THE OFFICE OF THE
LEGAL SERVICES
COMMISSIONER

'SOLICITORS' UNDERTAKINGS – DANGERS & SAFEGUARDS'

11 March 2011
Television Education Network

The use of undertakings is common amongst legal practitioners. Undertakings are used for example, to facilitate the transfer of files from one practitioner to another or where third party service providers are engaged on behalf of a client. Undertakings are also used by legal practitioners before the Courts. Although a useful mechanism to ensure action or inaction, undertakings can be subject to misuse. Failure to comply with an undertaking can lead to an array of consequences. Breach of an undertaking or failure to fulfill an undertaking to a court can constitute contempt of court. Breach of an undertaking or failure to fulfill an undertaking can constitute a breach of contract. Lastly, breach of an undertaking or failure to fulfill an undertaking can amount to unsatisfactory professional conduct or professional misconduct.

TYPES OF UNDERTAKINGS

An undertaking is a promise made by a solicitor upon which the recipient is entitled to rely and depending on the circumstances, which binds the solicitor or solicitor's client or both. Undertakings are obligations that lawyers pledge themselves or their clients to honor.

Undertakings arise in almost every area of the practice of law. In general, there are two types of undertakings:

(1) A personal undertaking
(2) A client undertaking

In the first type of undertaking the granting lawyer is personally liable to fulfill this undertaking. Legal practitioner's who give a personal undertaking should only do so where the means of fulfilling the undertaking are directly within the legal practitioner's control. In stating such, it would thus be unwise for a legal practitioner to give a personal undertaking to do something that is partly dependent upon a third parties acts or omissions.

In the second type of undertaking, the client undertaking, the undertaking can only be fulfilled by the lawyer's client. In this type, the legal practitioner may or may not accept personal liability. In the case where the legal practitioner does not accept personal liability, it is the lawyer's duty to take all steps to ensure that the client honors the undertaking. Thus, even the most carefully worded undertaking, designed by the solicitor to avoid personal responsibility, does not necessarily relieve him/her of the obligation to take steps to see that it is fulfilled.

Undertakings can be given to a variety of persons. Undertakings to fellow practitioners are probably the most common type of undertakings that occur. Undertakings can also be given to the Court and regulators of the legal profession.

THE PRACTICE RULES

In New South Wales there are two specific conduct rules in relation to undertakings. Rule 26 of the *Revised Professional Conduct and Practice Rules 1995 (Solicitors' Rules)* provides that a practitioner who communicates with another party in the conduct of legal practice in terms which expressly, or by implication constitute an undertaking on the part of the practitioner "must honor the undertaking so given strictly in accordance with its terms, and within the time promised, or, if no precise time limit is specified, within a reasonable time".

This conduct rule relates to undertakings between fellow practitioners. Rule 33 of the *Solicitors' Rules* further provides that "a legal practitioner who in the course of providing legal services to a client, and for the purposes of the client's business, communicates with a third party orally, or in writing, in terms which, expressly, or by necessary implication, constitute an undertaking on the part of the practitioner to ensure the performance of some action or obligation, in circumstances where it might reasonably be expected that the third party will rely on it, must honor the undertaking so given strictly in accordance with its terms, and within the time promised (if any) or within a reasonable time". This conduct rule is different to Rule 26 in that it relates to undertakings between legal practitioners and third parties.

The NSW Conduct Rules are similar to that of the Model Rules of Professional Conduct drafted by the Law Council of Australia. Rule 27 of the Model Rules provides as follows:

> **Undertakings**
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> 27.1 A practitioner who, in the course of providing legal services to a client, and for the purposes of the client's business, communicates with a third party orally, or in writing, in terms which, expressly, or by necessary implication, constitute an undertaking on the part of the practitioner to ensure the performance of some action or obligation, in circumstances where it might reasonably be expected that the third party will rely on it, must honor the undertaking so given strictly in accordance with its terms, and within the time promised (if any) or within a reasonable time.

BREACHING AN UNDERTAKING

The breach of an undertaking given by a legal practitioner who in the course of his/her practice is regarded by the courts, regulators and the profession as a very serious matter. This is because the concept of an undertaking represents the essence of professionalism and fitness to practice. As Wylie J in *Countrywide Banking Corporation Ltd v Kingston [1990] 1 NZLR 629* commented:

> "...to excuse the defendant from performance would...seriously undermine the justifiable claims of the legal profession to standards of integrity and honourable conduct in which both the profession and the public have constantly to rely." (at 640.)

