



---

SERVING  
*the* PUBLIC  
INTEREST

---

# ASSURANCE FUND CLAIMS GUIDELINE

April 2008

# TABLE OF CONTENTS

	Page
<b>Assurance Fund Claims Guideline.....</b>	<b>1</b>
I.    The Nature of this Guideline.....	1
II.   The Purpose of the Assurance Fund.....	1
III.  Terms and Definitions .....	2
IV.  Process .....	3
A.  Review of a Claim by the Executive Director.....	3
B.  Claim Decision by the Executive Director .....	3
C.  Preparation for Determination by the Claims Panel.....	4
D.  Determination by the Claims Panel .....	5
E.  Burden and Standard of Proof .....	8
F.  Appeals to the Benchers.....	9
G.  Payment of Claims.....	9
V.   Determining Whether to Approve a Claim.....	9
A.  Statutory Conditions .....	9
B.  Exercise of Discretion .....	12
<b>Appendix.....</b>	<b>14</b>
Excerpts from the Legal Profession Act.....	14
Excerpts from the Rules of the Law Society of Alberta .....	16

## ASSURANCE FUND CLAIMS GUIDELINE

### I. THE NATURE OF THIS GUIDELINE

1. This guide addresses the process of bringing an assurance claim and the considerations involved in approving a claim. It is intended to guide and assist all of those involved in a claim to understand the general requirements and process.
2. The guide begins with procedural guidelines which set out the basic procedure to be followed for a claim as prescribed by the *Legal Profession Act* and the Rules of the Law Society of Alberta ("Law Society"). This guide explains and expands on those provisions.
3. Lastly, this guideline is intended to support all those deciding claims to make effective and consistent decisions and to offer helpful information to claimants, members and other interested parties to allow them to reasonably assess and respond to issues associated with their claims.
4. The guideline was updated by the Benchers in February 2008. The updated guideline is not intended to change the substantive considerations in determining a claim, but clarifies changes to the process resulting from amendments to the Rules and clarifies underlying principles to assurance claims determinations. The updated guideline applies to all outstanding assurance claims.

### II. THE PURPOSE OF THE ASSURANCE FUND

5. Section 89 of the *Legal Profession Act* requires the Law Society to establish the Assurance Fund and require all members to make contributions to the fund. The section also sets out the basis upon which any payment may be made from the fund:

**89(1)** The Society shall hold and maintain a fund called the "Assurance Fund".

**(2)** If a member misappropriates or wrongfully converts money or other property entrusted to or received by a member in the member's capacity as a barrister and solicitor and in the course of the member's practice as a barrister and solicitor, a person entitled to the money or other property may submit a claim to the Society for compensation from the Assurance Fund in respect of

- (a) the money, or
- (b) in the case of property other than money, the value of the property.

6. In *Singh v. The Law Society of Alberta* [2000] A.J. No. 1144, the Alberta Court of Appeal considered the purpose of the Assurance Fund as follows:

To protect the public in its dealings with members of the Law Society, the Law Society is required by s. 86(1) of the Act to hold and maintain the Assurance Fund. The purpose of the Fund is to allow the Benchers, in the exercise of their discretion, to compensate those members of the public whose monies or property are improperly misappropriated or converted by a member of the Law Society. To fund this scheme, members are required to contribute to the Assurance Fund.

(at paragraph 39)

### III. TERMS AND DEFINITIONS

**References: Legal Profession Act, R.S.A. 2000, c. L-8 (the “Act”).  
Rules of the Law Society (the “Rules”).**

7. **Notice of claim and application for compensation.** A notice of claim is the notice required to be submitted by a claimant to start the claim process. The notice of claim must be submitted in writing to the Executive Director and should be accompanied by the application for compensation. If any assistance is required in finding or completing these forms, the claimant may contact the Law Society for assistance. (See Rule 139(5) and Rule 141)
8. **Claimant.** The claimant is the person who submits the notice of claim. The claimant may be represented by a lawyer.
9. **Lawyer concerned.** The term lawyer means a person who is a member or former member of the Law Society of Alberta. “Lawyer concerned” means the lawyer who is alleged in the claim to have committed the acts giving rise to the claim. (See Rule 139(2))
10. **Executive Director.** The term includes the Executive Director, an employee holding the position of Director of Insurance and any other person designated by the Executive Director. (See Rule 139(4))
11. **Claims Panel.** This refers to a three member panel of the Finance Committee appointed by the Chair of the Finance Committee for the purpose of considering the claim. The Rules require that at least one of the members of the claims panel must be a lay Benchers and there must be at least two Benchers on the claims panel. (See Rule 139 (3) and Rule 142(1))
12. **Appeal Panel.** This refers to panel of at least seven Benchers who decide an appeal from a decision of the claims panel. The Rules require that at least one of the members of the appeal panel must be a lay Benchers. Any Benchers who participated in the claims panel is not eligible to be part of the appeals panel. (See Rule 143 (1))
13. **Adjudicator.** The Executive Director, a claims panel or an appeals panel.

