

# PREPARING FOR A REVIEW

Published by Alberta's Review Offices

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## About this publication and its use

This publication is designed to:

- Familiarize you with review hearings so that you will know what to expect when you attend a review and how you should conduct yourself in the review, and
- Provide you with information and tips that should help you prepare and deliver your case for a possible reduction in your lawyer's (or former lawyer's) fees and other charges.

The publication assumes that you have booked a review, filed all documents required for the review and served your documents on the lawyer at least 10 days before the date scheduled for your review. If you have not taken all of these steps and are not sure how to take any of them, then you should read the Review Office publication entitled *How to Request a Review*. It and other Review Office publications that might be of interest or assistance to you can be found on our website: <http://www.albertacourts.ca/qb/areas-of-law/reviews-assessments>.

If you are reading a hard copy of this publication and have access to the Internet, then you should compare the version date of your hard copy (at the bottom of the title page) to the date on the online version. If the dates are not the same, then you should use the online version. It is updated whenever there is a change in practice or procedure and you will want to use it if it is more current than your hard copy.

This publication begins with information about review hearings. This information is presented first because understanding the hearing process should give you a better understanding of the information and tips provided later in the publication. The information and tips provided after the hearing process is explained, should help you prepare and present your case to the Review Officer.

## Review Hearings

### 1. Where are they held and when do they start?

Reviews that are conducted in Calgary or Edmonton are heard in the Review Offices located in these cities. The Review Office in Calgary is on the 8<sup>th</sup> Floor of the Calgary Courts Centre, 601 – 5<sup>th</sup> St. S.W (Suite 802-N). The Office in Edmonton is on the Mezzanine Level of the Law Courts Building, South Tower, 1A Sir Winston Churchill Square. Once you enter either courthouse, court security personnel will be able to provide you with directions, if needed.

When you arrive at the Review Office, you will usually be greeted by the Review Office Assistant who will invite you to wait until the Review Officer is ready to conduct your review. If the Review Office Assistant is not available, please wait until she or someone else arrives to greet you.

Reviews normally start on time. However, where both parties arrive early and the Review Officer is available and ready, they could start early. Occasionally they could start late, although this will generally happen only where a preceding review runs overtime. A review will rarely start late because one of the parties is late. If you do not arrive on time, the review could start without you or it could be adjourned or cancelled in your absence. For this reason, you should try to arrive at least 5 minutes early - and if you cannot arrive on time, then you should immediately contact the Review Office and advise the Review Office Assistant that you will be late. The Review Officer might be willing to delay the commencement of your review if she or he is given sufficient notice of your estimated time of arrival.

When the Review Officer is ready to conduct your review, you will be invited to enter the Review Officer's hearing room. This room is similar to a conference room. The parties sit on opposite sides of a conference table. The Review Officer sits at the head of the table or at a desk next to the table. There will be microphones on the table and the Review Officer will have a computer that will be used to operate the recording system and take written notes. The proceedings are recorded so that there will be a record of them in the event of an appeal. The Review Officer will let you know when the microphones are turned on and will guide you and the lawyer through the review process.

Reviews that are conducted outside of Calgary or Edmonton are conducted by Closed Circuit Television (CCTV), with the Review Officer located in Calgary or Edmonton. Red Deer reviews are conducted by the Calgary Review Officer. All other reviews outside of Calgary and Edmonton are conducted by the Edmonton Review Officer. In either case, the parties to the review must report to a court clerk in the courthouse that will be electronically linked to the Review Office. This should be done at least 10 minutes before the start time for the review, as the court clerk must escort the parties to the room booked for the review. This room could be a conference room or a courtroom. In either case, the court clerk will seat the parties and establish electronic communication with the appropriate Review Officer.

As in the case of reviews conducted in Calgary or Edmonton, the Review Officer is not obliged to wait for the arrival of a latecomer. If you do not arrive on time, the Review Officer may start the review in your absence, adjourn it or even cancel it. A review that is cancelled can be restored with the Review Officer's permission, but this would require

a rebooking and the preparation, filing and service of an Amended Appointment for Review.

With one exception, reviews that are conducted by CCTV are conducted in the same fashion as “in person reviews”. The proceedings are audio-recorded by the Review Officer, who also enters written notes in the recording software. The notes are entered as the Review Officer guides the parties through the review process and as he or she listens to the parties’ oral evidence and comments. The one exception mentioned above relates to the presentation of documents by the parties. In many cases, the parties will present documents that were not filed with the Court and are therefore not available to the Review Officer. This shortcoming is usually dealt with by having a party read the relevant portions of a document and by letting the other party inspect the document, if desired.

On some occasions a review could be conducted with one party participating by CCTV and the other by an in-person attendance at the Review Office. It is also possible for a party to participate by telephone, but permission to do this must be obtained from the Review Officer prior to the date set for the review. Where a party is given permission to participate by telephone, he or she might be directed to send copies of unfiled documents to the Review Office prior to the review, so that they will be available to the Review Officer during the review.

## 2. Hearing protocols

Reviews are conducted with less formality than a court appearance but are controlled by the Review Officer, as explained below. The Review Officer and the parties sit throughout the proceedings. The Review Officer begins the review hearing, decides who will speak and when, and may question the parties while they are speaking. Although Review Officers are not judges, they have considerable authority and their directions must be followed. Failure to follow a Review Officer’s directions could result in an award of costs against you.

