IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: Miller v. Johnson, 2006 NSSM 19

Date: 20060912
Claim: SCCH 265492
Registry: Halifax

Between:

Paul B. Miller, cob as Miller Campbell & Associates

Claimant

v.

Glen Duane Johnson

Defendant

Adjudicator: W. Augustus Richardson, QC

Heard: July 27, 2006 in Halifax, Nova Scotia; last submission July 30th.

Appearances: Paul B. Miller, for the Claimant
Glen Duane Johnson, for himself

By the Court:

[1] This matter raises two questions:

a. is it appropriate for a lawyer to charge a minimum billing rate for the various services provided to his or her client; and

b. can a taxation be conducted in respect of a particular service if that service has yet to be completed?

[2] This matter came on before me on July 27, 2006. It was a claim by a solicitor against his client for three outstanding accounts for services rendered. As is my practice, I indicated that notwithstanding that this matter came before me under a Notice of Claim it was still, in effect, a taxation or assessment of a lawyer's account–and hence the onus was on the lawyer to establish the "reasonableness" of his account.

[3] It has to be said at the outset that Mr Johnson himself had no difficulty with Mr Miller's accounts or services. He expressed himself satisfied with the work that was done, and was not adverse to paying for the work: he just lacked the money to pay.

[4] But while the client's feelings about the solicitor's work are a factor to be taken into account on a taxation they are not and cannot be the sole or a determining factor in the

assessment. Clients, particularly lay clients, are not generally equipped to evaluate the "reasonableness" of a lawyers' fees. They may feel dependent on the lawyer to continue providing services; or may, as here, feel guilty about their inability to pay the lawyer. In either event they may find themselves as a consequence reluctant to say anything critical about the lawyer's services.

[5] Mr Miller was retained by Mr Johnson on July 4, 2003. There was a written retainer letter, signed by Mr Johnson, stating the terms of Mr Miller's retainer. Those terms included the following term regarding the way in which time charges would be levied:

> "We calculate time in billing units (BU) of six minutes per unit. For some activities we charge a minimum of billing units (MBU): i.e., for telephone calls – 2 MBU; for letters – 3 MBU; for office consultations – 5 MBU; for attendances out of the office – 10 MBU, etc. For such activities, you will be charged either the minimum of billing units or the actual billing units if they exceed the MBU."

[6] The written retainer was signed by Mr Johnson. However, Mr Johnson's agreement is not in my opinion binding on me in a taxation. *Any* agreement regarding a lawyer's retainer, at least with respect to the fees and disbursements to be charged, is subject to review by the court for reasonableness.

[7] In my opinion it is not reasonable for a lawyer to bill a client a "minimum" number of "billing units" for any particular activity. For example, some letters may take 18 minutes to draft, in which case 3 MBUs might be appropriate. However, a similar charge for a one line acknowledgment of a List of Documents would not in my view be reasonable. I have taken this into consideration in evaluating the accounts upon which this claim is based.

The June 3, 2004 Account

[8] Mr Miller did not have a copy of the time records at the hearing. He advised that they were kept on a "Time Recap Record," which took the form of a printed memo on which he kept handwritten records of the tasks performed, who performed them and the number of time units assigned. So, for example, when an articled clerk did work he or she would tell the solicitor what was done and the solicitor would enter the information (including the time units) on the Time Recap Record. That information would subsequently be entered into the firm's accounting records, which then generated the bill.

[9] Upon reviewing the Time Recap Record it became apparent that much of the work was being performed by "CR," who was for part of the time an articling student and for part of the time an associate.

[10] On review, the work of CR appeared to break into two principle categories:

a. research and drafting; and

b. the routine administrative work associated with moving a litigation file along.

[11] So, for example, in the first category we have "research of case law in prep for hearing – 26 Time Units; "drafting & revising pre hearing memo – 35 Time Units."

[12] In the second category we have "T/C with C. administration re hearing dates – 4 Time Units;" "receipt of memo from Ct admin re dates – 2 Time Units;" and "receipt of signed order from C.J. – issue same – 3 Time Units." Similarly, on May 25th, 2004 CR phoned court scheduling; then spoke to Mr Johnson twice. Each call was recorded at 2 Time Units, for a total of 6 Time Units.

