



## Undertakings

<b>Purpose:</b>	To assist barristers to identify whether and when they may give professional undertakings as barristers, and to identify some practical considerations
<b>Overview:</b>	Meaning of undertaking – Distinction between personal undertaking and one given on behalf of someone else – Examples of professional undertakings – Giving undertakings as a barrister – Obligations to give undertakings – Obligations to comply with undertakings – Insurance – ‘Dos and don’ts’
<b>Scope of application:</b>	All barristers
<b>Issued by:</b>	The Ethics Committee
<b>First issued:</b>	June 2015
<b>Last reviewed:</b>	June 2019
<b>Status and effect:</b>	<b>Please see the notice at the end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.</b>

### What is meant by an undertaking?

1. In this document, references to an undertaking are not limited to undertakings given to the court. An undertaking may also be given to someone else, such as to a lawyer for another party to the proceedings, or to a third party in connection with your role as a practising barrister instructed in the proceedings.
2. An undertaking may take many forms. In identifying whether any statement or promise might amount to an undertaking, you might wish to bear in mind the definition of ‘undertaking’ given by the Solicitors’ Regulation Authority for the purposes of the SRA Handbook:

*“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 your firm will do something or cause something to be done, or refrain from doing something”*

3. For the avoidance of doubt, however, the Bar Council does not consider that you will be giving an undertaking to a court or tribunal simply by agreeing personally, as a matter of courtesy, to do something at the request of a judge or tribunal member, unless it is made plain (which ought to be recorded – see below) that you are being asked to give, and are giving, a formal undertaking. The Bar Council takes the view that a court or tribunal can be expected to make this clear if that is its intention.

### **Is there a distinction between a personal undertaking and one given on behalf of someone else?**

4. Yes – there is an important distinction between these two situations.

5. This document is not concerned with undertakings given by your professional or lay client through you. Ordinarily, this would be the limit of your involvement in the giving of undertakings: even if you are conducting litigation, the vast majority of undertakings can and probably should be given by your lay client (see paragraph 12 below). You should only give such an undertaking on instructions, as you would be giving it as the agent of your lay or professional client (and so could well be warranting that you have your lay or professional client’s authority to give it), but it is not an undertaking by you personally. You should also take note of the good practice suggestions set out below, particularly in sub-paragraph 30(c).

6. In some situations, however - particularly, if you are authorised to conduct litigation - you may be giving an undertaking for yourself (i.e. on your own behalf), as a professional person. It is these undertakings with which the rest of this document is concerned: i.e. personal undertakings given by you in your capacity as a practising barrister. In this document, they are referred to as “professional undertakings”.

7. The focus of this document is on professional undertakings given in connection with legal proceedings in which you are instructed to act, but similar principles might well apply in relation to any professional undertaking given by you in other circumstances (e.g. if no legal proceedings are yet on foot but may be issued in future).

8. You should also be wary of doing anything that might amount to giving an undertaking as a barrister outside the course of your practice, as it could still be a breach of your Core Duties to breach (or even simply to give) such an undertaking: for example, if to do so would affect your being able to act with integrity or honesty (CD3) or diminish the trust and confidence which the public places in you or the profession (CD5), including (in either case) because in doing so you have abused your professional position (see, e.g., gC26).

9. The observations under this heading apply to unregistered barristers as well as to practising barristers, because (pursuant to r17.1.c, rC1.1 and rC1.2.b) unregistered barristers are still subject to the Core Duties in the BSB Handbook, particularly CD3 and CD5, and to rC8 (and its related guidance).

**Can you give me examples of the sorts of professional undertakings you have in mind?**

10. Examples of professional undertakings that you might consider giving as a barrister (subject to being insured for doing so - see below) might be the following:

- a. An undertaking to keep documents disclosed by a party to litigation confidential, including from your own client.<sup>1</sup>
- b. An undertaking to satisfy money-laundering obligations.
- c. An undertaking to issue an application notice.
- d. An undertaking to serve a document on someone, or to file a document with the court.
- e. An undertaking to go on the record as the person/address for service of documents.

11. The last three of those are likely to involve you in conducting litigation (as to which see paragraph 15 below), and if there are fees to pay then you would also need to be able to ensure that this happens without your handling client money.

12. Even if you are conducting litigation, however, the vast majority of undertakings can just as well be given by your lay client and not by you. Indeed, it is suggested that all undertakings should ordinarily be given by your professional or lay client (whether through you or in some other way) unless it is essential that you are bound by the undertaking personally (as might be in the case in the example in paragraph 10(a) or 10(b)).

