

Undertakings are an essential part of the practice of law. They provide the practical means by which many transactions are carried out. Without them, in all fields of the law, the business efficacy that is a part of what lawyers do would be seriously affected. An undertaking is a promise from a lawyer to another that must be kept.

Legal life without undertakings would be unthinkable. Practice would be extremely difficult. How would a real estate lawyer repay a mortgage for her vendor before she gets the proceeds of sale? Without undertakings, real estate lawyers would need to meet face to face to exchange documents! How would a lawyer in another city be able to send a release signed by her client, to be held by the opposing counsel, until the first lawyer receives the settlement monies?

In a Formal Hearing Panel decision, the Discipline Committee of the Nova Scotia Barristers' Society said: "*Lawyers in Nova Scotia have traditionally been able to rely on the word and undertakings of fellow solicitors in many instances where otherwise more rigid formalities might be required.... Many aspects of the Nova Scotia Bar would screech to a halt if lawyers were unable to rely upon absolutely clear and unequivocal undertakings.*"<sup>1</sup> Similarly, a member who failed to honour a written undertaking to a fellow solicitor was said to have committed an offence which went: "*to the foundation of practicing law.*"<sup>2</sup>

Because undertakings are such an integral part of the practice of law, a fair amount of space is devoted to this topic in Chapter 13, of the *Legal Ethics & Professional Conduct Handbook* (the "Handbook"), with which all lawyers should be well versed.

No matter how excellent your relationship with the other lawyer is, if you are giving an undertaking, you have a duty to set out the undertaking *in writing and in unambiguous terms*<sup>3</sup>. A verbal undertaking will bind you, as will an implied undertaking, but either of these can expose you to real problems, a claim or a complaint to the Society if not followed up by a written confirmation as to its scope. You have a duty to fulfill an undertaking once given<sup>4</sup>. Never close a file until you have fulfilled all undertakings given.

I still recall a lawyer (now disbarred for other reasons) who, when asked by me for his undertaking on a certain matter in a real estate transaction, proceeded to type the undertaking on his computer, print it off and sign it. He then handed it to me without keeping a copy. Only when I insisted did he take a photocopy for his file.

A trust condition is a form of undertaking. A lawyer has a duty to scrupulously honour a trust condition once accepted.<sup>5</sup> Commentary 13.9 also provides: "*If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, he or she has a duty to immediately return the subject of the trust condition to the person imposing the trust condition unless the terms can be forthwith amended in writing on a mutually agreeable basis.*"

I once received a panic call from a lawyer acting for the purchaser of a home. He sent the purchase monies to the vendor's lawyer in escrow on the closing date, to be held pending delivery of the deed. There was a dispute about a certain matter, but the purchaser's lawyer had determined, since his clients wanted the home, and an adjustment had been refused, he should rely on the original contract of sale and close the purchase, and try to collect for the deficiency later. After the vendor's lawyer accepted the funds with their trust condition to hold the same pending delivery of the deed, he refused to deliver the deed unless the purchaser, then and there, accepted an adjustment to the price as a full and final settlement of the dispute. In my view, once the vendor's lawyer knew his client would not accept the trust conditions under which the

purchase funds were sent to him, the funds should have been returned by the vendor's lawyer the purchaser's lawyer right away. By the way, the transaction did close, as the vendor's lawyer did finally back down and deliver the deed as required by the original agreement of sale.

A lawyer must *never* give or request an undertaking that she or he cannot fulfill.<sup>6</sup> If you cannot produce the goods as promised or force someone else to do it, do not promise! Privately held mortgages fall in this category. With a mortgage held by a bank, it is easy to get a payout statement from a bank, and once the mortgage loan is repaid, to get a release of the mortgage. This may not be the case when an individual holds the mortgage. A dispute may develop over the amount and the mortgagee then refuses to sign the release. If this transaction had closed on the undertaking of one lawyer to the other provide and record the release of the mortgage, the vendor's lawyer has big problems. It has always been my practice, in this situation, to have the mortgagee on a private mortgage sign release of mortgage prior to the closing and deliver me the release in escrow, and also to give me written direction as to the amount to collect. Only then will I undertake to the other lawyer that I will produce a release of mortgage.

Note that Commentary 13.13 provides that the rules about undertakings apply not only to lawyers, but also to lay persons. Giving an undertaking to a bank is a good example. Any lawyer practicing real property has received a request from a bank to repay interim funding from mortgage draws. Simply put, your client gives you an irrevocable direction to repay her bank a certain amount of money from mortgage draws. You then give the bank an undertaking to do so. This allows the bank to advance monies when needed, even if an inspection is not done. Sounds simple? It is, until the mortgage draw arrives on a busy Friday, two months later. The builder wants his money and a quick subsearch is done and the cheque is written to your client to give to the builder (who often comes to your office with your client). Oops! What about the bank? You will be liable to the bank if you forget. I always mark "*undertaking*" in red on the the outside of the file, with a copy of the undertaking stapled right inside the file, to remind me. Make sure you take steps to know that the undertaking is there to be met.

The Discipline Committee of the Society has always viewed undertakings as serious business. A review of the decisions of the informal and formal hearings as set out in the "Notes" (Section 15) of Chapter 13 of the Handbook reveal a number of cases in which lawyers have been disciplined for failing to honour undertakings. A request to Society staff for research on this topic produced nearly 20 pages of cases reported in the *Discipline Digest* and *Professional Responsibility Today*. The situations range from failing to honour undertakings given to other lawyers, to surveyors, and to the Court. A couple of members even gave undertakings to the Society which they failed to honour. Several lawyers were disciplined for failure to return or hold a cheque when they or their clients did not agree with the conditions under which it was given. For example, documents are delivered by lawyer A to lawyer B, with a letter requiring the purchase monies to be paid by a certain date or the documents are to be returned to lawyer A (Remember Commentary 13.9 mentioned above). Lawyer B holds the documents until a date after that named by lawyer A and does not return the documents as requested. Later, after the date named by lawyer A, lawyer B proceeds to close the transaction.

A lawyer who does not intend to accept personal responsibility has a duty to make that intention clear in the undertaking. 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.<sup>7</sup>

In summary, be clear, put it in writing, and deliver on your undertakings. Don't let undertakings bury you in problems!<sup>8</sup>

## Notes

<sup>1</sup> (*RE R.G.C. , NSBS - D23, November 6, 1987 at 23*)

<sup>2</sup> 1988, NSBS case re CEB

<sup>3</sup> Commentary 13.8, Handbook

<sup>4</sup> Commentary 13.6(b), Handbook

<sup>5</sup> Commentary 13.6(c), Handbook

<sup>6</sup> Commentary 13.6(a), Handbook

<sup>7</sup> Commentary 13.8, Handbook

<sup>8</sup> I commend to you a very short article on this topic written by Robert S. Huestis, Q.C., "Elementary Ethics" 2000 N.S.L.N. 25:87, available online via the Society's web page.