

# Legal Fees and Costs In Estate Matters

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## I. INTRODUCTION

THE QUESTION OF LEGAL FEES in estate matters has been the subject of many court decisions. These decisions demonstrate the concern courts have with lawyers' fees.<sup>1</sup> Lawyers can anticipate increasing work in the area of estate law and can expect their accounts to be challenged on an ever increasing basis as beneficiaries and personal representatives become more aware of the effect of legal fees on an estate. On a passing of accounts one can assume that the court will look carefully at the solicitor's fees. Even with an agreement between the solicitor, the personal representative, and all the beneficiaries, the court may review the fees and disallow them.<sup>2</sup> In certain circumstances taking fees in excess of the tariff may lead to disciplinary hearings before the Law Society.

The objects of this paper are: to review the Court of Queen's Bench Rules concerning legal fees in non-contentious probate and administration; review a lawyer's professional obligations under the Professional Code of Conduct and *The Law Society Act* of Manitoba when charging fees on estate matters; examine the case law to learn what the courts have done in cases where lawyers

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<sup>1</sup> See, for example, *Re: Charlesworth Estate* (1996), 108 Man. R. (2d) 228 at 240 (Q.B.) where Beard J. sets out a series of concerns regarding legal fees to be paid. In *Asselin v. La-liberté* (1995), 101 Man. R. (2d) 25 at 27 (Q.B.), Beard J. remarked,

This is the type of case that causes the public to lose confidence in lawyers, the courts and the judicial system, as the sad reality is that the legal costs are likely to exceed whatever residual value there is in the property at issue, leaving little or nothing for the beneficiary.

See also *Lafrance v. Blanchet* (1995), 105 Man. R. (2d) 304 at 313 (Q.B.) where Master Goldberg stated, "[w]hen all is said and done, this estate did not benefit from any of these legal proceedings."

<sup>2</sup> *Re: Blowers Estate; Menrad v. Blowers* (1985), 33 Man. R. (2d) 131 (Q.B.).

have taken fees greater than the tariff without regard to the rules; examine the case law to help lawyers maximise their opportunities for full compensation for work completed on an estate; and to consider how the Manitoba courts have determined who should be paid their fees and costs in contentious proceedings, on what basis, and by whom.

## II. THE COURT OF QUEEN'S BENCH RULES

THE COURT OF QUEEN'S BENCH RULES in Manitoba governs the fees chargeable by a solicitor retained by a personal representative. The rules set out a tariff of fees for non-contentious probate and administration matters. Rule 74.14 of the Court of Queen's Bench Rules<sup>3</sup> contains the lawyer's Tariff of Fees, applicable to all estates for probate or administration. Fees and costs are defined in Rule 74.14(2) and do not include proper disbursements or remuneration to which a solicitor may be entitled as a personal representative.

### A. Tariff

Where the personal representative is not a lawyer, a trust company or the public trustee, the fee payable to the lawyer retained by the personal representative is:

- (i) three percent on the first \$10 000 or portion thereof of the aggregate value of the estate;
- (ii) two percent on the next \$90 000 or portion thereof;
- (iii) one percent on the next \$200 000 or portion thereof; and
- (iv) on the excess over \$300 000 additional fees may be charged; the time spent, the complexity of the matter, the results achieved, and the value of the estate determine the amount charged.<sup>4</sup>

Rule 74.14(3) defines the aggregate value<sup>5</sup> of the estate as the total value of all assets of the estate as shown in the Application for Probate or Administration and any amendment thereto. It does not include gifts made *inter vivos*, property held in joint tenancy, insurance, annuities and pensions not payable to the estate, or the value of any benefits under the Canada Pension Plan. Where an amendment must be filed to correct the value of an asset set out in

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<sup>3</sup> Manitoba, Court of Queen's Bench Rules, r. 74, Surrogate Practice—Non-contentious Proceedings, Fees, and Costs.

<sup>4</sup> Manitoba, Court of Queen's Bench Rules, r. 74.14(4), Fee Payable to Lawyer.

<sup>5</sup> The words aggregate value have been defined as the value of the assets at the time of death: *Re: Turley Estate*, [1955] 16 W.W.R. 72 (B.C. S.C.).

the initial inventory, the lawyer should file the amendment and calculate his fee based on the correct amended value of the assets.<sup>6</sup> The court may calculate the amount of fees based upon the appropriate amended inventory value, reducing the fee under the tariff, even where the lawyer has failed to file the amended inventory.<sup>7</sup>

## B. Additional Fees

In addition to the fees allowed in Rule 74.14(4), a lawyer is entitled to receive payment for the following:

- (i) appearances in court as allowed by the presiding judge;
- (ii) services with respect to a first passing of accounts of a personal representative where the lawyer retained by the personal representative has maintained the accounts of the estate and has prepared them for passing, based upon the total amount of assets and receipts shown on Schedules A and B to the application to pass accounts as follows:
  - (a) 3/4 of one percent on the first \$10 000 or portion thereof (minimum \$40);
  - (b) 1/6 of one percent on the next \$190 000 or portion thereof; and
  - (c) 1/10 of one percent on the excess over \$200 000 (subject to the discretion of the court on passing of accounts);
- (iii) services with respect to a first passing of accounts, where the personal representative has maintained the accounts of the estate and prepared same for passing, or for services with respect to any subsequent passing of accounts in such amount as may be allowed by the court on the passing of accounts;
- (iv) acting on the sale of an estate asset; and
- (v) finding a purchaser of an estate asset.

Fees of a lawyer acting for persons other than the personal representative properly attending on an assessment of costs of the lawyer acting for the personal representative or on a passing of personal representative's accounts, may be allowed in the discretion of the court.<sup>8</sup> The court may direct payment of any

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<sup>6</sup> *Taposchaner Estate v. Ross and Associates*, [1991] M.J. No. 498 (Q.L.) (Q.B.), Master Lee [hereinafter *Taposchaner Estate*].

