



NOVA SCOTIA

NOV 9 1988

Law News

Nova Scotia Barristers' Society

Volume 15, No. 2

Pages 17 to 28

October 1988



Elementary Ethics

Undertakings

I can remember from the earliest days of my call to the Bar being proud of my entry into a world where "a man's word was his bond". (Somehow in those days a woman's word never seemed to matter much.) Anyway, I sprayed undertakings around whenever I could, and as promised they were accepted without question and without being in writing, and they still are. Had I looked it up, I would have found that an undertaking is enforced in the Supreme Court or the court in which it was given, as a matter of keeping its officers honest and not as a matter of contract. Thus the Statutes of Frauds or Limitations provide no defence and a principal is liable for the loose lips of his clerk, and a partner for his associates and other partners.

Mind you, there is a little more to the concept than that. The subject matter must relate to the affairs of a client as opposed to personal things. An undertaking should not be given if it is beyond the power of the lawyer giving it to do or to enforce. This is an agreement made by the lawyer and not the client, and therefore one cannot give nor can one accept an undertaking that a client will do a certain thing, because the client may not agree and may then hire on a new lawyer or just do nothing. As long as the lawyer personally can force the compliance of others the promise is secure, and most undertakings pass this test.

Undertakings should be simple and readily understood by all concerned. They are offered after considering the effect that the unexpected such as death, bankruptcy or the like may have on one's ability to deliver on the promise. Every undertaking should be followed up by writing, because everyone's memory of the detail of the promise changes with time and with the circumstances.

While the undertaking might be considered more binding if delivered in a booming voice from the well of the court, it can as easily return to haunt you if given on a street corner. It requires no special words. It is often implied. If someone delivers money to you pursuant to an agreement of purchase and sale, it goes without saying you will deliver up the deed before using the money.

If we had to draft a client contract instead of giving a simple undertaking every time, life would become measurably more difficult. Most lawyers therefore carefully protect their reputation for performance. Apart from judicial sanction, the element that distinguishes an everyday promise from an undertaking is the expectation of performance. If a neighbor borrows my lawnmower and remembers to return it promptly, I will lend him my automobile. However, I am prepared right now to lend you my automobile or my client's, on the strength of your undertaking, without first checking you out. After all, I do the equivalent of that every day, and others do the same for me.

As a matter of fact I could use a Mercedes next Saturday night.

— Robert S. Huestis

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