A female Review Officer should be addressed “Ma’am” and a male as “Sir”. Neither party should interrupt a Review Officer when the Review Officer is speaking. Similarly, neither party should interrupt the other party while the other is speaking. The Review Officer will let you know when it is your turn to speak and will almost always allow you to comment on points made by the lawyer. This being so, you should listen to what the lawyer says and make notes of anything that you disagree with. You may refer to these notes when it is your turn to speak. They should remind you of the points that you wish to make with respect to what the lawyer said. The only time that the Review Officer will not ask for your comments on a point made by the lawyer is when the Review Officer has already rejected the point. In such a case, the Review Officer will advise the parties

of his or her rejection of the point and will provide reasons for the rejection. There should be no need for you to argue against a point that the Review Officer has already rejected.

As previously mentioned, a Review Officer may question a party while the party is speaking. A Review Officer may also stop a party to ask the other party a question or to end comments that have already been made or that the Review Officer considers unnecessary to the making of a fair decision. If the Review Officer interrupts you while you are speaking, stop speaking, listen to the Review Officer and respond to the Review Officer's questions or directions. Again, the Review Officer will always give both parties the opportunity to make useful points and arguments, and to present relevant evidence in support of their positions.

Once the Review Officer has heard enough to make a fair decision, she or he will let the parties know and will begin providing reasons for the decision made. A Review Officer should never be interrupted when giving his or her decision and the reasons for it. A party may speak after the Review Officer is finished but only to correct a clear error in a fact mentioned by the Review Officer. If the Review Officer accepts that an error has been made, the Review Officer may amend the decision made by her or him (depending on whether or not the fact is, in the Review Officer's opinion, material to the decision made).

It is not uncommon for a Review Officer to deal with fees first, provide a decision on fees and then hear evidence and arguments on the lawyer's disbursements and other charges. When this is done, the Review Officer will give a separate decision and reasons for decision on the lawyer's disbursements and other charges.

After the Review Officer has finished giving his or her decisions on the lawyer's fees, disbursements and other charges, the Review Officer will: (a) determine how much was paid on the lawyer's accounts (i.e. invoices); (b) make a decision on whether or not costs should be awarded to either of the parties for the review; and (c) prepare a certificate that reflects the outcome of the review. More information on this certificate is provided under the next subheading.

### 3. General outline of a review hearing

Review Officers have considerable flexibility with respect to how a review will be conducted and, in practice, they will tailor the procedure to fit the circumstances of each case. However, the following outline will almost always be employed, with the flexibility being exercised in step 4, as explained below.

- Step 1 – The Review Officer will introduce herself or himself; identify the persons present for the review; identify the Court File Number for the review; and identify the accounts (i.e. lawyer invoices) that are presented for review.
- Step 2 - If a written retainer agreement has been filed for the review, the Review Officer will identify it and confirm that it was signed by the client or was otherwise accepted by the client. A retainer agreement that was never signed by the client will usually be considered to have been accepted where the agreement was sent to the client and the client allowed the lawyer to provide legal services without objecting to any of the terms of the agreement. If no written retainer agreement was filed, then the Review Officer will confirm that there was no such agreement and she or he may question the parties to determine whether or not there was a verbal agreement. A Review Officer is bound to respect the reasonable terms of a retainer agreement, if there was one, and an agreement could therefore limit the Review Officer's discretion to reduce or disallow the lawyer's fees, disbursements and other charges.
- Step 3 - The Review Officer will identify any time limit problems and will deal with them, if there are any. In some cases a time limit problem can be resolved in the review, in which case the review will continue. In other cases, an application to the Court will be required, in which case the review will be adjourned to allow for the required application. Detailed information on this can be found in the Review Office publication entitled *Dealing with the Time Limit for a Review*. It can be found on the Review Office Webpage at <http://www.albertacourts.ca/qb/areas-of-law/reviews-assessments>.
- Step 4 - Where there is no time limit problem or the problem is resolved (either in the review or through a court application), the Review Officer will proceed with a review of the lawyer's fees. How this will be done will depend, to a large extent, on whether or not the client has specific concerns about the lawyer's fees. Where the client has specific concerns, the Review Officer will deal with each of them. This could be done by hearing from the client on all of them and then turning to the lawyer for lawyer's responses to them. Alternatively, the Review Officer could deal with each concern individually, with both parties addressing the concern until it is resolved, at which point the next concern would be raised and addressed. Where there are no specific concerns (i.e., the client's only concern is the total amount charged for the work done), the Review Officer will usually follow a more or less standard procedure for determining the reasonableness of the lawyer's fees. This procedure would usually include: (a) obtaining background information on what was done by the lawyer and why it was done; (b) sampling the time spent by the lawyer for key steps taken by him or her; (c) checking to make sure that the steps taken were

necessary or reasonably taken; and (d) considering and applying any other factors that could affect the reasonableness of the fees charged by the lawyer. All of this, of course, would be subject to the reasonable terms of any retainer agreement that was made between the parties with respect to fees.

