. Ct.) at para.34.

become almost a necessity in today's practice, and the reasonable cost of its use has been allowed in the past as a recoverable disbursement.⁷³ However, one might question the "flat rate" charges one often still sees for faxes. Faxes in the "old days" were slow and cumbersome, and usually required personal attendance. Now they can be sent (or indeed received) directly from an assistant's desktop computer. In such a case one is entitled to question whether a charge of, for example, a dollar a fax (or indeed a page) is reasonable.⁷⁴

64. The same considerations apply to photocopying.⁷⁵ The "standard" charge to the client is in the range of 25 to 30 cents a page. There are some cases, at least in the context of party-and-party awards, in which the court has been prepared to approve such charges, notwithstanding that commercial charges for photocopying are much less.⁷⁶

⁷³ *Knox v. Interprovincial Engineering* (1990) 120 NSR (2d) 288 (TD).

⁷⁴ See *Boyne Clarke v. Steel* [2002] NSJ No. 186 (N.S. Small Cl. Ct.) at paras.76-81, where a charge of \$83.50 for 37 faxes was reduced to zero, at least in a case where long-distance surcharges had been added to the faxes in addition to the amount claimed; see also *Bank of Montreal v. Binder* 2005 CarswellNS 412 (NS Small Cl. Ct.), where a total charge for faxes of \$578.67 (at \$1.00 per page) was reduced to \$70.00.

⁷⁵ See for example *Knox v. Interprovincial Engineering Ltd* (1993) 120 NSR (2d) 288, albeit in the case of a party-and-party assessment; the issue of photocopying charges is discussed at length in *Bank of Montreal v. Binder* 2005 CarswellNS 412 (N.S. Small Cl. Ct.) at paras.26-36.

⁷⁶ The commercial rate is usually in the range of a few pennies a page. See, for e.g., *Halifax Regional Municipality Pension Committee v. Nova Scotia (Superintendent of Pensions)* 2005 NSSC 228 (NSSC) at para.11, where Moir, J was of the view that the long standing practice of charging "twenty cents or more" for photocopying was to be accepted "[i]n the absence of showing this common practice to be unreasonable and in the absence of

65. However, and again in the context of party-and-party awards, there appears overall to be a fairly general reluctance to allow charges of 25 cents or more; and a more general tendency to reduce such charges by at least 50% if not more.⁷⁷ The courts have expressed concern in such cases that photocopying not become simply "another profit generator;"⁷⁸ and that the charges be supported by at least *some* evidence as to the actual cost of photocopying to the law firm.
66. Perhaps the best way to resolve the question is simply to return to first principles. In some cases it might be reasonable to do the work in-house and charge a premium over the commercial rate.⁷⁹ In other cases, however, it might be more appropriate to send the document out to a commercial printing shop.⁸⁰ In each case it will be up to the adjudicator to determine whether the photocopying charge is reasonable. Counsel should not assume that the "standard" rate will be allowed automatically without some evidence as to the need for a premium over the commercial rate.⁸¹

evidence that large bundles should have been sent to the printers" (emphasis added).

⁷⁷ See the cases cited in *Bank of Montreal v. Binder* 2005 CarswellNS 412 (N.S. Small Cl. Ct.) at paras.33-36.

⁷⁸ *Kimberly-Clark Inc. v. Julimar Lumber Co.* 2004 NSSC 71 (NSSC), per Gruchy, J at para.15 (where the entire claim for photocopying was disallowed).

⁷⁹ For example, where only a few pages must go out on an expedited basis; or where the documents to be copied are confidential. Even here, however, there is some room to question the "standard" charge, given that the paper, ink and operating costs to a law firm are not much more than those of a commercial printing company.

⁸⁰ For example, where case books or appeal books are being copied.

⁸¹ See *Boyne Clarke v. Steel* [2002] NSJ No. 186 (N.S. Small Cl. Ct.) at para.82, where a charge of \$334.10 was reduced to \$100; and see *Bank of*

Computerized Legal Searches

67. There appears to be some judicial disagreement as to the reasonableness of this disbursement. The disagreement seems to be over whether the charge is part of normal overhead (which is normally *not* taxable); or is a particular charge specific to the client's file (which may be taxable, if reasonable).
68. In *Keddy v. Western Regional Health Board* Oland, J (as she then was) was of the view that QuickLaw searches were reasonable "as this method of legal research is generally cost-effective;" but she only allowed \$500 of the \$700 claimed.⁸²
69. On the other hand, in *Elliott v. Nicholson* Hall, J was of the view that such charges, for work "that the lawyer would have to have done herself had the legal research service not been available," was "part of the lawyer's office overhead expense and thus not allowable."⁸³ This approach was supported by Goodfellow, J in *Bank of Montreal v. Scotia Capital Inc.*,⁸⁴ wherein His Lordship noted that in the days before electronic research disbursements to out-side firms to conduct research had never been allowed; and that computerized legal research was "(1) work that the lawyer would expect to do and possibility bill to a client, but not party and party; and (2) part of office overhead expense [and so not appropriate to include in party and party disbursements]."
70. An argument can be made on both sides of the issue. Clients are not normally charged for library expenses, since they are part of the normal overhead which is

Montreal v. Binder 2005 CarswellNS 412 (N.S. Small Cl. Ct.) at para.41, where the charge of \$1,614,53 (at 25 cents a page) was reduced by 50%.

