The Law Society of Manitoba

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TRUST CONDITIONS AND UNDERTAKINGS

Practice Management

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A. TRUST CONDITIONS AND UNDERTAKINGS*

1. Introduction

In *Legal Ethics* (Toronto: Cartwright & Sons, 1957), Mark Orkin comments on lawyers' undertakings:

> *The custom of solicitors carrying on business by means of undertakings and understandings is strongly deprecated and it has been said that if misunderstandings result practitioners may be left to suffer the consequences. "It is much better," said Allan, C.J. in Knox v. Gregory, "that they should carry on their business according to the established rules of practice than by understandings which generally lead to disputes."*

It is nevertheless common for lawyers to impose and accept trust conditions and give undertakings as an integral part of their practices.

2. Definitions of Undertakings and Trust Conditions

Trust conditions accepted and undertakings given (terms used here interchangeably) are commitments made by a lawyer which are intended to facilitate the progress of a matter without unnecessary delay. Elevated by the courts and by the codes of professional conduct to positions above those of simple promises, they are matters of utmost good faith (uberrimae fidei) and will be stringently enforced.

> If the lawyer's undertaking is not fulfilled it will affect and possibly cause damage to the client, the position of the other lawyer and/or the other lawyer's client.

> *An undertaking is the promise given by a solicitor through a written statement, a verbal communication or inferred from his acts, or any combination thereof, in reliance on which promise the recipient of the undertakings gives up to the solicitor, or to another party, a document or right, or performs an act which that recipient would not have done were it not for the receipt of the promise from that solicitor. (Beverley G. Smith, Professional Conduct for Lawyers and Judges (Fredericton: Maritime Law Books, 1998))*

> *To be enforceable by the court the undertaking must be a personal undertaking, given by the solicitor professionally, i.e., as a solicitor, it must be clear in its terms, the whole of the undertaking must be before the court, and the undertaking must be one which is capable of being performed ab initio. (Cordery on Solicitors, 9th ed., looseleaf (London: Butterworths, 1999)*

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* This article is an edited version of material prepared by Herb Peters.

In *Thomas Gold Pettingill LLP v. Ani-Wall Concrete Forming Inc. and Cassels Brock & Blackwell LLP (“Cassels Brock”),* 2012 ONSC 2182 (CanLII) the court discusses undertakings:

> ***45*** *Lawyer's undertakings are of two types. The first type of undertaking is an undertaking given by the lawyer acting as an agent of his or her client; the lawyer makes it clear that the principal, i.e. the client, is the party responsible for the satisfaction of the undertaking. This type of undertaking does not expose the lawyer to liability: Re Jost and Solicitors (1978), 7 C.P.C. 303 (N.S.S.C.); Wakefield v. Duckworth & Co., [1915] 1 K.B. 218. The second type of undertaking, which does expose the lawyer to liability, is the personal undertaking of the lawyer acting in his or her professional capacity as a lawyer.*

By giving your professional undertaking, you accept personal liability for its fulfillment. Your undertaking must be something that <u>you</u> are capable of performing.

A client’s undertaking should be communicated <u>directly by the client</u> in writing to the other person. If you communicate the client’s undertaking there is a risk that the person accepting the undertaking will rely on you to personally fulfil it. If you must do so, be clear. Unless you expressly state in writing that the undertaking is your client’s and is not your professional undertaking, the person to whom the undertaking is given is entitled to expect that you will honour it personally. The use of such words as “on behalf of my client” alone does not relieve you of personal responsibility.

Similarly, be wary of accepting an undertaking from another lawyer that purports to be made on behalf of their client.

If a lawyer undertakes only to use “best efforts” to fulfill a promise, they are trying to avoid being held personally responsible for compliance. Be clear about what will be done, and who will take personal liability.

You must fulfill every undertaking you give and every trust condition you accept. Insist on clarifying exactly what is being promised. Do not accept a trust condition that you cannot personally fulfill. Once you have done so, you cannot change it unilaterally. Only the person who imposed the trust condition can amend it.

You cannot be compelled to accept a trust condition or give an undertaking. You cannot accept the items sent in trust subject to some cross-condition that you prefer. If you do not want to accept the condition, refuse to accept or ask for an amendment. If you cannot work out an agreeable change, you must not use any documents or items which are subject to the trust condition and you should return them immediately.