Similar sentiments were expressed by the Administrative Decisions Tribunal in *The Law Society of New South Wales v Malouf [2007] NSWADT 54*. The Tribunal stated:

> "The mere fact that an undertaking entered into by a practitioner offends public policy, or is for any reason unenforceable, will not, without more, excuse the practitioner who fails to comply with his or her undertaking. The obligation of a practitioner, who enters into an undertaking, is to ensure a full understanding of the obligations imposed by that undertaking. A practitioner called upon to give an undertaking in terms that are too wide, offend public policy, or are objectionable for any other reason should decline to give such an undertaking, and bring to the attention of the practitioner seeking it, the proper purpose of undertakings between practitioners....Practitioners should be aware of the grave obligations consequent upon the giving of undertakings, and the risk to professional reputation of those who give them lightly or thoughtlessly."

Liability for breach of an undertaking by a legal practitioner can arise three ways:

(1) Proceedings in the ordinary jurisdiction of the court to enforce obligations that legal practitioners have incurred under contract law;
(2) Proceedings in a summary jurisdiction in which the court can compel compliance by lawyers with undertakings or the payment of compensation; and
(3) Disciplinary proceedings before the Administrative Decisions Tribunal or the Supreme Court in its inherent disciplinary jurisdiction.

(1) Enforceability in the court's ordinary jurisdiction - Contract Law

An undertaking given to a third party, or to another legal practitioner may be enforced in the court by way of a civil claim for breach of contract if the requirements of a contract are met. The principle that forms the liability lies in agency law, that is, an agent (the legal practitioner) may be liable under a principal's (client's) contract if s/he assumes personal liability under it.

Courts will closely scrutinize the wording of an undertaking to determine whether the undertaking can be attributed personally to a legal practitioner. The use of the word "undertaking" is not considered essential. Therefore, a legal practitioner who has accepted an obligation in his capacity as a legal practitioner may have given an undertaking without expressly stating so. In order to determine whether or not a legal practitioner's promise amounts to an undertaking the court will look at the scope of the promise, whether or not it is personal and the language of the promise.

Although the courts will closely scrutinize an undertaking, a finding that the undertaking is personal to the legal practitioner is rare. Courts have appeared to take a conservative approach to such a finding. In *Russo v Dupree (1989) 217 ALR 54* for example, the Court was asked to determine whether an undertaking given by a legal practitioner to protect the costs and disbursements of another legal practitioner from whom the legal practitioner had taken over the conduct of a personal injury matter, could be construed as a personal undertaking. Bryson J, looking at the terms of the undertaking and the language used determined that whilst the undertaking was given

on behalf of another legal practitioner, the undertaking did not impose a personal obligation that the costs would be paid out of the legal practitioner's own pocket if they had to be.

Legal practitioners should ensure that undertakings are expressed in clear, precise and unambiguous terms. A legal practitioner who gives an undertaking on behalf of a client should make it clear that s/he is not personally liable for the performance of the undertaking. If a legal practitioner proposes to give a personal undertaking, s/he should only do so if fulfilling the undertaking is in his/her control. A legal practitioner should not therefore give an undertaking to file documents in court if the legal practitioner cannot do so. Lastly, a legal practitioner should take great care in accepting undertakings that lack clarity.

(2) Enforceability in the courts summary jurisdiction – Compelling Compliance or Compensation

An undertaking may also be enforced by the court under the court's summary jurisdiction. The court can enforce the undertaking in this jurisdiction in one of two ways – by way of an order that the undertaking is to be fulfilled or by an order compensating the person who suffers a loss as a result of its non-fulfillment. A refusal to comply with an order from the court that the undertaking is to be fulfilled may place the legal practitioner in contempt of court. Where the court finds a legal practitioner in contempt of court, the court can order that the legal practitioner be suspended from practice.

The jurisdiction of the court is discretionary. The Court will thus not exercise its power as a matter of course but will determine each matter based on its facts. The court also has the power to release a legal practitioner from an undertaking if the court determines that the legal practitioner has been disadvantaged. See for example, Law Society of New South Wales v Waterhouse [2002] NSW ADT 204.

(3) Disciplinary proceedings

In the disciplinary regime, a legal practitioner's failure to honor an undertaking can amount to either unsatisfactory professional conduct or professional misconduct. A

finding of professional misconduct is most common in circumstances where the failure to honor an undertaking was deliberate and no reasonable explanation as to the failure was given. On the other hand a finding of unsatisfactory professional conduct will commonly occur if the failure to honor the undertaking was an isolated incident and a reasonable excuse was provided.