⁸² *Keddy v. Western Regional Health Board* [1999] NSJ No. 464 (TD) at para.18.

⁸³ *Elliott v. Nicholson* (1999) 179 NSR (2d) 264 (TD) at para.7.

⁸⁴ 2002 NSSC 274 at para.15.

reflected in the hourly rate charged to the client. If a law firm replaces its library with a computerized legal data base (or online research service) it is difficult to see why the client (or the unsuccessful party) should be billed for the charges associated with such services. This is especially true given that most if not all electronic research services do not now charge on a "per-use" basis.⁶⁵ Instead they charge a flat monthly or annual fee to a law firm, regardless of the number of individual searches. Such charges by their very nature appear to be more overhead than a particular out-of-pocket expense for a particular client.⁶⁶

71. On the other hand, if there was something about the client's case that required access to specific legal materials not normally used by lawyers in a general litigation practice (for example, access to US or Australian law) then such a charge, which was specific to the client's case, might be a reasonable disbursement.
72. In the end it is up to the adjudicator to determine whether, in the circumstances, some, all or none of the charges were "reasonable."⁶⁷

⁶⁵ As was the case in the early years of online electronic research.

⁶⁶ See the discussion in *Bank of Montreal v. Binder* 2005 CarswellNS 412 (N.S. Small Cl. Ct.) at paras.48-55.

⁶⁷ See, for example, *Coleman Fraser Whittome & Parcels v. Canada (Dept of Justice)* [2003] NSJ No. 272 (N.S. Small Cl. Ct.) at paras.77-79, where roughly a third of the total computerized search time was allowed, primarily on the ground that that portion of the time represented research in materials that would not normally be found in a law firm's library; see also *Bank of Montreal v. Binder* 2005 CarswellNS 412 (N.S. Small Cl. Ct.) at paras.48-57, where the law firm's entire charge of \$573.96 was reduced to zero on the grounds that the research involved well-known and widely-reported Nova Scotia decisions.

Expert Fees

73. A lawyer ought to obtain the consent of a client before retaining an expert; the failure to do so may result in a claim for that expense being disallowed.⁸⁸
74. If the expert fee was truly necessary to advance the client's case at the time it was incurred, then it may be allowed (at least if "comparatively modest") even if the client was not consulted.⁸⁹
75. On the other hand, if the expert was retained before he or she ought to have been, at a time when a report was not truly necessary, then the resulting bill might be disallowed as having been unnecessarily incurred.⁹⁰

Contingency Fee Agreements

76. The fact that a solicitor and a client have a contingency fee agreement does not prevent or bar an adjudicator, on application of the client or the solicitor, from taxing that account.⁹¹ Nor does it prevent him or her from assessing

⁸⁸ This is implied in *Oatway v. Bannister* (1988) 88 NSR (2d) 373 at para.28.

⁸⁹ *Oatway v. Bannister* (1988) 88 NSR (2d) 373, per Grant, J at para.28.

⁹⁰ *Coleman Fraser Whittome & Parcels v. Canada (Dept of Justice)* [2003] NSJ No. 272 (N.S. Small Cl. Ct.) at paras.65-68.

⁹¹ This is clearly stated in CPR 63.17, which deals specifically with contingency fee agreements; and more generally in CPR 63.16(2), which provides that the "charges of a solicitor for services performed by him ... are, notwithstanding any agreement to the contrary, subject to taxation as provided by Rule 63." See also *Ormrod (Litigation Guardian of) v. Goodall* [2002] NSJ No. 487 (TD) which, while strictly speaking a case arising out of an infant settlement, contains comments which indicate that the same principles would apply to a case involving an adult, competent plaintiff.

whether the overall fee, as calculated by the agreement, is reasonable.⁹²

Procedural Requirements for Contingency Agreements

77. Courts will tend to scrutinize contingency fee agreements carefully.⁹³ Any ambiguities will be construed in favour of the client. For example, a contingency agreement which failed to satisfy four of the six requirements spelled out under CPR 63.18(2) was held not to be a valid contingency agreement, which threw the solicitors back onto a "normal" taxation under CPR 63.19(2).⁹⁴