Once you have accepted a trust condition or given your undertaking, you are bound by it even in the face of subsequent contrary instructions by your client. The court will enforce the undertaking against you as an officer of the court.

In *Witten, Vogel, Binder & Lyons v. Leung*, 1983 CanLII 1028 (ABKB), the court explored the enforcement of lawyers' undertakings by the courts. In *Witten* the defendant firm of lawyers had accepted trust conditions that they would obtain the execution of documents by their client and return two of the documents and, in the event of their inability to comply within ten days, they would return certain documents unused. Time extensions were granted by the plaintiff law firm. When the last extension expired, they demanded the return of the unused documents. This demand was resisted. One of the defendants stated by affidavit: "I was constrained by my client's instructions and that these instructions might include a direction to send the documents to a third party".

The excuse that the client had instructed otherwise was not accepted. MacDonald J. ordered the immediate return of the documents and said:

> *In the present case the receiving solicitor, pinioned, as he thought, between competing claims for the documents by his own client and the forwarding solicitors, asked an official of the Law Society for advice the day before this action was commenced. The advice received was that his firm should launch a motion for interpleader relief....*
>
> *The advice obtained from the Law Society was wrong.... (at p. 424)*
>
> *The obligation of the recipient solicitors to respect and observe trust conditions upon which documents are received from other solicitors cannot be shackled by instructions given to the recipient solicitors by their client. (at p. 421)*
>
> *The court's enforcement of the trust condition was not based on the weighing of the merits of the competing clients' cases but rather was a conclusion based on the court enforcing the obligations of one of its officers who accepted the obligation as a solicitor and officer of the court.*

Your professional undertaking should not be given lightly because you cannot be released from it or change it except by agreement of the person who imposed it. Your client's change in instructions is ineffective to change the condition accepted and the court can order you to fulfill it.

3. Lawyers' Undertakings and the Code of Conduct

The *Code of Professional Conduct* sets out the basic rule, amplified by the Commentary:

> ***Undertakings and Trust Conditions***
> ***7.2-11*** *A lawyer must not give an undertaking that cannot be fulfilled and must fulfill every undertaking given and honour every trust condition once accepted.*
>
> ***Commentary***
> ***[1]*** *Undertakings should be written or confirmed in writing and should be absolutely unambiguous in their terms. If a lawyer giving an undertaking does not intend to accept personal responsibility, this should be stated clearly in the undertaking*

itself. 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. The use of such words as "on behalf of my client" or "on behalf of the vendor" does not relieve the lawyer giving the undertaking of personal responsibility.

[2] *Trust conditions should be clear, unambiguous and explicit and should state the time within which the conditions must be met. Trust conditions should be imposed in writing and communicated to the other party at the time the property is delivered. Trust conditions should be accepted in writing and, once accepted, constitute an obligation on the accepting lawyer that the lawyer must honour personally. The lawyer who delivers property without any trust condition cannot retroactively impose trust conditions on the use of that property by the other party.*

[3] *The lawyer should not impose or accept trust conditions that are unreasonable, nor accept trust conditions that cannot be fulfilled personally. When a lawyer accepts property subject to trust conditions, the lawyer must fully comply with such conditions, even if the conditions subsequently appear unreasonable. It is improper for a lawyer to ignore or breach a trust condition he or she has accepted on the basis that the condition is not in accordance with the contractual obligations of the clients. It is also improper to unilaterally impose cross conditions respecting one's compliance with the original trust conditions.*

[4] *If a lawyer is unable or unwilling to honour a trust condition imposed by someone else, the subject of the trust condition should be immediately returned to the person imposing the trust condition, unless its terms can be forthwith amended in writing on a mutually agreeable basis.*

[5] *Trust conditions can be varied with the consent of the person imposing them. Any variation should be confirmed in writing. Clients or others are not entitled to require a variation of trust conditions without the consent of the lawyer who has imposed the conditions and the lawyer who has accepted them.*

[6] *Any trust condition that is accepted is binding upon a lawyer, whether imposed by another lawyer or by a lay person. A lawyer may seek to impose trust conditions upon a non-lawyer, whether an individual or corporation, but great caution should be exercised in so doing since such conditions would be enforceable only through the courts as a matter of contract law and not by reason of the ethical obligations that exist between lawyers.*

[7] *A lawyer should treat money or property that, on a reasonable construction, is subject to trust conditions or an undertaking in accordance with these rules.*

Guard against making promises that are not within your ability to complete. If you must first rely on another person (including a client) to do something, remember that you cannot control the actions of a third party and don't accept the trust condition.

