# DEALING WITH THE TIME LIMIT FOR A REVIEW

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## About this publication and its use

This publication:

- Explains the Rule of Court that imposes a time limit on a client's request for a review of a lawyer's invoice for legal services (also called an "account"),
- Explains case law that governs the application of the Rule where two or more accounts are sent to a client for the same legal matter,
- Should help you determine if an account or number of accounts for the same matter are in or out of time for a review,
- Explains why and how you may deal with a time limit problem, and
- Provides guidance and step-by-step instructions on the procedures required to obtain the Court's permission to have out-of-time accounts reviewed.

Before you continue reading this publication, you should understand what a review is, how reviews are conducted and what a review can accomplish. Reading the Review Office publication entitled *FAQs – Review of Lawyer's Charges* should give you a good understanding of reviews and the review process. It and other Review Office publications that might be of interest to you can be found on our website at[http://www.albertacourts.ca/qb/areas-of-law/reviews-assessments.](http://www.albertacourts.ca/qb/areas-of-law/reviews-assessments)

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## Understanding the Time Limit Rule

Rule 10.10(2) of the *Alberta Rules of Court* imposes a 6 month time limit for a request to have a lawyer's "charges" reviewed by an appointed officer of the Court, known as a "Review Officer". The Rule reads, as follows:

> **10.10(2)** A lawyer's charges may not be reviewed, whether at the request of the lawyer or the client, if 6 months has passed after the date on which the account was sent to the client.

The term "charges" refers to the things that a lawyer may bill her or his clients for. Charges fall into two main categories: fees and disbursements – but also include GST.

Everything that a client is billed for will fall into these categories, so everything in a lawyer's bill may be reviewed by a Review Officer.

The term "account" refers to a lawyer's bill or invoice. It is an abbreviated form of "statement of account", which is the traditional term for a lawyer's bill. The traditional term is still in use but for the purpose of this publication, we will use the abbreviated form, as it is the term used in the *Rules of Court*.

The 6 month time period specified in Rule 10.10(2) begins on the date on which an account is sent to a client. In the absence of evidence as to when the account was actually sent (e.g. mailed or emailed to the client), the date of the account is presumed to be the date on which it was sent. In some cases, the account may have been sent days or even weeks after the account was prepared and dated. Where this occurs, the date on which it was sent may be proved by evidence, like a Canada Post date-stamp on an envelope, an email message or handwritten notes indicating that the account was handed to the client during a meeting that took place on certain date. Once the presumed or actual date is determined, the end date for the 6 month period can be easily determined. It will be the same day of the month, 6 months later.

What must occur within the 6 month period is not what it seems to be from a plain reading of Rule 10.10(2). The Rule seems to suggest that the account must be reviewed within the 6 month period – but if this were so, then the period could expire due to factors beyond a party's control. A review might be delayed due to the party's sudden illness or some other unforeseen factor. Moreover, the scheduling or rescheduling of a review will always depend on the Review Officer's availability. For these reasons, the Rule has been interpreted so as to require that review proceedings be commenced within the 6 month period. Review proceedings are commenced by the filing of a Form 42, *Appointment for Review of Retainer Agreement / Lawyer's Charges*, at a court clerks' counter in a courthouse. This form may be filed by or on behalf of a client on any regular business day (i.e., most weekdays during the year). Filing the form opens a court file for the review and thus "commences" the review proceedings.

From the foregoing, it should be apparent that an account is in time for a review if a Form 42 for its review is <u>filed</u> within 6 months of the date on which the account was sent to the client. Booking a date for a review or <u>preparing</u> a Form 42 for filing has no relevance to the Time Limit Rule. A client could book a date and prepare a Form 42 before the 6 month period expires but not file the Form until the period expires. In such a case, the account would be out of time for review.

Detailed information on preparing and filing a Form 42 can be found in the Review Office publication entitled *How to Request a Review*. You may want to read this publication to gain an appreciation of how much time it might take to prepare and file a

Form 42. You should always allow sufficient time to prepare and file your form so that it can be filed before the time limit for a review expires.

## Application of the Rule to more than one account for the same matter

Understanding Rule 10.10(2) is only part of what is required to determine whether or not an account is in time for a review. Where a lawyer or law firm has sent a client more than one account for the same legal matter, all of the accounts might be in time if 6 months has not passed since the most recent account was sent. This, however, will depend on the nature of the lawyer's accounts.

Case law, including a decision of our Court of Appeal, classifies lawyers' accounts into two categories: "final accounts" and "interim accounts". If a lawyer's accounts are "final", then each of them is subject to the 6 month time limit. Thus, only those of the accounts that are less than 6 months old when a Form 42 is filed may be reviewed. If the accounts are "interim", then the time limit applies only to the last account sent by the lawyer. If the last account is less than 6 months old when a Form 42 is filed, then all of the accounts may be reviewed, regardless of how old they are.

So how can a client tell if an account is final or interim? The answer to this question lies in the agreement that was made between the lawyer and the client with respect to the lawyer's method of billing for the legal services provided by him or her. If the agreement (traditionally called a "retainer agreement") provides for fees based solely on time spent multiplied by hourly rates, then all of the lawyer's accounts will be final. If the retainer agreement allows the lawyer to adjust fees based on factors or circumstances that could arise during the matter handled by the lawyer, then the lawyer's accounts will be interim.

Examples of the factors or circumstances that are most often provided for in a retainer agreement that creates interim accounts are; unforeseen complications; the urgency of a matter; the importance of a matter; and the results achieved by the lawyer. These and other similar factors or circumstances could change as a matter progresses. Because the lawyer's fees may be increased as a result of any change related to them, it would be difficult, if not impossible, for a Review Officer to determine if the lawyer's fees are reasonable until the last account has been sent to the client. This account (and possibly some other accounts that were sent to the client) could contain fee adjustments for things that happened as the matter progressed and the Review Officer would need to know everything that happened and the total amount billed for everything that was done by the lawyer. For this reason, the time limit for a review of interim accounts applies only to the last account sent for a matter. This allows for a proper review of the accounts, as a whole.

A final account can be properly reviewed without waiting for any further accounts. Because the fees charged in a final account are based solely on time spent by the lawyer (and possibly others in the lawyer's office) multiplied by hourly rates it does not matter what might happen after the account is sent. In such a case, the Review Officer can determine the reasonableness of the fees charged based on: what was done during the period covered by the account; how much time was actually spent by the lawyer (and possibly others in the lawyer's office) during the period; whether any of the steps taken by the lawyer were unnecessary or unreasonable; whether the services provided by the lawyer during the period are worth the fees charged; and any other relevant factor or factors. Because this can be done, each of the lawyer's final accounts is subject to the 6 month time limit specified in Rule 10.10(2).

Additional information on retainer agreements can be found in in the Review Office publication entitled *Understanding and Negotiating a Retainer Agreement*. If you did not sign a written retainer agreement for your lawyer's services, then you may want to read this publication to help you determine if your lawyer's accounts are interim or final, based on a verbal retainer agreement.

## Determining if accounts are in or out of time for a review

The steps for determining whether or not an account is in time for a review will depend on which of the following circumstances applies to your situation:

1. The lawyer-client relationship ended and only one account was sent by the lawyer.
2. The lawyer sent more than one account for a matter handled by her or him and the lawyer's accounts are final.
3. The lawyer sent more than one account for a matter handled by her or him and the lawyer's accounts are interim.

These circumstances and the steps that should be taken to determine time limits with respect to them are explained below.

<u>The lawyer-client relationship ended and only one account was sent.</u>

This circumstance could arise as a result of: (a) the lawyer completing the services that he or she was retained to provide; (b) the client terminating the relationship before an account is sent or after an account has been sent but before additional legal services are provided; or (c) the lawyer terminating the relationship and thereafter, sending an account for the services provided by her or him. Regardless of how the circumstance arose in your case, there should be no need to classify the lawyer's account as interim or final. Instead, take the following steps to determine if the account is in time for review:

1. Look for evidence of the date on which the account was actually sent to you (e.g., an email message from the lawyer that attaches the account for its delivery to you). If you can't find evidence of the actual date, then assume that the account was sent to you on the date of the account.

2. If 6 months has not passed since the date determined in step 1 and you are able to book an appointment and file a Form 42 before the end of the 6 months, then you should have no time limit problem and no need to read the rest of this publication. However, you must file your Form 42 before the 6 month period expires.

