

Guidance Note

Undertakings



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Costs Lawyer Standards Board

CLSB


What is an undertaking?

1. An undertaking is a commitment by a Costs Lawyer to do something or not to do something. More specifically, an undertaking is:
 - a statement given orally or in writing (even though it may not include the word “undertake” or “undertaking”);
 - to someone who reasonably places reliance upon it;
 - that a Costs Lawyer or a third party will do something, cause something to be done or refrain from doing something.

Do I have to honour an undertaking?

2. Yes. Principle 1 of the [Code of Conduct](#) requires that you act with honesty and integrity and maintain your independence. Failure to comply with an undertaking may be regarded as a failure to act with integrity and could lead to [disciplinary action](#) being taken against you by the CLSB.
3. You must perform all undertakings given by you within any agreed timescale, but if no timescale has been agreed then you must perform the undertaking within a reasonable amount of time.

Why do I have to honour an undertaking?

4. There is an expectation that professional people will be held to a higher standard than the standard applying to others outside the profession. This is established in case law (see, for example, *Williams v Solicitors Regulation Authority* [2017] EWHC 1478 (Admin), *Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin)).
5. The leading authorities concern solicitors, but the same overarching principles will be relevant to other parts of the legal profession, including Costs Lawyers.

Are all promises undertakings?

6. On its face, a promise by a Costs Lawyer given in their professional life – and in some circumstances, in their private life – could amount to an undertaking. You should exercise caution before making promises that you might not be able to honour.
7. In *Harcus Sinclair v Your Lawyers* [2021] UKSC 3, the Supreme Court set out a twofold test for determining whether a promise is an undertaking. Applying this test to Costs Lawyers, it will be relevant to ask:
 - Is the subject matter of the undertaking, and what the undertaking requires the Costs Lawyer to do (or not do), something that Costs Lawyers regularly carry out (or refrain from carrying out) as part of their ordinary professional practice?
 - Does the reason for giving the undertaking, and the cause or matter to which it relates, involve the sort of work that Costs Lawyers regularly carry out as part of their ordinary professional practice?

If both questions are answered affirmatively, then the promise is likely to be a Costs Lawyer's undertaking.

8. In relation to promises made in your private life, the court observed in the case of *Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin) that the relevant principles (in relation to solicitors' conduct):

“may reach into private life only when conduct that is part of a person's private life realistically touches on his/her practise of the profession ... or the standing of the profession ... Any such conduct must be qualitatively relevant. It must, in a way that is demonstrably relevant, engage one or other of the standards of behaviour which are set out in or necessarily implicit in [the Code of Conduct].”

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9. Given the above, generally speaking the personal dealings of a Costs Lawyer are likely to fall outside of the definition of an undertaking, as are any practice-related (as opposed to client-related) activities.

What if I cannot honour an undertaking I have already made?

10. In some cases, it might become impossible for you to honour an undertaking. Similarly, honouring an undertaking might require breaching another one of your professional obligations, such as Principle 7 of the Code of Conduct which requires you to keep the affairs of your clients confidential.
11. It is imperative that you take care not to give undertakings that you might not be able to perform. If it is likely or even possible for circumstances to change such that you could be prevented from doing (or not doing) something as promised, then you should refrain from making the promise, or should qualify it sufficiently to ensure the recipient understands the scope of your undertaking.
12. If you will need your client's instructions in order to perform an undertaking, then you must secure those instructions before the undertaking is given. You should explain to the client the consequences of you giving an undertaking, including that the client will not be able to revise or revoke their instructions on that issue later on, since you will be bound to fulfil the undertaking.
13. Our Guidance Note on [Client confidentiality and acting with integrity](#) might be helpful in circumstances where your duties to your client and your duty to honour an undertaking conflict with one another.

Dealing with ethical issues relating to undertakings

14. Below are three examples of situations relating to undertakings in which you would need to balance your professional duties in order to comply with the Code of Conduct. These examples are not exhaustive or comprehensive, and you must decide how to meet your professional obligations on a case by case basis. The examples aim to guide you and help you consider relevant factors.

Example 1

Scenario: You act for a lay client who stopped instructing the firm of solicitors she had previously engaged. The firm of solicitors agrees to provide you with all the information necessary to prepare a Bill of Costs, but seeks an undertaking that the firm will be provided with the Final Costs Certificate reflecting the work they had undertaken on behalf of the lay client. The Costs Lawyer gives that undertaking. When the client becomes aware of this, she refuses to authorise release of the Final Costs Certificate to the solicitors.

Analysis: You must comply with your undertaking to supply the Final Costs Certificate to the solicitors. Although, ordinarily, a Costs Lawyer must act on a client's instructions, that duty is superseded by (i) the obligation to fulfil a personal undertaking/the duty of integrity, and (ii) the requirement not to act in a way that is likely to diminish the trust the public places in the Costs Lawyer or the profession of Costs Lawyers.

Example 2

Scenario: In order to prepare a Bill of Costs for a firm of solicitors, Law LLP, you need to access further documents that are in the possession of a solicitor who no longer works with, or for, Law LLP. Before the solicitor will agree to provide the documents, he requires an undertaking from you that upon completion of the Bill of Costs the documents will be returned to him. You promise to return the documents to the solicitor. However, before the documents are returned, Law LLP asserts that it is the lawful owner of the documents and tells you that you must not return them to the solicitor.

Analysis: In this scenario, you have given an undertaking that you must perform, and therefore you are obliged to return the documents to the solicitor. Your duty to Law LLP is overridden by your duty to act with integrity and perform your undertaking.

This situation could have been avoided if the Costs Lawyer had, when the undertaking was requested, sought the instructions of the client who could at that stage have taken action against the solicitor as it thought appropriate, avoiding the Costs Lawyer being placed in a situation of conflict between competing regulatory obligations. The failure to obtain instructions before giving the undertaking may result in a complaint against the Costs Lawyer.

Example 3

Scenario: You are employed by a firm of solicitors, which is regulated by the Solicitors Regulation Authority. As such, it can accept clients' money on account of fees. You are contacted by a client, for whom you are the firm's relationship manager. The client asserts that an unnamed partner in the firm from another department undertook to return his deposit of £10,000 within seven days because of the firm's inefficient handling of his

business. He states that the period has now elapsed and, as relationship manager, you must comply with the firm's undertaking and arrange for his deposit to be returned immediately.

Analysis: Only individuals give undertakings. If you did not give the undertaking yourself, you do not have to comply with it from a regulatory perspective. You should take appropriate steps to have the matter resolved in the interests of the client, for example by treating it as a complaint and following your firm's complaints procedure, or escalating the matter to a senior partner, as appropriate.

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