## IV. PROCESS

### A. REVIEW OF A CLAIM BY THE EXECUTIVE DIRECTOR

14. Upon receiving a Notice of Claim the Executive Director is required to review it. During the course of the review the Executive Director will provide a copy of the claim materials to the lawyer concerned and may do any of the following: (See Rule 141.1 (2))
- a) By a request made in writing, ask the claimant and/or the lawyer concerned to answer any questions and to provide additional records and documents;
  - b) Require the claimant to attend an examination under oath on the materials supporting the claim; and
  - c) Direct that the claim be investigated.
15. If an investigation is directed, the investigator may require the claimant, the lawyer concerned or any other lawyer to do any of the following: (See Rule 141.1(3))
- a) Produce records and documentation;
  - b) Sign authorizations directed to third parties to permit the investigator to review and copy records and documentation in the possession of the third parties; and
  - c) Attend an interview.
16. At the conclusion of the investigation the investigator will provide a report to the Executive Director containing the findings of the investigation. (See Rule 141.1(4))

### B. CLAIM DECISION BY THE EXECUTIVE DIRECTOR

17. **Failure to cooperate by claimant.** If the claimant fails or refuses to comply with a request of the Executive Director or investigator, the Executive Director may dismiss the claim. (See Rule 141.2 (1))
18. **Referral to claims panel.** The Executive Director is entitled to decide whether or not a claim may be paid in certain circumstances, but in any case may refer the claim to a claims panel for decision. (See Rule 141.3)
19. **Evidence.** The determination of the claim by the Executive Director shall be based entirely on documentary information and evidence including any transcripts. In cases where viva voce evidence or oral submissions are required, as determined by the Executive Director, the claim shall be referred to a claims panel. (Rule 141.2 (4))
20. **Dismissing the claim.** The Executive Director shall dismiss the claim if the statutory conditions for a successful claim are not met. (See Rule 141.2 (2)) (See Section V – Determining whether to approve a claim)
21. **Approving the claim.** The Executive Director may approve all or part of a claim or refer it to a claims panel if the statutory conditions for a successful claim are met. (See Rule 141.2(3))
22. **Notice and form of decision.** Whether the Executive Director decides the claim or refers the claim to a claims panel, the decision shall be in writing and shall include the

reasons for the decision. The Executive Director shall provide the claimant, lawyer concerned and other interested parties (including the President and the Chair of Finance of the Law Society) with a copy of the written decision. (See Rule 141.2 (5))

23. **Appeal.** The claimant, the lawyer concerned, interested parties or the Law Society may appeal a determination of the Executive Director to a claims panel. To commence an appeal a notice of intention to appeal must be provided in writing to the Executive Director no more than 30 days after receipt of the written decision of the Executive Director. (See Rule 141.4)

### C. PREPARATION FOR DETERMINATION BY THE CLAIMS PANEL

24. The claims panel will determine a claim if the claim has been referred by the Executive Director or if the determination of the Executive Director has been appealed.

25. In *Duncan v. Law Society of Alberta* (1991) 80 D.L.R.(4th) 702 the Alberta Court of Appeal decided knowledge of a disciplinary outcome about the lawyer concerned in an assurance claim does not disqualify a member of a claims panel:

“The binding principle to be taken from these cases is that where a statute specifically authorizes procedures involving overlapping functions, which otherwise might give rise to a reasonable apprehension of bias, then if those procedures are followed without over-extension, they are not subject to review. Laskin, C.J. in Ringrose refers to the need to have something beyond institutional bias in order to establish reasonable apprehension of bias where authorized by statute. He states that the enabling provisions may permit overlapping of functions, but that this overlapping should not be overextended. Here there is no suggestion on the facts of an overextension of statutory authority.”

26. **Interested parties.** In some cases the Executive Director may believe that a person other than the claimant or the lawyer concerned has an interest in relation to the claim. In those cases the Executive Director shall provide the interested parties with the same notice of the hearing and materials as the claimant and lawyer concerned. An interested party may be represented by a lawyer. (See Rule 142.1 (1))

27. **Notice of hearing.** The claims panel will only conduct an oral hearing if requested. Otherwise the decision of the claims panel will be based on written materials only. For the purpose of providing notice of the hearing to determine the claim by the claims panel and the materials to be considered by the claims panel, the Executive Director shall serve the following documents on the claimant, the lawyer concerned and any interested parties:

- a) Letter of appointment by the Chair of Finance appointing the members of the claims panel;
- b) Copies of the materials that were before the Executive Director; and
- c) The written decision of the Executive Director.

If any of the material to be provided contains information which might be subject to a claim of solicitor-client privilege by someone other than the claimant, the Executive

- Director is required to edit the material to ensure the information is not disclosed. (See Rule 142.1(3) and (4))
28. **Oral hearing.** A request for an oral hearing must be made in writing within the period specified by the Executive Director. If an oral hearing is requested, the Executive Director shall serve the claimant, the lawyer concerned and all interested parties with a notice stating the time and place the claims panel will conduct the oral hearing. (See Rule 142.1(2))
29. **Notice to attend.** A notice to a person requiring the person to attend as a witness before the claims panel shall state the time and place of the hearing and the records, if any that the person is required to produce at the hearing. This notice shall be issued by the Executive Director, the Society's counsel, the lawyer concerned or the counsel for the lawyer. (See Section 69 (5))
30. **Pre-hearing direction.** The claimant, lawyer concerned or Assurance counsel may request the Chair of Finance to provide pre-hearing direction to resolve any issues which may arise regarding the hearing process. The request for direction must be made in writing to the Executive Director. Once such a request is made all other parties will be provided with the request and be asked to provide a response by a fixed date. The request and responses will then be provided to the Chair of Finance who may make orders on any conditions, may impose and may set a plan and schedule for the completion of any steps by any or all parties to be completed before the hearing. (Rule 142.2)

#### **D. DETERMINATION BY THE CLAIMS PANEL**

31. Where no request for an oral hearing has been made, a claims panel must determine the process to be followed prior to making its decision as guided by the principles of natural justice and the circumstances of the case. Amongst other things, this will generally require:
- a) that the claimant, the lawyer concerned and counsel for the Law Society be permitted to submit relevant evidence and argument to the claims panel;
  - b) that the claimant, the lawyer concerned and counsel for the Law Society be advised of all material that will be provided to the claims panel; and
  - c) that the claimant, the lawyer concerned and counsel for the Law Society be provided with a meaningful opportunity to object to material being provided to the claims panel.

Upon being satisfied that an oral hearing is not required, the claims panel may complete the hearing and provide written reasons for its decision to the Executive Director.