3. If 6 months has passed since the date determined in step 1 or you will be unable to book an appointment and file a Form 42 before the end of the 6 months, then you have a time limit problem. Go to the section of this publication entitled "Options for dealing with a time limit problem" to see what options are available to you - and continue reading the publication to find out how you might be able to overcome your time limit problem.

<u>The lawyer sent more than one account for a matter and the accounts are final.</u>

As previously explained:

(a) a lawyer's accounts for a matter handled by the lawyer will be classified as "final" where, under an agreement between the lawyer and the client, the lawyer's fees are to be based solely on time spent multiplied by an hourly rate or rates; and

(b) where the accounts are final, each account will be subject to its own 6 month time limit.

If your lawyer has handled more than one matter for you (e.g., an estate matter and a divorce), then you must classify the accounts for each matter by referring to the retainer agreement for that matter. A retainer agreement for one matter could provide for a different method of billing than the retainer agreement for another matter. If you find that the accounts for a matter are final, then you should use the instructions below to determine which, if any, of the accounts are out of time for a review.

If you find that the accounts for a matter are interim, then you should follow the instructions under the next subheading in this publication ("The lawyer sent more than one account and the accounts are interim"). If the retainer agreement that you had with you lawyer is verbal, then you might want to read the Review Office publication entitled *Understanding and Negotiating a Retainer Agreement*. It explains how you can determine if accounts are interim or final where there is no written retainer agreement.

Once you have determined that the accounts for a matter are final accounts, take the following steps to determine which, if any, of the accounts are in time for review:

1. Arrange the accounts in date order, from the oldest to the most current.

2. Count 6 months back from today's date to establish the "cut-off date" for the accounts that should be in time for review. All of the accounts that were sent by the lawyer prior to the cut-off date will be out of time – and all of the accounts that were sent after the cut-off date should be in time. However, you must allow time to book an appointment and file a Form 42. If you cannot file a Form 42 within 6 months from the date of the earliest account that was sent after the cut-off date, then that account should be added to the out-of-time accounts.

3. If all of your accounts are in time for review, then there should be no need to read the rest of this publication. However, you must file your Form 42 within 6 months of the date of your oldest account.

4. If any of your accounts are out of time for review, then you should read the rest of this publication to see what options are available to you and to find out how you might be able to overcome your time limit problem.

The lawyer sent more than one account for a matter and the accounts are interim.

Where a lawyer's accounts for a matter are interim, the time limit imposed by Rule 10.10(2) will apply only to the last account sent by the lawyer. If this account is in time for review, then all of the accounts will be in time. If it is out of time, then all of the accounts will be out of time.

You can determine if the last account is in time by following the steps provided under the subheading "The lawyer-client relationship ended and only one account was sent". You will find these steps on page 6. If you are reading an electronic copy of this publication, then you can click here to go directly to them.

## Options for dealing with a time limit problem

If one or more of your lawyer's accounts is out of time for review, then you may:

(a) Request a review of only those of the accounts that are in time. This can be done by attaching only those accounts to the Form 42 that you will be filing for the review;

(b) Seek the lawyer's agreement to have the out-of-time accounts reviewed. This can be done before the date booked for the review or at the beginning of the review. Additional information on this option is provided below and in the next section of this publication, entitled "Overcoming a time limit problem"; or

(c) Apply to the Court for an order permitting a review of the out-of-time accounts. Additional information on this option is also provided in the next section of this publication, and the remaining sections of the publication.

Each of the options has its advantages and disadvantages. The commentary below outlines the advantages and disadvantages of each option and provides guidance for selecting the option that would be best for you.

Option (a) is effortless. It requires no additional paperwork and no appearance before the Court. Moreover, it should decrease the possibility of a delay in the completion of a review requested by you. The review might be delayed for reasons other than a time limit problem, but it would not be delayed because of this problem. On the downside, option (a) would limit the Review Officer's consideration of the out of time accounts. The Review Officer could still consider the total amount billed for the matter handled by the lawyer (including the amounts of the out-of-time accounts) but the Review Officer could not examine the out-of-time accounts to determine whether or not:

(a) any unnecessary or unreasonable work was done:

(b) the time spent by the lawyer or lawyer's staff was reasonable, having regard to what was done;

(c) the time recorded by the lawyer was accurately and properly recorded;

(d) you were billed for things that you should not have been billed for; and

(e) other similar factors.

With this in mind, your answers to the following questions should help you to decide whether or not option (a) would be the best option for you:

(a) Is the total of the amounts billed in the out-of-time accounts significant in relation to the total of the amounts billed in the in-time accounts? Example: Where the out-of-time accounts total $1,000 and the in-time accounts total $33,000, it is probably not worth seeking a review of the out-of-time accounts.

(b) Are you generally satisfied with the out-of-time accounts and the work done by the lawyer for these accounts but dissatisfied with the in-time accounts and/or the work done for them?

(c) How likely is it that the lawyer might agree to a review of the out-of-time accounts? If you believe that the lawyer is likely to agree, then option (b) might be a better option for you.

(d) Do you have the time and energy required to prepare court documents and appear in court for an order to permit a review of the out-of-time accounts? You may want to read the section of this publication entitled "Applying for permission to have out-of-time accounts reviewed" before answering this question, as it explains what must be done to seek the Court's permission.

(e) How likely is it that you would be successful in obtaining the Court's permission? Reading the next section should help you to determine your likelihood of success.

(f) Would you be comfortable preparing court documents and appearing before the Court? Some clients would rather limit the review requested by them than appear in court.

(g) How important is it to you to that the review be completed without delay or, put another way, would you be concerned if the review is delayed? Options (b) and (c) could result in delays in the completion of a review, depending on when they are exercised, as explained below.

Option (b) might also have the advantages of option (a). As previously stated, a lawyer's agreement to have out-of-time accounts reviewed can be sought before the date booked for a review. If this is done and the lawyer agrees, then there would be no additional paperwork, no need for a court appearance and no possibility of a delay caused by a time limit problem. Moreover, the lawyer's agreement would allow the Review Officer to examine all of the accounts, in detail, and to consider all relevant issues raised with respect to them. For these reasons option (b) is usually the best option for most clients. The only real downside to the option is that it requires communication between the parties. In most cases, the lawyer no longer acts for the client and the relationship between the client and the lawyer is strained or even sour. In this situation, many clients are reluctant to speak to their former lawyers and others have already tried and have found that meaningful communication is impossible.

Another approach to option (b) is to seek the lawyer's agreement at the beginning of a review. Review Officers usually begin their reviews by identifying and dealing with time limit problems. Where a problem exists, the Review Officer will ask the lawyer if she or he will agree to a review of the out-of-time accounts. If the lawyer agrees, then all of the accounts will be reviewed. If the lawyer does not agree, then the Review Officer will usually give the client the options of either proceeding with a review of only the in-time accounts or adjourning the review to give the client an opportunity to apply to the Court for an extension of time. These options are rarely withheld and in some cases the Review Officer may review the in-time accounts and then adjourn the review to allow for an application to extend the time for a review of the out-of-time accounts. Because these options are typically offered by Review Officers, seeking a former lawyer's agreement at the beginning of a review is a good option for clients who can no longer communicate with their former lawyers and are in no rush to have the lawyer's accounts reviewed. The principal downside to this approach is the potential for delay. While many lawyers will agree to a review of out-of-time accounts, many will not - and where a lawyer does not agree, a court application and second appearance before the Review Officer will be required. This could delay the completion of the review by several weeks,

or even months, depending on the Review Officer's calendar. That said, a client could seek a lawyer's agreement at the beginning of a review and if the lawyer refuses, elect, at that time, to proceed only on the in-time-accounts.

The final option (option (c)) is to apply for a court order before the date booked for the review. This option reduces the potential for delay and provides early certainty with regard to the accounts that will be reviewed. If the Court permits a review of the out-of-time accounts, then all of the accounts will be reviewed. If the Court does not permit a review of the out-of-time accounts, then only the in-time accounts will be reviewed. In either case, both parties will know which accounts will be reviewed and as a result, both should be better able to prepare for the review. The principal downside to this option is the prospect of losing the court application. While permission to review out-of-time accounts is rarely refused, a refusal would make it virtually impossible to obtain the lawyer's approval to have the out-of-time accounts reviewed. Few if any lawyers would agree to a review that the Court would not allow. In addition, option (c) would require more time and effort than option (a) or option (b), assuming that option (b) results in the lawyer's agreement to have the out-of-time accounts reviewed.

Although the above should help you to determine which of options (a), (b) or (c) might be best for you, you should also read the next two sections of this publication ("Overcoming a time limit problem" and "Applying for permission to have out-of-time accounts reviewed"). They provide additional information that should be considered in selecting the option that would work best for you.