Before you accept a trust condition or give an undertaking be sure that there is no ambiguity, that you can completely control its fulfillment and that there is no risk that you will not be able to comply.

If you want to permit a non-lawyer under your supervision, such as a student or employee, to give or accept undertakings or trust conditions, it is your ethical responsibility to supervise them. If they give undertakings or accept trust conditions, they must make it clear that they are not a lawyer and the fulfillment of the undertakings/trust conditions is your obligation. (Code Rule 6.1-3)

4. Professional Obligations Versus Business Considerations

There are **no circumstances** in which the strictest reading of the Code may be relaxed in favour of other considerations, namely the day-to-day pressures of practice, the demands of clients or other business considerations of the lawyer. Even where there are compelling business considerations (e.g., the cost to the client will increase by waiting for a necessary document and an undertaking or trust condition which cannot be fulfilled *ab initio* will reduce the delay), do not succumb to that pressure.

The strict enforcement of lawyers' undertakings is essential. The trust condition or undertaking you give as a lawyer has to be reliable or an element of risk is inserted that did not previously exist in the transaction. Your reliable undertaking patches over that risk to the client only where it is entirely enforceable against you.

5. Who Bears the Risk?

A lawyer who fails to fulfill an undertaking or trust condition bears personal liability for the failure. The lawyer's undertaking may be enforced even though the circumstances under which it is given might give rise to defences if the undertaking was considered to merely amount to a contract. An undertaking that is given gratuitously, or an undertaking that might otherwise be unenforceable under the law, will still be enforced by the courts.

However, the Court of Appeal in Ontario and the Privy Council in Great Britain have held that in certain circumstances, such as when the lawyer giving the undertaking is known to be unreliable, the risk that they may not fulfill a trust condition might fall on the lawyer who <u>imposed</u> the trust condition without warning their client of the risk. If the risk is foreseeable, a lawyer who imposes trust conditions without their client agreeing to accept that risk will be held negligent and responsible to the client to pay damages.

Polischuk v. Hagarty, 1983 CanLII 3067 (ON SC) was such a case:

> *In this case, the plaintiffs claim damages for breach of contract against the defendant, whom they retained as their solicitor, to close a transaction of purchase and sale, on their behalf as purchasers. On the day of closing, the defendant solicitor paid the balance due to the vendor and accepted an undertaking by the vendor's solicitor that he would obtain and register a discharge of a mortgage on the lands, as well as all other existing encumbrances. The vendor's solicitor failed to carry out his undertaking or to account for the funds. The mortgage was not discharged, the plaintiffs thereby suffered damages which they seek to recover from their solicitor, the defendant.*

The vendor's lawyer died and the vendors left the country.

Henry J. found that although it was common practice for real estate transactions to be closed in exactly the manner that the lawyer Hagarty closed this transaction, there was risk involved when he accepted the vendor's lawyer's undertaking to obtain a discharge of the mortgage rather than insisting that the lawyer confirm possession of a signed discharge. Hagarty knew the day before closing that the discharge would not be available but he did not tell his clients.

The vendor's lawyer failed to honour his undertaking, and Hagarty the purchasers' lawyer was found liable for his clients' resulting damages. The trial court concluded that Hagarty was liable either because he failed to close the transaction according to its terms or because he had a responsibility to competently explain the risks to the clients and allow them to make a decision.

The Court of Appeal found that there was a foreseeable risk in the procedure adopted by Hagarty in paying all the money to the vendor's lawyer in trust that he obtain the discharge rather than provide the discharge in trade for the money. This risk could have been avoided by choosing a different procedure at closing. Hagarty could have closed the transaction subject to a hold-back of the funds required to discharge the mortgage or drawn a cheque payable to the mortgagee instead of the vendor's lawyer, either of which alternatives would have permitted the closing of the transaction without risk to the client. The purchasers should have had a chance to decide on their options and Hagarty should not have taken that route with their money without specific instructions.

Hagarty is a reminder that it is wise to consider if there is a different method of getting what your client needs instead of agreeing to accept a last minute trust condition to cover a missing document. When you choose to rely on the other lawyer's undertakings rather than the required documentation to complete a transaction, the risk of the procedure must be communicated to and accepted by the client if you want to protect yourself from potential liability if the trust condition is later breached and cannot be fulfilled.