- Step 5 - When the review of the lawyer's fees is completed, the Review Officer will announce his or her decision on fees and provide reasons for the decision.
- Step 6 - After dealing with the lawyer's fees, the Review Officer will examine the lawyer's disbursements and "Other Charges". Disbursements are payments made to third party for or on behalf of a client. A filing fee paid to the Court for filing a Statement of Claim is an example. So is a payment made to a courier for the delivery of documents. An Other Charge is a charge made by the lawyer for something done within the lawyer's office. A charge for photocopying documents on the lawyer's photocopy machine is an example. There are different rules for the review of disbursements and Other Charges. The Review Officer will usually explain these rules, apply them and make decisions based on them. Some information on these rules is provided later in this publication. Like fees, disbursements and Other Charges may be reduced or even disallowed by the Review Officer.
- Step 7 - Once all decisions have been made with respect to fees, disbursements and Other Charges, the Review Officer will determine the amount that was paid by the client on the accounts under review. This determination is usually made by examining the lawyer's accounting records. However, the client will always be given the opportunity to challenge the lawyer's evidence and present other evidence of the amounts paid (e.g., photocopies of cheques, copies of bank drafts, receipts provided by the lawyer, etc.).
- Step 8 - At the conclusion of the review, the Review Officer will make a decision on the costs of the review. Costs may be awarded against a client only if the client's request for the review was unreasonable or the client acted improperly or unreasonably in the review [see Rule 10.23 of the *Alberta Rules of Court*]. An unreasonable request for a review will generally be found only where the Review Officer is convinced that the client had no genuine concerns with the lawyer's accounts and requested the review simply to forestall payment of an amount owing to the lawyer. Improper or unreasonable behaviour in a review will generally be found only where the client repeatedly failed to follow directions given by the Review Officer, used inappropriate language in the review or otherwise acted in a disrespectful or uncivilized manner. Costs may be awarded against a lawyer for a number of reasons, including the client's

success in obtaining a reduction in the lawyer's charges or the lawyer's failure to file documents for the review, as required by the *Rules of Court*.

Step 9 - At this point the Review Officer will close the proceedings, turn the microphones off and prepare a "Certificate of Review of Lawyer's Charges". The certificate will show the amounts allowed by the Review Officer for fees, disbursements, Other Charges and GST, together with the total allowed. In addition, it will contain a "certification of the amount payable". The certification will show the total amount that was paid by the client on the accounts reviewed, and what amount, if any, remains owing by either party to the other. Where the client paid less than the total amount allowed by the Review Officer, the certification will show the amount that must be paid by the client. Where the client paid more than the amount allowed by the Review Officer, it will show the amount that must be returned to the client.

Certificates are usually prepared, filed and provided to the parties immediately after the review. Where a certificate requires a payment by the lawyer to the client, the lawyer must make the payment as soon as is practically possible. This is required by the Law Society of Alberta's Code of Conduct. For this reason, lawyers will usually pay within days following a review unless they wish to appeal from the Review Officer's decision. Where a lawyer wishes to appeal, the lawyer is not required to make the payment until the appeal is heard and decided.\* Where a certificate requires a payment by the client to the lawyer, the client must either make the payment or make arrangements with the lawyer for payments over time (if agreeable to the lawyer). This should be done within the period allowed for an appeal from the Review Officer's decision (one month from the date of the decision). If it is not done and a Notice of Appeal is not filed by the client, then the lawyer may apply to the Court to have the Review Officer's decision entered as a judgment of the Court. Thereafter, the lawyer may employ various legal procedures to collect the amount owing (e.g., by garnisheeing wages, seizing assets, etc.).

A further incentive to the early settlement of an amount owing to a lawyer is the matter of costs. When a lawyer applies to have a Review Officer's decision entered as a judgement of the Court, the lawyer may ask the Court for the costs of the review. Unlike a Review Officer, the Court is not limited in its ability to award these costs and typically awards them to the lawyer. This could add several hundred dollars to the amount payable to the lawyer. Settling with the lawyer within one month of the Review Officer's decision could avoid an application to the Court and a possible award of costs against the client.

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\* If a lawyer fails to pay when required to do so, the client may apply to the Court for an order compelling the payment [Rule 10.21].

#### 4. Evidence

Review hearings are intended to be client-friendly and expeditious. To fulfil these objectives, the parties to the review are rarely sworn and are typically the only witnesses that provide evidence at the review. However, a third party witness may be brought to a review if his or her evidence would be useful.

Oral evidence is given by a party when it is the party's turn to speak and may be intermingled with expressions of concern, arguments and the presentation of documents. A party needn't distinguish between these types of statements or actions. The Review Officer will recognize what they are and will consider them according to what they are.

Where there is a conflict in oral evidence given by the parties, the Review Officer will try to resolve the conflict by examining relevant documents. These documents could be presented by a party, or the Review Officer could require that they be produced. A lawyer will usually bring the client's legal file to the review and the Review Officer may direct that a document be removed from the file for inspection. The Review Officer can also direct that the client produce any document that the client brought to the review or has access to. Where an extremely important document is identified but is not available at the review, the Review Officer may direct that it be produced at a later date, in which case the review might be adjourned to allow for the production. This, however, is rarely done, as it is expected that the parties will bring all important documents to the review. A party who does not do so, risks having a decision made by the Review Officer without the document, as though it does not exist.

Examples of documents that are typically brought to a review include email correspondence between the lawyer and client, handwritten notes of meetings between the lawyer and the client, copies of cheques and receipts, copies of letters and hard copies of text messages that were exchanged between the lawyer and the client. All relevant electronic documents should be printed for the review, as the Review Officer's examination of a document on an electronic device is often difficult and cumbersome.

Where a conflict in oral evidence cannot be resolved by examining relevant documents, the Review Officer may resolve the conflict through a finding of credibility.

#### Preparing your case for review

##### 1. Key documents

Preparations for a review should begin with an examination of the key documents. What follows are descriptions of the key documents, together with tips and advice on what to look for when reviewing them.

