

Undertakings

Introduction

An undertaking is a promise to do something, or not do something, and the recipient is entitled to rely on it. As officers of the court, under common law, solicitors have a professional duty to honour an undertaking once given. Breach of an undertaking by a solicitor is regarded by courts and tribunals as an extremely serious matter, and in some instances may result in a civil contempt of court, or a finding of professional misconduct or unsatisfactory professional conduct.

In addition, in Victoria, the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 ("the Conduct Rules") provide:

"6. Undertakings in The Course of Legal Practice

6.1 A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction.

6.2 A solicitor must not seek from another solicitor, or that solicitor's employee, associate, or agent, undertakings in respect of a matter, that would require the co-operation of a third party who is not a party to the undertaking."

Given the very serious nature of a solicitor's undertaking, strict compliance is required.¹ Accordingly if a solicitor has any concerns about a requested undertaking then the solicitor should resist the request and consider alternative solutions to the relevant practical problem that do not involve providing the undertaking.

Client Undertaking

An undertaking given by a solicitor may be personal to the solicitor or may be given on behalf of a client. The distinction is significant.

In the case of a client undertaking, (being an undertaking given by the client or on behalf of the client, not the solicitor) it must be made very clear to the person receiving the undertaking that it is the client's undertaking and not that of the solicitor. In that regard, such an undertaking should only ever be given in writing (on specific instructions from the client), and it should be in clear and unambiguous terms. If drafting a 'client undertaking' a good rule of thumb is use words such as:

"My client, [client name] undertakes that he/she will..."

Personal Undertakings

If a personal undertaking is given by a solicitor it should be given in clear and unambiguous terms and it is important that it has a realistic condition which will trigger the undertaking to come to an end and not continue indefinitely.

Eg: *"I undertake to provide a cheque to 'X' in the sum of 'Y' by 13 June 2014."*

The use of the word 'undertaking' is not necessary for a statement to be construed as an undertaking.²

Undertakings Given By Employees

As a general rule, an undertaking given by an employee of a solicitor is deemed to be a personal undertaking by the solicitor unless the employee, if a solicitor, makes expressly clear that the undertaking is the employee solicitor's personal undertaking and not that of the employer. For this reason, many law firms will only allow undertakings to be given by a partner of the firm.

¹ *Legal Services Commissioner v Sapountzis (Legal Practice)* (2010) VCAT 1124

² *Legal Services Commissioner v Kaine (Legal Practice)* [2013] VCAT 1077 (28 June 2013)

An undertaking given by a solicitor to a Court is usually regarded as a personal undertaking of that solicitor which also binds that solicitor's employer or firm unless expressed to be limited to that solicitor personally.

An undertaking given by one partner in a law firm will bind all partners in the firm.³ It would be wise for law firms to have written policies in place dealing with the giving of undertakings and to keep a central record of all undertakings given as well as a record on the individual file.

Third Party Co-operation With An Undertaking

The Conduct Rules provide that a solicitor must not seek from another solicitor (or that solicitor's employee or agent) undertakings in respect of a matter that would require the co-operation of a third party who is not a party to the undertaking.⁴

There was previously a prohibition on a solicitor giving an undertaking where compliance with it requires the co-operation of a third party who is not a party to the undertaking and whose cooperation cannot be guaranteed by the solicitor. This is no longer a rule, but for obvious practical reasons it should be observed.

Eg: If the solicitor attends a settlement and a withdrawal of caveat is missing, the solicitor should not undertake to provide the missing document until the solicitor has obtained it. It may be that the client will fail to provide the solicitor with the document or instructions regarding the document and the solicitor will then be in breach of the undertaking. If, on the other hand, the missing document is in the solicitor's possession and control back at the office, then the solicitor would be able to give such an undertaking to enable the settlement to proceed.

Subsequent Client Instructions Which Are Inconsistent With Your Personal Undertaking

It is good practice for solicitors to obtain client consent to giving undertakings before giving them, as it keeps the client fully informed on their matter and should prevent the client from subsequently giving instructions that are inconsistent with an undertaking.

A solicitor should not give a personal undertaking that a client will do or refrain from doing something,

as it can result in a solicitor breaching an undertaking if the client changes their mind or terminates the retainer. For example, it would be unwise for a solicitor to agree that they will account to a third party for the monies owed by their client, without detailing necessary conditions. Clients may withdraw previous instructions to pay the other person, or the payment of settlement funds owing to the client, such as in a compensation matter, may, in accordance with law, be paid direct to the client and not ever reach the solicitor's trust account.⁵

Holding Monies On Trust

Solicitors should be aware that if the undertaking relates to monies held in a solicitor's trust account, then s.138 the *Legal Profession Uniform Law (Victoria)* imposes particular restrictions on the holding and disbursing of that money. It is important to exercise care when holding monies on trust for two or more parties. The conditions upon which the monies shall be released need to be detailed, clear and unambiguous.⁶

How can we help you?

These are guidelines only and do not have the force of law. The information is intended to be a general guide only and is not intended to constitute professional or legal advice and you should rely on your own inquiries and assessment.

The Law Institute of Victoria expressly disclaims any and all liability for any loss or damage arising from reliance upon any information in this document.

A practitioner must comply with the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* and the *Legal Profession Uniform Law (Victoria)* and any other applicable rules or legislation.

To discuss concerns about undertakings, contact the Law Institute of Victoria's Ethics Department on 9607 9336.

Approved by the President of the Law Institute of Victoria on 12 October 2022, under the Instrument of Delegation authorised by a resolution of the Council passed on 19 June 2019.

³ 'Lawyers' Professional Responsibility' Gino Dal Pont, 5th Edition, paragraph 22.75

⁴ Rule 6.2 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015.

⁵ *LSC v Simon* [2014] VCAT 1179

⁶ Refer to the LIV 'Releasing Money from Trust Guideline'