32. **Oral hearing.** A court reporter shall be present for the duration of an oral hearing. The process shall be guided by the principles of natural justice, and in general will proceed as described below.
33. **Authority to decide.** For the purposes of establishing the authority of the claims panel to decide the claim, Assurance counsel submits the following exhibits:
- a) Letter(s) of Appointment.

- b) Materials provided to the parties as required by Rule 142.1. (See paragraph 27)
  - c) Affidavit(s) of Service of materials on any interested parties.
34. **Bias.** At the hearing, parties will be asked if there is any objection to the membership of the claims panel based on an apprehension of bias or for any other reason. If there is an objection, the claims panel member will not disqualify herself or himself unless reasonable grounds exist.
35. **Open hearing.** An oral hearing shall be open to the **public** unless the claims panel, on its own motion or on the application of any person expected to be a witness at the hearing or any other interested party, directs that all or part of the hearing is to be held in private. (Rule 142.1 (6)) When the hearing commences, the Chair shall invite applications to have the whole or part of the hearing in private.
- a) In the interests of transparency, hearings will be open to the public – except to the extent required to protect compelling privacy interests.
  - b) To the extent possible, an application for a private hearing will be made in public, with the applicant providing a general outline as to why the hearing should be held in private.
  - c) Protection of legal privilege and solicitor-client confidentiality are compelling privacy interests which must be protected unless they are expressly waived by the appropriate person(s). Neither applying to the Assurance Fund or failure to attend a hearing constitutes an express waiver.
  - d) Where a claims panel decides that privacy should be protected, that may be accomplished by closing the necessary portions of the hearing or taking other appropriate measures. If the hearing is closed, the only persons who may attend the hearing are the claimant, the lawyer concerned, the Executive Director, Assurance counsel, counsel for any party and any other party authorized by the claims panel to attend.
36. **Exclusion of witnesses.** Generally, witnesses other than the claimants will be excluded until they have given their evidence. Witnesses who are claimants generally will be allowed to remain in the hearing room unless there is a reason to exclude them, such as where evidence is to be given in a private portion of the hearing and the complainant is not entitled to hear it.
37. **Opening statements.** The parties or counsel for the claimant, the lawyer concerned and the Assurance Fund may each respectively provide a brief opening statement. Ordinarily Assurance counsel shall make the first opening statement, followed by the claimant and the lawyer concerned.
38. **Oath.** A member of the claims panel may administer an oath or affirmation to a witness pursuant to sections 16 or 17 of the *Alberta Evidence Act*.

OATH: “Do you swear that the evidence you will give touching the matters in question shall be the truth, the whole truth and nothing but the truth so help you God?” or

AFFIRMATION: "Do you affirm that the evidence you will give touching the matters in question shall be the truth, the whole truth and nothing but the truth?"

39. **Claimant evidence.** In addition to the materials provided by the Executive Director, the claimant and additional witnesses on behalf of the claimant may be called to provide relevant supplementary evidence. The claimant or witnesses called on behalf of the claimant will be subject to questions by the lawyer concerned or his or her counsel, Assurance counsel and members of the claims panel.
40. **Other party evidence.** Other interested parties may, with the permission of the claims panel, give evidence the claims panel considers proper. All other parties giving evidence at the hearing shall be subject to questions by the claimant, the lawyer concerned, or their respective counsel, Assurance counsel and members of the claims panel.
41. **Assurance counsel evidence.** The lawyer concerned is a compellable witness (Section 88 of the Legal Profession Act) and may be called to give evidence at the hearing and may call witnesses on his or her behalf. The lawyer concerned and witnesses called on his or her behalf are subject to questions from the claimant or his or her counsel, Assurance counsel and members of the claims panel.
42. Assurance counsel may call witnesses in response to the claim. Any witnesses called by Assurance counsel will be subject to questions from the claimant, the lawyer concerned, or their respective counsel, and members of the claims panel.
43. **Adjournments and other rulings.** The claims panel may determine its own proceedings, subject to the *Legal Profession Act*, Rules and these guidelines as will best ensure a fair and expedient determination of the issues in dispute. For that purpose the claims panel may adjourn proceedings sine die or to a date certain, from time to time, as it deems appropriate, and either before or after completion of evidence.
44. **Submissions.** Assurance counsel is asked to present argument first, followed by the claimant, then any other parties, and by the lawyer concerned. There is a right of rebuttal at the discretion of the claims panel.
45. **Decision based on evidence presented.** The claims panel shall make a decision based on the evidence before it, including the following:
  - a) Materials that were before the Executive Director;
  - b) Written reasons for the decision of the Executive Director;
  - c) Additional materials provided to the claims panel by the claimant, the lawyer concerned, any other interested person or by Assurance counsel; and
  - d) In case of an oral hearing, evidence presented during the course of the hearing. (See Rule 142.1 (3))

The claims panel is not permitted to draw any inferences from the outcome of any related disciplinary proceedings related to the lawyer concerned.

46. **Exhibits.** The claims panel invites submissions on whether exhibits will be made available for inspection and whether the public should be able to obtain a copy (See Rule 98(3)). Where the claims panel determines that an exhibit will be available for inspection, it will also be made available for copying unless the claims panel specifically

directs otherwise (See Rule 98(3)) and, therefore, copying will be specifically dealt with at the time of the hearing.

