

Undertakings and trust conditions

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Introduction

Undertakings and trust conditions given by lawyers are binding promises whose conditions must be met. Blacks Law Dictionary defines “undertaking” as:

A promise, pledge, or engagement.³

A breached undertaking must be reported to the Law Society.

Notwithstanding the mandatory nature of undertakings and trust conditions, such conditions can be modified on consent.

As inappropriate as it is for a lawyer to give an undertaking or agree to a trust condition that cannot, or will not, be met or fulfilled it is equally inappropriate for a lawyer to seek an undertaking or trust condition from another lawyer knowing that the undertaking or trust condition sought is unmeetable.

The implied undertaking, while imposed by operation of law rather than by another party to a matter, must be scrupulously observed.

Professional responsibility considerations⁴

Code of Professional Conduct for BC (“Code”) [rule 5.1-6](#) imposes a positive obligation on lawyers to “scrupulously fulfill any undertaking given”. This Code rule, which directs the lawyer to its companion Code rule, highlights the imperative nature of undertakings.⁵

[Code rule 7.2-11](#) is a companion to Code rule 5.1-6 and provides further context and guidance regarding the use of undertakings. This Code rule expressly mandates that:

¹ This Ethics Advisory represents the amalgamation of Ethics Committee Opinions on undertakings. Ethics Advisories are reviewed and approved by the Ethics & Lawyer Independence Advisory Committee.

² Inaugural publication of this Ethics Advisory.

³ “undertaking”, *Blacks Law Dictionary*, (7th ed., St Paul, Minn: Thomson/West, 1999)1528.

⁴ This Ethics Advisory contemplates issues arising in regard to undertakings provided by counsel or their clients in respect of legal matters.

⁵ See also the Canons of Legal Ethics at Code rule 2.1-4(b), *infra* note 10.

1. Lawyers not give undertakings that cannot be fulfilled; and
2. Lawyers fulfill each undertaking they give.

While the language refers to “lawyers” giving undertakings it is clear that, as with any undertaking or trust condition and absent unambiguous language to the contrary, an undertaking given by a lawyer on behalf of their client is expected to be honoured, personally, by the lawyer.⁶ As such, and while not mandatory, it is recommended that all undertakings and trust conditions be reduced to writing, and that their terms be clear and unambiguous. In the event that the lawyer being asked to give the undertaking is unclear or uncertain as to its terms that lawyer should take active steps to clarify the terms of that undertaking with the lawyer requesting it.⁷

In the event a client gave an undertaking prior to the lawyer’s retainer, the lawyer will be expected to fulfill the undertaking until such time as that undertaking is either modified on consent or more favourable terms can be secured.⁸

An undertaking or trust condition sought from a lay person and agreed to by a lawyer must be fulfilled in the same way a trust condition given by a lawyer to another lawyer must be fulfilled. However, and while a lawyer may seek to impose trust conditions on non-lawyers this should be done with caution as the only means for enforcement of such promises, if extracted, is the courts.⁹ A lawyer’s ethical obligations in respect of undertakings and trust conditions is unique and does not extend to non-lawyers.

Additionally, it is inappropriate for any lawyer to either accept or impose an undertaking or trust condition that is unreasonable¹⁰ or that cannot be fulfilled¹¹. This includes undertakings that would have the effect of preventing counsel from obtaining adequate instructions from their

⁶ Commentary [1] states “[If] a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking itself. In the absence of such a statement, the person to whom the undertaking is given is entitled to expect that the lawyer giving it will honour it personally”.

⁷ Commentary [5] states: “Trust conditions can be varied with the consent of the person imposing them. Any variation should be confirmed in writing.”

⁸ Original consideration: [EC January 2007, Item 7](#). Original summary: “A lawyer’s client, when unrepresented, agreed to receive documents relevant to an inquest being conducted with respect to the death of her sister on certain conditions. The lawyer acting for her subsequently cannot act inconsistently with the conditions agreed to by his client, although he is free to take legal action on her behalf to attempt to secure access to the relevant documents on more favourable conditions.”

