TIMEKEEPING

1. A lawyer's accounts must be fair, reasonable and lawful.¹

   a) The assessment and reasonableness of a lawyer’s account will depend on many factors, of one which is the time and effort “required and spent”.²

NOTES

¹ When considering the fairness, reasonableness and legality of accounts for legal services, general resort should be had to s. 66 of the Legal Profession Act, S.N.S 2004, c. 28, s. 3.6-1 of the Nova Scotia Barristers’ Society’s Code of Professional Conduct and Rule 77.13(1) of the Nova Scotia Civil procedure Rules. These statutory and regulatory provisions express a constant theme but they do not do so in the same way and through the use of the same nomenclature. (see also: Chapter 11(a) of the Canadian Bar Association’s Code of Professional Conduct)

² s. 3.6-1 [1](a) of the Nova Scotia Barristers’ Society’s Code of Professional Conduct

PRACTICE NOTES

An Introduction to Timekeeping:

In many respects, everything a lawyer needs to know about timekeeping is set out in the Legal Profession Act, the Nova Scotia Barristers’ Society’s Code of Professional Conduct (“the Code”) adopted in 2012 (and in the commentaries thereto) and in the Nova Scotia Civil Procedure Rules.

Section 66 of the Legal Profession Act provides that: “[a] lawyer may sue to recover the lawyer's reasonable and lawful account.” The implication, of course, is that a lawyer’s account, to be recoverable, must be both “reasonable” and “lawful”.

Neither the Legal Profession Act, nor the Regulations made thereunder, nor the related provisions of the Code, nor the applicable case law define what a lawyer’s “lawful” account might be. The Code and the related case law do, however, require all lawyers’ accounts to be “reasonable”.¹

The reasonableness of a lawyer’s account is dependent on a variety of criteria. One of them is the amount of time taken by the lawyer to render the service which is the subject matter of the account.² The implication, thus, is that a “reasonable” account would also be “lawful”. It is on that basis that time spent on the rendering of legal services can become an important issue.

Section 3.6-1 of the Code does not speak to legal fees which are “lawful” only to those that are “fair and reasonable” in that: “[a] lawyer must not charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion.”
Legal fees which are “fair and reasonable” have been further defined by the Code to be dependent on a number of factors, some interrelated and some not, such as: “the time and effort required and spent” on the matter for which the lawyer’s account has been rendered.³ It is on that basis also that time spent on the rendering of legal services can become an important issue.⁴

The Nova Scotia Civil Procedure Rules also speak to the matter in which a lawyer’s entitlement to compensation is to be assessed. According to the Rules, a lawyer “is entitled to reasonable compensation for services performed, and recovery of disbursements necessarily and reasonably made, for a client who...” has been the recipient of legal services.⁵ Once again, the Court’s concept of reasonable compensation has been benchmarked, in part, against the lawyer’s effort(s) on behalf of the client.⁶

Though the quantity of time within which a lawyer’s services to her or his client have been performed is not referred to in the Rule, a lawyer’s “effort”, as an indication of her or his entitlement to fees in any give matter or transaction, would be a tangible thing. It would thus only make sense that it would have to be capable of measurement. Though effort in such circumstances might be measured through a variety of different means and analyses, the time over which such effort was expended would have to be one of them. Hence, the reason for the references to time set out above.⁷

“Time is money.”⁸ “Don’t count every hour in the day but make every hour count.”⁹ “Time is actually more valuable than money. You can always get more money but you cannot get more time. Once it’s used, it’s gone. And it’s gone forever.”¹⁰ “They who know how to employ opportunities will often find that they can create them; and what we achieve depends less on the amount of time we possess than on the use we make of our time.”¹¹

These quotations have helped professionals and others understand the necessity of time management from a value perspective. Although there is a move away from the billable hour by some lawyers the billable hour remains the principal basis upon which many if not most legal fee accounts are determined. In assessing the reasonableness of lump sum legal fee accounts, assessment and taxing officers, as well as the courts, will more often than not resort to an analysis of how much time was taken to perform the services in issue and how much time should have objectively been taken for them. It is on that basis that lawyers who do not keep time, fail to do so at their peril.¹²

Timekeeping Practices:

The practice of timekeeping falls into two broad categories: the why and the how.