## Overcoming a time limit problem

The commentary under this heading deals primarily with the two options that could result in a review of out-of-time accounts: options (b) and (c). Option (a) cannot produce this result. It is essentially a decision to seek a review of only those of a lawyer's accounts that are in time for review. It may be exercised by filing a Form 42 that has attached to it, only the in-time accounts. Once this is done, the review should proceed on the date booked for it and only the attached accounts would be reviewed. Options (b) and (c) may be exercised by filing a Form 42 that has all of the lawyer's accounts attached to it, regardless of whether or not they are in time for review. This may be done even where there is only one account and it is out of time.

The remaining commentary under this heading explains:

- Why it is a good practice to attach out-of-time accounts to a Form 42, except where you have no interest in having them reviewed,

- Why a lawyer can agree to a review of out-of-time accounts and why many do agree,
- What is required for an agreement to review an out-of-time account,
- Why a Form 42 should be filed before a client applies to the Court for permission to have out-of-time accounts reviewed, except in Calgary when the client will be seeking a Fiat that permits the review,
- What factors are considered by the Court in an application for permission to have out-of-time accounts reviewed,
- How likely it is that permission would be given, and
- What the risks are taken by a client who applies for permission to have out-of-time accounts reviewed.

Why is it a good practice to attach out-of-time accounts to a Form 42?

Unless you have already decided that a review of out-of-time accounts wouldn't be worth the time and effort required to overcome your time limit problem, you should attach the out-of-time accounts to your Form 42 before you file it. A Form 42 serves as a notice to the lawyer of the date, time and place for a review – and of the accounts that will be reviewed. The lawyer will examine the Form, note the accounts that are attached to it and prepare for a review of only those accounts. The Review Officer will also note the attached accounts and prepare for a review of only those accounts. While it is possible to add accounts after you have filed and served a Form 42, the procedures for doing this could be difficult, time consuming and likely to require an adjournment and rebooking of the review. It is always easier to include the out-of-time accounts from the outset and subsequently advise the lawyer and the Review Officer that you no longer wish to have the out-of-time accounts reviewed. This may even be done on the date of the review and is unlikely to cause any delay in the review of the in-time accounts.

Attaching the out-of-time accounts to your Form 42 should also facilitate the overcoming of your time limit problem. Since it would formally notify the lawyer of your intention to have the out-of-time accounts reviewed, it should make it easier for you to request the lawyer's agreement to have them reviewed. A failure to attach them could inspire the lawyer to object to their inclusion in the review, in which case an agreement to have them reviewed would be more difficult to obtain. Some (but not most) lawyers would rather force former clients to take formal steps to add accounts to a review (e.g., through the filing and service of an Amended Appointment) than simply agree to have them added and reviewed. Moreover, attaching the out-of-time accounts should make it easier to apply for an extension of time to have them reviewed. It would evidence an earlier and stronger desire to have the accounts reviewed, and satisfy the Court that a

review of all of the accounts could proceed without any significant delay. Since the lawyer will have received early notice of the client's intention to have the out-of-time accounts reviewed and the Review Officer would already have copies of these accounts, there should be no need for much, if any, additional time to prepare for a review of all of the accounts.

Why can a lawyer agree to a review of out-of-time accounts and why do many of them agree?

The 6 month time limit for a review of lawyer's accounts is not a limitation period. It is a time limit imposed by Rule 10.10(2) of the *Rules of Court*. Another rule, Rule 13.5(1), provides, as follows:

> Unless the Court otherwise orders or a rule otherwise provides, the parties may agree to extend any time period specified in these rules.

Because there is no rule that prevents an agreement to extend the time limit for a review and because court orders preventing such extensions are virtually unheard of, a lawyer may agree to extend the time for a review. This may be done even after the 6 month time limit has expired. A Review Officer, on the other hand, cannot extend the time period. Only the parties to the review or the Court may do so.

So why, then, would a lawyer agree to extend the time period? There are several reasons why many do. First, most lawyers believe that their accounts are reasonable and are confident that a review will prove this. Second, many believe that accommodating a former client is the right thing to do. Third, accommodating a client or former client could result in a more rapid collection of any monies still owed to the lawyer. Finally, most applications to the Court for permission to review out-of-time accounts are successful and many lawyers would rather not waste valuable time attending them. Although lawyers are not required to attend these applications, a lawyer's failure to attend carries the risk that something unfavourable to the lawyer could be ordered (e.g., costs against the lawyer). For this reason, most lawyers would want to either attend or simply agree to an extension.

Before moving on, a cautionary note should be added. A lawyer's refusal to agree to an extension of time should not be taken to suggest that the lawyer lacks confidence in the reasonableness of her or his accounts. There are a number of reasons why a lawyer might not agree, including a genuine belief that the Court would not permit a review of the out-of-time accounts, based on age of the accounts and other relevant factors.

What is required for an agreement to review out-of-time accounts?

A lawyer's agreement to review out-of-time accounts needn't be in writing. If it is provided without requiring anything of value from the client, then it could be withdrawn by the lawyer at any time; although a lawyer who withdraws such an agreement at the outset of a review could be liable to pay the client's costs of attending the review hearing. An agreement of this type could be as simple as a one-sentence statement by the lawyer, like "I will not object to a review of the out-of-time accounts".

If the agreement requires something of value from the client, then it could be withdrawn or would cease to exist if the thing of value is not provided. If the thing of value is provided, then the agreement could not be withdrawn. Example: The lawyer advises the client that he will agree to a review of the out of time accounts if the client pays all outstanding disbursements by a specified date and the client agrees to this arrangement. In this example, the lawyer may not withdraw her or his agreement until the specified date but if the disbursements are not paid by the specified date, then the agreement would cease to exist. If the disbursements are paid by the specified date, then the lawyer would not be allowed to withdraw her or his agreement and the Review Officer would have jurisdiction to review the out-of-time accounts.

Although the lawyer's agreement needn't be in writing, a written record of it would useful and could be extremely valuable. Disagreements concerning what precisely was agreed to are not uncommon and any written evidence of what was agreed to would help the Review Officer resolve the issue. Email correspondence is often used for this purpose.

Why a Form 42 should be filed before a client applies to the Court for permission to have out-of-time accounts reviewed, except in Calgary when the client will be seeking a Fiat that permits the review.

Technically, an application to Court cannot be made until proceedings are commenced through the filing of a "commencement document" that opens a court file. A Form 42 is a commencement document. When it is presented for filing, a court file is opened for it and for all other documents that must or may be filed for review proceedings, including any documents required for a court application. Until the Form 42 is filed, there are, at least technically, no proceedings within which the Court may hear an application and grant an order. For this reason the Edmonton Review Office recommends that a client's Form 42 be filed before the client applies for permission to have out-of-time accounts reviewed.

For practical reasons, the Calgary Review Office permits a less technical approach. It recommends that a client make an *ex parte* application for short form of order, called a "fiat", before the client files his or her Form 42. This procedure is explained later in this

publication. The Calgary Review Office recommends it because it may save the client the cost of filing a Form 42 (a $100 filing fee) should the client's application prove unsuccessful. Where the Court refuses to permit a review of out-of-time accounts and the client decides to abandon his or her request for review, no documents, including a Form 42, are ever filed. Where the Court grants permission or the client also has in-time accounts that she or he still wishes to have reviewed, the client's documents are filed after the client's application.

What factors are considered by the Court in an application for permission to have out-of-time accounts reviewed?

The Court's decision to grant or refuse permission will be based on a number of factors that can be found in case law. The most important of these factors are explained below.

(a) The limitation period has expired. An account that was sent to a client 2 years or more prior to the filing of a Form 42 for its review cannot be reviewed. A review of the account would be barred by section 3(1)(a) of *The Limitations Act* (Alberta) and the Court would have no jurisdiction to permit its review.

(b) Other age considerations. A review of an account that was sent to a client less than 2 years prior to the filing of the Form 42 would not be barred from review and the Court may permit its review. The Court will usually permit a review where the account is less than 1 year old. It is less likely to permit a review where the account is more than 1 year old. However, the decision to refuse or permit may depend on the other factors explained below. These factors tend to be of greater importance when the account is more than a year old.

