

Guidelines for Abeyance Requests

Introduction

The Law Society's object and duty is to uphold and protect the public interest in the administration of justice. Generally, it is in the public interest to complete an investigation in a timely manner. However, in limited circumstances, the public interest may be better served by placing an investigation in abeyance. An abeyance is an arrangement whereby the Law Society agrees, in appropriate circumstances, that it will not conclude its investigation or take certain actions for a prescribed period of time.

These Guidelines include guidance on when an abeyance may be sought, the relevant factors when considering an abeyance, and the effect of an abeyance on an investigation.

Threshold issue: When can an abeyance be sought?

A lawyer who is the subject of an ongoing complaint investigation may bring an application to hold the investigation in abeyance only if there are significant overlapping issues or facts between the Law Society's investigation and another proceeding or investigation involving the lawyer (the "**Parallel Matter**").

The Parallel Matter could include court proceedings (civil or criminal), a criminal investigation, or the enforcement actions of another regulatory body (for example, the BC Securities Commission).

If there is a Parallel Matter with significant overlapping issues or facts, the following pre-conditions must also be met before an abeyance application can be made by the lawyer:

1. The Law Society's investigation must have proceeded to the extent necessary to identify the issues under investigation and to assess whether the public is at risk. In some cases, the lawyer's response to the complaint may be required to inform this assessment.
2. Any material evidence that may be lost or unavailable, or whose reliability may be diminished with the passage of time, must be reasonably secured by the Law Society.
3. The lawyer must provide a signed undertaking to the Law Society confirming that, if the abeyance is granted, they will not raise any argument based on delay resulting from the abeyance. The undertaking may include other obligations or restrictions as may be required by the Law Society, including, but not limited to:

- a. keeping the Law Society informed of the progress of the Parallel Matter,
- b. not entering into any confidentiality agreement that would exclude the Law Society's knowledge of the terms of any settlement, or
- c. consenting to the Law Society obtaining and reviewing the transcript from the lawyer's examination for discovery.

Relevant factors to be considered

There is a presumption that the public interest is best served by completing investigations in a timely manner, and that investigations should not be held in abeyance.

However, where the pre-conditions noted above have been met and there is a Parallel Matter with significant overlapping issues or facts, there may be circumstances where an abeyance is in the public interest. The following factors may be relevant to determining whether an abeyance is in the public interest:

1. Whether there is a risk to the administration of justice if an abeyance is not granted arising from:
 - a. steps being taken in the Law Society's investigation that may unduly prejudice the rights of the lawyer in the Parallel Matter, including the right to due process in a criminal proceeding,
 - b. an abuse of the Law Society's complaints process by a party to the Parallel Matter, for example to seek the disclosure of information not otherwise available, or
 - c. inconsistent findings of fact if the Law Society investigation is concluded prior to the completion of the Parallel Matter.

2. Whether the Law Society's investigation may benefit from the evidence and determinations arising from the Parallel Matter, taking into consideration:
 - a. the extent of overlap between the Law Society's concerns and the facts and issues in question in the Parallel Matter,
 - b. the evidence that may become available in the course of the Parallel Matter,
 - c. the expertise and powers of the regulatory authorities involved in the Parallel Matter (for example, the expertise of securities regulators in a matter before the BC Securities Commission),
 - d. the likelihood that relevant determinations or information may reasonably be expected to flow from the Parallel Matter in a timely way, or

- e. the likelihood that the Parallel Matter may be abandoned, settled without admissions, or concluded with no useful determinations or evidence becoming available for the Law Society's investigation.
3. The effect the abeyance may have on the Law Society's ability to complete its investigations and carry out its disciplinary processes, such as:
 - a. the risk that the complainant or other witnesses may no longer be available, or willing to participate in the Law Society's investigation, following the period of abeyance, or
 - b. the risk that evidence may become lost or unavailable, or its reliability may become diminished with the passage of time, and cannot be otherwise secured.
4. The impact of the abeyance on the Law Society's ability to protect the public, including whether there is a need for interim public protection measures and, if so, whether adequate measures are in place.

The Executive Director may consider any other factors that they consider relevant in the circumstances.

Effect of an abeyance

If an abeyance is granted, the Law Society may continue to exercise all of its powers under the *Legal Profession Act* and Law Society Rules, except that the Law Society agrees not to do the following during the period of abeyance:

- a. refer the matter to the Chair of the Discipline Committee under Rule 3-8(4), or to the Discipline Committee for consideration of the complaint under Rule 4-3 (other than in the case of a referral to the Discipline Committee for consideration of the abeyance request),
- b. require the lawyer to provide a written response to the complaint under Rule 3-5(7) (although the lawyer may be required to provide information and documents to the Law Society in relation to the Parallel Matter),
- c. require the lawyer to attend an interview under Rule 3-5(8)(b)(i),
- d. require the lawyer to answer questions under Rule 3-5(8)(b)(ii), or
- e. apply for an order under Rule 3-10 (staff may prepare for a Rule 3-10 application during the abeyance).

For greater clarity, during the period of abeyance, the Executive Director retains the authority to, *inter alia*, require the lawyer's production of files, documents and other records under Rule 3-5(8).

Law Society staff may also continue to obtain evidence from other sources, such as the complainant, public registries, or the Courts, as appropriate.

Abeyance term and termination

An abeyance may be granted for a specified period of time, typically 6 or 12 months. In specifying the length of an abeyance, the Executive Director may consider, without limitation and as applicable:

- a. the progress and anticipated timeline for conclusion of any relevant Parallel Matter, or
- b. the duration of time for which the investigation has already been held in abeyance.

An abeyance will terminate, without the requirement for further notice to the lawyer, upon the occurrence of any of the following events, as applicable:

- a. the expiry of the abeyance period as set out in the grant of abeyance,
- b. the conclusion of the relevant Parallel Matter, for example by way of a final decision of the court seized of the matter, a stay of proceedings, or a stay of the relevant criminal charges, or
- c. the Law Society providing notice to the lawyer, or to the lawyer's counsel as applicable, of an application for an order for interim measures under Rule 3-10.

In addition to the termination events above, the Executive Director may terminate an abeyance at any time, if, in the Executive Director's discretion, it is in the public interest to do so. Such termination will be effective upon the lawyer, or the lawyer's counsel as applicable, being served with notice of the termination in accordance with Rule 10-1.

Application process

A lawyer who is the subject of an ongoing complaint investigation under section 26 of the *Legal Profession Act* and Part 3 of the Law Society Rules may submit an application to the Executive Director requesting that such investigation be held in abeyance, or that any abeyance previously granted be extended, provided that the threshold and the pre-conditions for seeking an abeyance have been met.

The lawyer's abeyance application must be made in writing and should set out the circumstances and factors relevant to the abeyance request. The abeyance application should also append the lawyer's signed undertaking.

The complainant, if any, will be advised of the abeyance application and be given an opportunity to provide their comments.

The Executive Director may determine whether to grant or deny an abeyance, taking into consideration the circumstances and factors set out in these Guidelines, or any other factors the Executive Director deems relevant.

If the Executive Director denies an abeyance request, the lawyer may request that the matter be referred to the Discipline Committee for the Committee's consideration. The Executive Director's decision remains in effect pending consideration by the Discipline Committee.