<sup>7</sup> *Ibid.*

<sup>8</sup> Manitoba, Court of Queen's Bench Rules, r. 74.14(15).

costs, including proper disbursements, from the estate generally, or by from funds of the estate belonging to any legatee, heir, or interested person.<sup>9</sup>

### C. Estates Over \$300 000

Additional fees may be charged on the excess over \$300 000. The time spent, the complexity of the matter, the results achieved, and the value of the estate determine the amount.<sup>10</sup> The wording of this rule should act as a sufficient warning to solicitors to keep detailed and accurate records of the nature of services provided and the time expended on estate matters. In estates with a value in excess of \$300 000 additional fees may not always be justified.<sup>11</sup> If a lawyer cannot furnish the court with a detailed statement of account, it may be impossible to convince a master or judge that additional fees are merited.

### D. Acting as Solicitor and Executor

A solicitor may also act as an estate executor. Additional fees may be allowed for doing the executor's work. Further, the solicitor will be entitled to seek compensation for additional legal services rendered which are not contemplated under the tariff. However, accurate time records should be kept. Rule 74.14(5) limits the fees allowable for work done as a solicitor to 40 percent of the fee allowed under the tariff prescribed by Rule 17.14(4).

Solicitors will often perform duties normally expected of the executor. However, a solicitor should not expect to receive compensation over and above the compensation provided by Rule 74.14(4). The tariff contemplates a solicitor doing a certain amount of executor work for a non-professional executor.<sup>12</sup> However, the court has opined that the solicitor might properly calculate the fees on the basis of Rule 74.14(5) and then seek additional compen-

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<sup>9</sup> Manitoba, Court of Queen's Bench Rules, r. 74.14(17); *Re: Nichol Estate* (1996), 112 Man. R. (2d) 35 (Q.B.), Master Lee; *Reimer v. Reimer*, [1997] M.J. No. 330 (Q.L.) (Q.B.), Senior Master Goldberg.

<sup>10</sup> Manitoba, Court of Queen's Bench Rules, r. 74.14(4).

<sup>11</sup> *In the Estate of Harry Malanchuk, Deceased*, [1993] M.J. No. 555 (Q.L.) (Q.B.), Senior Master Goldberg.

<sup>12</sup> *In Re: Heap Estate*, [1951] 4 W.W.R. 206 at 210 (B.C. S.C.) where Farris, C.J.S.C. described the intent of a tariff as an attempt to simplify charges:

[I]t was to include all work done by the solicitor from the time of the deceased's death, including searching for documents, obtaining valuations, etc., as to enable probate or administration to be applied for, and all necessary services including court proceedings necessary that probate or administration may be obtained and when necessary the passing of first accounts.

sation for the executor services if merited on time.<sup>13</sup> Where the solicitor assumes the executor's duties on behalf of an executor, the court will either reduce the compensation otherwise payable to the executor and allow additional compensation to the solicitor, or award the compensation to the executor and require the solicitor to seek remuneration from the executor out of this compensation. In effect, the solicitor has performed these duties as agent for the executor and should seek remuneration directly from the principal who is the executor. The solicitor may risk receiving no compensation for the additional services if she has failed to obtain the authority from the executor to perform the services.<sup>14</sup>

### E. Contentious Matters

In contentious matters a lawyer shall be allowed such fees as the presiding judge deems adequate. Rule 74.14(16) seems straightforward, but is actually quite difficult. In easy situations, the contentious matter has been heard, the court has approved the fees, and made an order for costs. The difficult situation arises where the contentious matter has been settled prior to a hearing. In these circumstances, the solicitor must either have the additional fees approved by the court or have all of the beneficiaries consent to the additional fees. A solicitor should not take these fees prior to court approval or consent of all the beneficiaries. Even with the consent of the parties the agreement or arrangement is reviewable by the court and may not be accepted on a passing of accounts.

A further problem arises when the executor is also a beneficiary. The failure to recognise the executor as a beneficiary and the pursuit of litigation which is later determined to be of a personal interest to the executor may result in the executor (client) being personally responsible for the fees. A solicitor should be very careful not to take fees out of the estate until an agreement exists with the beneficiaries or the court's approval has been secured. A court may determine the fees are not properly payable by the estate and deny the payment of legal fees and recovery from the estate on a passing of accounts.<sup>15</sup>

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<sup>13</sup> *Krawchuck v. Ciastko*, [1993] M.J. No. 54 (Q.L.)(Q.B.).

<sup>14</sup> *Re Solicitors* (1967), 2 O.R. (2d) 104 (Ont. S.C.) where Taxing Officer McBride stated:

I know that it is common practice for solicitors to perform what they are pleased to call executor's work and then charge for it on the basis that it is legal work. I do not think they have any right to do that, at least, not unless they have received his instructions to do that work for him. If they get that far they had better get those instructions in writing. ... For these reasons, I can give no consideration to any work done by the solicitors that is normally considered to be executor's work.

<sup>15</sup> *Re Buhr Estate* (1994), 90 Man. R. (2d) 118 (Q.B.).

### III. LAWYERS' PROFESSIONAL OBLIGATIONS

#### A. Form 74AA

Form 74AA must be sent to personal representatives and residuary beneficiaries within sixty days after Letters Probate or Letters of Administration have been granted. Service must be effected either personally or by an alternative to personal service.<sup>16</sup> In *Sigfusson v. Gawryluk and Carpenter*, failure to serve Form 74AA resulted in the further reduction of \$1 000 from the allowable fees after a reduction of fees from \$19 095 to \$14 100.<sup>17</sup> After finding that the failure did not constitute a "wanton disregard of the rights of the beneficiaries," Master Bolton accepted the respondent's submission, "that there should be some consequences that follow this if the rule is to have any meaning." Master Bolton went on to find that Rule 74.14 exists to ensure that all beneficiaries are treated with an even hand and are able to control disbursements of the estate.

#### B. Practice Directions

As a result of complaints to the Discipline Committee, the Law Society of Manitoba issued practice directions concerning estate fees in 1991 and 1993.<sup>18</sup> The practice directions highlight Rule 74.14, stating it is inappropriate for a lawyer to charge or withhold a higher fee prior to serving the necessary parties with Form 74AA or obtaining their consent. Practically, this means a lawyer cannot take even the fees allowed under the tariff unless she has served 74AA.