(c) Possible prejudice to the lawyer. The time limit rule attempts to balance the legitimate competing interests of the client against those of the lawyer. The client's interest is the right to have the reasonableness of the lawyer's accounts determined. The lawyer's interest is to have this determination made within a reasonable period of time in order to prevent or minimize financial difficulties for the lawyer. Accounts are the source of a lawyer's income. Once they are paid, the expenses related to them are paid and the balance the monies received by the lawyer supports the lawyer's practice and provides a source of personal income. With this in mind, you can imagine that a process that could require a large refund of monies that were paid to the lawyer long ago could cause serious financial difficulties for the lawyer. For this reason, the Court will consider how much was paid to the lawyer on the out-of-time accounts and how long ago it was paid. Where the amount that was paid is small and where the payment was made recently, the Court would find less prejudice to the lawyer and would be more likely to permit a review of the out-of-time accounts. Where the amount that was paid is large and the payment was made long ago, it would be less likely to permit a

review. In addition to these considerations, the lawyer could raise other reasons for finding prejudice and these could also be considered by the Court.

(d) Evidence of overcharging. This factor would be weighed against factors (b) and (c). Where the evidence presented for a court application raises a reasonable suspicion of overcharging by the lawyer, the amount that was paid to the lawyer and when it was paid would be of less importance. A lawyer who is believed to have overcharged a client would have a difficult time arguing that he or she would be prejudiced by a process that could prove that the client was overcharged. On this point, it is important to recognize that the client's evidence needn't prove that the lawyer overcharged. It must merely raise a reasonably held suspicion that he or she did. In some cases very little evidence may be required to do this. In other cases, detailed evidence would be required. Where the matter handled by the lawyer is typically routine and uncomplicated (like the preparation of a simple will or a simple real estate transaction) and the lawyer charged a great deal more than would normally be charged, very little evidence would be required to raise a reasonable suspicion of overcharging. Where the matter is atypical or complex (like matrimonial property or commercial litigation) there would have to be evidence that the lawyer might have: done work that was not required; spent too much time doing something that was relatively simple or of little importance; worked on matters that the lawyer was not retained to work on; recorded more time than was actually spent by the lawyer; or taken or failed to take some other action, the consequences of which resulted in inflated costs to the client. Here again, the client needn't prove that any of this actually happened. For the purpose of an application for permission to have out-of-time accounts reviewed, the client must merely raise a reasonably held suspicion that it did. If the Court's permission is given, then the Review Officer will determine whether it did or did not actually happen.

(e) Reason for the Delay. The Court will also want to know, and will consider, why the client did not commence review proceedings (by filing a Form 42) within the 6 month time limit for a review. In many cases the client will have failed to commence the proceedings on time because the client was of unaware of the review process and its availability. While this excuse is typically accepted by the Court, it is less likely to be accepted where a written retainer agreement signed by the client advises the client of the process and explains that it may be used to determine the reasonableness of the lawyer's accounts. It is even less likely to be accepted where the agreement advises the client that there is a 6 month time limit for a review. Of course other explanations for a delay in the commencement of review proceedings may be provided and could be accepted by the Court. A delay caused by the lawyer's refusal to provide billing information or explanations to the client would be an example. In this example, the client should provide evidence of the

client's efforts to obtain the information or explanations from the lawyer, and of the lawyer's refusals and/or inaction.

Additional information on evidence that should or may be presented for an application to permit a review out-of-time accounts and how it must be presented can be found in the next section of this publication, entitled "Applying for permission to have out-of-time accounts reviewed".

Although the factors explained above are not the only factors that may be considered by the Court, they are most important and most commonly considered. Applying them to the facts of your case should give you a good understanding of the evidence that you would be required to present for a successful application for an order permitting the review of out-of-time accounts.

How likely is it that permission would be granted in your case?

As a general rule, most applications to permit reviews of out-of-time accounts are successful. However, applications are less likely to be successful where:

(a) The accounts are more than a year old;

(b) The accounts were paid long ago;

(c) There are no in-time accounts;

(d) There is no evidence that suggests that the client was overcharged; or

(e) The client has no reasonable explanation for delaying the commencement of review proceedings.

Where all of these factors exist there would be very little, if any, likelihood of success. Where only one or two exist, there would still be a high likelihood of success but this would depend on a balancing of the facts presented to the Court and the strength of the parties' evidence. This can be explained by providing two examples. In the first example, the accounts are more than a year old and the total amount charged on the accounts is high - but there is strong evidence that the client might have been significantly overcharged for the legal services provided. In this example permission to have the account reviewed is likely to be given. In the second example, the out-of-time accounts are less than a year old but they were paid months ago; there is no evidence that the client might have been overcharged; and the client has no reasonable excuse failing to commence review proceedings on time. In this example, the Court's permission would likely be refused. In both examples, the existence of one or more in-time accounts would weigh in favour of the client, particularly where the lawyer is still owed a significant amount on these accounts.

There are several reasons why the existence of in-time accounts would weigh in favour of the client. First, because the client is entitled to a review of the in-time accounts and the lawyer will want to attend the review, adding the out-of-time accounts to the review shouldn't cause much, if any, inconvenience to the lawyer. Second, where the lawyer is still owed a significant amount on the in-time accounts, a review of the out-of-time accounts would be less likely to cause financial difficulties for the lawyer. In such a case, a Review Officer's reduction in the lawyer's fees and/or disbursements would probably result in a reduction in the amount still owing to the lawyer. It would be less likely to result in a required refund of monies that were received and already used by the lawyer (see page 14, factor (c), "Possible prejudice to the lawyer"). Finally, where money is still owed to the lawyer, the lawyer could derive a benefit from a review of the in-time accounts, which would, in most cases, reduce the lawyer's resistance to a review of the out-time-accounts. Because a Review Officer's decision may be entered as a judgement of the Court, a review could lead to a judgement in favour of the lawyer, without the time, effort and expense required to sue a client for unpaid accounts. With this advantage in mind, many lawyers will not oppose a client's application for permission to review out-of-time accounts, as this could expedite the obtaining of a judgement in favour of the lawyer.

As can be seen from the foregoing, the probability of obtaining the Court's permission to have out-of-time accounts reviewed will depend on the facts in each case. That said, the general rule and guidance provided above should allow you to make a reasonable estimate of the probability of succeeding based on the relevant facts in your case.

What are the risks of applying for permission to have out-of-time accounts reviewed?

The only real risk is the possibility of an award of costs against you. If your application is opposed by the lawyer and is unsuccessful, then the lawyer could ask for costs of the application. These costs would typically be around $500. For this reason, you may want to abandon your desire to have your out-of-time accounts reviewed where, on the facts in your case, you are unlikely to succeed.

While it is possible to win your court application and still have costs awarded against you, this would be extremely rare. For it to occur, you would have to have acted improperly during the application or in the steps taken to bring your application before the Court. Making insulting or derogatory remarks about the lawyer in the application, interrupting the proceedings or failing to follow instructions given to you by the Court are examples of improper conduct during the application. Failing to serve your affidavit on the lawyer in advance of the application, making untruthful statements in the affidavit or causing unnecessary delays in the hearing of the application are examples of improper conduct in the steps taken to bring your application before the Court.

It is also possible to lose an application and not have costs awarded against you. This can happen where you had a genuine but mistaken belief that your facts favoured the granting of an extension, or where you had an arguable but ultimately losing case.

In assessing the risk of an adverse costs award, you should consider:

(a) The likelihood that your application will be successful;

(b) Your ability to pay costs, should they be awarded against you;

(c) How important a review of the out-of-time accounts is to you; and

(d) How likely it is that the lawyer will oppose your application.

You might also wish to consider the possibility of obtaining the lawyer's agreement to have the out-of-time accounts reviewed (see "Why can a lawyer agree..." on page 12).

## Applying for permission to have out-of-time accounts reviewed

This section:

- Familiarizes you with Masters in Chambers of the Court of Queen's Bench, before whom you would appear to obtain permission to have out-of-time accounts reviewed;
- Outlines the procedures normally required by the Masters who hear matters in Northern Alberta (the courthouses north of Red Deer);
- Outlines the "*ex parte"* procedures allowed by the Masters who hear matters in Southern Alberta (in Red Deer and in the courthouses south of Red Deer); and
- Provides step-by-step instructions for complying with the procedures.

<u>Masters in Chambers.</u>

Masters are judges who deal with certain civil actions that rarely result in trials - or with applications that could help bring a matter to trial or end an action without a trial. Applications for permission to have out-of-time accounts reviewed are heard by them and they are "the Court" for these matters. They should be addressed "Sir" or "Ma'am", depending on their gender.