⁹ Commentary [6] states: “Any trust condition that is accepted is binding upon a lawyer, whether imposed by another lawyer or by a lay person. A lawyer may seek to impose trust conditions upon a non-lawyer, whether an individual or a corporation or other organization, but great caution should be exercised in so doing since such conditions would be enforceable only through the courts as a matter of contract law and not by reason of the ethical obligations that exist between lawyers”.

¹⁰ The Canons of Legal Ethics, as enumerated at Code rule 2.1-4(b) states: “A lawyer should neither give nor request an undertaking that cannot be fulfilled and should fulfil every undertaking given.”

¹¹ Commentary [3] states: “The lawyer should not impose or accept trust conditions that are unreasonable, nor accept trust conditions that cannot be fulfilled personally”.

client¹² or would interfere with a lawyer's ethical obligations including but not limited to the duty of honesty and candour, which requires a lawyer to "inform the client of all information known to the lawyer that may affect the interests of the client in the matter".¹³ This principle applies equally to civil and criminal matters and includes undertakings sought by the Crown prior to providing disclosure in criminal proceedings.

While the subject of an imposed undertaking or trust condition should be returned if that undertaking or trust condition is unacceptable, a lawyer should be mindful that undertakings and trust conditions can be modified and varied on consent. There may be some benefit to engaging in negotiations in the face of an imposed undertaking or trust condition that appears, at the outset, to be unreasonable¹⁴.

The only person who can consent to the variation of an undertaking or trust condition is the person who imposed the undertaking or trust condition.¹⁵

The implied undertaking, while not imposed by another party, that mandates that information obtained through discovery not be used for any collateral purpose must also be scrupulously observed both in criminal and civil matters.¹⁶

[Code rule 7.1-3\(a.1\)](#) requires a lawyer to report to the Law Society "a breach of undertaking or trust condition that has not been consented to or waived". This obligation to report is mandatory and is not subject to the discretion on the part of the lawyer who becomes aware of the breach. This obligation to report applies equally to the lawyer who imposed the undertaking or trust condition as to the lawyer who accepted the undertaking or trust condition.

Practical guidance

- Ensure that every undertaking or trust condition that you give or accept, and every undertaking or trust condition that that you impose or request, can – in fact – be fulfilled.
- Ensure that every undertaking you give, and every undertaking you request, is consistent with a lawyer's ethical obligations including but not limited to the duties of

¹² Original consideration: [EC March 2012](#). Original summary: "It is improper to attempt to impose on other counsel an undertaking that prevents that counsel from obtaining adequate client instructions."

¹³ Code rule 3.2.2 states: "When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter."

¹⁴ Commentary [4] states: "If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to the person imposing the trust condition, unless its terms can be forthwith amended in writing on a mutually agreeable basis."

¹⁵ Commentary [5] states: "Trust conditions can be varied with the consent of the person imposing them. Any variation should be confirmed in writing. Clients or others are not entitled to require a variation of trust conditions without the consent of the lawyer who has imposed the conditions and the lawyer who has accepted them."

¹⁶ [Wong v. Antunes](#), 2009 BCCA 278 and [Juman v. Doucette](#), 2008 SCC 8

confidentiality¹⁷, honesty and candour¹⁸, and courtesy and good faith¹⁹.

- Should you receive property, information, or material subject to an imposed undertaking or trust condition you are obliged to return that property, information, or material if you are not prepared to accept the undertaking or trust condition or should you determine that you cannot meet the undertaking or trust condition. However, prior to the return of that property, information, or material, consider whether a discussion with the party imposing the trust condition or undertaking might result in a variation of the undertaking or trust condition such that it could be modified and rendered acceptable.

Questions

If you would like to discuss a specific professional responsibility issue regarding undertakings, please [contact a practice advisor](#).

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¹⁷ Code rule 3.3

¹⁸ Code rule 3.2-2

¹⁹ Code rule 7.2-1