47. **Decision.** The claims panel may decide to do any of the following:
- a) Dismiss the claim;
  - b) Approve some or all of the claim with or without conditions;
  - c) In the case of an appeal from the decision of the Executive Director, resubmit the claim to the Executive Director to continue the review; and
  - d) In the case of an appeal from the decision of the Executive Director, impose requirements on the appellant to be met as a condition of any order made.
48. **Form of the Decision.** The decision of the claims panel shall be in writing and shall be submitted to the Executive Director. (See Rule 142.1 (7)) The Executive Director, upon receipt of the decision, shall provide a copy of it to the lawyer concerned or his or her counsel, the claimant and any other person recognized by the claims panel as an interested person. (See Rule 142.1 (8))

## E. BURDEN AND STANDARD OF PROOF

49. In *Ringrose v. College of Physicians and Surgeons of Alberta*, [1978] 2 W.W.R. 534 (Alta. C.A.), Clement J.A. stated:

“The burden of proof...is to establish the guilt charged against a practitioner by a fair and reasonable preponderance of credible testimony, the tribunal of fact being entitled to act upon a balance of probabilities.”

“...The cogency of the evidence required to satisfy the burden of proof by a preponderance of probability may vary, however, according to the nature of the issue with respect to which that burden must be met.”

“...The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established.”

50. In *Law Society of Alberta v. Estrin* (1992), 4 Alta. L. R. (3rd) 373 (C.A.), the Court said:

"The evidence required by the Law Society to reach a conclusion of deceit is short of that in a criminal proceeding but must meet a higher standard than the balance of probabilities."

51. In *K.V. v. College of Physicians and Surgeons of the Province of Alberta* (1999), 74 Alta. L.R. (3d) 93 (C.A.) the Alberta Court of Appeal dismissed the argument that an allegation of conduct tantamount to criminal behaviour requires proof beyond a reasonable doubt:

“However, counsel for Dr. V. argued that when a complainant in a disciplinary proceeding alleges an act which is tantamount to criminal behaviour, that act should be proven on a standard higher than that set out in Ringrose, that is,

higher than a balance of probabilities. It should be proven by strong, clear, cogent and convincing evidence.”

“I do not agree. I can think of no reason, and none has been suggested, for treating conduct tantamount to criminal behaviour differently from other conduct. Surely an allegation of criminal behaviour in the context of disciplinary proceedings under the Medical Profession Act, can be no more serious than an allegation of gross incompetence in the same context. The disciplinary tools available to council are the same in each of these cases, and they do not in any circumstances include the power to deprive a practitioner of his or her liberty.” (At paragraphs 33 and 34).

The court also affirmed the standard set in the Ringrose case.

## F. APPEALS TO THE BENCHERS

52. The decision of a claims panel may be appealed to a panel of seven Benchers in accordance with Rules 143 and 144.

## G. PAYMENT OF CLAIMS

53. **Conditions imposed.** The Executive Director shall make a payment of compensation to a claimant from the Assurance Fund if the provisions of Rule 144 are met, including any conditions imposed.

## V. DETERMINING WHETHER TO APPROVE A CLAIM

54. As stated in paragraph 5, in *Singh v. The Law Society of Alberta* [2000] A.J. No. 1144, the Alberta Court of Appeal considered the purpose of the Assurance Fund as follows:

To protect the public in its dealings with members of the Law Society, the Law Society is required by s. 86(1) of the Act to hold and maintain the Assurance Fund. The purpose of the Fund is to allow the Benchers, in the exercise of their discretion, to compensate those members of the public whose monies or property are improperly misappropriated or converted by a member of the Law Society. To fund this scheme, members are required to contribute to the Assurance Fund.

(at paragraph 39)

55. **Consequential Losses.** Only the money, or in the case of property other than money, the value of the property, can be returned. The *Legal Profession Act* makes no provision for claims for interest, damages, expenses, loss of profits and loss of income and none of these claims will be entertained by the adjudicator.

## A. STATUTORY CONDITIONS

56. Before the Executive Director or the claims panel can determine whether to exercise discretion to approve an assurance claim, the following elements must be present:
- a) The money or property was entrusted or received by the lawyer concerned in his/her capacity as a barrister and solicitor and in the course of the lawyer's practice as a barrister and solicitor;

- b) The lawyer concerned misappropriated or wrongfully converted money or property; and
  - c) The claimant is entitled to the money or property.
57. **Entrusted or received in capacity as a barrister and solicitor.** Prior to the 1991 *Legal Profession Act*, for a claim to be brought against the Assurance Fund, the claimant simply had to demonstrate the money or property were entrusted to or received by a lawyer. In *Law Society of Alberta v. Singh*, the Court of Appeal offered the following comments regarding the 1991 amendment: (at paragraph 37)

Until 1991, for a claim to be made against the Fund, the Act only required that the funds be entrusted [to] or received by the member in his or her capacity as a barrister and solicitor. The requirement that the monies also be entrusted to or received in the course of the member's practice as a barrister and solicitor did not exist. . . . The 1991 amendment to s. 86(2) which added the requirement that the monies be entrusted to or received by the member in connection with his or her practice as a barrister and solicitor was designed to put beyond doubt that for the Assurance Fund to be accessed by claimants, the role requirement had to be met. The Legislature wanted to ensure that the public was well aware that access to the Assurance Fund required that the monies be paid in the course of the member's practice as a barrister and solicitor.

58. For the statutory condition to be met, the adjudicator must be satisfied that the money or property entrusted was received by the lawyer concerned in the capacity as a barrister and solicitor rather than in some other capacity. In *Tinant v. Law Society of Alberta* [1989] A.J. No. 1038, the Court of Appeal upheld the dismissal of a claim on the basis the lawyer concerned involved was also a chartered accountant and had received the money in his capacity as an accountant. In other more recent cases assurance claims have been dismissed when the claims panel concluded the money was received for investment purposes.
59. In considering whether the money or other property entrusted was received by the lawyer concerned in the capacity as a barrister and solicitor, care must be taken to distinguish between the following situations:
- a) Where the money or property have been paid over to the lawyer concerned in connection with the performance or intended performance by the lawyer concerned of services as a barrister and solicitor and on behalf of a client, the statutory requirement is likely met.
  - b) Where the lawyer concerned was known to the claimant to be a borrower of money, or co-investor of the money in the lawyer's own right, or any situation where the lawyer concerned participated in the course of a venture jointly with the claimant(s) and another person advancing such money or property, then generally the money or property received shall not be considered to have been received in the lawyer's capacity as a barrister and solicitor, and the claim will be dismissed.
  - c) An exception to subparagraph (b) may be made where it appears that the dominant inducement for the advancing of the money or property to the lawyer concerned was a confidence enjoyed by that lawyer by reason of an otherwise

well established solicitor and client relationship. As long as the money or property were not intended for the personal use of that lawyer, but were to be held in trust by that lawyer, then the statutory requirement may be met.