The Law Society of Manitoba Discipline Committee has held that the failure to provide a beneficiary with Form 74AA constitutes professional misconduct. In one decision, the committee considered the failure serious because,

[I]t created an environment in which the uninformed client, uninformed personal representative or uninformed beneficiary would not have available to him or her the necessary knowledge to make an informed judgment about fee matters.<sup>19</sup>

In addition, the committee felt the failure to provide Form 74AA facilitated the disciplined lawyer in taking fees in excess of those permitted by the tariff in Rule 74.14.

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<sup>16</sup> Form 74AA is to be sent to personal representative and residuary beneficiaries; Manitoba, Court of Queen's Bench Rules, r. 74.14(14).

<sup>17</sup> *Sigfusson v. Gawryluk and Carpenter* (1996), (Man. Q.B.) [unreported].

<sup>18</sup> Law Society Practice Direction PD 91-02, Fees Charged by Personal Representative's Lawyer on Administration of Estate; Law Society Practice Direction PD 93-01, Administration of Estates.

<sup>19</sup> *In The Matter Of The Law Society Act*, [1994] L.S.D.D. No. 142, case no. 94-11.

### C. Law Society of Manitoba Rules and Code of Professional Conduct

For services rendered in an estate matter for which either the tariff does not apply, or the lawyer is contemplating taking fees in excess of the tariff, the solicitor should ensure that an hourly rate has been communicated to the client. The Code of Professional Conduct and *The Law Society Act* require attorneys to clearly set out the terms upon which they charge for services.<sup>20</sup> The Law Society rules require a fully disclosed, fair, and reasonable fee. A retainer agreement, or at the very least a letter confirming an agreement for fees in excess of the tariff, for disbursements and litigation proceedings should be part of an estate attorney's practice. If an hourly rate is used by an attorney on estate matters, a retainer agreement or signed letter confirming the hourly rate will serve as evidence that the fee was fully disclosed. The letter should include an explanation of disbursements and how they differ from fees.

### IV. REVIEW OF FEES

THE FEES ALLOWED by Rule 74.14 are subject to review by the court on a passing of accounts<sup>21</sup> or under assessment of costs to review or fix the fee payable to a lawyer retained by a personal representative.<sup>22</sup> In an assessment for costs under Rule 74.14(7), the provisions of Rule 58 apply with necessary changes, except that the Notice of Appointment is served upon all interested persons at least thirty days before the date fixed for the assessment. The assessment of

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<sup>20</sup> Law Society of Manitoba Rules, r. 155, Fees and Disbursements:

A member shall not:

- (a) stipulate, charge or accept a fee that is not fully disclosed, fair and reasonable; or
- (b) charge or accept an amount as a disbursement that is not fully disclosed, fair and reasonable.

Chapter 11 of the Code of Professional Conduct sets out a similar rule to the Law Society rules and discusses a lawyers basic duty regarding legal fees:

Lawyers shall not:

- (a) stipulate, charge or accept any fee or disbursement that is not fully disclosed, fair and reasonable; or
- (b) appropriate any funds of the client held in trust or otherwise under the lawyer's control for or on account of fees without the express authority of the client, save as permitted by the rules of the governing body.

<sup>21</sup> Manitoba, Court of Queen's Bench Rules, r. 74.14(6), Review by Court.

<sup>22</sup> Manitoba, Court of Queen's Bench Rules, r. 74.14(7), Assessment of Costs.

costs requires that at least 14 days before the date of the hearing a lawyer shall file, unless the court otherwise orders, an itemised bill of costs, an affidavit setting out that he or she has complied with sub rule 74.14(14), the fees payable under sub rule 74.14(4), the fees desired, whether the desired fees exceed those payable under sub rule 74.14(4), and the reasons the fees above the tariff should be allowed.

On a hearing to fix or review the fees payable to the lawyer, the court shall examine the nature of the estate assets relative to the value of the estate, the amount and nature of the services performed by the lawyer, and other matters which the court considers relevant. In regard to the two procedures, Rule 74.14(7) is appropriate to use when the only issue to be raised is the legal fees or accounts of the solicitor. If all other matters regarding the administration of the estate are acceptable to the personal representative and the beneficiaries, there is no need to do a formal passing of accounts to have legal fees reviewed.

### A. Who May Request the Review of Fees

Rule 74.14(10) defines interested persons for the purposes of Rule 74.14(7) and 74.14(8). Interested persons include personal representatives, the lawyer retained by the personal representative, and any beneficiary whose interest in the estate is affected by the lawyer's fee.<sup>23</sup>

When bringing an application on behalf of a beneficiary to review fees, Rule 74 has been held as the appropriate rule for a review of the legal fees, rather than Rule 71, Assessment of a Lawyer's Bill.<sup>24</sup> A beneficiary is not the client of the lawyer for the purposes of Rule 71.

### B. Burden Upon Review of Legal Fees

On assessing legal accounts the onus is not on the client:

If a client proceeds with the assessment of a lawyer's account, it is the lawyer's responsibility to justify the account. If time records are the basis of an account, the Lawyer must satisfy the court that the time spent was appropriate in the circumstances.<sup>25</sup>

## V. TAKING FEES IN EXCESS OF THE TARIFF

THE LEGAL FEES WHICH MAY BE CHARGED by a lawyer for an estate are not merely guidelines. Rule 74.14(13) states,

<sup>23</sup> Manitoba, Court of Queen's Bench Rules, r. 74.14(10), Interested Persons.

<sup>24</sup> *MacKenzie v. Lawrence*, [1993] M.J. No. 45 (Q.L.) (Q.B.), Master Ring.

<sup>25</sup> *Heinrichs v. Baker, Zivot & Co.* (1995), 98 Man. R. (2d) 179 (Q.B.), Master Goldberg; *aff'd* (1996), 108 Man. R. (2d) 47 (Q.B.) [hereinafter *Heinrichs*].



The lawyer retained by the personal representative shall not accept payment for services to the personal representative or to the estate, in excess of such fees as are provided in this rule.