Courts have taken a particularly strong stance against legal practitioners and undertakings. In *Law Society of New South Wales v Waterhouse [2002] NSWADT 204*, the undertaking breached by the respondent solicitor was to deliver a certificate of title to another solicitor. The Tribunal noted some mitigating circumstances relating to the undertaking itself, in view of which it made a finding of unsatisfactory professional misconduct and imposed a fine of $2,000. In *Law Society of New South Wales v Hinde [2005] NSWADT 199*, the respondent solicitor failed over a period of three years to comply with an undertaking given at the settlement of a sale of land to pay the commission owing to the estate agent involved in the sale. The Tribunal made a finding of professional misconduct and imposed as penalty both a reprimand and a fine of $3,000.

In *Legal Services Commissioner v Piper [2006] NSWADT 12*, the respondent solicitor gave an undertaking to the OLSC to give 'highest priority' to responding to correspondence from the Commissioner. He in fact delayed over eleven months, despite receiving five reminder letters, to reply as required to a particular letter. Having made a finding of unsatisfactory professional conduct, the Tribunal ordered that he be reprimanded and that he pay a fine of $1,000. The Tribunal noted at his apparent failure to acknowledge at any time that he had been in breach of his undertaking. It also referred, at to the circumstances in which he had previously been reprimanded for failure to comply with an undertaking to send a file to a solicitor.

In *Legal Services Commissioner v McCarthy*, unreported, Administrative Decisions Tribunal, 2 June 2008, the Tribunal dealt *ex parte* with a breach of an undertaking by solicitor to reply within 28 days to correspondence from the Legal Services Commissioner. There was a relatively brief delay before he finally replied. In previous proceedings, he had consented to a finding of professional misconduct, a reprimand and a fine of $2,000, on account of having failed to comply with a notice

under section 660 of the Act (requiring information to be furnished to the Commissioner) and with an earlier undertaking to the Commissioner. The Tribunal again found professional misconduct, and imposed a reprimand and a fine of $2,500.

CONCLUSION

The legal profession in Australia is about to undergo unforseen changes that will have significant effects on the way we practice law. Some time in the next 24 months, we will find ourselves practicing under a different set of Rules and Regulations. This new legislation will see the introduction of outcomes-based regulation with a specific focus on professional responsibilities. Under the draft National Laws, as they presently stand, all legal practitioners will have enhanced professional responsibilities. These enhanced professional responsibilities are found in the definition of "professional obligations" in Part 1.2 of the National Laws. According to the National Laws "professional obligations" include:

(a) Duties to the Supreme Courts; and
(b) Obligations in connection with conflicts of interest; and
(c) Duties to clients, including disclosure; and
(d) Ethical standards required to be observed by the practitioner;

The enhancement is found in (d) which specifically refers to "ethical standards."

In addition to this new legislation, we will also be subject to a set of new conduct rules. In relation to undertakings the proposed conduct rules, formally known as the *Australian Solicitors Rules 2010*, provides as follows:

"Undertakings

6.1 A solicitor who has given an undertaking to another solicitor, 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 party to the undertaking.

6.3 A solicitor who has given an undertaking to a third party in the course of providing legal services to a client and for the purposes of the client's business, must honour the undertaking, strictly in accordance with its terms, and within the time promised (if any) or

within reasonable time, unless released by the recipient or by a court of competent jurisdiction."

These new conduct rules, drafted by the Law Council of Australia reflect much of the current conduct rules to which we are now subject but like the draft National Law, emphasize the ethical obligations of legal practitioners.

The emphasis on ethics is premised on the recognition that as legal practitioners, we have a duty to ensure that we do not engage in conduct that diminishes public confidence in the administration of justice or is prejudicial to the administration of justice. At all times we need to act in accordance with the highest standards of ethical and practice conduct. We need to understand that in addition to being legal practitioners we too are ordinary citizens in society and whilst we do owe a fidelity to our client, we also owe a duty to society to be respectable and moral persons.

Legal practitioners must carefully consider when and how an undertaking is used. In doing so legal practitioners should note the relevant Practice Rules as set out above that relate to undertakings and the changes that are about to take place. Most importantly however legal practitioners should be aware of the underlying philosophy of an undertaking. As stated above, undertakings are integral to professionalism and fitness to practice. A failure to honor an undertaking diminishes our ability to hold ourselves out to be a noble and virtuous profession whose sole purpose is to protect the public from the injustices of the State.