60. **Misappropriation or wrongful conversion.** The lawyer concerned must have misappropriated or wrongfully converted the money or property. This requirement has two components: that the claimant was deprived of the money or property and that the lawyer concerned knew or ought to have known at the time of taking the money or property that he or she was not entitled to it.
61. **Deprivation.** Many claims involve a dispute as to the value of the work done by the lawyer concerned for the claimant. Often this factual dispute places the adjudicator in the position of assessing the value of the work done by the lawyer concerned. The following is provided to assist with dealing with determinations involving a question of deprivation related to services provided:
- a) **Inadequate accounting records.** In the event the lawyer concerned has not maintained proper accounting records or has not rendered any accounts to the claimant, the lawyer concerned bears the onus to demonstrate the value of services provided to the claimant.
  - b) **Inability to complete essential work.** Where the lawyer concerned asserts that the money was converted for fees earned, and the lawyer concerned was unable to complete the essential work because of a suspension, that weighs against any submission that the amount of the claim will be reduced by the amount claimed for fees. In these cases, the focus should be on the value received by the client.
  - c) **Dispute regarding account which was rendered.** In the event the claimant disputes an account properly rendered by the lawyer concerned, the claimant bears the onus to demonstrate the entitlement to the claim.
  - d) **Taxation.** In cases where an account has been taxed and where both the lawyer concerned and the claimant have attended the taxation, the report of the taxing officer will be received as prima facie evidence of the value of the legal services provided. In the event either the lawyer concerned or the claimant have not attended the taxation, the report of the taxing officer may be considered by the adjudicator but such report may not be determinative of the value of the services to the claimant.
62. In other cases questions may arise whether the claimant or some other party was deprived by the acts of the lawyer concerned. For example, the misappropriation of money held on court order may involve the interest of other parties in the action to the money. In these cases the adjudicator will take care to fully investigate the possibility of a third party interest in the money and ensure notice has been provided to a third party, if appropriate.
63. **Knowledge required.** There must be a finding of knowledge on the part of the lawyer concerned that at the time the money or property were used or disbursed, the entitlement of the claimant was wrongfully denied even if the wrongful denial was intended to be temporary.
64. In some cases the adjudicator may make a finding of knowledge even though an account was rendered at the time of the trust transfer. In those cases the adjudicator

must conclude the lawyer concerned knew, at the time of rendering the account, that he or she was not entitled to the amount of the account.

65. In other cases a lawyer concerned may assert that he or she did not intend to deprive the client of trust money as at the time of taking the trust money the lawyer concerned honestly but mistakenly believed he had a right to the trust money. Such an argument was considered by a Hearing Committee *In the matter of Dennis McGechie*. The Hearing Committee provided the following comments which may assist a claims panel in these cases:

Counsel for the LSA asserted **that if the Member withdrew funds from trust in a reckless manner, then the Member cannot shelter behind an “honest belief” defence to misappropriation.** The Committee agrees that **the Member is not entitled to assert a defence to misappropriation where the alleged honest belief is founded on reckless and careless behaviour.**

Given the numerous ‘uncoded’ withdrawals made by the Member over a long period of time, and given the Members own testimony that he was depressed (and thus suffering from confusion) during the subject time period, **the Committee is satisfied on the evidence that the Member was aware, when he was withdrawing funds from trust, that he may well have been taking trust funds belonging to his clients. In other words, given the disarray of the Member’s books of account he did not know whether or not the funds he was withdrawing from trust had been earned by him** (by means of as yet unbilled legal work) or not. As a result it is the Committee’s conclusion that Citation 4 has been made out i.e. that **the Member is guilty of misappropriation.**” [Emphasis added.] (at para. 13-16)

## B. EXERCISE OF DISCRETION

66. The adjudicator has the discretion to refuse a claim (in whole or in part) where the statutory requirements for a claim are met, but the adjudicator considers a refusal to be appropriate in the circumstances (See Section 89(3)). The factors outlined below are not exhaustive.
67. **Delay.** Delay in making a claim does not prevent it being heard; however, where the delay is significant the delay may be considered by the adjudicator in the exercise of discretion.
68. **Refusal to cooperate.** Any refusal or failure by the claimant or other parties to respond to questions or to produce documents shall be a factor to be considered by the adjudicator in the exercise of its discretion.
69. **Purpose of entrustment with the lawyer concerned.** The adjudicator shall inquire into the circumstances that surround the use of trust by the claimant where these circumstances raise concerns regarding the good faith of the claimant.

70. **Conduct of claimant.** The adjudicator shall inquire into whether or not the claimant made an informed business decision to deposit or leave trust money with the lawyer concerned, recognizing the risk of the situation but choosing to assume or to ignore the risk. The adjudicator shall also consider any conduct of the claimant that contributed to the loss, including, but not limited to:
- a) the extent of the trust placed by the claimant in the lawyer concerned and other sources of professional advice (accounting, legal or otherwise) available to the claimant;
  - b) whether the claimant was reckless in some manner related to entrusting the money to the lawyer concerned, or;
  - c) whether the claimant was careless in protecting the claimant's own interest after having a reasonable opportunity to determine or suspect the misappropriation or wrongful conversion.