(a) The written retainer agreement (if there is one)

As previously stated, a Review Officer is bound to respect the reasonable terms of a retainer agreement. Have a look at your retainer agreement and pay particular attention to the provisions in it that indicate how the lawyer's fees were to be charged. Does the agreement provide for:

- (i) fees based on time spent multiplied a specified hourly rate or rates;
- (ii) a "flat fee" for the lawyer's services (e.g., "I will complete your real estate transaction for \$750 plus disbursements"); or
- (iii) some other basis for setting or calculating the lawyer's fees?

If the agreement does this, then the Review Officer will be bound to follow the agreement, unless its method of setting or calculating the fees is clearly unreasonable. If it does not provide a method for setting or calculating fees or if there is no agreement, then the Review Officer will have much greater discretion in his or her determination of reasonableness of the fees charged by the lawyer. Yet, in either case, the Review Officer will be free to consider all relevant factors that are unrelated to the method of settling or calculating fees. Many of these factors are explained later in this publication (beginning on page 14).

You will also want to look at the provisions in your agreement that govern disbursements and Other Charges. The difference between disbursements and Other Charges is explained in "Step 6" on page 7.

The disbursement provisions in a retainer agreement are important because a disbursement will almost always be allowed if it was agreed to by the client. A disbursement will also be allowed where it was reasonably required for the conduct of the matter handled by the lawyer. A disbursement that does not fall into either of these categories must be justified by the lawyer. If the lawyer cannot justify it to the satisfaction of the Review Officer, then the Review Officer may disallow or reduce it. The Review Officer may also reduce a disbursement that falls into either category but is too high, having regard to the current market price for the product or service obtained by the lawyer on the client's behalf.

Other Charges will only be allowed if they are expressly provided for in the retainer agreement or if they are for photocopies, faxes and printing. A \$50 "file opening fee", for example, would not be allowed unless it is expressly provided for in the agreement. Although photocopy, fax and printing charges will be allowed with or without an agreement, the amount that will be allowed will differ. In the absence of an agreement, only 15¢ per page will be allowed for black and white photocopies, 15¢ per page for faxes and 10¢ per page for printing. 25¢ per page will be allowed

for colour photocopies but only if colour copies were required. If black and white copies could have been used, then only 15¢ per page will be allowed.

Where a retainer agreement provides for higher photocopy, fax and printing charges, the higher amounts will be allowed unless they are clearly unreasonable. A charge of 25¢ per page for black and white photocopies would pass this test. A charge of \$1.00 per page would not. Such a charge would be disallowed or reduced to 15¢ per page.

While disallowances and reductions in the amounts charged by lawyers for photocopies, faxes, printing and other internal charges may seem to be somewhat insignificant, they could result in a significant reduction in the total amount charged by the lawyer over the course of a file.

With the information provided above and with a working familiarity with the provisions of your retainer agreement, you should be able to more effectively examine your lawyer's accounts to prepare for your review.

(b) The lawyer's accounts

Each of your lawyer's accounts should show the fees, disbursements and Other Charges billed by the lawyer for the period of time covered by the account, and each type of charge should be shown separately. In addition, the amount of GST charged by the lawyer should be shown.

Begin your examination of the accounts by checking to make sure that you were billed in accordance with your retainer agreement, if you have one. If the retainer agreement provides for billing by time, did the lawyer bill you by time? Did she or he charge you the agreed upon hourly rate? Did she or he charge you for work done by someone else at a higher hourly rate and if so, does your retainer agreement provide for this? If you see any unusual or unexpected charges, recheck your retainer agreement to see if it provides for the billing of these charges. Remember that the Review Officer will be bound to respect the agreement unless its provisions are clearly unreasonable. However, if you are charged for something that is not provided for in the agreement, then the Review Officer may reduce or disallow the charge.

Next, check to see what disbursements and Other Charges have been billed in the lawyer's accounts. Highlight significant disbursements that you don't understand. You may refer to them in the review and ask that they be explained. If the lawyer cannot explain them to the satisfaction of the Review Officer, then the Review Officer may reduce or disallow them. Also, check to see what Other Charges have been billed and what amounts were billed for them. Refer to the paragraph about

“Other Charges” beginning on page 10 of this publication to see how they are typically reviewed. Accounts will sometimes show what was charged per page for photocopies, faxes printing and the like. If they don’t, then the lawyer will have to provide this information at the review. In either case, the Review Officer may reduce or disallow Other Charges in accordance with the principles explained on pages 10 and 11.

(c) Time records

When a client serves his or her lawyer with a Form 42, Appointment for Review, the lawyer must file a copy of whatever time records the lawyer has. This must be done at least 5 days prior to the date of the review. Unfortunately, the Rules do not require that these records be served on the client. However, the lawyer should provide them to the client prior to the review, particularly if requested to do so by the client. Alternatively, the client may obtain copies from the Review Office. The Rule that requires the filing of time records by the lawyer gives the Review Officer discretion to penalize the lawyer for failing to file them but this will not apply where the lawyer’s accounts contain a record of the billable time spent by the lawyer and others in the lawyer’s office.

If you obtain time records prior to your review, check them to see how much time was spent on things done by the lawyer and others in her or his office. The time records should show the time spent in increments of 1/10<sup>th</sup> of an hour (i.e. every 6 minutes). They should also show who did the work (by showing the initials of that person) and the amount charged for the work (time spent multiplied by the hourly rate for that person). In some cases, they may also show the person’s hourly rate but if they don’t, it can be easily determined from any time entry and the amount charged for it.