Masters do not preside over trials and rarely hear testimony from witnesses. Evidence is presented to them through sworn or affirmed statements contained in affidavits. How an affidavit must be prepared and what should be included in it for an application to have out-of-time accounts reviewed is explained later in this section.

There are several Masters at the courthouse in Edmonton and several at the courthouse in Calgary. The Edmonton Masters normally hear matters in Edmonton and in the other courthouses in Northern Alberta. The Calgary Masters normally hear matters in Calgary and in the other courthouses in Southern Alberta. Certain days in each month are allocated for the matters that will be heard outside of Edmonton and Calgary. When you file documents for an application to have out-of-time accounts reviewed, the court clerk will provide you with a date for the hearing of the application based on the availability of a Master to hear it at that location. If you are applying in Calgary, your application may be heard immediately after the filing of your documents. The reason for this will be explained under the subheading entitled "Outline of the *ex parte* procedures" (later in this section).

You cannot pick the location for your application. An application for permission to have out-of-time accounts reviewed must be heard at the courthouse in which the documents for the review have been filed. Information on where the documents for a review must be filed can be found in the Review Office Publication entitled *How to Request a Review*.

Occasionally, an Edmonton Master will be assigned to hear applications in Southern Alberta and a Calgary Master will be assigned to hear applications in Northern Alberta. As this could affect the availability of the *ex parte* procedures allowed by the Calgary Masters, you will be reminded of this later in this publication.

<u>Outline of the normal procedures for an application to have out-of-time accounts reviewed.</u>

The normal procedures consist of:

(a) The preparation and filing of an application form (referred to as an "Application", with a capital "A") and an affidavit;

(b) Service of these documents on the lawyer;

(c) The preparation and filing of an Affidavit of Service; and

(d) Preparing a form of order that can be signed by the Master if permission is given to have the accounts reviewed.

The Application is a document that notifies the lawyer that you will be applying for an order permitting a review of out-of-time accounts - and of the date, time and location of your application. A copy of the Application is served on the lawyer so that the lawyer will know where and when to attend in court, should the lawyer wish to oppose the application. A client's failure to serve an Application on the lawyer will be considered, by the Court, as having deprived the lawyer of the opportunity to oppose the application.

A copy of the client's affidavit must also be served on the lawyer. This gives the lawyer an opportunity to see what evidence will be provided to the Court by the client. If the lawyer believes that this evidence, or some of it, is false, inaccurate or incomplete, then the lawyer may prepare and file his or her own affidavit. A copy of this affidavit should be served on, or given to, the client prior to the application.

After a client has served the lawyer, the client must prepare and file an Affidavit of Service. This affidavit provides the Court with evidence that the lawyer received copies of the client's Application and affidavit. Where an Affidavit of Service is filed and the lawyer does not attend the client's application, the client's chances of obtaining permission to have out-of-time accounts reviewed will usually improve. The lawyer's failure to attend, in these circumstances, will be taken as a sign that the lawyer does not object to the Court's granting of the permission sought by the client.

Outline of the *ex parte* procedures

The Latin expression "*ex parte"* may be understood to mean "without the other party". In the context of court applications, it refers to an application that is made, or is permitted to be made, by a party without notifying the other party. The Calgary Masters allow *ex parte* applications for permission to have out-of-time accounts reviewed. They do this because many lawyers do not oppose these applications and because lawyers who might oppose may appeal from a Master's decision to permit a review.

Because an *ex parte* application is made without notice, an Appointment and an Affidavit of Service are not required. This reduces the client's paperwork for an application but increases the paperwork for a lawyer who wishes to appeal from a Master's decision. It also simplifies and could speed up the review process, as long as the lawyer does not appeal. If the lawyer appeals, then the process could be lengthened and complicated by the appeal.

The Calgary Masters also allow the use of fiats for some *ex parte* applications. A fiat is an abbreviated form of order that is written on another court document. For applications to permit the review of out-of-time accounts, the fiat is written on a copy of the client's Form 42 (Appointment for Review). This eliminates the need to prepare a formal order that can be signed by the Master. Further information on fiats is provided in the next section of this publication.

Since *ex parte* applications are made without notice, they can be made at any time, as long as the client has filed an affidavit and a Master is available to hear the client's application. Masters are almost always available on weekday mornings in Calgary. Because this is so, a client could prepare an affidavit and, shortly thereafter, attend before a Master to obtain a fiat. At any other Southern Alberta courthouse, the client

may have to wait until a Master is available at that location. The dates on which a Master should be available at a particular courthouse may be obtained from any court clerk in the courthouse.

The Edmonton Masters prefer the normal procedures for an application to permit the review of out-of-time accounts. They would rather deal with any potential objections by lawyers than have these objections dealt with through an appeal. For this reason, the normal procedures should be used for applications that will be heard in Northern Alberta.

As previously mentioned, an Edmonton Master will sometimes be assigned to hear matters in Southern Alberta and a Calgary Master will sometimes be assigned to hear matters in Northern Alberta. If you prepare for an *ex parte* application at a courthouse in Southern Alberta and come before an Edmonton Master, you could be directed to file an Application and serve it and your affidavit on the lawyer – or you might be permitted to proceed without notice to the lawyer. An Edmonton Master might allow you to proceed where your evidence for permission to review out-of-time accounts is so strong as to make an objection by the lawyer highly unlikely.

If you utilize the normal procedures and appear before a Calgary Master, then you should have no difficulties. The Calgary Masters do not require that applications for permission to review out-of-time accounts be made *ex parte*. They merely allow these applications to be made *ex parte* for practical reasons.

The instructions below are for the normal procedures. However, Steps 2 and 5 are also applicable to the *ex parte* procedures.

Instructions for the preparation, filing and service of the documents.

**Step 1** – Preparing and filing an Application

An Application for permission to review out-of-time accounts and an affidavit for your application may be filed immediately after the filing of a Form 42 (Appointment for a Review) or at any time thereafter. If you wish to file them immediately after you have filed your Form 42, then you should prepare your Application and affidavit before you attend at the courthouse to file your Form 42.

The Application form that you will need (Form 27 Application to Permit Review) can be found on the Review Office website at http://www.albertacourts.ca/qb/areas-of-law/reviews-assessments. It is only available in MS Word format. You should be able to copy it to your computer and complete it on your computer or you could print it and complete it by hand. The following instructions should help you complete it:

1. If you have already filed your Form 42, then insert the Court File Number to the right of “Court File Number”, near the top of page one of the Application. The Court File Number would have been added to your Form 42 when you filed it with the clerk. If you are filing your Form 42 immediately before you file your Application, then you must add the Court File Number to your Application after the clerk adds it to your Form 42.

2. Complete the rest of page 1 of your Application up to the “Notice to Respondents” box. The information that you must add should be identical to the information on page 1 of your Form 42. Make sure that the names of parties are written exactly as they are in your Form 42.

3. Contact a court clerk and ask for dates on which a Master will be available to hear your application. From the dates provided, pick one that will give you sufficient time to serve the lawyer at least 5 days before the selected date. If you believe that you might have difficulty serving the lawyer, then you should pick a later date so that you will have more time to serve the lawyer. Once you have selected your date, insert it in the “Notice to Respondents” box on your Form 27, Application.

4. Masters normally begin their sittings at 10:00 a.m. and this is the time that should be inserted in the “Notice to Respondents” box on your Form 27. This does not mean that your application will be heard precisely at 10:00 a.m. All applications before the Master are set for this time and all parties to the applications must be in the courtroom at that time. Once the proceedings start, the Master will typically deal with the applications in the order in which they appear on a list prepared for the Master by a court clerk. Thus, you will have to wait until the Master announces that he is ready to hear your application. This could occur at any time between 10:00 a.m. and 12:00 noon. If the lawyer appears for your application, the lawyer will also have to wait until the Master is ready to hear your application.

5. Insert the name and address of the courthouse after “Where” in the “Notice to Respondents” box on your Form 27. This address should be the same as the one that appears in “Notice to Respondent” box on your Form 42, Appointment for Review, but it should not include “Review Office” or the location of the Review Office within the courthouse (e.g., it should not include “Mezzanine Level” in the case of the address for Edmonton).

6. Next, list your out-of-time accounts in the table within paragraph 1 of your Form 27, providing all of the information required to complete the table. If your lawyer’s accounts do not have invoice numbers, insert “none” in the table column for this information. You may add rows to the table, if required, or you may insert “also see

attached" in the last row and attach, to your Form 27, a list of further out-of-time accounts.