## APPENDIX

### EXCERPTS FROM THE LEGAL PROFESSION ACT

\*\*\*

#### Evidence

**68(1)** In proceedings under this Division, a Hearing Committee, the Practice Review Committee or the Appeal Committee

- (a) may hear, receive and examine evidence in any manner it considers proper, and
- (b) is not bound by any rules of law concerning evidence in judicial proceedings.

**(2)** A Benchler who is a member of a Committee referred to in subsection (1) may administer an oath to a witness who is to give evidence before that Committee.

1990 cL-9.1 s65;1998 c23 s11

#### Witness

**69(1)** A member whose conduct is the subject of a hearing before a Hearing Committee is a compellable witness in proceedings before that Committee.

**(2)** A witness in proceedings before a Hearing Committee may be examined on oath on all matters relevant to the hearing and shall not be excused from answering any question on the ground that the answer

- (a) might tend to incriminate the witness,
- (b) might subject the witness to punishment under this Part, or
- (c) might tend to establish the witness's liability
  - (i) to a civil proceeding at the instance of the Crown or of any other person, or
  - (ii) to prosecution under any Act,

but the answer so given, if it tends to incriminate the witness, subject the witness to punishment or tends to establish the witness's liability, shall not be used or received against the witness in any other proceedings under this or any other Act except as provided under subsection (3).

**(3)** An answer referred to in subsection (2) may be used or received against the witness who gave it in

- (a) other proceedings against the witness under this Division,
- (b) proceedings under section 89 in respect of a claim against the Assurance Fund, or
- (c) an action against the witness under section 91 or 97(2).

**(4)** For the purpose of obtaining the testimony in proceedings before a Hearing Committee of a witness who is out of Alberta, the Court of Queen's Bench on an ex parte application by the Society may direct the issuing of a commission for the obtaining of the evidence of the witness, and the commission shall be issued and the evidence taken pursuant to the *Alberta Rules of Court*.

- (5) The Executive Director, the Society's counsel, the member whose conduct is the subject of a hearing before a Hearing Committee or the member's counsel may issue a notice to a person requiring that person to attend as a witness before the Hearing Committee at the time and place stated in the notice and stating the records, if any, that the person is required to produce at that hearing.
- (6) A witness, other than the member whose conduct is the subject of a hearing before a Hearing Committee, who has been served with a notice to attend or a notice for the production of records under subsection (5) is entitled to be paid the same fees as are payable to witnesses in an action in the Court of Queen's Bench.

1990 cL-9.1 s66;2000 c15 s5(31)

### Attendance of witnesses

**70(1)** If a person has been served with a notice referred to in section 69(5) and

- (a) fails to attend as a witness before the Hearing Committee in compliance with the notice,
- (b) fails to produce any records before the Hearing Committee in compliance with the notice,
- (c) refuses to be sworn as a witness before the Hearing Committee, or
- (d) refuses to answer any question put to the person in a hearing before the Hearing Committee after the chair of the Committee has directed the person to do so,

the Court of Queen's Bench, on application, may make an order requiring that person to do what that person has failed or refused to do.

(2) The Hearing Committee, on proof of service of a notice referred to in section 69(5) on the member whose conduct is the subject of the hearing, may

- (a) proceed with the hearing in the absence of the member, and
- (b) act and report on the member's conduct in the same way as if the member were in attendance.

1990 cL-9.1 s67

\*\*\*

### Proceedings

**88(1)** Subject to subsection (2), sections 68 to 70 apply to proceedings under this Part before the Finance Committee, an appeal panel of Benchers or the Benchers.

(2) Without restricting the generality of subsection (1), in applying sections 68 to 70 to proceedings under this Part,

- (a) references in those sections to a Hearing Committee shall be construed as references to the Finance Committee, the appeal panel of Benchers or the Benchers, whichever body is conducting the proceedings under this Part,
- (b) references in those sections to a witness include the member whose conduct gave rise to a claim against the Assurance Fund, and
- (c) references in those sections to the member whose conduct is the subject of proceedings under Part 3 shall be construed as references to the member whose conduct gave rise to a claim against the Assurance Fund.

**Assurance Fund**

- 89(1)** The Society shall hold and maintain a fund called the "Assurance Fund".
- (2)** If a member misappropriates or wrongfully converts money or other property entrusted to or received by a member in the member's capacity as a barrister and solicitor and in the course of the member's practice as a barrister and solicitor, a person entitled to the money or other property may submit a claim to the Society for compensation from the Assurance Fund in respect of
- (a) the money, or
  - (b) in the case of property other than money, the value of the property.
- (3)** The Finance Committee, an appeal panel of Benchers or the Benchers, whichever hears a claim under this section, may
- (a) approve, with or without conditions, the payment from the Assurance Fund of all or any part of the amount of compensation that may be claimed under subsection (2), or
  - (b) refuse to approve the payment of compensation where it considers a refusal to be appropriate in the circumstances.

\*\*\*

**EXCERPTS FROM THE RULES OF THE LAW SOCIETY OF ALBERTA**

\*\*\*

- 139** In this Division:
- (a) "Assurance counsel" means counsel engaged by the Society to represent the Society in its capacity as the holder of the Assurance Fund;
  - (b) "Member concerned", in relation to a claim, means the member or former member who is alleged in the claim to have committed the acts giving rise to the claim;
  - (c) "Claims panel" means a panel of the Finance Committee established pursuant to Rule 142(1).
  - (d) "Executive Director" includes the employee holding the position of Director of Insurance and any other person designated by the Executive Director to perform any of the duties assigned to the Executive Director in this Division.
  - (e) "Application for compensation" means the form designated by the Executive Director from time to time in support of a claim for compensation by a claimant.

