

SOLICITORS' UNDERTAKINGS: CHECKLIST

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A checklist summarising matters for SRA-authorised law firms and solicitors to consider in relation to solicitors' undertakings.

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A solicitor's undertaking is a promise by a solicitor to do, or to refrain from doing, a certain act. It is defined by the Solicitors Regulation Authority (SRA) as:

"A statement, given orally or in writing, whether or not it includes the word 'undertake' or 'undertaking', to someone who reasonably places reliance on it, that you or a third party will do something or cause something to be done, or refrain from doing something" (*SRA: Standards and Regulations: SRA Glossary*).

A solicitor's undertaking must be given either by a solicitor or on behalf of a solicitor or solicitors' firm. This means that although only solicitors can give undertakings in their own name, it is possible for an employee who is not a solicitor to give a solicitor's undertaking on behalf of either an individual solicitor or a firm if they have actual or ostensible authority to do so.

This checklist summarises the points which a solicitor should consider before giving an undertaking. The points should also be considered by the firm and addressed as part of the firm's risk management policies and processes in relation to a solicitor's undertaking. A firm or solicitor receiving an undertaking should consider the same issues before accepting it.

The checklist is designed for use alongside *Practice note, Solicitors' undertakings: legal and regulatory considerations for solicitors and law firms* which considers the legal and regulatory issues which arise when giving a solicitor's undertaking.

CONTEXT OF SOLICITOR'S UNDERTAKING

A solicitor should consider the context in which the undertaking is given and address the following:

- Whether the undertaking is given in the course of a solicitor's practice, or whether it might be considered to be given on that basis. To clarify this, it may assist to consider the two questions posed by the Supreme Court in *Harcus Sinclair LLP v Your Lawyers Ltd [2021] UKSC 32*:
 - whether the undertaking requires the solicitor to do (or not to do) something which a solicitor regularly carries out (or refrains from doing) as part of their ordinary professional practice; and



- what the reason for giving the undertaking is and the extent to which the cause or matter to which the undertaking relates involves the sort of work which a solicitor regularly carries out as part of their ordinary professional practice.
- Whether the undertaking is of a standard nature and given routinely, or whether it is less common. If routine, then the solicitor's firm may have relevant policies and procedures in place which address many of the issues relevant to this checklist.

REGULATORY OBLIGATIONS

A solicitor should consider the regulatory obligation to perform undertakings within an agreed timescale, or if no timescale has been agreed, then within a reasonable amount of time (*SRA Code of Conduct for Firms and SRA Code of Conduct for Individuals, paragraph 1.3*) (*SRA Principles 2, 3 and 7*). For more information, see *Practice note, Solicitors' undertakings: legal and regulatory considerations for solicitors and law firms: Regulatory sanctions and proceedings before the SDT*.

Further points to consider include:

- What exactly the undertaking commits the solicitor to do. The undertaking should be in writing, specific and reviewed carefully by a solicitor the firm considers to be of sufficient seniority within the firm.
- Whether there is any risk of ambiguity in the undertaking that needs to be clarified internally within the firm or externally with a client or other party. There is case law indicating that if an undertaking is ambiguous, the undertaking will be construed so as to resolve ambiguity against the solicitor, and in favour of the recipient (*Templeton Insurance Ltd v Penningtons Solicitors LLP [2006] EWHC 685 (Ch)*, *Lewison J at paragraph 8*).
- Whether the performance of the undertaking is wholly within the solicitor's control. This is important because a solicitor or firm will be held responsible for non-compliance even if it is caused by events outside their control. If the undertaking is not wholly within the solicitor or firm's control, consider the steps which the firm (or the solicitor the firm considers to be of sufficient seniority) must take before giving the undertaking to ensure that it is wholly within the solicitor's control. It may be possible to reword the undertaking to bring it firmly within the solicitor's control.
- Whether the undertaking is in the best interests of the client.
- Whether the undertaking can be given and fulfilled without breaching the *SRA Accounts Rules*.

FIRM'S POLICY POSITION

A firm should have in place a clear, written and accessible policy on solicitors' undertakings. The following is a non-exhaustive list of suggested matters to consider in the policy:

- The nature of an undertaking, its effect and enforceability, and the regulatory considerations.
- Whether it is the firm's policy to permit giving undertakings and, if so, under what circumstances. Some firms may consider that, given the risk exposures, giving undertakings should be generally avoided and only done in exceptional circumstances.
- The application of the policy and guidance for practice areas which routinely give undertakings as part of their client work. For more information on practice area-specific undertakings, see *Practice note, Solicitors' undertakings: legal and regulatory considerations for solicitors and law firms: Promises that can be solicitors' undertakings*.
- Where undertakings are permitted, the policy needs to be clear on which solicitors within the firm have the necessary authority to give them. For example, a firm may have a policy that only solicitors of a certain level of seniority and in certain practice areas may give an undertaking on a client matter in line with an internal approval process.
- A prior approval process may assist in verifying the appropriateness and scope of the undertaking and in addressing any risks arising from it. The undertaking should be in writing for evidential reasons with its wording reviewed by a person the firm has designated as having sufficient authority to give approval. The approval process will vary across firms. Some firms may, for instance, require the solicitor giving the undertaking to obtain the written approval of the relevant matter partner before agreeing to give the undertaking.