7. Complete paragraph 7 of your Form 27 by inserting information about the affidavit that you will be filing with your Form 27. In most cases you will be the one swearing or affirming the affidavit, so your name should be inserted in the first blank in paragraph 7. If you do not swear or affirm your affidavit before the date on which you attend at the courthouse to file your Form 27, then insert the attendance date in paragraph 7. Because most court clerks are commissioners for oaths you should be able to swear or affirm your affidavit before a court clerk when you are filing your documents. Alternatively, you may add the date to paragraph 7 after you have sworn or affirmed your affidavit before a clerk. In this case, you should add the date to each copy of your Form 27 before the form is filed.

8. File your Form 27 and affidavit. The affidavit is explained below. There is a $50 fee for filing a Form 27 but there is no fee for filing an affidavit.

**Step 2** – Preparing your affidavit

Masters make decisions and grant orders based on evidence contained in sworn or affirmed affidavits. Although a Master might grant an order permitting a review in an *ex parte* application where there is no affidavit, the absence of an affidavit provides the lawyer with a fairly solid ground for an appeal. Therefore, you should always prepare, swear or affirm, and file an affidavit in support of your application, even if you intend to proceed *ex parte*.

A form of affidavit for an application to permit a review of out-of-time accounts (Form 49, Affidavit to Permit Review) can be found on the Review Office website at http://www.albertacourts.ca/qb/areas-of-law/reviews-assessments. The following instructions should help you complete it:

1. Complete the top half of page 1 (up to "Affidavit of _____") so that the information in the top half is identical to the information on your Forms 42 and 27 (up to the "Notice to Respondent" box). You might find it helpful to refer to instructions 1 and 2 in Step 1, above.

2. Add the name of the person swearing or affirming the affidavit (usually it will be you) on the first blanks in the unnumbered sentences immediately below the "Address for Service and Contact Information" section on page 1.

3. Add, to the first sentence, the date on which the affidavit will be sworn or affirmed. You might find it helpful to refer to instruction 7 in Step 1, above, as it explains how and why this date may be added later.

4. Complete paragraph 1 by adding the date on which your review will be heard. You will have booked this date with the Review Office and it will be shown in the "Notice to Respondent" box on page 1 of your Form 42, Appointment for Review.

5. If you, personally, were a client of the lawyer, then cross out the phrase "a representative of the client", as it appears, within brackets, in paragraph 1 of the affidavit. If you are an officer or director of a corporate client, then cross out only the brackets that surround the phrase.

6. Complete paragraph 3 by adding the facts that lead you to believe that the lawyer's accounts are unreasonable. You might find it helpful to read the Review Office publication entitled "Preparing for a Review" before completing paragraph 3. This publication, which can be found on the Review Office website at http://www.albertacourts.ca/qb/areas-of-law/reviews-assessments, lists and explains the most common factors that a Review Officer may consider when conducting a review. The explanations that are given for these factors contain information that might help you to better express some of the facts that lead you to believe your lawyer's accounts are unreasonable.

7. Complete paragraph 4 by adding the reason or reasons that you did not file an Appointment for Review within the time limit. In many cases clients miss the time limit because they are not made aware of it or of the review process until time limit has expired. This should not be the case where the client's retainer agreement explains the review process and the time limit for it. However, even in these cases a client might forget what was explained in the retainer agreement. Of course they may be other reasons (e.g., the client did not come to appreciate the unreasonableness of the lawyer's charges until after the time limit expired). If you have several reasons for failing to file on time, you may add as many subparagraphs to paragraph 4, as may be required to state your reasons.

8. Complete paragraph 5 by adding reasons why the lawyer would not be prejudiced by a late review. You might find it helpful to read the second last paragraph under the heading in this publication entitled "How likely is it that permission would be granted in your case?" (beginning near the bottom of page 17). The information in this paragraph should help you to understand why a lawyer might not be prejudiced by the review of an out-of-time account. As in the case of your completion of paragraph 4, you may add as many subparagraphs to paragraph 5, as may be required.

9. Add to paragraph 7, any other reason or reasons that you believe should cause the Master to grant permission to have your out-of-time accounts reviewed. If you have no other reasons, then you may remove paragraph 7 from you affidavit or simply leave it bank.

10. Take your affidavit to a commissioner for oaths and have it sworn or affirmed. It is best not sign the affidavit until you are before the commissioner for oaths. Don't worry about the difference between swearing and affirming. The commissioner for oaths will explain difference and will use the procedure that applies to you.

11. File your sworn or affirmed affidavit. Remember that your affidavit may be sworn by a court clerk, so you should be able to have it sworn immediately before you file it. As previously stated, you may file your Form 27 Application and your affidavit immediately after you have filed your Form 42 (Appointment for Review) or you may file them later, should you wish to do so.

**Step 3** – Serving your documents

1. You may serve copies of your Application and affidavit on the lawyer at the same time, or after you serve your Form 42. Preparing and filing all of your documents before you serve makes it possible to serve the documents at the same time, thus avoiding the need to serve twice.

2. Your documents may be served by:

   (a) Personally delivering them to the lawyer's office and leaving them with the lawyer, the lawyer's receptionist or someone else holding a position in the lawyer's office. This delivery may be done by you or by someone else on your behalf.

   (b) Emailing copies of your documents to the lawyer. Although this method of service is not provided for in the Rules of Court except in specific cases that will not typically apply to review documents, a Master will usually accept it. Masters have the authority to validate any form of service that they believe has been effective (i.e., has resulted in the delivery of the documents to the Respondent to an application). If you use this method of service, then you should print a copy of your email message, as you will need it for your Affidavit of Service (Step 4, below).

   (c) Mailing the documents to the lawyer's office by "recorded mail". This is a form of Canada Post mail delivery that requires a signature by the person receiving the documents. Once the envelope containing the documents has been signed for

by someone in lawyer's office, Canada Post will make a delivery receipt available to you, on-line. You will need to print this receipt for you Affidavit of Service.

(d) Arranging to have the documents delivered to the lawyer's office by courier. If you use this method of service, then you should retain the courier's invoice or receipt, as you will need it for your Affidavit of Service.

(e) Hiring a process server. Process servers are in the business of serving legal documents. They charge a fee that will likely exceed the cost of service by recorded mail but their fee will include the preparation of an Affidavit of Service, thus saving you the need to prepare one yourself (Step 4, below). You may want to get a quote from a process server before deciding whether or not you might wish to use one.

**Step 4** – Preparing and filing an Affidavit of Service

As previously mentioned, Masters make decisions and grant orders based on evidence contained in sworn or affirmed affidavits. This applies equally to evidence that a lawyer has been given notice of an application for permission to review out-of-time accounts. If you do not have an affidavit proving that the lawyer has been served, the Master may refuse to hear your application, in which case the Master will tell you what you must do to bring the matter back before the Court on another day. This, of course, will not apply where the Master allows you to proceed *ex parte*. An *ex parte* application is, by definition, an application that does not require the service of any documents on the lawyer.

The following instructions should help you to prepare and file an Affidavit of Service.

1. Form 49, which is the form used to support an application for permission to review out-of-time accounts, is also the form used for an Affidavit of Service. However, the title and most of the contents of an Affidavit of Service are different. You can find a "Form 49, Affidavit of Service" on the Review Office website at http://www.albertacourts.ca/qb/areas-of-law/reviews-assessments. It is in MS Word format. You may copy it to your computer and complete it on your computer, or you may print it and complete it by hand.

2. Complete to top half of page 1, exactly as you did for your "Form 49, Affidavit to Permit Review". If you don't remember how to do this, then you should follow Instructions 1 to 3 in Step 2, above. In all but one case, you will be the person swearing or affirming the affidavit. The exception would apply where your documents were personally delivered to the lawyer's office by someone else (e.g., a

friend or relative). In this case, the affidavit must be sworn or affirmed by the person who delivered the documents, so his or her name should be inserted in the applicable blanks in the sentences preceding paragraph 1 of the affidavit.

3. Insert, in the first blank in paragraph 2, the date on which the documents were served. If the documents were served by recorded mail or courier, then you would find this date on the Canada Post receipt for the mail delivery or on the courier's invoice or receipt.

4. Complete paragraph 2 by placing a checkmark in each box that corresponds to a document that was served. The last box is for the "Form 49, Affidavit to Permit Review"… so you will need to insert the name of the person who swore or affirmed that affidavit. In most cases this will be you. After this, fill in the Exhibit blanks **but only** for the documents that were served. If you did not serve a listed document (e.g., you did not serve your Form 42, Appointment for Review, because you had previously served it), the box for it should not be checked and the Exhibit blank for it should be left blank. The blank for the first "checked document" should be filled in with a capital "A". The blank for the next checked document should filled in with a capital "B" - and if a third document was served, the blank for it should be filled in with a capital "C".