There is always a risk that a person who promises to do something will fail to do it. However, when you are relying on promises made by another lawyer, the risk is small because of the status of the lawyer, the fact that the court will help enforce the fulfillment of the undertaking and the penalties the Law Society will impose on a lawyer who does not fulfill undertakings given.

That is not to say that the Manitoba cooperative method of closing a real estate transaction using trust conditions is not appropriate; just be aware that there is still a risk when you are closing a transaction based on undertakings and trust conditions, even if it is standard practice, and it is prudent to explain the process and the risk to your client and obtain their consent in advance to assume that risk.

Trust conditions accepted can alter the agreement between the parties. In *Milburn v. Dueck*, 1992 CanLII 8534 (MB CA), it was a term of the purchase agreement for residential property that all structures complied with building and zoning restrictions and did not encroach beyond the land. On the closing date, the purchasers' lawyer forwarded a cheque to the vendor's lawyer upon the trust condition that if the purchasers' lawyer was unable to obtain a certificate of the property's compliance with the building and zoning regulation, the vendor would be responsible for resolving the defects.

Two weeks later a surveyor's certificate revealed that the house and garage encroached significantly on the adjacent property. The vendor then arranged for the purchase of sufficient land from the adjoining owner to cure the encroachment and obtained subdivision approval to consolidate the title for the newly acquired land with the title to his former residence. The purchasers knew this had been done six months after the closing date. However, they then vacated the residence, announced their repudiation of the contract and demanded the return of their payment.

The vendor did not accept the repudiation. The purchasers brought an action for damages, alleging that the vendor was in breach of the contractual term relating to zoning and encroachments. The vendor counterclaimed for the balance owing by the purchasers with interest.

In construing the effect of the trust condition, the Court of Appeal disagreed with the trial judge and held that:

> *Where…funds are forwarded subject to a condition that involves, not the mechanics of closing, but a change in those obligations between the parties which would otherwise exist following unqualified acceptance of title and possession, the condition is in truth a proposal to vary the existing agreement. If accepted, such condition alters the obligations between the parties; its breach entitles the injured party to recover his consequential loss. (para. 20)*
>
> *…the trust conditions imposed a new obligation upon the defendant which he accepted. It was a new condition, one, which, in the circumstances of the case, effected a fundamental change in the rights and obligations of the parties. (para. 21)*

The Court of Appeal ultimately held that the vendor fulfilled this new obligation and thereby complied with his obligations under the entire contract.

The *Milburn* case does not deal with any potential liability of the lawyers involved. However, if an accepted trust condition is capable of changing the agreement between their respective clients, the lawyers involved may well bear the risk of liability for such a change to the parties' contract absent the clients' advance authorization.

6. Trust Conditions in Real Estate Transactions

The system of closing real estate transactions in Manitoba has been described as a "cooperative conveyancing system." Under the old English land system, the two sides needed to meet at the registry office and simultaneously tender all documents and funds required under the contract. In Manitoba, the lawyers for the vendor and purchaser may exchange documents and funds on trust conditions that certain incomplete matters (the registration of title documents, discharge of prior mortgages and so on) are to be completed by the respective lawyers following the date of closing. The lawyers' undertakings temporarily take the place of the required documents or actions so that the sale and purchase of the property can proceed while those things are being completed. Each undertaking given by the lawyer is the lawyer's personal undertaking.

The efficiency of this cooperative system benefits vendors and purchasers as well as the lawyers involved. It avoids the necessity for the historical practice of in-person closing meetings, the arrangement of interim financing pending confirmation of successful registrations and other matters as at the date of closing which would significantly add to the costs of closing conveyancing transactions.

The Alberta Court of Appeal, in *Carling Development Inc. v. Aurora River Tower Inc.,* 2005 ABCA 267 (CanLII), described this cooperative system as

> *"...a handsome high bridge quickly crossed every day by thousands of clients with valuable transactions. To remove any struts from the structure now would wreck the bridge, flinging down into the deep valley all the clients now crossing. It would also condemn all future clients to a long descent down one side of the valley and a laborious climb up the other." (para. 64)*

The use of lawyers' undertakings and trust conditions is critical to Manitoba's conveyancing practitioners. In our Torrens system and with the way our Land Titles Office operates, closing without trust conditions is virtually impossible.