- The policy should be clear on the name in which the undertaking is to be given. Due to personal liability risk, some firms may require the undertaking to be given in the name of the firm (instead of the individual solicitor) even though the court does not have jurisdiction to summarily enforce the undertaking where the firm is incorporated as a limited liability partnership (LLP) or a limited company. On the other hand, an undertaking given in the name of a solicitor is enforceable by the court since a solicitor is an officer of the court. However, it is key to establish the individual solicitor's ability to ensure fulfilment of the undertaking as well as their willingness to sign an undertaking in their own name. For more information on the binding effect of a solicitor's undertaking, see [Practice note, Solicitors' undertakings: legal and regulatory considerations for solicitors and law firms: Authority to give undertakings – who is bound when an undertaking is given?](#).
- Communicating the firm's stance on undertakings to the client. This should be documented in writing and could take place at the matter engagement stage or at an appropriate stage during the course of the matter. Additionally, immediately before the solicitor gives the undertaking, the solicitor should confirm with the client that they have the client's express written authority to give the undertaking on the client matter. Where the client gives authority some time before the undertaking is due to be given, this authority should always be (re)confirmed as the client may revoke (even irrevocable) authority at any time before the time the undertaking is given.
- How to address any concerns or changes affecting the undertakings which are being considered or which have been given. The policy should set out escalation processes and contact details, where possible.
- How undertakings and their fulfilment should be recorded, monitored and updated on the matter file and in a central register the firm considers appropriate. The firm may choose to adopt a different approach for practice areas which routinely give undertakings as part of their client work. For more information on the firm's regulatory obligations, see [Practice note, Solicitors' undertakings: legal and regulatory considerations for solicitors and law firms: Monitoring compliance with undertakings](#).
- The firm's position on the acceptance and reliance on undertakings from solicitors and the firms acting for another party to the matter with a focus on receiving the benefit of a clear and enforceable undertaking. Examples of relevant issues may include:
 - whether the undertaking is a solicitor's undertaking, including whether it is given in the name of a solicitor or firm or in the name of the client;
 - any ambiguity;
 - the status and authority of the person giving the undertaking;
 - whether the undertaking is given personally or in the name of an incorporated law firm;
 - accordingly, whether the undertaking is capable of being enforced summarily; and
 - whether the undertaking is capable of being enforced as a contract.
- Staff training and other awareness-raising campaigns. These are key to minimising the risks in giving and accepting solicitors' undertakings. Training all staff (both legally and non-legally qualified) well on undertakings should minimise the potential for arguments about whether or not the promise constitutes a solicitor's undertaking.
- The sufficiency of the firm's professional indemnity insurance, including the circumstances in which it covers any liability arising from the undertaking. For more information on professional indemnity insurance, see [Practice note, Professional Indemnity Insurance](#).
- Taking into account the nature of the firm's size and business, any other policy considerations that need to be addressed.

CONTRACTUAL MATTERS

A solicitor should consider whether it is desirable for the undertaking to have contractual effect. This is particularly relevant following the Supreme Court's decision in [Harcus Sinclair LLP v Your Lawyers Ltd \[2021\] UKSC 32](#) that undertakings given by incorporated law firms (LLPs and limited companies) are not enforceable under the court's supervisory jurisdiction over solicitors. For such an undertaking to be enforceable, a normal cause of action such as claiming for breach of contract must be available if the undertaking is to be enforced (see [Article, Enforcing solicitors' undertakings: practical implications of the Supreme Court's decision in Harcus Sinclair v Your Lawyers \[2021\] UKSC 32](#)).

If contractual effect is needed, the following matters should be assessed and addressed:

- Whether the requirements for the formation of a valid contract are present.
- That sufficiently clear evidence of an intention to create a contractual relationship is present.
- That the recipient of the undertaking has given consideration.
- Whether the undertaking needs to be enforced by someone other than the recipient, such as the client where the undertaking is being given to another firm of solicitors. In these circumstances, a solicitor should check that there is a written agreement in place between all the relevant parties to evidence this arrangement. For more information on contractual consideration, see *Practice note, Solicitors' undertakings: legal and regulatory considerations for solicitors and law firms: Undertakings as contracts*.
- Whether the agreement needs to be executed as a deed or comply with any other requirements on form or content. For more information on the formalities governing the execution of deeds, see *Practice note, Execution of deeds and documents by LLPs, partnerships and limited partnerships*.
- Whether the undertaking is suitably evidenced, ensuring that both the terms and consent to the agreement are accurately recorded in writing.