\*\*\*

**Notice of Claim**

- 141 (1)** Notice of a claim against the Assurance Fund shall be submitted to the Executive Director in writing and accompanied by an Application for Compensation.
- (2)** The Executive Director, the Finance Committee or a claims panel may determine a claim even if an Application for Compensation is not submitted with the claim in accordance with this Rule.

**Review and Determinations by Executive Director**

- 141.1 (1)** The Executive Director shall review each claim.

- (2) In the course of a review under this Division the Executive Director may do any of the following:
    - (a) Require the claimant or the member concerned to answer any inquiries or to furnish any records that the Executive Director considers relevant for the purpose of the review;
    - (b) Direct an investigation of the claim; and
    - (c) Require the claimant to attend at an examination under oath on the material supporting the claim by counsel for the Society.
  - (3) Where a person conducts an investigation under this Rule, the investigator may require a member or the claimant to:
    - (a) Produce records and supporting documentation;
    - (b) Provide authorizations directed to third parties to permit the review and copying of records and supporting documentation in the possession of third parties; and
    - (c) Attend an interview.
  - (4) The investigator shall provide a report addressed to the Executive Director containing the findings of the investigation.
- 141.2 (1)** During the course of a review under this Division, the Executive Director may dismiss the claim if the claimant refuses or fails to comply with a requirement of the Executive Director or an investigator made pursuant to Rule 141.1.
- (2) The Executive Director may dismiss the claim where the statutory requirements for a successful claim are not met.
  - (3) The Executive Director may approve some or all of a claim where all of the statutory requirements are met.
  - (4) The Executive Director's review and determination shall be based entirely on documentary information and evidence, including any transcripts obtained pursuant to Rule 141.1(2)(c). The Executive Director shall not be entitled to conduct an oral hearing. Where the Executive Director determines that *viva voce* evidence or oral submissions are required in order to properly assess the claim, the claim shall be referred to a claims panel.
  - (5) Where the Executive Director decides a claim, the Executive Director shall advise the claimant and the member in writing of the decision made, of the reasons for that decision, and of the right to appeal the decision to a claims panel.
  - (6) Notwithstanding Rule 139(d), in this Rule "Executive Director" means:
    - (a) the Executive Director, or
    - (b) the employee holding the position of the Director of Insurance where the claim does not exceed \$150,000.00.

### Referrals by the Executive Director

- 141.3** In any case, the Executive Director may, in his/her sole discretion, refer the matter to a claims panel for determination.

### Appeal of Determinations by the Executive Director

- 141.4 (1)** The decision of the Executive Director may be appealed to a claims panel in accordance with this Rule.
- (2) An appeal under this Rule may be commenced:
    - (a) by the claimant, the member concerned or an interested party, by filing a notice of appeal containing an address for service with the Executive Director within the 30-day period following receipt in writing of the decision made, and
    - (b) by the Executive Committee, by filing a notice of appeal with the President or President-Elect within the 30-day period following the date on which the President and Chair of Finance were provided a copy of the decision made.
  - (3) An appeal of a determination by the Executive Director shall be heard by a claims panel.

- (4) Appeals to claims panels will be dealt with as if the Executive Director had never determined the claim, however the claims panel shall be entitled to review and consider the written decision of the Executive Director as part of the material before it.
- (5) A claims panel may order one or more of the following upon determining an appeal of a decision of the Executive Director:
  - (a) That the claim be resubmitted to the Executive Director to continue the review;
  - (b) That the claim be dismissed;
  - (c) That some or all of the claim be approved; and
  - (d) That the appellant meet certain conditions within any time frame as a condition of any order made.

### Committee/Panel Process

- 142 (1)** The Finance Committee may sit in panels of a minimum of three members comprised of a majority of Benchers, one of whom will be a lay Bencher, for the purpose of:
- (a) adjudicating claims for compensation from the Assurance Fund under section 89 of the Act, and/or
  - (b) making any decisions on any other matters referred to the Finance Committee for determination.
- (2)** Three members of a claims panel constitute a quorum at a meeting of the claims panel, comprised of a majority of Benchers, at least one of whom shall be a lay Bencher.
- 142.1 (1)** To commence a hearing under this Part the Executive Director shall serve on
- (a) the claimant,
  - (b) the member concerned, and
  - (c) any other person who the Executive Director believes may have an interest in relation to the claim,
- a Letter of Appointment of claims panel, notice of the materials to be provided to the panel to decide the matter, and notice of the right to request an oral hearing.
- (2)** A request for an oral hearing must be made in writing within the period specified by the Executive Director. Where an oral hearing is requested, the Executive Director shall serve the parties in subrule (1) a notice stating the time and place at which the hearing will be held.
  - (3)** The panel shall make its decision on a matter on the basis of:
    - (a) the materials that were before the Executive Director,
    - (b) the written reasons for the decision of the Executive Director,
    - (c) any additional materials provided to the panel by the applicant or appellant, any other person who may have an interest in relation to the matter or by Assurance counsel, and
    - (d) if an oral hearing is held, any evidence received by the panel during the course of the hearing.
  - (4)** If any information referred to in subrule (1) contains information which may be subject to a claim of solicitor-client privilege by a party other than the claimant, the Executive Director shall edit the material provided to any party in advance of the hearing to ensure no information is disclosed which may be subject to a claim of solicitor-client privilege.
  - (5)** The panel hearing the matter shall determine the process to be followed in accordance with the Act, the Rules, the principles of natural justice and the circumstances of the case. In the event of an oral hearing the committee shall comply with Rule 98 as to persons present at the hearing, exhibits and records of the Society, and shall comply with the requirements of section 88 of the Act.
  - (6)** An oral hearing shall be open to the public unless the panel, on its own motion or on the application of the applicant or any person expected to be a witness at the hearing or any other interested party at any time before or during the proceedings, directs that all or part of the hearing is to be held in private.
  - (7)** On completing its hearing and deliberations, the panel shall provide written reasons for its decision to the Executive Director.