Scan through the time records, looking for .1 and .2 time entries. The presence of many such entries suggests accurate time keeping and that there was no intentional inflation of time. An absence or near absence of them suggests the opposite and will cause the Review Officer to question the lawyer and perhaps examine documents in the lawyer’s file to determine if high time entries were warranted for the type of work done. A .5 time entry for the receipt and review of an email message, for example, will likely cause the Review Officer to examine the email message to determine how a half-hour could have been spent reviewing it.

Also, examine some of the higher time entries (1 hour or more) to see if they correspond with your knowledge of the time actually spent by the lawyer. However, be aware that most lawyers include preparatory and concluding work in their time entries. A lawyer could, for example, record a 1 hour time entry for a meeting with

you that lasted only 45 minutes. In this example, the extra 15 minutes might be for time spent preparing for the meeting, for making follow-up notes after the meeting or both. Similarly, a time entry for a court application could include time spent traveling to and from the court house. More often than not, the description of the work done for a time entry will reflect the reason for any such additional time (e.g., “attending at court for a court application, including travel time”) but this is not always the case.

As you review your lawyer’s time records (or your lawyer’s time entries on a statement of account) highlight all of the entries that seem, to you, to be questionable. You will have an opportunity to bring them to the attention of the Review Officer during the review and if the Review Officer has any difficulty with them, he or she will question the lawyer to determine whether or not can be reasonable explained and justified.

(d) Documents evidencing payments by the client

After a lawyer’s accounts have been reviewed, the Review Officer must determine how much, if anything, is payable by one side to the other and this amount must be certified by the Review Officer. To determine and certify this amount, the Review Officer will consider relevant documents provided by the parties in the review hearing. Lawyers will typically provide a trust account statement that shows payments made by the client and how these payments were applied to the lawyer’s accounts. Clients will sometimes provide copies of cheques made payable to the lawyer or the lawyer’s firm, copies of bank drafts, copies of credit card statements or any other documents that evidence payments made by them. If you have any of these documents, then you should assemble them and use them to confirm the amount that you paid on the accounts reviewed.

The best way to confirm the amount paid is to:

- (i) Check each of your payment documents to make sure that it relates only to the accounts that were presented for review. This step wouldn’t be required if the lawyer handled no other matters for you and all of lawyer’s accounts were presented for review.
- (ii) Add up all of the amounts that you believe were paid toward the accounts presented for review.
- (iii) Check your total against the lawyer’s trust account statement, if one was provided by the lawyer prior to the review.
- (iv) If no trust account statement was provided prior to the review, then add up the totals of all of the accounts presented for review; subtract the amount that

you believe was paid toward the accounts and check your result against the amount that the lawyer claims to be outstanding on the accounts. This amount can usually be found in the lawyer's last statement of account or in a covering letter that enclosed the last statement of account.

If your figures agree with the lawyer's, then there should be no issue with regard to the amount paid by you. If your figures do not agree with the lawyer's, then you should prepare a sheet showing your calculations and bring it and 2 copies to the review. In addition, you should make 2 extra copies of your payment documents and also bring them to the review. The Review Officer will use one set of copies and any relevant documents provided by the lawyer to determine the amount paid. The other set will be given to the lawyer so that he or she may review the documents and provide comments on them.

One possible reason for a mismatch between your calculations and the amount that the lawyer claims to be outstanding could be the lawyer's addition of late payment interest to the amount outstanding. If this is the case, then you may ignore the lawyer's claim for interest. A Review Officer does not have jurisdiction to deal with claims for interest and will ignore them in her or his certification of the amount owing. That said, the lawyer may seek late payment interest when applying to the Court to have the Review Officer's decision entered as a judgment. How successful such a claim might be will depend, in large part, on the existence of a provision in a retainer agreement that expressly provides for late payment interest.

## 2. Factors that could be considered by the Review Officer

A Review Officer has no jurisdiction to consider issues of professional incompetence or unethical conduct. Complaints about incompetence or unethical conduct should be made to the Law Society of Alberta. However, there may be occasions where inappropriate conduct may be considered by a Review Officer. Several examples of this are provided in the list of factors provided below. Pay attention to this list and note any factors that might apply to your case. Some of the factors have already been discussed in the "Key documents" section of this publication, immediately above.

- (a) Possible time inflation - This factor was discussed in the "Key documents" section, under the subheading "Time records".
- (b) Clerical Errors - Clerical errors are occasionally found in time records and lawyer's accounts. The duplication of one or more time entries in a time record or an account is a common example. These errors generally occur when time is entered in the lawyer's accounting software on the same day that an account is generated. In such a case, the entry may appear on the account that is generated and, again, on the next following account. Check the last two or three

entries at the end of each of your accounts and compare them with the first two or three entries on each immediately following account. By doing this you should be able to spot a double entry, if there is one. Another common clerical error is the accidental entry of time from another file. You should be able to spot this type of error by looking at the descriptions of the work done, as stated in your lawyer's account. If you see a reference to a completely unfamiliar name or to work that has nothing to do with your file, highlight the entry and bring it to the attention of the Review Officer. If the entry belongs to another client's file, the charge for it will be disallowed. An account might also contain mathematical errors, including errors in the calculation of GST. However, these types of errors are usually caught by the Review Officer in his or her preparations for a review.