It is improper for a lawyer to charge a fee in excess of the amount set out in the tariff without consent of the beneficiaries or court approval. The Law Society Discipline Committee has held that taking a fee in excess of the tariff without the appropriate approvals amounts to professional misconduct.<sup>26</sup> Manitoba courts have held that if the legal accounts that exceed the tariff have been paid out of the estate, the lawyer/law firm may be required to repay the funds to the estate, possibly with interest.<sup>27</sup>

## VI. FEES

### A. Retainer Agreement

In Ontario, courts increasingly emphasise examining the time actually expended by the solicitor in assessing what constitutes a reasonable fee for legal services in estate matters.<sup>28</sup> Arguably, a similar trend exists in Manitoba. The assessment of a reasonable fee for legal services may, on certain occasions, require scrutinising the amount of time spent by the solicitor. For those estates over \$300 000 or where the lawyer can justify a fee greater than the tariff, the court must assess the fees using the principles articulated in Rule 74.14(4). On contentious matters the court must determine the fee for the attorney representing the personal representative. Where the court must resort to an assessment of the actual time expenditure, some basic questions require answers. What was the lawyer's hourly rate? What terms did the retainer agreement set out?

The lawyer will often require a retainer agreement notwithstanding the tariff in the Court of Queen's Bench Rules. If the lawyer has not entered into a retainer agreement with the personal representative proving or successfully arguing a particular hourly rate may be difficult. In addition, the lawyer may be required to prove an agreement to pay certain disbursements other than those paid to the court. Charges for photocopying, facsimile, and telephone calls may require an agreement if a client (personal representative) suddenly decides he did not agree to pay for them (at least at the rate charged by the law firm). A contested account means some time will necessarily pass before payment is re-

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<sup>26</sup> *In the Matter of The Law Society Act*, [1994] L.S.D.D. No. 142, case no. 94-11; *In the Matter of The Law Society Act*, [1993] L.S.D.D. No. 152, case no. 93-04; *In the Matter of The Law Society Act*, [1995] L.S.D.D. No. 3, case no. 95-03.

<sup>27</sup> *Baumstark v. Harvey*, [1993] M.J. No. 318 (Q.L.)(Q.B.), Master Lee.

<sup>28</sup> B.A. Schnurr, "Quantifying Executors' Compensation: Law and Procedure" (1991) 11 E.T.J. 134 at 139.

ceived. If the account is approved, a retainer agreement may allow for interest on the outstanding account, although it does not guarantee payment of interest. Without an interest provision in the agreement, however, interest will not likely be allowed.

The courts have recognised the need to explain legal fees to clients.<sup>29</sup> The retainer agreement or letter should be addressed at the first meeting with the personal representative as a matter of practice. Even small or moderate estates may become contentious and it is impossible to determine on the first visit with a personal representative what problems might surface, either with obstreperous beneficiaries, multiple executors, or the will itself.

## B. Interest On Unpaid Accounts

Before the enactment of s. 47(3) of *The Law Society Act*, some question existed as to whether a solicitor could in law charge interest on unpaid fees. *The Law Society Act* now allows interest to be charged on overdue accounts where certain conditions are met.<sup>30</sup> With the number of people who may be involved in an estate matter and the complex issues that may arise, accounts may be rendered and not paid for some time. Interest on overdue accounts is not permitted unless the client has agreed to allow interest to be charged on unpaid fees, charges, or disbursements. Section 161 of the *Income Tax Act* sets out the maximum interest rate.<sup>31</sup> Where there is an agreement on the rate of interest, that rate will remain the same as initially agreed so long as it does not exceed that set out under s. 161 of the *Income Tax Act* at the time the account is rendered.<sup>32</sup> The rate must be shown on every bill delivered to the client.

*Re: Zilberman Estate*<sup>33</sup> discussed the question of interest. The Court of Appeal held interest may be payable where an agreement existed between the per-

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<sup>29</sup> *Heinrichs*, *supra* note 25. In this decision, the solicitor was criticised for failing to clearly explain the basis of fees, failing to provide a written retainer agreement and failing to provide any interim statements of account, which would have kept the clients apprised of the amount of fees that were accumulating.

<sup>30</sup> Section 47(3) states:

Where a barrister or a solicitor and a client thereof have agreed that interest may be charged on unpaid fees, charges or disbursements of the barrister or solicitor, the barrister or solicitor may charge and recover interest on the unpaid fees, charges or disbursements charged to the client calculated from a date that is at least one month after the day the bill is delivered to the client.

<sup>31</sup> Section 47(5).

<sup>32</sup> Law Society of Manitoba Practice Direction 86-01, Interest on Unpaid Fees.

<sup>33</sup> Section 47(6). See also *Re: Zilberman* (1981), 12 Man. R. (2d) 427 (Q.B.); *rev'd Re: Zilberman*, [1982] 2 W.W.R. 654 (Man. C.A.). The Court of Appeal agreed interest was

sonal representative and the lawyer. In this case no mention of interest occurred until a court application was made to review the fees; therefore, the necessary agreement was not in place. There is some question about the use of the prejudgment interest provisions pursuant to the Court of Queen's Bench Act outside the purview of this paper.

## VII. WHERE THERE HAS BEEN NO AGREEMENT ON FEES

WHERE NO EVIDENCE has been submitted on an agreement as to fees between the client and the lawyer, the court will attempt to find some mechanism to determine the appropriate fees. The court has a variety of sources to use in this task. The Code of Professional Conduct,<sup>34</sup> the Court of Queen's Bench Rules, and case law<sup>35</sup> outline factors for consideration in assessing a fair and reasonable fee.

Rules 74.14(4) and 57.10(1) list considerations for the court in assessing costs and fees. The following factors have been considered when assessing a fee on the basis of what is fair and reasonable:

- (i) the time expended by the solicitor;
- (ii) the legal complexity of the matters dealt with;

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available where an agreement existed between solicitor and client. In the specific instance of *Zilberman*, however, interest was not allowed because no agreement could be proved.

<sup>34</sup> The Code of Professional Conduct, Chapter 11, sets out a list of considerations in assessing fees.