5. Next, check the appropriate box in paragraph 3 and fill in the Exhibit blank for it, if there is one. This blank should be filled in with the capital letter immediately following the last Exhibit letter in paragraph 2. If the last Exhibit in paragraph 2 was "C", then "D" should be inserted in the appropriate Exhibit blank in paragraph 3. You will note that there is no Exhibit blank for the third box (personal delivery). If your documents were personally delivered to the lawyer's office, then you would complete this item by inserting, in its blank, the name (if known) and the position of the person with whom the documents were left (Examples: "Sally Smyth, the receptionist"; "a receptionist"; "Marco Fisher, a lawyer").

6. Photocopy the documents that will be attached as exhibits to the affidavit and paperclip them to the affidavit. Do not write on them. They will have to be marked as exhibits but this will be done by the commissioner for oaths.

7. Take your affidavit to a commissioner for oaths and have it sworn or affirmed. It is best not sign the affidavit until you are before the commissioner for oaths. Most court clerks are commissioners for oaths, so you (or the person who personally delivered the documents to the lawyer's office) can swear or affirm the affidavit just before it is filed.

8. Once the affidavit is sworn or affirmed but before it is filed, make two copies of it. Thereafter, staple the original and copies and present them to the clerk for filing. The clerk will keep the original and return the copies, with a filing stamp on each. One of the copies is for your record and use. The other should be given to the lawyer if she or he attends at your application. This copy needn't be served on the lawyer prior to your application.

**Step 5** – Preparing and presenting an order or fiat

At some point prior to your application, you should prepare a form of order that can be completed and signed by the Master at the end of the application. If you will be making an *ex parte* application, then you could prepare a fiat instead of an order (although an order may also be used for an *ex parte* application). This step explains how an order or fiat should be prepared and presented.

Preparing an order:

1. If you look in the "forms" section of the Review Office webpage, you will see a document entitled "Order to Permit Review". It is currently available only MS Word format. You may print it and fill it in by hand or you may copy it to your computer and complete it on your computer.

2. Complete the top half of the first page (up to "DATE ON WHICH THE ORDER WAS PRONOUNCED") so that the information in the top half is identical to the information on your Forms 42 and 27 (up to the "Notice to Respondent" box).

3. Fill in the blank after "DATE ON WHICH THE ORDER WAS PRONOUNCED" by inserting the date on which you will be appearing before the Master. If you will be making an *ex parte* application and are not sure when you will be appearing, you can add the date on the morning of your appearance.

4. In the space after "Location of Hearing" insert the name of the courthouse where your application will be heard, followed by a comma and the name of the city in which it is located. The name of the courthouse in Calgary is "Calgary Courts Centre"; the name in Edmonton and Wetaskiwin is "The Law Courts"; and the name in every other city is "The Courthouse". Example: "The Courthouse, Peace River". There is no need to include the address of the courthouse.

5. Next, list your out-of-time accounts in the table in paragraph 1 of the order, providing all of the information required to complete the table. If you prepared a Form 27, Application, on your computer, then you could copy the completed table from that form and paste it onto your order. If you will be making your application *ex*

*parte*, then you will be completing this table for the first time, in which case you might find it helpful to refer to instruction 6 in Step 1, above.

6. All of the other blanks and checkbox selections in the order will be completed by the Master. At this stage, all you need do is print a hard copy of the order for presentation to the Master if the Master decides to grant the order.

Preparing a fiat:

A fiat is an abbreviated form of order that is written on an existing court document. For applications to permit the review of out-of-time accounts, it is written on a copy of the Form 42, Appointment for Review of Retainer Agreement / Lawyer's Charges. To prepare a fiat make an extra copy of your Form 42 and type or print the following in an empty space on the first page:

**FIAT**

Let the out-of-time accounts in this matter be reviewed, notwithstanding Rule 10.10(2).

_____

Master:

Date:

The boarder around the fiat is not required but it makes the fiat easier to spot, so it should be included if this can be done without too much trouble. If you prepared your Form 42 using MS Word, you may use the electronic copy and add your fiat as a text box to it. The copy of the Form 42 that you use needn't contain the filing stamp that was placed on your original Form 42 when it was filed – and the accounts that were attached to the original needn't be attached to the copy that contains the fiat.

Your fiat should now be ready for presentation to the Master, should the Master grant you permission to have your out-of-time accounts reviewed.

Presenting your order or fiat

Guidance on how you should prepare for and present your application is provided later in this publication. At the end of your application the Master will either grant or deny the permission you seek. If the Master grants it, then he or she will ask you if you have a form of order or fiat. After stating that you do, you should hand your order or fiat to the

Master or to the court clerk, who will pass it to the Master. The Master will complete and sign the order or fiat and return it to you. Once this is done, you application is over and, after thanking the Master, you may leave the courtroom.

## Preparing for your application

Applications for permission to have out-of-time accounts reviewed are heard on what is what is known as “the ordinary chambers list”. This list is prepared for morning hearings and consists of applications that are expected be dealt with quickly. When you file a Form 27, Application to Permit Review, your application will be automatically placed on the ordinary chambers list for the date of your application.

Masters also hear *ex parte* applications in the same morning sittings. If you are doing an *ex parte* application, then you may attend before the Master at 10:00 a.m. on any morning that a Master is sitting. You could even attend immediately after you have filed the affidavit for your application, as long as you are fully prepared and are able to get to the courtroom shortly before or at 10:00 a.m.

Because all applications that are heard in the morning sittings are expected to be quick, your presentation must be brief and to the point. To facilitate this, you should prepare notes or an outline of what you will say – and you should compile, and bring with you, copies of the documents that you filed for your application, together with copies of order or fiat that you prepared.

If your application is being made *ex parte*, then you will need two copies of each of your documents – one for you and one for the Master (should the Master wish to see any of them). If your application is being made on notice to the lawyer, then you should bring a third copy of each document, which should be given to the lawyer prior to the application if he or she shows up.

Your notes or outline should cover only the information that a Master typically needs for a permission to review application. Should any addition information be required, the Master will ask for it. Offering such information without being asked for it will unnecessarily lengthen your presentation.

The following is a list of what should be covered in your notes or outline:

1. Who you are. This information is usually provided by introducing yourself at the outset of your presentation. If you are an officer of a corporate client, then you should include this information in your introduction (e.g., “Good morning Ma’am / Sir. I am Fred Farkel, an officer of the Applicant, Goodlife Systems Inc.”).

2. What you are applying for (e.g., “This is an application for permission to have out-of-time accounts reviewed by a Review Officer”).

3. Who is there to represent the lawyer or law firm. This information is provided by introducing the lawyer who appeared (e.g., “Sir / Ma’am, this is Anton Krapinski, a lawyer from the firm that represented me” or “This is my former lawyer, Anton Krapinski”).

4. If no one appears for the lawyer or law firm, then you should advise the Master that you served the lawyer and filed an affidavit of service. The Master may want to see a copy of your Affidavit of Service or you may offer to provide it. If the Master is not given a copy, then you should tell the Master how and when you served the lawyer.

5. The nature of the legal matter that the lawyer billed you for (e.g., “Sir / Ma’am, Mr. Smyth acted for me in a personal injury action”).

6. The number of accounts that the lawyer sent to you and total amount billed. This should include your in-time accounts, if there are any.

7. Information on the out-of-time accounts. The best way to present this information is to prepare a table (like the one in the order discussed in Step 6 of “Applying for permission to have out-of-time accounts reviewed”). If you prepared an order for your application, then a separate table would not be required. In this case you could advise the Master that you have a form of order for your application and that you would like to provide it to her or him because it contains the dates and amounts of all of the out-of-time accounts. Where there are less than 3 accounts, you could simply advise the Master of the dates and amounts of the accounts.

8. The date on which you filed your Appointment for Review and the date set for the review.

9. Why you did not file the Appointment before the time limit expired. This information should be same as the information in the affidavit that you filed for your application. Although you needn’t hand a copy of your affidavit to the Master unless the Master asks for it, you should advise the Master that you filed an affidavit that confirms this, and that also provides your reasons for believing that the lawyer’s accounts are unreasonable.

10. If the Master has not asked for a copy of your affidavit, then you should state the reasons for your belief that the lawyer’s accounts are unreasonable. These reasons should be stated as briefly as possible. If the Master requires details of any of your reasons, he or she will ask for them.