⁹² See, for example, *Oatway v. Bannister* [1988] NSJ No. 458 (TD), where the court concluded that a contingency fee of \$141,643 on a settlement of \$30,000 cash and \$70,000 structured was unreasonable; see also *Rusk v. Medicine Hat (City of)* (Alta QB, Sulatycky, ACJ, Lawyer's Weekly, 18 Jan 2002, 2134-016), where a contingency fee agreement yielded fees of \$1.055 million on a \$3.015 settlement. The matter was settled after the claim was filed but before any contested steps were taken. The court reduced the fee to \$472,500, and accepted the Public Trustee's argument that no more than an estimated 700 hours on the file should be ruled necessary. The importance of judging the reasonableness of a contingency fee agreement by the quality of the results (and how much effort it took to achieve those results) was highlighted in *McIntyre Estate v. Ontario (AG)* (2002) 61 OR (3d) 257 (CA) at para.79; the case also includes an interesting and detailed analysis of champerty and whether or how contingency fee agreements might run afoul of champerty laws.

⁹³ For a general discussion of the court's supervisory function in respect of the reasonableness of any particular contingency agreement, see *Ormrod (Litigation guardian of) v. Goodall* [2002] NSJ No. 487.

⁹⁴ *Boyne Clark v. Nofzell (Guardian ad litem of)* [1994] NSJ No. 604 (TD) at paras.16-17. The firm's account of \$171,800 (which appears to have represented roughly 25% of the proposed

78. Similarly, failure to file the contingency fee agreement with the Prothonotary (as required by CPR 63.19(1)) means that the solicitor will be entitled only to "the compensation as would have been payable in the absence of any contingency agreement *and without regard to the contingency.*"⁹⁵
79. A contingency fee agreement may also be set aside (or ignored) if the court feels that the agreement was entered into at a time when the solicitor and the client lacked enough information to be able to determine whether a contingency—or the proposed contingency percentage—was reasonable.⁹⁶
80. In essence, a contingency fee agreement has no particular claim to enforceability against a client. While its terms and

settlement) was reduced to \$120,000, after an independent expert (hired by the court and charged to the law firm's account) concluded that on a *quantum meruit* basis the fee should have been \$120,000.

⁹⁵ CPR 63.19(2); and see *Re Solicitor* (1977) 22 NSR (2d) 168 (TD), per Cowan, CJTD at para. 25, where His Lordship stated that a lawyer who failed to file a contingency agreement, at least in the circumstances of that case, "entitled only to the compensation as would have been payable in the absence of any contingency agreement;" see also *Costello (Guardian of) v. MacKenzie* [1997] NSJ No. 32 (TD), where the contingency fee agreement was ignored because it had not been filed.

⁹⁶ *Re Usipuik v. Jensen, Mitchell & Co* (1986) 39 ACWS (2d) 265 (BCSC). But see *Raphael Partners v. Lam* (2002) 61 OR (3d) 417 (Ont CA), where the court held that it so long as the client understood the agreement at the beginning, it did not matter that the eventual resolution of the matter (and hence the fee charged) happened after mediation rather than after trial; since contingency fees were by definition based on the amount of the recovery rather than the amount of time put in, it is an error to place too much emphasis on events after the agreement in assessing the reasonableness of the eventual fee.

conditions are certainly an important factor in the assessment of the account's reasonableness, it cannot and does not oust the adjudicator's power to "award" (that is, assess or tax) a different amount.⁹⁷

Time Dockets in Contingency Fee Matters

81. Counsel on contingency files should keep time dockets in all cases.⁹⁸ A lawyer who does not, particularly where there is any risk that his or her account will be taxed (as in the case of clients with disabilities), is "foolhardy."⁹⁹
82. Time dockets are important because "it is the time actually expended that of necessity must help define the premium" to which a lawyer on a contingency is entitled.¹⁰⁰ Having

⁹⁷ *Coleman Fraser Whitome & Parcels v. Canada (Dept of Justice)* [2003] NSJ No. 272 at para.51.

⁹⁸ This is recommendation 3(1) of the Bar Society's Contingency Fees Practice Advisory (redraft Feb 2001). Justice Grant in *Boyne Clark v. Nofzell (Guardian ad litem of)* [1994] NSJ No. 604 (TD) at paras.45-61 disapproved of a law firm's failure to keep dockets on a contingency matter; see also *Evans v. Richey* (2000) 186 NSR (2d) 384 (TD), and *Ross, Barrett & Scott v. Simanic* (1997) 163 NSR (2d) 61 (TD), aff'd 165 NSR (2d) 211 (CA). In *Binder v. Murrant* (2001) 196 NSR (2d) 25 (Goodfellow, J) at paras. 17-18 the court noted that there was a duty on counsel, *regardless* of the fee arrangement, to charge only fees that are "fully disclosed, fair and reasonable;" and that the best way to comply with this duty was to keep accurate time records of all services performed by the solicitor.