(a) Why Keep Time:

Apart from the general reasons set out above, there are several discrete reasons rooted in law practice and law office economics on why lawyers should keep time:

• Careful time records will permit a lawyer to analyze what she or he is or has been doing with respect to the professional service being offered
• The same records will permit a lawyer to analyze her or his efficiency with a view to refining the manner in which individual professional services are being offered

• Time records will also permit a lawyer to determine whether he or she is wasting time (in the sense that time in the office is not necessarily translating into revenue or non-revenue based professional services

• In many private practices, careful and accurate time records are the primary basis, if not the sole basis, for a lawyer’s accounts to her or his clients

• Finally, timekeeping is now recognized as one of the primary methods by which a lawyer can communicate with her or his clients on how and in what manner(s) a matter is progressing\textsuperscript{13}

\textit{(b) Timekeeping Nuts and Bolts:}

• Lawyers should be timely when recording the time spent on any professional service\textsuperscript{14}

• Lawyers should be accurate in describing the professional service being performed and for how long
  
  • Lawyers should not use abbreviations or acronyms for professional services known only to them
  
  • Lawyers should review time records to ensure that they are free of misspellings and errors in the amounts of time recorded

• Lawyers should be compete in describing the purpose for the particular service rendered and recorded
  
  • Lawyers should not record so little information regarding the particular professional service rendered that neither they nor anyone else can define or describe it objectively from the value to the client perspective

\textit{(c) Examples of Proper Timekeeping Entries or Dockets:}

• “Discussion with Mr. Smith regarding Date Assignment Conference and availability of Jury Trial dates in September and October, 2012”

• “Lengthy correspondence to Ms. Jones regarding draft Settlement Conference Brief and detailing the various settlement positions expected to be taken and to require detailed response”
• “E-mail message to Prothonotary Smith to confirm the Plaintiff’s position that they do not approve of the Defendant’s Notice of Discontinuance without costs”

• “Legal research and related opinion to Ms. Jones regarding availability in construction litigation in Canada of damages on the basis of the ‘total cost method’”

• “Consideration and lengthy reasoned response/rebuttal to Mr. Smith’s suggestion regarding vessel arrest”

(d) **The Use of Standard Dockets:**

Standard, opening or minimum dockets have been used by lawyers and other professionals for many years. Many accounts for legal services contain standard time docket entries (i.e. .1 and .2 etc.). As a time management tool, lawyers should bear in mind that every interruption from a task at hand involves distinct components: disengaging from the task at hand, turning one’s mind to the new matter, dealing with it, disengaging from that matter, and returning to the original task.

Though the concept of standard, opening or minimum dockets do not appear to have been considered in the available authorities, they would no doubt become an issue in proceedings examining a lawyer’s account against the backdrop of the objectives set out in these standards. Thus, for lawyers who employ or who might wish to employ standard, opening or minimum dockets, the better course might be to raise and confirm them by written retainer agreement.¹⁵

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¹ For a summary of some of the other legal provisions and authorities which underpin these concepts, see: Giles, Gavin and Giacomantonio, James, “Getting Paid a Reasonable Fee – A Thumbnail Sketch of the Art and Science of Solicitor-Client Taxation”, a paper presented to the Canadian Bar Association Professional Development Day, January, 2010