- (c) Unnecessary and potentially unjustifiable steps - Review Officers often ask lawyers to outline what they have done, including all steps taken in a court action, if applicable. They do this to get a complete picture of the work done and also, to identify any unnecessary and potentially unjustifiable steps. Unnecessary and potentially unjustifiable steps can also be identified by examining the work descriptions in a statement of account. In either case, a Review Officer who believes that an unnecessary or unjustifiable step was taken will ask the lawyer to explain and justify it. If the lawyer cannot do this to the Review Officer's satisfaction, then the Review Officer may reduce or disallow the amount charged for the step. While it is unlikely that you would be able to identify these steps yourself, you may highlight any steps that you do not understand and ask for an explanation of them. Doing this could help the Review Officer identify problems that he or she might otherwise miss.
- (d) Work done by a paralegal or legal assistant – Some lawyers bill clients for work done by a legal assistant. Others include the cost of this work in their own hourly rates. Both of these approaches are permitted by the Law Society and by Review Officers but, in either case, the lawyers may not bill a legal assistant's time as their own. Additionally, lawyers should not charge their full hourly rate for legal assistant work actually done by them. These erroneous billing practices can often be identified through a careful examination of the lawyer's time records. The first step in the examination is to look at the descriptions of the work done, with a view to spotting work that would seem to be routine or "secretarial" in nature (e.g., "photocopying documents" or "organizing a pleadings binder, including the addition of binder tabs"). The next step is to determine the hourly rate that was charged for this work. Some time records will show the hourly rate while others will not, but all time records should show the time spent and what was charged for time spent. This information can be used to calculate the hourly rate that was applied to the time spent. If the hourly rate is significantly below the lawyer's

hourly rate, then you can be fairly certain that you were not overbilled. If the rate is the same as the lawyer's, then you were likely overbilled and you should highlight the time entry and bring it to Review Officer's attention. While there may be circumstances in which the lawyer can justify the use of her or his hourly rate, these are generally limited to situations in which an unforeseen urgency has forced the lawyer to do assistant work in order to protect the client's interests or meet the client's demands (e.g., the lawyer must do the work over the weekend to meet an unexpected Monday morning deadline). A lawyer should not bill her or his hourly rate for assistant work done by the lawyer simply because the lawyer's assistant was on vacation or out of the office for other reasons. In such a case the lawyer may bill the work at the assistant's hourly rate.

- (e) Failure to follow a client's instructions - This is a type of inappropriate conduct that a Review Officer may consider, notwithstanding that it may also be considered by the Law Society. In many legal matters there will be times when decisions must be made as to which of two or more options may be chosen by a client. In a litigation matter, for example, a decision may have to be made as to whether or not a particular court application should be made. In a real estate transaction, a decision may have to be made as to how a breach of contract by the other party should be handled or, more typically, whether or not a condition in a contract should be waived if it cannot be satisfied. In these types of situations, the lawyer must explain the advantages and disadvantages of the client's options, the client must make the decision and the lawyer must act on the client's instructions (i.e. decision). If the lawyer fails to act on the client's instructions, the lawyer's charges for any work done contrary to the client's instructions may be reduced or disallowed. In some cases, the lawyer's entire statement of account may be reduced or disallowed. This could occur where the lawyer's failure to follow the client's instructions diminishes the value, to the client, of the work done by the lawyer. It should be noted, however, that a lawyer does not require instructions for every action taken by him or her. Where a client gives the lawyer instructions to attempt to settle a matter, for example, it is up to the lawyer to determine how the client's instructions should be carried out. The lawyer does not require instructions to send a particular email message, make a telephone call or write a letter to foster settlement negotiations. In addition, there may be actions that a lawyer must take in order to satisfy the lawyer's ethical obligations or a duty to the Court. These actions are typically taken without instructions and may be billed for in appropriate circumstances.
- (f) Failure to provide cost information - Lawyers have an obligation to advise their clients of the potential costs of a legal matter and to provide periodic updates, particularly when there has been a change in circumstances that could

significantly increase the client's costs. Similarly, information concerning potential costs should be provided when the client must make a decision as to which of two or more available options should be selected by the client with respect to the handling of the client's matter. The exercise of one option may cost significantly more than the exercise of another. Information on costs will almost always help a client choose an option with costs in mind, thus facilitating the client's management of his or her legal costs. Depriving the client of this important cost management information could result in a reduction in the lawyer's fees. Whenever possible, this information should be provided in writing (e.g., in letters or email messages) but verbal advice may be accepted by a Review Officer, if it can be proven by the lawyer (e.g., by notes made of a meeting between the lawyer and the client). In addition, frequent (e.g., monthly) billings by the lawyer can often substitute for periodic updates on costs. They give clients an appreciation of their legal costs, as they mount, and often provide sufficient information for proper cost management by the client. What is not acceptable is a lawyer's failure to provide adequate cost information coupled with a large bill covering a long period of time (e.g., 6 months). That said, clients have a converse obligation to seek cost information from their lawyers and a failure to seek it could be taken into consideration by a Review Officer in determining what, if any, reduction should be made to a lawyer's fees for the lawyer's failure to provide adequate cost information.