⁹⁹ *Cook (Guardian ad litem of) v. Mission Memorial Hospital* (1996) 63 ACWS (3d) 962 (BSCS), per Oliver, J.

¹⁰⁰ *Renaerts (Guardian ad litem) v. Korn* [1999] WWR 499 (BCSC), per Williamson, J. See also *Rusk v. Medicine Hat (City of)* (Alta QB, Sulatycky, ACJ, Lawyer's Weekly, 18 Jan 2002), where the court allowed no more than 700 hrs of the 1,313 docketed as a guide to what was reasonable

said that, that it should also be noted that time docketed (that is, the actual time spent) are not the *only*, or the *determinative*, factor to be taken into consideration. Contingency agreements, by definition, provide for fees based on the amount recovered for the client. If the client fully understands the agreement when it is entered into; if there was risk to the lawyer; if there was considerable preparation, research and work undertaken by the lawyer; and if the actual percentages employed are reasonable, a contingency agreement ought to be accepted on assessment.¹⁰¹

Where the Client Terminates the Contingency Retainer Before the Matter is Concluded

83. Regardless of the provisions of the agreement, a client who terminates his or her lawyer's retainer is entitled to receive from the lawyer a bill of costs (or account) and all justifying information so that the client can move to have the bill taxed. The lawyer is not entitled to insist that the taxation be postponed until the matter reaches a conclusion with the new lawyer "unless the just fee cannot be determined without knowing the outcome."¹⁰² On the other hand, *liability to pay* any such account following taxation may be postponed until the matter is resolved; indeed, a provision that required payment upon discharge would be contrary to CPR 63.22(2) and 63.22(6).¹⁰³

Particular Terms in Contingency Agreements (and Whether They are Valid)

84. Provisions in a contingency agreement that:

(cutting a \$1 million contingency fee on a \$3 million settlement to \$472,500), even though the client thought the original fee was reasonable.

¹⁰¹ *Raphael Partners v. Lam* (2002) 61 OR (3d) 417 (CA).

¹⁰² *Evans v. Richey* [2000] NSJ No. 2000 (TD), per Moir, J at para.7.

¹⁰³ *Ibid.*, at para.3.

- a. Purport to waive the right to a taxation of the account;¹⁰⁴ or
- b. Require immediate payment of the account upon the discharge of the solicitor,

are not valid and will not be enforced by the court.

85. Contingency agreements may provide for a higher percentage return when the matter proceeds to action (*i.e.*, when a statement of claim is issued). However, where the action is commenced simply to enable the solicitor to apply for court approval of a settlement he or she should "not count on the extra fees which commencing an action may trigger under the agreement."¹⁰⁵

"Fair and Reasonable"

86. The fact that a contingency fee is supposed to represent the *maximum* that a client may be expected to pay does not make the fee "unreasonable" when a matter settles after mediation rather than going to trial. So, for example, where a client in a catastrophic injury case settles a claim for a total of \$2.5 million, it was not unreasonable to charge him \$417,000 in respect of fees based on a contingency of 15% on the first \$1 million, and 10% on each additional million. An assessment officer who so held was overruled by the Ontario Court of Appeal, which held that it was an error to look only at the mediation itself; and to ignore the fact that the agreement had been fully understood by the client; and to ignore the considerable work, research and preparation that went into the conduct of the file. The solicitors were accordingly allowed \$250,000 (which represented a premium over the docketed time of almost \$97,000).¹⁰⁶
87. On the other hand, it may not be reasonable to charge 25% of a settlement where there is "little doubt that the

¹⁰⁴ Such a provision would be contrary to the express requirements of CPR 63.18(2)(f)

¹⁰⁵ *Boyne Clarke v. Nottell (Guardian ad litem of)* [1994] NSJ No. 604 (TD), per Grant, J at para.20.

¹⁰⁶ *Raphael Partners v. Lam* (2002) 61 OR (3d) 417 (CA).

infant plaintiff would eventually recover her damages," although some premium might be justified where the lawyer would be required to carry the file for some years prior to settlement or trial.¹⁰⁷

The Taxation of Solicitor-and-Client Awards of Costs

88. On occasion an adjudicator will be asked to assess a solicitor and client account not by the client, but by a party who has been ordered in an action to pay that client's solicitor and client costs.
89. The question which then arises is whether this type of taxation is to be assessed in the same way as a "normal" solicitor and client taxation (where the client is being asked to pay)? Or should there be a difference and, in particular, should the losing party be expected to pay *all* of the successful party's solicitor and client costs?
90. On balance, the answer is that there should be *no* difference. As noted by Goodfellow, J in *Halifax Regional Municipality v. Joudrey*,¹⁰⁸ "[a]n award of solicitor and client costs is not a determination that the responsible party pays whatever the solicitor and client costs bill happens to be."¹⁰⁹ To put it another way, a person who has the benefit of such an order is to receive from the party against whom the order is made "payment for all costs relating to the litigation that ... [the former's] solicitor could properly ... [have asked him or her] to pay."¹¹⁰
91. Accordingly, a party who has been ordered to pay another party's solicitor and client costs is entitled to raise any objection that that party could have raised to the

¹⁰⁷ See the comments of Justice Gruchy in *Ormrod (Litigation guardian of) v. Goodall* [2002] NSJ No. 487.