Lawyers conducting a real estate practice in Manitoba must take great care in the settlement and fulfillment of trust conditions between them. You must understand why the undertaking is being given or requested before you give or accept it. Be aware of the crucial role that your undertakings play in protecting the rights and interests of purchasers and vendors of real property and maintaining the cooperative nature of the Manitoba conveyancing practice. This efficient and economic manner of conveyancing using trust conditions cannot be maintained unless all lawyers comply with their ethical obligations in both practice and spirit.

Manitoba lawyers have streamlined residential conveyancing by developing standardized trust conditions. The Standard Conveyancing Practice ("SCP") trust conditions are tailored for use with the statutory offer to purchase forms for single family residential houses and condominium units which were introduced in 2025. The SCP trust conditions reflect the conveyancing practice changes called for under those revised offer forms as well as current best practice standards. They are suitable for use on either title-insured transactions or closings under the Western Law Societies Conveyancing Protocol, and can be customized to fit the circumstances of the individual transaction. The *SCP trust conditions* are available in the *Real Estate materials* under Practice Fundamentals in the Law Society Education Centre.

7. Lawyers' Undertakings in Commercial Transactions

The complexities of an asset purchase or share purchase transaction make the careful consideration of appropriate lawyers' undertakings imperative.

To facilitate the closing of commercial transactions, the delivery of documents and funds on closing, and the fulfillment of various matters after the closing, lawyers often undertake to do certain things and/or act as escrow agents in respect of certain documents and/or funds pending completion of such matters. The lawyers' undertakings must be carefully considered in the context of the general rules regarding undertakings and must be reduced to writing.

If a lawyer is agreeing to act as an escrow agent, an escrow agreement should be entered into by all parties (including the lawyers and clients). The clients are parties to the agreement for purposes of confirming their respective instructions to their lawyers regarding the escrow period. Also, by executing the agreement each party acknowledges the involvement of the other party's lawyer as a party to the escrow agreement. As well, to the extent that the undertakings of the lawyers result in a variation of the contract between the parties, by executing the agreement, the parties are acknowledging and agreeing to such a variation.

8. Lawyers' Undertakings in Litigation

> *A lawyer must strictly fulfill any undertakings given and honour any trust conditions accepted in the course of litigation.* (Code Rule 5.1-6)

In litigation, undertakings are requested and given in many circumstances, including:

- during negotiations;
- in concluding or implementing settlement agreements;
- during examinations for discovery or out-of-court cross-examinations; and
- to administrative tribunals or the court.

Before you give an undertaking, be sure that it is something within your control and with which you can comply. For example, a lawyer can comply with:

- an undertaking to deliver a document <u>already in their possession</u> by a certain time;

- an undertaking to postpone noting an adverse party in default or to postpone entering a default judgment against them for a set time;
- an undertaking to deliver funds already in their possession by a specified date;
- an undertaking to admit certain facts to an administrative tribunal or court without the need to call evidence;
- an undertaking to the court to deliver documents already in their possession;
- an undertaking to the court not to take steps to execute on a judgment pending an appeal, or not to act on a signed order or judgment for a certain period;
- an undertaking to an adverse party, lawyer, tribunal or the court to attempt to do something or attempt to contact someone within a set time.

The common theme in these examples is that the lawyer is in control of fulfilling the promise. If the undertaking is not fulfilled, they will be held accountable.

Examples of undertakings that lawyers should **not** give because they are not in control include:

- an undertaking that their client or a third party will or will not do something;
- an undertaking to produce a document or a thing that is not yet in their possession;
- an undertaking to obtain an expert's report by a specified date.

Lawyers often give undertakings in the course of an examination for discovery. For example, a lawyer may undertake to produce a document or undertake to speak to a third party to obtain information requested. The client should give the undertaking but the lawyer who gives the undertaking in an oral examination for discovery can rely on King's Bench Rule 31.08:

> *Questions on an oral examination for discovery shall be answered by the person being examined but, where there is no objection, the question may be answered by the person's counsel and the answer shall be deemed to be the answer of the person being examined unless, before the conclusion of the examination, the person repudiates, contradicts or qualifies the answer.*

To prevent any misunderstandings, it would be better practice to have the client give those undertakings personally on the record rather than have to rely on the rule.

King's Bench Rule 30.1 also provides a deemed undertaking in litigation, whereby parties and their lawyers are deemed to undertake not to use evidence or information obtained through a discovery process for any purposes other than those of the proceeding in which the evidence was obtained.