- (g) Billing for time spent for the mutual benefit the client and the lawyer - A lawyer should not bill a client for the preparation of a retainer agreement or for correspondence or discussions related solely to the lawyer's bills. A retainer agreement is always as beneficial to the lawyer as it is to the client, and often it is more beneficial to the lawyer. Preparing a retainer agreement is not "work done for the client". Similarly, correspondence and discussions concerning the lawyer's bills benefits both parties and should not be considered to be billable work done for the client. These communications help to avoid misunderstandings, foster good lawyer-client relationships and, if handled properly, often result in timely payments of the lawyer's bills. Similarly, work done by the lawyer to foster a client's payment of the lawyer's bills (e.g. the preparation of a covering letter enclosing a bill or the preparation of an agreement that provides security for payment of the lawyer's bills) is not billable. This, however, does not apply to a lawyer's provision of cost information to a client. A lawyer's estimate of what it might cost to take a particular step in an action, for example, will typically benefit only the client. Moreover, the provision of this information will, in most cases, depend on the lawyer's knowledge and experience. A good estimate requires knowledge of how an opposing party might react, what tasks might be involved in meeting the client's objectives, how much time will likely be spent on each task,

what might go wrong, how potential contingencies could affect costs, and other similar factors.

- (h) Billing to correct errors – Like all human beings, lawyers occasionally make mistakes that must be corrected. When this occurs, the lawyer should not bill the client for any of the work done to correct the mistake. Fees for this work, as well as any related disbursements, will be disallowed. However, this does not apply to mistakes that are caused by the client (e.g., an error by incomplete or erroneous information provided by the client).
- (i) Billing for work that was not done - This factor is rarely encountered. Where it is, the Review Officer will try to determine if the billing was inadvertent (e.g. the result of a clerical or accounting error) or intentional. In either case, the fee charged by the lawyer will be disallowed. Where the billing is found to have been intentional, the Review Officer may also award costs against the lawyer and client should consider reporting the matter to the Law Society.
- (j) The client's financial circumstances - Lawyers are obliged to consider their clients' financial circumstances when negotiating a retainer agreement and when setting their fees for a statement of account. Most lawyers accommodate financially distressed clients by reducing their hourly rates; some provide "courtesy discounts" in their statements of account; while others maximize the use of paralegals and junior lawyers to reduce costs. Review Officers often consider whether or not enough has been done to accommodate a financially distressed client but they must also consider the value of work done by the lawyer and issues of fairness. One issue of fairness that often arises concerns the lawyer's knowledge of the client's circumstances. A lawyer cannot be expected to accommodate a financially distressed client if the lawyer is not advised of the client's financial condition. This would not preclude a Review Officer from reducing the lawyer's fees but it could affect the amount of the reduction. Lawyers who are advised that their clients are struggling financially can often tailor cost management strategies to assist their clients. Depriving a lawyer of the opportunity to do this by keeping the lawyer in the dark with respect to the client's financial condition is unfair to the lawyer and will be considered by the Review Officer.
- (k) The value of the work done - This factor is invariably considered where a lawyer does not bill by time and there is no agreement to bill a fixed fee for the services that are to be provided by the lawyer. It may also be considered where a lawyer bills by time spent. The approach taken by Review Officers when considering this factor is often referred to "the global approach" to determining the reasonableness of a lawyer's fees. It consists of: (a) determining what work was

done by the lawyer; and (b) determining what a reasonable fee for this work would be, based on the Review Officer's experience and knowledge of what is typically charged by lawyers for the same or similar work. While the results achieved by the lawyer can sometimes be considered in this approach, it is rarely, if ever, considered in litigation or negotiation files. This is because success in litigation or negotiations depends on many factors that are not within the lawyer's control. In addition, Review Officers will rarely, if ever, consider how well a lawyer performed in a proceeding before the Court or an Administrative Tribunal (e.g. in a court application or trial). Review Officers are simply not equipped to evaluate this within the context of a review hearing. However, they can and often do consider results and performance with respect to legal matters that are more easily examined and over which lawyers have a greater degree of control. Examples of these matters would include the preparation of a written agreement, the handling of a typical real estate transaction and preparation of a will.

- (l) Proportionality - Lawyers are expected to consider and counsel their clients on the potential costs of a matter versus the value of the matter to the client. A failure to do this could result in a reduction or disallowance of the lawyer's fees. The collection of a small debt owed to the client may be used as a good example. Suppose that the client is owed \$5,000 and wishes to sue the debtor and collect on the judgment obtained. In this example, the lawyer should advise the client: (a) that the client could sue the debtor in the Provincial Court, without a lawyer; (b) how much it would likely cost to have the lawyer involved to a limited extent or to handle the entire matter; and (c) what the likely outcome would be versus the likely costs involved. If this advice is not given and the ultimate cost of the lawyer's services are unreasonably disproportionate to the benefit received by the client, then lawyer's fees would almost certainly be reduced. They would not be reduced where the lawyer properly advised the client and the client nevertheless elected to proceed with the lawyer's assistance. Clients will sometimes elect to proceed for reasons other than monetary gain. Some might elect to proceed even where the outcome is likely to be a monetary loss.

The factors listed above are not the only factors that could be considered by a Review Officer. Unique circumstances could result in other factors and it is therefore impossible to provide an exhaustive list of the type of factors that could be considered. If you believe that an unlisted factor should be considered in your case, then you should raise it in your review. The Review Officer will determine whether or not it might affect the reasonableness of the lawyer's charges and will weigh it in his or her decision.

### 3. Organizing your thoughts and materials

Once you have determined what factors might be relevant to your case, list them and compile all documents that support your position with respect to each. Remember to include evidence of the payments that you made to the lawyer, if you have any. If you have more than a few documents, then you should number them so that the Review Officer and the lawyer easily identify each document when you refer to it in the review. If you have more than 20 documents, you may want to prepare a binder in which each document is placed after a numbered tab. Remember that you will have to make two additional copies of these materials (one for the Review Officer and one for the lawyer). You may present these at the review or provide them to the Review Office and the lawyer prior to the review.