A fair and reasonable fee will depend on and reflect such factors as:

- (a) the time and effort required and spent;
- (b) the difficulty and importance of the matter;
- (c) whether special skill or service has been required and provided;
- (d) the customary charges of other lawyers of equal standing in the locality in like matters and circumstances;
- (e) in civil cases the amount involved, or the value of the subject matter;
- (f) in criminal cases the exposure and risk to the client;
- (g) the results obtained;
- (h) tariffs or scales authorised by local law;
- (i) such special circumstances as loss of other employment, urgency and uncertainty of reward;
- (j) any relevant agreement between the lawyer and the client.

<sup>35</sup> *Levine v. Bartel* (1992), 79 Man. R. (2d) 287 (Q.B.).

- (iii) the degree of responsibility assumed by the solicitor;
- (iv) the monetary value of the matters in issue;
- (v) the importance of the matters to the client;
- (vi) the degree of skill and competence demonstrated by the solicitor;
- (vii) the results achieved;
- (viii) the ability of the client to pay; and
- (ix) the reasonable expectation of the client as to the amount of the fee.

In practice, where there has been no agreement on the fees, reference is made to the considerations set out in Rule 74 and Rule 57.10(1), the Code of Professional Conduct, and *quantum meruit* principles.<sup>36</sup>

## VIII. TIME RECORDS

ONE CLEAR DIRECTION given by the court to solicitors is to keep detailed time records. Time records should include a narrative description of work done which is detailed enough to ensure that the time is justified. The record must cover both non-contentious and contentious matters. Numerous decisions have criticised lawyers for failing to properly and accurately record their time.<sup>37</sup>

Several additional reasons mandate the maintenance of adequate time records. First, the tariff set out in Rule 74.14(11) is reviewable by the court. With large estates held in simple investments with one or two beneficiaries the court may find it appropriate to reduce the fees allowed by the tariff unless the amount of work expended justifies a fee calculated in accordance with the tar-

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<sup>36</sup> *Heinrichs*, *supra* note 25.

<sup>37</sup> *Taposchaner Estate*, *supra* note 6 and *Re Bilan Estate*, [1991] M.J. No. 432 (Q.L.) (Q.B.). The solicitor rendered an account for fees in the amount of \$6 047 plus disbursements in relation to administration of an estate. No itemised statement of account was provided to the court showing the time spent. A first account gave a description of what was done and disclosed performance of all the normal services which might be expected in the administration of an estate. Subsequent accounts disclosed services normally expected within the realm of administration plus some time spent responding to beneficiaries. The court was not persuaded that the estate was of sufficient complexity to justify a 50 percent increase over what the tariff would allow under the rules. The court awarded the tariff amount of \$4100 plus an additional \$1 000 to reflect services related to the transmission and transfer of real property plus a small amount for additional time spent. See also *Canada Trust Co. of Canada v. Miller*, [1993] M.J. No. 214 (Q.L.) (Q.B.), Master Lee; *Baumstark v. Harvey*, [1993] M.J. No. 318 (Q.L.) (Q.B.), Master Lee; *Heinrichs*, *supra* note 25.

iff.<sup>38</sup> Second, recording time presents a simple way to provide some protection to a lawyer. Estates initially start as uncomplicated matters with minimal work required, but frequently turn out to be complex and time-consuming situations. The number of beneficiaries may add to the inquiries a lawyer must answer. Judges may have never practised in estate matters or may have been removed from private practice for many years and have forgotten how difficult it can be for a lawyer to respond to several beneficiaries and a personal representative's enquiries. In addition, the lawyer may have worked hours to affect a settlement

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<sup>38</sup> *Finkle v. Lawrence*, [1990] M.J. No. 382 (Q.L.) (Q.B.). Where the total value of the estate was \$377 000, Master Goldberg [as he then was] considered the assets of the estate and concluded that the aggregate value of \$299 500 consisted of three bank accounts and one guaranteed investment certificate, all of which were simple to deal with, and contributed significantly to the basic fee calculation under Rule 74. A fee of \$7 000 was requested by the lawyer. The additional fee was for extra work done by lawyer which he was of the opinion was not covered by the tariff. The extra work related to:

- (i) time spent in attempting to locate the original last will of the deceased;
- (ii) time spent in attempting to find the witness to the will;
- (iii) time spent in communicating with the co-executor's lawyer; and attempting to resolve the claim of the co-executor, Larry Rubinstein for the executor's fee and reimbursement of his legal costs;
- (iv) time spent attempting to obtain a consent to the co-executor to the release of the balance of the estate,
- (v) time spent attempting to obtain Larry Rubinstein's consent to the passing of accounts; and
- (vi) time spent administering the proceeds of sale and holding same in trust pending the appeal of Master Lee's order on the passing of accounts.

The Tariff calculation on the first \$300 000 was \$4 100. In addition, the lawyer was entitled to additional fees pursuant to Rule 74.14(11)(d) for the sale of a home and fees for appearing on the first passing of accounts Rule 74.14(11)(b). The fees allowed for the sale of home were \$500. The fees allowed for the first passing were calculated in accordance with the Rule 74.14(11)(b) and were \$568.67. Master Goldberg allowed \$5 168.67 fees to the lawyer inclusive of the additional fees that were allowable pursuant to the Court of Queen's Bench Rules. The lawyer had supplied a bill of costs indicating 36.5 hours of work which the Master took into consideration concluding this lawyer was fully compensated for his work.