¹⁰⁸ *HRM v. Joudrey* (Goodfellow, J; released December 10, 2001; 2001 NSSC 185) at para.14. emphasis in original.

¹⁰⁹ See also *Aulwes v. Mai and Mai* 2002 NSSC 204 (Goodfellow, J) at para.22.

¹¹⁰ *Mintz v. Mintz* (1983) 43 OR (2d) 789 (HCJ), per Trainor, J.

"reasonableness" of the charges on a taxation. Hence an adjudicator is obligated to tax a solicitor and client costs award as though a client were the one resisting the bill.¹¹¹

92. There are of course certain distinctions between a client who undergoes a solicitor and client taxation, and a party who has been ordered to pay another party's solicitor and client costs. One such distinction occurs with respect to charges in respect of unreasonable steps that a client insisted be taken. In such a case, the resulting charges might be "reasonable" if the client was the one expected to pay; but not if the other party were expected to pay.¹¹²
93. Similarly, a party charged with another's solicitor and client costs cannot be expected to pay in respect of costs and disbursements incurred *before* the action in which the order is made is commenced.¹¹³
94. On balance, the approach is the same regardless of whether a client or a party is the one paying the account: is the account "reasonable and lawful" in light of all the circumstances. What is "reasonable" in a particular case will depend on the facts of the case. So, for example, it may be "reasonable" to permit a solicitor to charge a client who insists (against the solicitor's advice) on a course of conduct which is likely (in the solicitor's view) to be unsuccessful; but highly "unreasonable" to force the unsuccessful party to pay for such time.

¹¹¹ *Harwood v. Harwood* [1998] AJ No. 217 (Taxing Officer); aff'd [1998] AJ No. 296 (QB); see also *Coleman Fraser Whittome & Parcels v. Canada (Dept of Justice)* [2003] NSJ No. 272 at para.50 (N.S. Small Cl. Ct.).

¹¹² *Magee v. Trustees RCSS Ottawa* (1962) 32 DLR (2d) 162 (Ont HC), per McRuer, CJHC at pp.165-66.

¹¹³ See *Gordon's Law of Costs* (1884) at pp.187-88, cited in *Magee, ibid.*, at p.163.

PART III: THE PRACTICE OF TAXATION

95. In the old days law firms used to prefer issuing a Notice of Claim in Small Claims Court because they could combine the assessment of the quantum of the account with the procedure to obtain an order for judgment for that amount. However, the amendments to the legislation and the regulations did away with the old distinction between a taxation (which produced a Certificate that was binding but not enforceable as such) and a Small Claims Court action (which produced an order that was enforceable as well as binding), at least in cases within the monetary jurisdiction of the Small Claims Court (currently \$15,000). It may continue to be important to bear the old distinction in mind, however, in cases involving accounts in excess of the monetary jurisdiction because of the question of jurisdiction.¹¹⁴
96. So long as the account is within the Court's monetary jurisdiction, then in my view it does not matter too much whether you proceed in the Small Claims Court by way of Notice of Claim (in an action to enforce your account) or by way of Notice of Taxation (for a taxation of your account), because in either case the adjudicator must determine whether or not your account is "reasonable and lawful."¹¹⁵

The Notice of Claim Approach

97. It is assumed that you are familiar with the "normal" practice in respect of the issuance and service of Notice of Claim in the Small Claims Court. The procedure will not be detailed here.

¹¹⁴ For which see above, Part I.

¹¹⁵ There is a difference in the filing fees, with Notice of Taxation being cheaper than Notices of Claim. As well, a Notice of Taxation has a lighter service obligation than a Notice of Claim, which requires personal service.

The Notice of Taxation Approach

98. The following procedure governs if one chooses to tax an account by way of a Notice of Taxation.

Service

99. One of the benefits of proceeding by way of Notice of Taxation (as opposed to Notice of Claim) are the somewhat more relaxed rules regarding service, as noted below.
100. The applicant must have served the Notice of Taxation on the respondent, together with a copy of each bill incurred in the proceeding that was filed pursuant along with the Notice.¹¹⁶
101. *Service of a Notice of Taxation* may be effected by:
- a. personal service;
 - b. substituted service (for which a court order is required); or
 - c. registered mail.¹¹⁷
102. The date of service must be at least 5 clear days before the taxation hearing.¹¹⁸
103. Service may be proved by affidavit.¹¹⁹
104. Notwithstanding the above, service is not required where the respondent "is absconding or absent from the Province."¹²⁰

¹¹⁶ Taxation Reg., s.4(1).

