Focus BUSINESS LAW

Thoroughly explain fees and put retainer in writing

Anna Wong

One of the things lawyers look forward to least, short of having their fees wholly ignored and unpaid, is having their fees challenged by clients.

Ontario's *Solicitors Act* sets out a process for a lawyer's account to be assessed by an assessment officer of the Superior Court of Justice. Section 3 entitles a client to requisition an assessment where: (a) the retainer is not disputed; (b) there are no special circumstances; and (c) the requisition is made within one month of the delivery of the bill.

If a month has elapsed since the bill was delivered, a client must bring an application for an order to refer the lawyer's account for assessment. Section 4 of the act stipulates a 12-month period for such an application, "except under special circumstances." Section 11 provides that with respect to an account that has been paid, special circumstances must exist for an assessment to be ordered; the presumption underlying s. 11 is that payment of an account implies acceptance of it as proper and reasonable.

There is no absolute time bar against applications for assessment of lawyers' accounts, according to the Ontario Court of Appeal in the leading case of *Guillemette v. Doucet* [2007] O.J. No. 4172. To begin with, the 12-month time limit under the *Solicitors Act* is superseded by the two-year limitation period set out in the *Limitations Act, 2002,* though the "special circumstances" qualifier is preserved. Irrespective of the statutory limitation, a superior court has inherent jurisdiction to review lawyers' accounts, and that inherent jurisdiction is not subject to a time limit.

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Solicitors' accounts have always warranted different treatment than other debts and even other professional accounts. Given that access to justice, a right entrenched in Canadian values, is intimately tied to the reasonableness of legal fees, it is pivotal that individuals are able to refer their lawyers' accounts to a fair, independent assessment. Public confidence in the administration of justice requires the court to intervene where necessary to protect a client's right to an independent review of his/her solicitor's bill. As the Court of Appeal recently confirmed in *McCarthy Tétrault LLP v. Guberman* [2012] O.J. No. 4694, little is required for the court to intervene by invoking its inherent jurisdiction.

What constitutes "special circumstances?" They have been amorphously described as "circumstances of an exceptional nature" affecting the matter of costs or the liability of a client that a judge may consider to justify an assessment of the account (*Thomas Gold Pettingill LLP v. Ani-Wall Concrete Forming Inc.* [2012] O.J. No. 2109). An inquiry into special circumstances is a fact-driven exercise to be approached from the perspective of the client.

Courts have found the following factors to be relevant in the special circumstances analysis:

- Passage of time;
- Sophistication of the client;
- Adequacy of communications between the lawyer and the client concerning fees;
- Client's expression of dissatisfaction with the account;
- Whether there is over-charging for the services provided;
- Level of detail in the account;
- Whether a solicitor-client relationship still exists, rendering it impractical for a client to have the account assessed;
- Whether payment of the account could be characterized as voluntary.

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Even though the analysis is client-oriented, the court will consider potential prejudice to the lawyer. For example, in *Nakhdjavan v. Murdoch* [2013] O.J. No. 192, Justice E.M. Macdonald refused to grant an order to refer the accounts to an assessment in part because five years had elapsed since the final account was rendered, which made it difficult for the lawyers who worked on the file, one of whom had moved to the Cayman Islands, to provide cogent and reliable evidence regarding the work done.

Lawyers should inform their clients about their right to have accounts assessed, pursuant to the commentary to Rule 2.08 of the Law Society of Upper Canada's *Rules of Professional Conduct.* Failure to do so can exacerbate controversy over fees and lead to an order for assessment, as was the case in *Borden Ladner Gervais LLP v. Cohen* [2005] O.J. No. 2440. Ordinarily, lawyers ought to consent to an assessment when a client raises an objection, even if it was raised tardily.

On an assessment, the solicitor has the burden of proving, on a balance of probabilities, that the fees charged were fair and reasonable. Assessment officers have no inherent authority to determine retainer disputes (save for quantum). Questions involving the nature, validity or effect of a retainer are to be resolved by judges, who may, in a rare case, specifically authorize an assessment officer to address them as part of the assessment process. It is important to set out the terms of a retainer in writing, because if there is a dispute and no written retainer in place, the court will accept the client's words over the solicitor's.

The jurisprudence suggests that to dissuade challenges to the propriety and reasonableness of one's accounts, law firms should, as much as possible, advise clients of the legal costs that lie ahead for the work required; reduce the retainer agreement to writing; notify clients of rate increases in advance; maintain a policy of delegating work to lawyers with appropriate seniority; and send out regular, detailed bills.

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Liability: The lawyer-client relationship may have to be terminated

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Where an individual provides legal advice, business advice, and mixed legal and business advice to a board or to its members, the statements made may not meet the established legal tests for solicitor-client privilege. While a lawyer can attempt to set up the conditions for the client's later assertion of privilege (for example, by saying on the record something like "speaking, now, in my capacity as legal counsel"), that attempt may not always be determinative, and the client may lose the benefit of privilege for certain communications.

A lawyer who chooses to act as a director can attempt to distinguish legal advice from business discussions by causing the record of meetings to reflect the distinction. The lawyer might also, if asked for legal advice during board proceedings, advise that he or she "will get back to" the asker, and then do so in a context more consistent with lawyer-client communications. Neither option is foolproof, and the lawyer would do well to formally advise the client of the risk of loss of solicitor-client privilege that board participation poses.

Related to the foregoing is a separate risk: the risk that being a party to certain board discussions might trigger the eventual termination of the lawyer-client relationship. Consider the scenario in which board proceedings — observed by a lawyer — lead to eventual litigation. If the lawyer-director is called as a witness in those proceedings, he or she could easily become a party adverse in interest to either the company as a whole or to other individual directors. As a result, the lawyer would lose the right to represent the corporate client (and the corporation would lose its counsel).

From an insurance perspective, a lawyer considering sitting on a client's board should be aware that his or her professional indemnity insurance covers only the provision of "professional services" qua lawyer, as defined in the policy. Acting as a corporate director does not fall within the definition of professional services. Lawyers who sit on corporate boards should ensure they are covered under a directors' and officers' liability coverage policy, and/ or an outside directors' liability policy.

Finally, since some firms have policies in place with respect to lawyers serving on boards, it's important to review these, if they exist, and to ensure compliance with the approval process.

Lawyers who choose to serve on clients' boards may be motivated by prestige, or the opportunity to "give back." However, the risks may outweigh the benefits so provided to the client. These risks are not only risks to the lawyer, but in many cases, to the client as well. Lawyers should think carefully before accepting an invitation to serve on a client's board of directors.

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