11. Why you believe that the lawyer would not be prejudiced by a review of the out-of-time accounts. Here again, the reasons you provide should be same as the ones provided in your affidavit and they should be stated as briefly as possible.

12. Your conclusion. This should be a brief statement that lets the Master know that you have finished your presentation (e.g., “Ma’am, for the reasons that I provided I believe that I should be given permission to have the out-time-accounts reviewed”).

With notes or an outline that contains the information described above, you should able to present your application as quickly and efficiently as possible.

The next section in this publication provides information on: what to expect when you enter the courtroom for your application; how to conduct yourself in the courtroom; how and when your application may be heard; and what should happen after you have presented your application.

## Presenting your application

Parties wishing to make *ex parte* applications, as well as parties to applications on the ordinary chambers list, should be in the courtroom at least 5 minutes prior to 10:00 a.m. Don’t be too concerned if you are a few minutes late, as it is unlikely that your application will be among the first heard.

When you enter the courtroom, you will likely see many others who are there to have their applications heard. Take a seat and wait for your turn to be heard. If the Master is not yet in the courtroom (which will be case if you arrive before 10:00) then the clerk will ask everyone to rise as the Master enters – and the Master will invite everyone to sit, as she or he is sitting. At this point the Master will ask if anyone has a consent order or an *ex parte* application. Because lawyers bill their clients for their wait-time in a courtroom, the protocol is to allow lawyers with *ex parte* applications the opportunity to go first. If you are making your application *ex parte*, then you should wait until it looks as though all of the lawyers with *ex parte* applications are finished. By this time, you will have seen how an *ex parte* application should be made. The first step is to stand and advise the Master that you have an *ex parte* application for permission to have out-of-time accounts reviewed by a Review Officer. At this point the Master will either invite you to make your application or will ask you to wait. If the Master invites you to make your application, then you should go to one of the two “counsel tables” in front of the Master, remain standing and present your application. If the Master asks you to wait, then you should sit and wait until the Master lets you know that he or she is ready to hear your application.

If your application is on the ordinary chambers list, then you must wait until the Master has finished all of the *ex parte* applications. At this point, the Master will usually ask if there are any matters on the list that will be unopposed. If your lawyer does not show up for your application, then you may stand, introduce yourself (so the Master can see where you are on the chambers list) and advise the Master that you have an application for permission to have out-of-time accounts reviewed by a Review Officer. In addition, you should advise the Master that the lawyer was served but is not in the courtroom to oppose your application. Here again, the Master may invite you to proceed or ask you to wait.

If your application is on the list and your lawyer shows up, then you will have to wait until your matter is called. The Master usually calls applications in the order in which they appear on the list. They are called by announcing the names of the parties to them, so your and your lawyer's names will be announced when it is time for your application. When this happens you should go to either of the counsel tables and remain standing. The lawyer will go to the other table and may remain standing or sit. At this point you should remain standing and begin the presentation of your application.

How you begin your presentation will depend on whether your application is being presented as an *ex parte* application, an unopposed application; or an application on the ordinary chambers list. If it is being presented as an *ex parte* application, then you will have already advised the Master that you are applying for permission to have out-of-time accounts reviewed and the Master will know that you did not serve the lawyer. Thus, you should begin your presentation by introducing yourself and then move directly to nature of the legal matter that the lawyer billed you for (see the preceding list of what should be covered in your notes or outline). If your application is being presented as an unopposed application, then you will probably have already introduced yourself and advised the Master that you are applying for permission to have out-of-time accounts reviewed. In this case, you should begin your application by telling the Master how and when you served the lawyer, and that you have filed an Affidavit of Service. If your application is heard on the list, then you should cover all of the points in your application notes or outline.

After you have finished the presentation of an *ex parte* or uncontested application, you should remain standing and ask the Master if you may provide your form of order or fiat (if not already provided). At this point the Master will either deny permission to have your out-of-time accounts reviewed or accept your form of order or fiat, complete and sign it, and have the clerk hand it back to you. If your application is contested (i.e., the lawyer is present or represented) then you should sit when you have finished your presentation. The Master will then hear from the lawyer and make a decision on your application. If you are successful, the Master will ask you for a form of order or fiat – or

you may offer to provide it.  Proper protocol requires that you stand whenever you are addressing the Master, so you should stand to advise that you have a form or order or fiat - and to provide it to the Master.

Once you have received the Master's decision (and a signed order or fiat, if you were successful) you should thank the Master and depart from the counsel table. Your application will be over and you may leave the courtroom.

## Filing your order or fiat

Although the proper legal term for "filing" an order or fiat is "entering", the procedures for entering an order or fiat are virtually identical to those for the filing of other court documents. For this reason, and to avoid confusion, we will use the more commonly understood term "filing". You may file your order or fiat immediately after your application. However, before you do, make two copies of it. Once you have done this, take the original and copies to the document filing area in the courthouse and present them to one of the clerks there. The clerk will retain the original and will return the copies with a filing stamp on each. If you used a fiat and the fiat was placed on a copy of a Form 42 that contains the original filing stamp for the Form 42, then document will be returned with a second filing stamp for the fiat.

One of the copies that are returned to you will be for you record and use. The other should be served on the lawyer.

## Serving your order or fiat

A copy of your order or fiat should be served on the lawyer prior to the date of your review. If the lawyer was present at your application and is willing to wait until you file the order or fiat, then you may give the lawyer a copy before she or he leaves. Otherwise, you may serve the lawyer by any of the means previously explained in this publication [see Step 3 on page 25]. The Review Officer will not require an Affidavit of Service but you should be prepared to advise the Review Officer of how and when you served the lawyer and the Review Officer may want to see some unsworn evidence of it (e.g., a copy of your email message, a receipt from Canada Post or some other applicable document).

## Preparing for or cancelling your review

If you are successful in obtaining permission to have your out-of-time accounts reviewed, then you should prepare to have all of your accounts reviewed. If you were unsuccessful but have one or more in-time accounts that you would still like to have reviewed, then you should prepare for their review and attend at the date scheduled for

the review.  If you were unsuccessful and have no in-time accounts or you conclude that pursuing a review of only the in-time accounts would not be worthwhile, then you should contact the Review Office, cancel your review and advise the lawyer that you have done so. Cancelling your review will facilitate the closing of your court file and will free up a time slot that may then be used for someone else's review.

Guidance on preparing for a review can be found in the Review Office publication entitled "Preparing for a Review".  It can be found on our website at http://www.albertacourts.ca/qb/areas-of-law/reviews-assessments.

## Conclusion

Rule 10.10(2) of the *Alberta Rules of Court* imposes a 6 month time limit for a review of a lawyer's accounts. The time limit begins on the date on which an account is sent to the client. To have an account reviewed, the client must file an Appointment for Review within 6 months of this date. However, the time limit does not apply to interim accounts, as long as an Appointment for Review is filed within 6 months of last account sent to the client. This publication explains this and provides guidance on determining whether or not an account is in time for review. In addition, it explains the options that a client will have for dealing with out-of-time accounts. These consist of abandoning a review insofar as it applies to out-of-time accounts (i.e., limiting the review to in-time accounts, if there are any); obtaining the lawyer's agreement to have the out-of-time accounts reviewed; or applying to the Court for permission to have the out-of-time accounts reviewed.

Guidance is also provided on the procedures for a court application. This includes guidance on: the preparation, filing and service of all required documents; preparing for the court application; and presenting the application. Detailed, step-by-step instructions are provided for these topics - and the presentation topic includes information that should familiarize you with protocol and procedures within the courtroom.

Given the scope and design of the publication, reading it from its beginning to its end should help you to identify a true time limit problem, determine how to best deal with it and enhance your ability to achieve the best available outcome. While efforts have been made to provide all of the information that you should need to attain these objectives, you might nevertheless be left with some unanswered questions. Answers to questions regarding forms or procedures may be obtained from the Review Office Assistant in Calgary or Edmonton. Contact information for the Assistants is same as that provided on the title page of this publication.

For reasons related to procedural fairness, questions regarding the merits of your particular case, including your chances of succeeding with a court application on the

facts of your case, cannot be answered by a Review Office Assistant. Answers to questions that go beyond forms or procedures should be addressed to a lawyer or a legal service organization. Unfortunately, the Review Office does not have the resources required to refer clients to legal service organizations. However, a Court Administration and Resolution Services (CARA) centre may be able to do so. Contact information for CARA centres can be found at: https://www.alberta.ca/rcas.aspx#toc-0.