¹¹⁷ Taxation Reg., s.4(1)(b); bear in mind that if one is proceeding by way of a Notice of Claim one cannot use these provisions, and must instead effect personal service.

¹¹⁸ Taxation Reg., s.4(1)(b).

¹¹⁹ Taxation Reg., s.4(2).

¹²⁰ Taxation Reg., s.4(3).

Procedures Governing All Taxations Once in Court

105. Whether the question of the reasonableness of an account arrives in Small Claims Court by way of a Notice of Claim, or a Notice of Taxation, the end result (at least as far as the hearing itself) is the same: a hearing as to whether the account is "reasonable and lawful." The following procedures and issues would then apply.

Required Response to a Notice of Taxation

106. A person who is served with a Notice of Taxation is expected to file a response, setting out his or her reasons for disputing the amount or amounts in issue.¹²¹ A response is not mandatory.
107. The adjudicator is permitted to proceed with a taxation hearing "in the absence of the respondent."¹²² However, the fact that the respondent does not appear does not entitle the adjudicator to ignore his or her duty to assess the merits of the account; that is, to determine whether it is "reasonable and lawful."¹²³
108. What this means is that the "quick judgment" procedure normally available under s. 23(1) of the SCCA to claimants who issue a Notice of Claim in the Small Claims Court cannot in my view be used in respect of claims on legal accounts. Since legal accounts must be assessed for their reasonableness a hearing is arguably mandatory.

¹²¹ See Form 1; if the taxation is by way of Notice of Claim, then a Defence should be filed.

¹²² Taxation Reg., s.7(2).

¹²³ See for example *Smith's Field Manor Development Ltd v. Campbell* [2002] NSJ No. 492, where Goodfellow, J noted at para.33 that "[t]here is no taxation by default or absence;" see also *Re Levine* [1960] OJ No. 233 (CA), as well as the discussion under Part II above. This duty is particularly important given the fact that many clients do not know that they in fact have the right to question the reasonableness of a lawyer's account.

**What You Should Consider Bringing to a Taxation (or
a Claim Based on Your Account)**

109. The regulations regarding taxations specify that the person seeking the taxation file a Notice of Taxation together with:
- a. "a copy of *each* bill incurred in the proceeding;"¹²⁴
and
 - b. a ~~\$75.00~~ taxation fee.¹²⁵
110. In addition, if the account involves disbursements for which any rule or enactment requires an affidavit in proof of such disbursements, the affidavit should be filed along with the Notice.¹²⁶
111. Note that the bills filed with the Notice may be filed in a sealed envelope and, if they are, the envelope must remained sealed until opened by the adjudicator for the purposes of the taxation.¹²⁷
112. In practice, however, one does not always see *all* the bills that may have been rendered to the client. One often only sees the last account (or at least only the accounts which the client has refused or neglected to pay). However, the adjudicator may (and probably should) request *all* accounts, even those which have already been paid, and even those over which there appears to be no dispute.

now \$ 80.00

¹²⁴ Taxation Reg., s.3(1)(b), emphasis added. Note that it is *each* bill incurred in the proceeding, not just the bill that the client has refused to pay.

¹²⁵ Taxation Reg., s.3(1)(c).

¹²⁶ Taxation Reg., s.3(3)(a); a respondent in such a case must file the affidavit in proof of disbursements within 5 days of being served with the Notice: s.3(3)(b).

¹²⁷ Taxation Reg., s.3(2).

The Hearing: Open or Closed

113. A dispute over the taxation of an account raises issues of solicitor and client privilege.
114. The normal rule is that a client impliedly waives privilege in respect of any matters that are relevant to the matters in dispute. In other words, if a client puts into issue the nature and scope of the work performed by the lawyer he or she impliedly releases the lawyer to give evidence concerning his or her instructions from the client.
115. Nevertheless, the waiver is not necessarily a full waiver. The practical difficulty of balancing the client's interest in legal confidentiality with the lawyer's interest in justifying his or her claim to payment is partially addressed in the Taxation Regulation by permitting the holding of a closed hearing.
116. While the normal rule is that all hearings in the SCC, including taxations, are open to the public,¹²⁸ the person filing the Notice may request that the hearing be held in closed court.¹²⁹
117. Once the request is made, the adjudicator must determine whether:
 - a. "it is in the public interest to hold all or part of the hearing in private;" or
 - b. "it is necessary to hold all or part of the hearing in private to protect solicitor-client privilege."¹³⁰

¹²⁸ Taxation Regs., s.5.

¹²⁹ Form 1.

¹³⁰ Taxation Reg., s.5.