There are consequences to a lawyer's failure to comply with an undertaking. These include potential prejudice to a client, damage to the lawyer's reputation in the profession and before the court and possible professional discipline. Depending upon the circumstances, exposure to civil liability is also a risk.

9. Enforcement of Lawyers' Undertakings

The courts will stringently enforce a lawyer's undertakings as their personal obligations. The court's jurisdiction to enforce is derived from its inherent jurisdiction to supervise and regulate the practice of its officers (s*ee Witten* above).

In enforcing lawyers' undertakings, the court aims to secure the honesty of conduct in its officers, and is not guided purely by considerations of contract.

In *Guay v. Dennehy,* 1994 CanLII 16669 (MBQB) Beard, J. (as she was then) lists the relevant considerations about the law of trust conditions:

> *1. In proceedings to enforce a trust condition, the applicant is not relying on the law of contract, or tort, but rather on the special relationship between lawyers (see Hoffman & Dorchik v. Agnew, Nykyforuk, Purdy & Davis, [1985] 1 W.W.R. 656 (Sask. Q.B.), at p. 662).*
>
> *2. An undertaking given gratuitously will be enforced even though the lack of consideration may be a defence if considered under the law of contract (see McCarthy Tetrault v. Lawson, Lundell, Lawson & McIntosh (1991), 58 B.C.L.R. (2d) 310 (S.C.), at p. 314).*
>
> *3. The court has an inherent jurisdiction to enforce undertakings or trust conditions as part of its responsibility to secure the proper conduct of its officers (*see *Witten, at p. 423).*
>
> *4. In dealings between law firms under trust conditions, the rights and wrongs of the parties are irrelevant (see Minsos, McLeod & Edwards v. Foster Wedekind (May 10, 1988), (Alta. C.A.) [unreported], at p. 2). [Since reported].*
>
> *5. The solicitor's obligation to observe trust conditions cannot be shackled by instructions given to the solicitor by the client (see Witten, at p. 421).*
>
> *6. The possibility of claims being made in the future by a stranger to the transaction, even where arising out of the transaction, is not a matter which a court is entitled to take into consideration as a ground for ordering payment into court instead of to the vendor. (See Damodaran s/o Raman v. Choe Kuan Him, [1980] A.C. 497 (P.C.), at p. 502).*
>
> *7. The court may, depending on the facts of a particular case, consider evidence extrinsic to the trust conditions themselves to arrive at the correct meaning or interpretation of what the parties understood the undertaking to be (see Eddy Group Ltd. v. Brookes (1991), 102 N.S.R. (2d)122 (T.D.), at p. 134).*

8. A trust condition can be one of two types:
(i) One concerning the mechanics of completing or closing a transaction;
(ii) The other effecting a fundamental change in the obligations between the parties (see Milburn v. Dueck (1992), 81 Man. R. (2d) 266, [1992] 6 W.W.R. 497] (C.A.), at p. 269).

9. The law is clear that a solicitor's undertaking may be enforced against him personally, depending on the facts of the case. However, the undertaking must be his personally qua solicitor and must be clear on its terms (see Bank of British Columbia v. M. (1981), 120 D.L.R. (3d) 177, [1981] 2 W.W.R. 351] (B.C.C.A.), at pp. 180-81).

10. If a lawyer accepts documents under certain trust conditions and then uses the documents, he impliedly undertakes to comply with those trust conditions (see Witten, (supra), at p. 421).

[CanLII citation links added]

The steps that might be taken to enforce an undertaking are the choice of the enforcing person and depend upon the nature of the undertaking, and sometimes on whether the enforcing person believes the undertaking lawyer is acting in good faith.

When considering enforcement actions remember Code Rule 7.2-1:

Courtesy and Good Faith
7.2-1 *A lawyer must be courteous and civil and act in good faith with all persons with whom the lawyer has dealings in the course of practice.*

Consider if it is appropriate to contact the other lawyer to see if any impediment to fulfilling the undertaking can be resolved. A courteous discussion and a brief extension of time to comply could be the only actions required to resolve the matter.

Other steps that might be taken to encourage compliance include:

- a demand letter with a short final deadline to comply with the undertaking;
- reporting the breach to the Law Society seeking disciplinary action;
- reporting the breach to the Law Society Insurance Department;
- a court application for contempt. *Witten* affirms the court's jurisdiction to deal summarily with an application for an order requiring fulfillment of a lawyer's undertaking and contempt proceedings if an order is not followed;
- an action for damages where trust conditions are no longer capable of being fulfilled and the only remedy is the payment of damages.