- (8) The Executive Director, on receipt of the written reasons under subsection (7) and with respect to written reasons issued by the Executive Director pursuant to Rule 141.2(5), shall within a reasonable time:
- (a) give a copy of the reasons to the member or the member's counsel, the President and the Chair of Finance; and
  - (b) subject to subsection (9), provide a copy of the reasons to the claimant and any other person recognized by the claims panel at the hearing or by the appeal panel at the appeal as an interested party and shall make the reasons available to the public.
- (9) If the whole or part of the hearing has been held in private, the claimant and any other person recognized by the claims panel at the hearing as an interested party is not entitled to receive the portion of the report relating to any part of the hearing held in private for the benefit of another person.
- (10) The chair of the Finance Committee shall determine what portions of a report may be provided for the purposes of subsection (8).

### Pre-Hearing Direction

- 142.2 (1)** Upon a matter being referred to a claims panel or being appealed, the claimant, member concerned or Assurance counsel may request the Chair of Finance to resolve issues and provide direction to the parties to move matters towards hearings or appeals in accordance with the Rules and Guidelines, by making a request for pre-hearing direction in writing and providing it to the Executive Director.
- (2) Upon receiving such a request, the Executive Director shall send the request for pre-hearing direction to all other parties and provide a date for responses in writing to the request.
- (3) After the date for responses, the Executive Director shall provide the request for pre-hearing direction and all responses to the Chair of the Finance Committee who may make orders on any conditions, may impose and may set a plan and schedule for the completion of any steps by any or all parties to be completed before the hearing or appeal.
- (4) The Chair of the Finance Committee who provides pre-hearing direction under this Rule may participate in a later hearing or appeal unless any party objects to such participation.
- 143 (1)** The adjudication of the Finance Committee or a claims panel respecting a claim may be appealed to the Benchers in accordance with this Rule.
- (2) Where the adjudication of the Executive Director, a claims panel, or the Finance Committee respecting a claim is based on an Agreed Statement of Facts and Exhibits agreed to by all parties entitled to appear before the Executive Director, the Finance Committee or claims panel, the right of appeal may be waived, in writing, by all parties. In such an instance, the Executive Director may pay the claim prior to the conclusion of the appeal period, provided all conditions for payment ordered by the Executive Director or the Committee (as the case may be) have been met.
- (3) An appeal under this Rule may be commenced:
- (a) by the claimant, the member concerned or any person recognized by the Finance Committee or claims panel at the hearing as an interested party, by filing a notice of appeal containing an address for service with the Executive Director within the 30-day period following:
    - (i) the date on which the Finance Committee or claims panel announced its adjudication, if the appellant or the appellant's counsel was present before the Committee when the announcement was made, or
    - (ii) in any other case, the date on which the appellant was notified under Rule 142.1 (8) of the adjudication of the Finance Committee or the claims panel, or
  - (b) by the Executive Director, by filing a notice of appeal with the President or President-Elect within the 30-day period following the date on which the Executive Director was first notified of the Finance Committee's adjudication.
- (4) An appeal to the Benchers under this Rule:
- (a) shall be heard by an appeal panel consisting of no fewer than 7 Benchers at least one of whom shall be a lay Bencher unless the Benchers direct that the claim will be heard by the Benchers in convocation;

- (b) shall be based on the record of the hearing before the Finance Committee or claims panel and on its adjudication rendered to the parties; and
  - (c) shall be held in public, unless the Benchers, on application, but subject to section 112(2) of the Act, direct that all or part of the appeal is to be held in public.
- (5) Upon the application of the claimant, the member concerned, any person recognized as an interested party or the Executive Director, the Chair of the Finance Committee or the appeal panel may order that the appellant pay of all or part of the cost of preparing and distributing the record of the hearing prior to the appeal being heard or at the conclusion of the hearing.
- (6) If an order has been made requiring the appellant to pay costs prior to the appeal being heard, and the costs have not been paid within 30 days of notice of the requirement to the appellant, the appeal shall be deemed to be abandoned. The Executive Director shall note the abandonment in the Society's records and notify the appellant, the member and any other person recognized at the hearing by the Finance Committee or claims panel.
- (7) The provisions of Rule 142.1 shall be followed for an appeal.

### Preconditions to Payment of Claims

- 144 (1) Subject to subrule (2) and any limitation imposed by the Benchers on payments from the Fund, the Society shall make a payment of compensation to a claimant from the Assurance Fund in respect of all or part of a claim under section 89 of the Act if:
- (a) the Executive Director, the Finance Committee or a claims panel has approved the payment in its adjudication and the Executive Director is satisfied that either:
    - (i) the appeal periods provided for in Rules 141.4(2) or 143 (as the case may be) have expired without an appeal having been taken,
    - (ii) any appeal commenced in accordance with Rules 141.4(2) or 143 (as the case may be) has been abandoned or deemed to be abandoned,
    - (iii) all persons entitled to appeal under 143(3)(a) have notified the Executive Director that they have waived their right to appeal and the Executive Director has waived the right of appeal,
    - (iv) the member did not oppose the claim, the Executive Committee has waived the right of appeal and no other person is entitled to appeal; or
    - (v) the appeal panel has confirmed the adjudication by the Finance Committee or the claims panel of the claim and the amount of compensation to be paid; or
  - (b) the appeal panel has approved the payment in its adjudication but in an amount different from that approved by the Finance Committee or the claims panel.
- (2) A payment from the Assurance Fund approved by the Executive Director, a claims panel, the Finance Committee or the appeal panel may not be made unless the Executive Director is satisfied that all conditions imposed by the Executive Director, the Finance Committee, claims panel or the appeal panel, as the case may be, have been fulfilled.

\*\*\*