The Review Officer and the lawyer will already have copies of the lawyer's accounts, your written retainer agreement (if there is one) and the lawyer's time records (if there are any). These materials needn't be included in the compilation of documents described above and there should be no need to number them. Both the Review Officer and the lawyer will know what you are referring to when you refer to these documents.

The next step is to prepare an outline of your presentation. Relist the factors that you believe should be considered in your case and under each factor:

- (a) note the key points that you want to make with respect to each factor;
- (b) add references to the relevant documents; and
- (c) note the result that you will be seeking with respect to the factor (e.g., "the lawyer's fee for this should be disallowed").

Your references to accounts and time records should include dates and page numbers, where applicable (Example: Statement of Account dated June 3, 2016, page 3, the 2<sup>nd</sup> entry for April 8, 2016). Noting your reference in this way will allow you to quickly direct the Review Officer and the lawyer to the account or time record entry that you object to or question.

References to other documents should be to the document or tab number that you have assigned to each. If you have only a few documents, you may want to simply provide copies of each document when you wish to refer to it.

You may also wish to prepare a written statement based on your outline. If you do this, then you may want to make copies for the Review Officer and the lawyer. They may be presented to the Review Officer and the lawyer either before or during the review.

Finally, it should be noted that you are not required to follow the procedures outlined above. However, following them should expedite your review and improve the quality of your presentation.

## Presenting your case

When you are called upon to present your case to the Review Officer (i.e., to outline your concerns with, or objections to, your lawyer's accounts) you may do so with or without the use of a written statement. While the use of a written statement can offer some degree of comfort to a nervous client, this approach tends to be less effective than speaking from an outline or crib notes. In either case, the Review Officer will likely stop you from time to time to ask questions. This is typically done to ensure that the Review Officer correctly understands statements made by you or to ask you if you have any written evidence related to a statement made by you. As a result of these potential interruptions, you should be prepared to pick up where you left off in your presentation. This can be done by marking interruption points on your outline, crib notes or written statement.

Another possible approach to presenting your case is to provide copies of a written statement to the Review Officer and the lawyer and invite the Review Officer to ask you questions about it.

You may, of course, present your case without an outline, crib notes or a written statement but a client who does this risks the possibility that he or she might forget to mention an important point or present important evidence. Unless the point or evidence comes up through questioning by the Review Officer or in the lawyer's presentation, it will not be considered by the Review Officer. Moreover, since an appeal from a Review Officer's decision is an appeal "on the record" (i.e. on the evidence that was before the Review Officer) evidence that was not presented to the Review Officer will not be available to the Judge hearing the appeal.

Regardless of how you chose to present your case, the following tips should be of assistance to you:

- (a) Try to avoid becoming nervous prior to your review. Remember that the review process is intended to be informal and client-friendly, and that the Review Officer will guide you through the process. Expect that your nervousness will dissipate soon after the review begins.
- (b) Don't speak out of turn. The Review Officer will let you know when it is your turn to speak and you will likely be given many opportunities to speak throughout the review.

- (c) Unless the Review Officer otherwise directs, limit your initial presentation to reasonableness of the lawyer's fees. In most cases the Review Officer will deal with this issue first, make a decision on it, and only then hear from the parties on disbursements, Other Charges and the amount paid by the client on the lawyer's accounts.
- (d) Organize your documents in such a way that you can quickly and clearly refer to a document and to an important point in a document, both during your presentation and in response to questions asked by the Review Officer.
- (e) Avoid repeating the same statement or argument multiple times, particularly when the Review Officer tells you that she or he understands your statement or argument.
- (f) Pay attention to what the lawyer says when it is the lawyer's turn to speak. If the lawyer says something that you disagree with, make a note of it and address it when you are given your next opportunity to speak.
- (g) Don't attempt to engage in an argument with, or a "cross-examination" of, the lawyer. If you want the lawyer to provide information that the lawyer is not providing or to explain something, wait until it is your next turn to speak and ask the Review Officer to seek the information or explanation from the lawyer.
- (h) Don't be shy to ask the Review Officer questions about procedure when you find it necessary to do so (e.g., "I forgot to mention a point about \_\_\_\_\_, may I do that now?").
- (i) Remain courteous throughout the review. Discourteous conduct will reflect poorly on you and could detract from the points and arguments that you wish to make. Moreover, it could result in an award of costs against you.

## Conclusion

This publication was designed to give you a better understanding of the review process and to provide you with guidance on the preparation and presentation of a case for a review. Having read it, you should know: what to expect on the day of the review; what documents should be examined in advance; what to look for in these documents; how to organize your thoughts and materials; how to conduct yourself in the review; and how to best present your case. While you are not obliged to follow the guidance provided, following it should reduce nervousness or stress going into the review and improve the quality of your presentation. Perhaps the most important point made in the publication is that the review process is intended to be, and is, client-friendly. This, in itself, should help reduce any stress or nervousness that you might feel prior to a review. Even if you are not prepared or not as fully prepared as you would like to be, you may rest assured that the Review Officer will guide you through the review hearing, assist in identification

of relevant issues, consider your evidence and provide a fair and impartial decision. That said, proper preparation on your part should ensure that all of your concerns will be identified and addressed, and that they will be supported by the best evidence available.