Evidence at the Hearing

118. The applicant and the respondent (if he or she attends) "shall bring any relevant documentation to the taxation hearing."¹³¹
119. It is suggested that at a minimum the lawyer seeking to tax an account, or advance a claim on it, bring witnesses or documents relevant to the following:
- a. the nature and scope of the initial retainer;
 - b. any written retainer letters or agreements;
 - c. any discussions or agreements (oral or written) regarding payment of fees *and* disbursements;
 - d. any discussions or estimates (oral or written) as to projected fees, both at the time of the initial retainer and later as the matter progressed;
 - e. affidavit in proof of disbursements;
 - f. time dockets; and
 - g. evidence as to what actually was accomplished by the lawyer.
120. The best evidence in support of a lawyer's account is that of the lawyer him- or herself. If that is not possible, the lawyer should file an affidavit touching on the above issues. Such an affidavit will not likely bear much weight in the face of a client who gives *vive voce* evidence.
121. Witnesses may be subpoenaed, by means of a subpoena issued out of the Small Claims Court office, to give evidence at the hearing.¹³²

¹³¹ Taxation Reg., s.8.

¹³² Taxation Reg., s.11(1) and (2). The witness must be served with a witness fee of \$5.00 plus \$.20 per kilometre one way from his or her place of resident to the hearing place not less than 4 days before the hearing date, or the subpoena is ineffective: s.11(3).

Powers of the Adjudicator at a Hearing

122. As noted, the adjudicator does have the power on application to hold some or all of the hearing in closed court.¹³³
123. At the hearing the adjudicator may:
- a. take evidence by affidavit;
 - b. by oral testimony upon oath or affirmation;¹³⁴
 - c. order the production of books, papers and documents;
 - d. require that the notice of taxation and a copy of the bill of costs be given to any person who may be interested:
 - i. in the taxation, or
 - ii. in the fund or estate out of which the costs are payable; andwith respect to such a person, give directions as to the manner of service of the notice of taxation and bill of costs on such person;
 - e. extend or abridge any time period pertaining to taxations that is specified in any Act, regulation, rule or order, but only where he or she "considers the extension or abridgement to be justified in the circumstances;" and
 - f. where a party entitled to receive costs is liable to pay costs to any other party, adjust the costs by way of deduction or set-off.¹³⁵

¹³³ Taxation Reg., s.5.

¹³⁴ By convention, lawyers are not sworn; as officers of the court they are expected to tell the truth.

¹³⁵ See generally, Taxation Reg., s.9(a)-(f).

The Decision

124. The Adjudicator is required to render a decision on a taxation in the form of a Certificate of Taxation which is filed with the Small Claims Court.¹³⁶ If the matter has come on by way of a Notice of Taxation, it is my practice to include a "certificate" of the account in any Order that is issued.
125. If, on the other hand, the taxation arose out of a *claim* in Small Claims Court, the adjudicator ought to simply make an order for the amount that he or she finds reasonable and lawful.

Enforcement

126. An order, or a certificate, of an adjudicator issued after a hearing is binding on the parties. It can be enforced by an execution order issued out of the Small Claims Court Office.

Appeals

127. Appeals from a decision of an Adjudicator lie, at least in first instance, to a judge of the Supreme Court in Chambers.¹³⁷ The actual procedure on appeal, however, is somewhat confusingly governed by overlapping provisions.
128. Section 32(1) of the SCCA provides for appeals from decisions of Adjudicators, and limits such appeals to:
- a. jurisdictional errors;
 - b. errors in law; or
 - c. failure to follow the requirements of natural justice.
129. However, the Court of Appeal has held that Adjudicators exercising their taxation jurisdiction are in effect acting on

CPR ~~3.37A~~
63.38(1)

¹³⁶ Taxation Reg., s.10.

¹³⁷ Section 70(a), LPA.

a reference from the Supreme Court¹³⁸ and that accordingly the limit on appeals imposed by s.32(6) of the SCCA (which prohibits appeals from the Chamber's Judge's decision on the appeal) does not apply to appeals in taxation matters.¹³⁹

130. It is thus somewhat unclear whether appeals from such a "reference" are limited to the grounds specified in s.32(1) of the SCCA. Such lack of clarity does not have much practical effect, however, because it is clear that such appeals, whatever their foundation, are not re-hearings; the chamber's judge is not expected to retry the taxation in the absence of the above-noted errors.¹⁴⁰ In short, there would not appear to be any change in the old law, which always was that an appellant had to show that the taxing officer had fallen into error, as by operating under a wrong principle, before the Court would interfere;¹⁴¹ however, once that has been shown the court can exercise *all* of the powers of review under CPR 63.40 and, in effect, conduct a new assessment.¹⁴²
131. The Notice of Appeal should specify:

¹³⁸ Notwithstanding that CPR 63.38(2) expressly provides that appeals from taxations shall be commenced by filing with the prothonotary "a notice of appeal as prescribed by the Small Claims Court Taxation of Costs Regulations."