It is difficult to accept that the list of activities set out by the lawyer are properly covered by the tariff. Essentially, they were litigious issues outside the application for probate and basic administration of the estate. The decision did not specifically address whether the activities were just a part of the normal administration of the estate or were additional matters raised by the circumstances of this estate. The decision seems to accept that these matters were additional matters completed outside the normal course of tariff compensated work. However, because of the simple assets involved in the estate, the basic tariff fee overcompensated the lawyer and therefore the additional fees for these activities were covered by the basic tariff fees.

between the beneficiaries and the estate, saving the estate litigation costs, but unless the time and activities are recorded she may either not remember the activities or be forced into a situation of reconstructing their time. The reconstruction method may not convince a court that the fees are justified.<sup>39</sup> The court may not accept an account drafted so as to list all activities in one paragraph without corresponding time entries. The lawyer may be called upon by the court to provide time records or entries for the Account<sup>40</sup> or even her file for review.<sup>41</sup> Knowing which estate proceedings will be simple to resolve and which matters will turn complex is impossible. The tariff allowed on a small estate where hours have been spent responding to the personal representative, beneficiaries' inquiries, and resolving conflicts may not adequately compensate the lawyer for her efforts. Given this uncertainty, recording time is really a small inconvenience.

*Zimbel Estate v. Manitoba (Public Trustee)*<sup>42</sup> illustrates how detailed and accurate records can work for an attorney. On an application for passing of executor's accounts the main issue was fixing the fee payable to the lawyer retained by the executors. The solicitor had rendered two accounts totalling \$9 000 in respect of work done between October 1990 and April 1991. The work related to litigation involving the interpretation of the testator's will. The lawyer, whose hourly rate was \$150, submitted time sheets indicating 135 hours in unbilled time relating to services rendered from April 1991 to June 1993. The work concerned representing the estate on an application challenging the validity of the will, preparation of an application for passing accounts, compilation of responses to undertakings made by beneficiaries and cross-examination of one of the executors. The court found the lawyer spent an excessive amount of time preparing the application to pass accounts, including the affidavit in support. Executor duties include preparation of the accounts; therefore, the attorney spent time completing executor duties. However, the court was still persuaded to give the lawyer a further \$12 000 towards his \$20 000 unbilled time in addition to the already billed fee of \$9 000 based on the time spent by the lawyer as reflected in the time records.<sup>43</sup>

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<sup>39</sup> *Canada Trust Co. of Canada v. Miller*, *supra* note 37.

<sup>40</sup> *Ibid.* at 2.

<sup>41</sup> *Re: Ciwko Estate* (1994), 99 Man. R. (2d) 302 (Q.B.), where Master Lee requested the lawyer for the executor to leave his file for review. See also *Re: Gore Estate*, *supra* note 37 where Master Lee reviewed the solicitor's file to determine the reasonableness of the claim for compensation requested executor/lawyer.

<sup>42</sup> *Zimbel Estate v. Manitoba (Public Trustee)*, [1994] M.J. No. 136 (Q.L.) (Q.B.), Senior Master Goldberg.

<sup>43</sup> See also *Re: Flatt Estate* (1997), 116 Man. R. (2d) 288 (Q.B.), Master Lee. The solicitor claimed a fee over the tariff by at least \$21 000. Although the fees were not approved in

## IX. CONTROLLING TIME

SINCE THE COURTS scrutinise a lawyer's accounts, one must understand the different rôles of the executor and attorney in the administration of an estate. An executor is responsible for the administration of trusts set out in the will,<sup>44</sup> the burial of the deceased, proving the will, collecting the estate, paying debts, and satisfying bequests. Specific legal knowledge may be required to collect some assets, but for the most part standard letters suffice.

A lawyer should be careful about what she tells her client she will do. Writing letters for specific assets is one thing, whereas obtaining receipts for income received and debt paid, and preparing detailed records of the administration are another. The latter are clearly executor's functions. If the lawyer has no choice due to the circumstances but to attend to executor's matters, precedent exists to ask for compensation which the executor would have received for doing these activities.<sup>45</sup> Courts may not allow legal fees to an attorney for performing the functions of the personal representative. The key to successfully obtaining compensation in these circumstances lies in knowing the duties an executor will normally perform, acknowledging the distinction to the court, explaining why the solicitor was required to complete the work, and the basis on which compensation is sought—as executor compensation rather than legal fees. The courts have not clearly defined executor duties; however, the distinction between the roles has been identified.<sup>46</sup> In some instances the court has identified the differing roles, allowing compensation under both heads.<sup>47</sup>

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total the lawyer was awarded \$15 000 in fees which was at least \$10 000 in excess of the tariff. Although the case does not discuss what time records were provided, it appears that they were detailed in nature as the Master discussed the lawyer's activities in detail.

<sup>44</sup> D. Waters, "The Law of Trusts in the 80s" (1980-81) 7 E.T.R. 27 at 38.

Executors/Administrators are true fiduciaries whose duties are to act for the benefit of others, but not at their instructions. Fiduciaries are instructed by the instrument which creates their office. Lawyers are instructed by their clients to do or complete matters in accordance with the instructions given.

<sup>45</sup> *Re: Lloyd* (1954), 12 W.W.R. 445 (Man. C.A.); *Preboy* (1989), 72 Sask R. 33 (Surr. Ct.) *aff'd* (1989), 74 Sask R. 233 (C.A.).

<sup>46</sup> *Zimbel Estate v. Manitoba (Public Trustee)* *supra* note 42.

<sup>47</sup> *Baumstark v. Harvey*, [1993] M.J. No. 318(Q.L.) (Q.B.). The respondent lawyer failed to file material justifying his account. Master Lee reviewed the estate file and considered the lawyer as acting as executor and solicitor for the estate. It is dangerous for lawyers not to make these distinctions themselves, because the court may not be generous of its time in every instance and might not allow compensation payable for executor type services on the basis of no evidence. For a discussion on what a court may consider as services compensable to the lawyer acting as the executor and what services are compensable to the lawyer acting as a lawyer, see: *Re: Lloyd* and *Preboy*, *supra* note 45.

Engaging the services of a bookkeeper may prove worthwhile in estates where the executor may encounter difficulty fulfilling the task. It is probably inappropriate for lawyers to provide these services and expect to be compensated. In complex estates involving reconciling several receipts, both income and disbursements, using a bookkeeper appears justified. Usually a bookkeeper will charge a considerably lower hourly rate than an attorney. Moreover, a bookkeeper will complete the reconciliation faster due to experience in preparing accounts. Thus, the cost to the estate will be considerably less than what an attorney would charge. Of course the personal representative must agree to retain the bookkeeper, and the size and complexity of the estate must justify the cost.