In *Carling*, the Alberta Court of Appeal found that a trust condition creates more than just a promise or contract between the lawyer who imposes the condition and the lawyer who accepts; it creates a trust. The court stated that where a trust is created, *"[m]any remedies might be possible (apart from the court's summary powers over solicitors): disgorgement of profits, or possibly damages in lieu of specific performance or in lieu of injunction or in lieu of other equitable remedy…"*

In Manitoba, it will seldom be necessary to enlist the aid of the courts to recover losses to the clients caused by a lawyer's breach of trust conditions. As part of its mandate to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence, the Law Society requires compulsory liability insurance for all practising lawyers in the province. The policy will pay damages that an insured lawyer becomes legally obligated to pay if it arises from an error in the rendering of professional services.

A breach of a trust condition has obvious potential to cause loss to a member of the public, sometimes very substantial loss. If failure to fulfill an undertaking causes damage, both the defaulting lawyer and the lawyer who imposed the condition may be liable for the losses that flow from the default. **Do not attempt to repair the situation independently!** The Code and the policy of insurance require that lawyers give prompt notice to the Law Society Insurance Department of any circumstances which might give rise to a claim.

In the case of a failure or inability to comply with a trust condition, the immediate reporting of the matter can be critical to the insurer's ability to repair the situation or to minimize the loss. The late reporting of a claim – particularly if it causes prejudice to the insurer – can result in a denial of coverage under the policy. By immediately referring the matter to the lawyers in the Insurance Department, the lawyer can cooperate with the possible repair, while ensuring that the client's own (and perhaps by then divergent) interests are protected with the benefit of independent legal advice where appropriate.

Reporting a potential claim to the Insurance Department of the Law Society does not preclude a complaint being filed about the breach of a trust condition or undertaking. In addition to requiring insurance coverage, as the regulator of the legal profession, the Law Society operates to secure the honesty and integrity of the conduct of its members. In all that it does the Law Society seeks to preserve the public's confidence in the legal profession.

For example, if a lawyer has failed to fulfil an undertaking or comply with a trust condition, the Complaint Resolution Department of the Law Society may be contacted to relay those concerns. If a matter cannot be resolved informally, a formal complaint may be made and the concerns may be investigated. Ultimately, charges of professional misconduct may be authorized by the Complaints Investigation Committee and the lawyer may be prosecuted before the Discipline Committee.

> The Law Society's function and jurisdiction regarding discipline are independent of the civil remedies referred to above, so a lawyer could face both civil liability for negligence (which would be dealt with by insurance) and discipline.

Lawyers sometimes have the misconception that the enforcement of lawyers' trust conditions through the court or a complaint to the Law Society will entirely solve their clients' problems resulting from lawyers' defaults. Sanctioning the lawyer does not compensate a client who has sustained a pecuniary loss. The processing of an insurance claim, or an application to the court for an order requiring fulfillment of the undertaking, or a suit for damages all have the usual disadvantage of delay in receiving the benefit of the remedy, even if the court proceeds on a summary basis.

By the time the situation is repaired or the court has ordered the fulfillment of the condition or payment of damages in lieu, the aggrieved party may have had to find alternate means of rectifying the situation. For example, if the trust condition breached was the payment and discharge of a mortgage, the purchaser who was to benefit from the discharge may have been forced to delay a re-sale or re-financing of the property pending the conclusion of the enforcement remedy.

Be mindful of the interests of the clients when completing transactions on trust conditions. Cooperation and courtesy between lawyers in imposing and accepting and amending trust conditions where necessary is in clients' best interests.

10. Conclusion

A lawyer's acceptance of a trust condition or giving of an undertaking is a serious commitment that creates serious obligations. You must ensure that you can comply before you agree. Do not make a promise that depends on the action of your client or a third party. All trust conditions, undertakings and amendments should be in writing. If the undertaking is the client's, have the client give it directly to prevent the expectation that it is your responsibility.

Do not use trust conditions which may change the terms of a transaction without your client's instructions and consent. Remember that civil and regulatory liability may arise for both the lawyer who imposes the trust condition or accepts the undertaking, and the lawyer who breaches their commitment.