¹³⁹ *Turner-Lienaux v. Campbell* 2004 NSCA 41 at paras. 17-18.

¹⁴⁰ *Higgins v. Saunders* 1998 Carswell NS 476; *Walker v. Scotia Career Academy Limited* (1999) 177 NSR (2d) 316 (Robertson, J); see also *Turner-Lienaux v. Campbell* 2002 NSSC 248 (Goodfellow, J) at paras.10-12.

¹⁴¹ *O'Connell v. Romney* 111 NSR (2d) 268 (CA); *Cape Breton Landowners v. Nova Scotia Forest Industries* (1983) (2d) 193 (CA) at pp.197-98.

¹⁴² *Cape Breton Landowners v. Stora Kopparbergs Bergslags AB* (1983) 58 NSR (2d) 193 (CA) at pp.197-98, cited in *Gorin v. Flinn Merrick* (1994) 131 NSR (2d) 55 (SC) at para.6, *aff'd* at (1995) 138 NSR (2d) 116.

- a. the items objected to;
 - b. the grounds of the objection; and
 - c. the date of the hearing of the appeal (which must be within 15 days of the filing of the appeal with the prothonotary).¹⁴³
132. The notice must be served on all parties "directly affected" by the appeal not less than three days before the date set for the hearing.¹⁴⁴

Grounds for Appeal: Various

133. It would appear that a taxing officer has a duty to hear evidence before he or she decides the amount to be taxed. The duty is not excused by the client's failure to insist that evidence be introduced; and a failure to hear evidence before deciding the amount to be taxed is an error of principle.¹⁴⁵
134. A denial of natural justice, as when the taxing master makes his or her mind up before hearing from the solicitor, is a reviewable error.¹⁴⁶ Similarly, a taxing officer who hears from one side without permitting the other to make representations commits a denial of natural justice giving rise to a right of appeal.¹⁴⁷
135. Where the taxing officer hears evidence which calls into question the competence of the solicitor or the value of his or her work, but fails to provide any written reasons to explain his or her taxation decision, an error in principle has arguably been committed. Accordingly, while a taxing officer may be entitled to the same deference accorded a trial judge on questions of fact within his or her jurisdiction,

¹⁴³ CPR 63.38(3) and (4)(a).

¹⁴⁴ CPR 63.38(4)(b).

¹⁴⁵ *Re Levine* [1960] OJ No. 233 (CA).

¹⁴⁶ *Goodman MacDonald Patterson v. Fraser (Guardian of)* [1998] NSJ No. 350 (TD) at para.2.

¹⁴⁷ *Walker, Dunlop v. Connolly* [1995] NSJ No. 530 (TD) at paras.14-17.

in the absence of *any* reasons there is "then no support for the conclusion that he arrived at the proper value of the solicitor's services."¹⁴⁸

136. The allowance of a "highly unreasonable" fee by a taxing master "may itself be evidence of the exercise of a wrong principle."¹⁴⁹

¹⁴⁸ *Re Solicitor* [1976] OJ No. 1245 (CA), per LaCourciere, JA at para.6.

¹⁴⁹ *Re Isner* [1989] NSJ No. 415 (TD), per Tidman, J at p.3; 99 NSR (2d) 281.

PART IV: A 10-SECOND GUIDE TO TAXATION

137. One might expect (and prepare for) the following questions on a taxation, or a claim based on your legal account:
- a. Are you the lawyer having carriage of the file (and hence the most knowledgeable as to what happened on it)?
 - b. What were you retained to do?
 - c. Was there a *written* agreement or confirmation of fees or budgets (and if so, do you have a copy with you)?
 - d. Was the client reasonably advised by you as to what was to be expected (and in particular, the cost to be incurred) to perform the retainer? For example,
 - i. What discussions or agreements, oral or written, were there as to what you had to do to carry out the retainer?
 - ii. Was the client provided with an initial budget or cost estimate? Was he or she kept up to date as to future costs as the retainer progressed?
 - e. have you brought detailed time dockets for the entire file and for all accounts ever rendered (not just the one in issue)?
 - f. Did you perform the retainer efficiently and in a cost-effective manner, or was there duplication, repetition, unnecessary or incompetent work?
 - g. Were you successful?
 - h. In light of original retainer, is the total amount of fees charged (regardless of the time actually docketed or billed) reasonable in all the circumstances of the case?
 - i. In respect of disbursements, are they overhead or true out-of-pocket expenses incurred on behalf of the client? if they are true out-of-pocket expenses,

- i. what is the actual cost?
- ii. how was it arrived at?
- iii. was it reasonable to incur that cost?
- iv. did the client agree (whether expressly or impliedly) to the cost being incurred?