[13] All of these entries were for the period January 21, 2004 to May 31, 2004. The lawyer had agreed to cap the fee for all services rendered at $2,500, and did so. If he had not, and if the client had been charged an amount based on all of the time charges recorded (not just those of CR), the total would have amounted to $2,907.75. (In my review, reducing CR's time by appropriate amounts would have reduced the account by at least 450 in any event.)

[14] There was also some duplication. For example, on January 19, 2004 both the lawyer and CR are noted as follows: "attendance at hearing at NSSCID & arguing case – 26 Time Units."

[15] Accordingly, had the account remained at $2,907.75 I would have been disposed to reduce it because of the inappropriate use of minimum MBUs; and because of the duplication of time of the lawyer and CR. However, taking into account the fact that the account did involve a court attendance, as well as research leading up to that appearance, I am of the view that the $2,500 that was quoted to and billed to the client was reasonable.

The August 5, 2004 Account

[16] This account was for $898.75 in fees, for the work of the lawyer and CR, plus disbursements and HST. It dealt with the lawyer's work in dealing with a foreclosure application made against the client.

[17] Once again, a review of the time sheets indicates the use of minimum MBUs, which, as I have already indicated, is not in my opinion appropriate.

[18] There is also a charge of 6 MBUs for preparation of the account. I my opinion account preparation is part of normal overhead, and is something that is recovered in the hourly rate; it is not something that should be charged as a separate item to the client.

[19] To deal with the inappropriate use of minimum MBUs, and charging the client for account preparation, I am of the view that the account should be reduced by $150, resulting in a revised account of $748.75.

The January 31, 2006 Account

[20] This account is for $3,442.50 in respect of fees, plus HST and disbursements. This account covered primarily work done to obtain a divorce. It including drafting the appropriate documents. However, none of these documents were filed with the court, on the grounds that the lawyer refused to proceed with his work in the absence of payment of his account.

[21] Having reviewed the time sheet I note that a large part of the time of the articling student or associates was made up of researching and drafting the settlement and divorce documentation. There was no evidence that this divorce was particularly difficult; or that it required as much research, drafting and revising as was reflected on the time sheets. My concern here is that much of the work, being the work of lawyers or students new to the field, was as much about educating them as it was doing work for the client. As a rule, a client should not be expected to pay for the training of young lawyers or students. There is no doubt that such work does give value to the client (and for that the client should expect to pay), but there is equally no doubt that in ordinary course some of the time spent performing the work is composed of false starts, or looking up precedents that will later be known by heart.

[22] In this instance a total of 41.75 hours at a student's rate of $75.00 was spent on what appears to have been a fairly straightforward divorce settlement. In addition, 15 MBUs (or 1.5 hours) was spent drafting the account. In my opinion the 15 MBUs for the account should be removed; and the 41.75 hours should be reduced to 20 hours, which should have provided more than enough time to prepare the appropriate documentation.

[23] The account is accordingly reduced by $1,743.75. The reduction was arrived at by removing 1.5 hours for the account preparation; and 21.75 in respect of the preparation of the divorce settlement documentation, all at $75.00 an hour.

[24] The resulting revised total in respect of fees is thus $1,698.75.

Disbursements

[25] Each of the three accounts includes a disbursement charge for "administration." The first is for $75.00; the second is for $25.00; and the third is for $100.00.

[26] Administration is overhead, and overheard is not recoverable as a separate charge; it is included or factored into the hourly rate. I will accordingly disallow those amounts in my assessment of the three accounts.

Conclusion

[27] For the reasons set out above the three accounts are either allowed or reduced as follows:

a. July 3, 2004 account

i. fees $2,500.00

	ii.	disbursements	$359.80
	iii.	HST	$428.97
b.	August 5, 2004 account		
	i.	fees	$748.75
	ii.	disbursements	$55.10
	iii.	HST	$120.58
c.	January 31, 2004 account		
	i.	fees	$1,698.75
	ii.	disbursements	$274.30
	iii.	HST	$295.96
d.	Total all accounts		$6,482.21

Dated at Halifax, this 13th day of September, 2006

Original: Court File)
Copy: Claimant)
Copy: Defendant)

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W. Augustus Richardson, QC
ADJUDICATOR