## X. COST AWARDS IN ESTATE LITIGATION

GENERALLY, AN EXECUTOR IS INDEMNIFIED for all reasonable costs and expenses incurred in the course of the administration of an estate.<sup>48</sup> This includes fees on a solicitor and own client basis. The facts of each case will determine whether other parties will be paid costs out of the estate. Considerations of whether the executors or trustees were acting for the benefit of the estate or for themselves are often relevant.

Traditionally, courts have allowed the recovery of costs from the estate without regard to the degree of success of a party to the litigation. This is significantly different than in civil litigation cases where costs are usually awarded to the successful party. The reasons for the difference lie in two policy considerations.<sup>49</sup> First, in estate litigation the difficulties, conflicts, or ambiguities causing the litigation stem either entirely or partially from the testator's actions. Therefore, the testator or her estate should carry the burden of the cost. Second, the courts have a responsibility to ensure that wills under which estates are distributed are valid, the proper support of the testator's dependants are met, and that the provisions of the will are accurately understood. In view of these concerns, courts have recognised that a party should not hesitate to bring an issue before the court due to fears of impending legal costs.<sup>50</sup>

Courts must maintain a balancing act between fostering unfounded litigation on the basis that the litigants know their costs will be absorbed by the estate and allowing doubtful wills to pass into probate by making the costs opposing them dependant upon success. Brian Schnurr,<sup>51</sup> a lawyer who has pub-

<sup>48</sup> *Re: Public Trustee v. Ballen* (1992), 87 D.L.R. (4th) 111 at 115 (Man. C.A.). See also *Goodman Estate v. Geffen*, [1991] 5 W.W.R. 389 at 416 (S.C.C.).

<sup>49</sup> B.A. Schnurr, "Estate Litigation—Who Pays the Costs?" (1991) 11 E.T.J. 52

<sup>50</sup> *Mitchell v. Gard* (1863), 164 E.R. 1280 (P.D.).

<sup>51</sup> Schnurr, *supra* note 49.



lished several articles on estate matters, concludes that courts are becoming less inclined to award costs from the estate to an unsuccessful litigant. He reviewed Ontario case law and concluded that Ontario courts are moving away from the traditional position of allowing costs for all parties to be paid out of the estate. The court is more inclined to have costs paid out of the estate when the circumstances of the estate or will are such that well grounded concerns are raised. If the court finds the beneficiaries have put an estate through unnecessary expense and trouble, only a minimal contribution to costs may be allowed.<sup>52</sup>

Where an appeal was taken by an executor who was an unsuccessful litigant at first instance attempting to uphold the will, the Ontario Court of Appeal denied the costs being paid from the estate. The Court of Appeal reasoned that although the executor had a duty to bring the will forward and defend it, this duty did not extend to an appeal from an adverse finding.<sup>53</sup> A similar result occurred in *Re Beck*,<sup>54</sup> a Manitoba case where the executor appealed a Court of Queen's Bench judgment. The executor was awarded solicitor and own client costs in the Queen's Bench. The Court of Appeal stated that the executors would be justified in pursuing an appeal only if they were prepared to "risk payment of the costs of an unsuccessful appeal."

Other cases have denied recovery of costs where allegations of fraud were made without any evidence whatsoever. Costs in one instance were awarded against the solicitor where the unfounded allegations were known by the solicitor to be untrue.<sup>55</sup> In another case, the plaintiffs were ordered to pay a defendant's solicitor and client costs where the plaintiff had received an offer to settle and had claimed undue influence, but failed to prove the undue influence or even provide some evidence on the issue.<sup>56</sup>

Manitoba courts are adopting an approach similar to that of Ontario and are examining the specific elements of each case to determine whether all costs—including those of an unsuccessful party—are to be paid by the estate. *Syrota v. Clark Estate*<sup>57</sup> stands as an example of the court moving away from the traditional approach of assessing costs.

In *Syrota*, a testator left his estate to his estranged second wife. The children of the testator's first marriage challenged the validity of the will alleging

<sup>52</sup> *In the Matter of the Estate of Edward Thomas Nichol, Deceased* (1996), 112 Man. R. (2d) 35 (Q.B.), Master Lee.

<sup>53</sup> *Eady v. Waring* (1974), 43 D.L.R. (3rd) 667 (Ont. C.A.).

<sup>54</sup> *Re Beck*, [1976] 4 W.W.R. 670 (Man. C.A.).

<sup>55</sup> *Orleski v. Reid*, [1989] 31 E.T.R. 249 (Sask. C.A.).

<sup>56</sup> *Kerner v. Fioreli* (1990), 37 E.T.R. 60 (Ont. Surr. Ct.).

<sup>57</sup> *Re Clark Estate* (1993), 83 Man. R. (2d) 21 (C.A.).

undue influence and lack of testamentary capacity. Both allegations were defeated at trial. The trial judge found the actions of the testator in secretly making a will which disinherited his children to be the cause of the litigation. He then ordered that the costs of the applicant children be paid out of the estate on a solicitor-client basis. The Court of Appeal allowed an appeal by the executrix wife and held that the parties should bear their own costs of the trial. In discussing when costs would be ordered, the court considered two instances where costs should not follow the event. Costs should not be borne by the parties incurring them where the circumstances warrant investigation or where the testator is found to have caused the litigation. The Court of Appeal reviewed the record and found that virtually no evidence was put forth on undue influence or the issue of testamentary capacity. The Court of Appeal did not find the actions of the testator caused the litigation.