³ *supra*, footnote 2

⁴ Cohen v. Kealey and Blaney, [1985] O.J. No. 160 10 O.A.C. 344 (Ont. C.A.) (at p. 350, wherein Robins J.A. articulated nine criteria to be applied on an assessment of the reasonableness of an account for legal services, the first of which was “[t]he time expended by the solicitor”. (see also: *McInnes Cooper, supra*, footnote 4, at para. 113 wherein it was held that: “When looking at the time dockets of a law firm, it is important to remember that the time dockets alone cannot be used to justify a solicitor/client account in totality. Instead, some ancillary evidence is required. That said, it is not incumbent upon me to review in detail every one of the time entries docketed. As was held by the Supreme Court of Nova Scotia in *Tannous v. Halifax (City)* (1995), 145 N.S.R. (2d) 23 (Per Goodfellow, J.), I am entitled to take an overall view of the law firm’s account in determining whether or not it is reasonable. In doing so, I have considered both the law firm’s overall account and many, but not all, of the individual time entries it comprises.”)

⁵ *Rule 77.13(1)*

⁶ See: *Rule 77.13(2):* “The reasonableness of counsel's compensation must be assessed in light of all the relevant circumstances, and the following are examples of subjects and circumstances that may be relevant on the assessment... (a) counsel's efforts to secure speed and avoid expense for the client;...”
7 supra, footnote 5

8 Benjamin Franklin

9 Albert Einstein

10 “The Effective Executive”, Professor Peter F. Drucker

11 John Stuart Mill

12 See for example: Mor-Town Developments Ltd. v. MacDonald, 2012 NSCA 35 (at para 49). To be noted is that Mor-Town related to a commercial property transaction in which the client complained about the legal fees charged by the lawyer only after the legal fees had been paid. Amongst other things, the lawyer argued that the client had no right to an assessment or a taxation of those fees once they had been paid. The Court of Appeal disagreed. The Court of Appeal also held in all circumstances wherein a lawyer’s account is being challenged, the lawyer bears the onus of demonstrating that the account is reasonable. One such message is in reference to the time it took for the subject legal services to have been performed.

13 “A detailed docket will help the client understand the nature and the complexity of the legal services which have been rendered and will thus help justify the time docketed and the related legal fee which has been charged.” – Stanley P. Jaskot, Harper Jaskot LLP (see also: Pietrafesa, Gianfranco, “Communication with Clients Through Invoices”: “The more descriptive the time charges on an invoice, the more likely a client will understand the work being done, the more likely a client will appreciate the effort being made on his behalf, and the more likely payment will be made. A lengthy description is not necessary.”)

14 Experts who have studied professional timekeeping practices have reported that their research has indicated that the most complete and accurate form of time recording is that which is undertaken as each discrete professional service to which it relates is completed. These experts have further reported that those professionals who attempt to reconstruct accurate time records from memory at the end of a day, routinely under-record their time by as much as 20%. The ratio of under-recorded time rises to 25% for reconstructions attempted at the commencement of the following day, to 35-40% for reconstructions attempted at the conclusion of the week and to a staggering 60% for reconstructions attempted at conclusions of the month. (see also: Mor-Town, supra, footnote 14, at para. 56)

15 An example is as follows: “My current hourly rate is $____. This rate is subject to change without notice. It is likely to change while this matter in proceeding. You will be advised in advance if and when it does. Disbursements and applicable taxes are additional to fees. My clients must pay HST of ___% on our fees and on most (but not all) of our disbursements. Consistent with my normal billing practices, services to you on this matter will be docketed in tenths of hours. Though there are services which can be accomplished within two-tenths (and even one-tenth) of an hour, those services are very few. I tend not to docket in increments of less than three-tenths of an hour. Docketed time and hourly rates are the predominant basis for my fee accounts to my clients. That said, there are circumstances which can arise in the course of my services on any matter which can serve to reduce or increase fees which otherwise would be calculated from the application of normal dockets and hourly rates. In circumstances where individual services seem to have taken too much time or to have been of too little value, fees on the basis of normal dockets and hourly rates will be reduced. Conversely, for services which are provided on an urgent basis, or within compressed time periods, or which are particularly complex, or which result in particularly good value, fees can be increased from those resulting from normal dockets and hourly rates. In both instances (up and down), deviation from fees calculated on the basis of normal dockets and hourly rates is rare.”