In *The Public Trustee v. Ballen*,<sup>58</sup> the Manitoba Court of Appeal addressed some of the issues to consider when costs may be paid out of the estate. The court held,

The costs of all parties to estate proceedings have been ordered to be paid out of an estate when it was necessary to apply to the court to construe a testamentary document; to determine who were the heirs of an intestate deceased, or to determine the capacity of a testator or the circumstances of the execution of his/her will.<sup>59</sup>

Where the litigation involves an estate, but is not a probate matter, the courts will refuse to allow costs to be paid out of the estate. In *Shimnowski v. Shimnowski*,<sup>60</sup> the executors of an estate brought an application for directions on whether they should honour cheques drawn by the deceased payable to a son and the son's wife (the proponents/applicants). Other beneficiaries opposed the payment (the respondents). At trial, the court held that the estate did not have to honour the cheques. However, the court ordered the proponents' and respondents' costs to be paid out of the estate. The trial court's decision on the cheques was upheld. On a cross appeal on the issue of payment of the proponents costs out of the estate, the proponents' position was held to be identical to a creditor claiming against the estate; therefore, it was not a probate action. The Court of Appeal overturned the trial court's order for payment of the proponents' costs and ordered the proponent to pay party-and-party costs to the respondents.

In *Ballen*, the administration of the deceased's estate was contentious, with many applications to the court and significant legal costs resulting. The Public Trustee sought an order proposing settlement of legal costs on the basis of so-

<sup>58</sup> *The Public Trustee v. Ballen*, *supra* note 48. See also *Lafrance v. Blanchet*, *supra* note 1.

<sup>59</sup> *Re: Public Trustee v. Ballen* *supra* note 48 at 116.

<sup>60</sup> *Schimnowski v. Schimnowski* (1994), 87 Man. R. (2d) 10 (Q.B.); *var'd* (1994), 89 Man. R. (2d) 81 (C.A.).

licitor-client costs for all parties. It was assumed this would save the estate litigation on the issue of legal fees. The order granted in the Court of Queen's Bench was reversed on appeal. Philp, J.A. approved of previous cases which have held only in "rare and exceptional" circumstances will the court allow solicitor-own client costs to persons challenging the validity of a will or in other proceedings in estate matters.<sup>61</sup> The Court of Appeal held that awarding solicitor-client costs should only be done in exceptional circumstances and costs to be paid out of an estate should only be allowed if the estate benefited from the legal work. In *Ballen*, Philp J. raised a number of questions which should have been determined before ordering the payment of the costs:

- (i) what was the nature of the legal work represented by the outstanding accounts, and by the accounts that have already been paid out of the estate;
- (ii) for whose benefit was the work performed;
- (iii) did the estate benefit from the work that was performed and from the proceedings that were taken;
- (iv) did any of the proceedings that have been taken meet the "rare and exceptional" test;
- (v) were the legal costs incurred by the former executors properly incurred by them, and directed for the benefit of the estate;
- (vi) what portion of the legal costs already paid to the Public Trustee was incurred by her in her capacity as the representative of the estate;
- (vii) was the conduct of the former executors in their administration of the estate the foundation for the proceedings taken and legal costs incurred by certain beneficiaries; and
- (viii) has there been conduct by the former executors or by beneficiaries over the years that would warrant an order of costs being made against them in favour of the estate.

While specific to *Ballen*, these questions highlight some of the considerations an attorney should make when advising clients about receiving payment of their legal fees from an estate.

Courts have ordered all parties' solicitor-client costs to be paid out of the estate when a particularly vexing principle of law had to be clarified.<sup>62</sup> The Court of Queen's Bench has denied costs to certain beneficiaries where the

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<sup>61</sup> *Clark Estate*, *supra* note 37; *Re: Public Trustee v. Ballen*, *supra* note 48.

<sup>62</sup> *Sparks Estate v. Wenham* (1995), 95 Man. R. (2d) 181 (C.A.); *aff'g* (1994), 91 Man. R. (2d) 52 (Q.B.).

proceedings were unconscionable in comparison to the actual amounts involved.<sup>63</sup> The court has ordered parties to pay costs to the estate on a solicitor-and-client basis when a party has been particularly obstreperous<sup>64</sup> and where distribution of the estate has been delayed inordinately and unnecessary costs have been incurred.<sup>65</sup> If the action is not justifiable the parties challenging the will must bear the cost of litigation.

Schnurr<sup>66</sup> concludes courts are likely to continue to recognise that estate litigation is different from other forms of litigation with respect to costs. However, with the concern of unnecessary litigation growing there will be a trend towards letting costs "follow the event." In conclusion, Schnurr provides a list of matters counsel should consider carefully before commencing litigation:

- (i) the degree of merit to the position taken or claim being made;
- (ii) which party bears the onus of proof;
- (iii) the increased likelihood that the court will deny costs out of the estate where the estate is relatively modest;
- (iv) the extent of reasonable efforts to settle the matter; and
- (v) the professional obligation of counsel to his client and perhaps to the court to discuss fully with the client the hazards of proceeding with unmeritorious litigation and the possible costs consequence to the client.<sup>67</sup>

## XI. CONCLUSION

THE PUBLIC IS INCREASINGLY aware of lawyers' responsibilities and obligations respecting billing practices. Consequently, lawyers can expect their fees to be scrutinised by clients and should expect that unsubstantiated fees will be challenged. To effectively address these billing concerns, lawyers should maintain detailed and accurate records contemporaneously with services rendered. Failing to provide detailed accounts may result in the denial of fees rightfully owed to a lawyer. Additionally, because incomplete record keeping may cause clients to question the accuracy of their lawyer's bill, the goodwill between the

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<sup>63</sup> *Derksen v. Kunkel et al.*, [1994] M.J. No. 431 (Q.L.) (Q.B.); and see *Re: Blowers Estate; Menrad v. Blowers*, *supra* note 2 where payment of costs of litigation against the estate was denied where litigation was unnecessary and frivolous.

<sup>64</sup> *Carr Estate v. Danyluk* (14 April 1987), (Man. Q.B.) [unreported].

<sup>65</sup> *Decorby v. Decorby* (1985), 21 E.T.R. 283 (Man. C.A.); *Kessiloff v. Kessiloff* (1988), 56 Man. R. (2d) 265 (Q.B.).

<sup>66</sup> Schnurr, *supra* note 49 at 63.

<sup>67</sup> *Ibid.*

lawyer and client may potentially—and unnecessarily—suffer. Regarding litigation over legal fees, the courts appear to be returning to a more traditional approach of allowing costs to the successful party. In light of this shift, lawyers should proceed with caution when advising clients to commence estate litigation.