**Am I permitted to give that sort of professional undertaking as a barrister?**

13. You are permitted to give a professional undertaking, except for one which:
- a. Would be unlawful to give, or the performance of which would require you to do an unlawful act; or
  - b. Would put you in breach of your duties contained in the BSB Handbook, or the performance of which would require you to breach those duties.

---

<sup>1</sup> Whether or not to give such an undertaking will need careful consideration: see 'Non-Disclosure of information to your own Client' on the [Bar Council Ethics website](#).

14. An example of the latter would be a professional undertaking to do something which would require you to handle, receive or control client money. An undertaking of that type would be prohibited under rC73.

15. You also need to take care to identify whether a professional undertaking would involve your conducting litigation. Some examples of professional undertakings that are likely to fall within this category are given in sub-paragraphs 10(c), (d) and (e) above. You may give such a professional undertaking if you have been authorised by the BSB to conduct litigation; but you may not do so if you have not been so authorised.

**Might I be obliged to give a professional undertaking by my duty to act in my client's best interests?**

16. The view of the Bar Council is that this duty cannot oblige you to give a professional undertaking. Whether to do so is a matter for you.

**Am I obliged to comply with a professional undertaking as a barrister?**

17. Yes.

18. If you give a professional undertaking in the course of conducting litigation, then rC11 is explicit: you will be obliged professionally to comply with that undertaking within an agreed timescale or within a reasonable period of time.

19. Although rC11 is limited to professional undertakings given in the course of conducting litigation, the Bar Council takes the view that you will be obliged by your Core Duties under the BSB Handbook to comply with any other professional undertaking that you give as a barrister within any agreed timescale or within a reasonable time.

20. You would also be obliged to comply with a professional undertaking given to the court.

21. Those are your professional obligations under the BSB Handbook. You may also, of course, be obliged to comply with a professional undertaking for other reasons. These would be a matter of law, on which the Bar Council cannot advise you (and on which you should take your own legal advice), but examples might include the following:

- a. You might incur a civil law obligation or civil liability: e.g. by way of a warranty or other contract.
- b. Enforcement action might be taken against you for breach of an undertaking to the court, including proceedings for contempt of court.

c. There may be circumstances in which you could incur civil liability to one or more parties to particular litigation (or even to non-parties) for breach of an undertaking ostensibly given only to the court.

d. Barristers are not officers of the court (unlike solicitors), so it is not thought that you would, ordinarily, be subject to the court's inherent jurisdiction over its own officers, even if you are conducting litigation (see Assaubayev v Michael Wilson & Partners [2014] EWCA Civ 1491), but you would need to consider for yourself whether this might be possible.

22. Bear in mind that it may well be no defence, legally or professionally, to say that you are unable to comply with a professional undertaking that you have given, that your client will not let you comply with it, or that you would be in breach of your duties to your client if you were to comply with it.

**Am I professionally obliged to be insured in connection with any professional undertaking given by me as a barrister?**

23. Yes.

24. The guidance in the BSB Handbook in relation to rC11 (gC33) makes clear that you should ensure that your insurance covers you in respect of any liability incurred in giving a professional undertaking.

25. Although it relates specifically to rC11, the Bar Council considers that the thrust of the guidance at gC33 is likely to apply to all types of undertaking (i.e. not just those given to a court) and all situations in which you give a professional undertaking as a barrister (i.e. not just undertakings given in the course of conducting litigation), as it thinks it likely that rC76.1 will require this. If this is right, then you must not give any professional undertaking as a barrister if you would not be insured for any and all liability you may incur as a result of giving it.

**Will I be insured?**

26. Whether you are insured for all such liability will depend on the terms of your insurance policy or policies. There may well be circumstances in which you would not be covered for all such liability. It is your personal responsibility to ensure that you have all necessary insurance, and to take any legal advice that you may need for this purpose.

27. If you are a self-employed barrister insured under BMIF terms, then it is the Bar Council's understanding that you are covered (subject to the limit of your cover) for claims for civil compensation or civil damages for civil liability arising out of or in connection with your practice; and that you would be covered for such a claim based on a professional undertaking even if a breach by you of that undertaking would also

be a contempt of court. However, the Bar Council also understands that you are unlikely to be covered under the BMIF terms for all types of claim that might arise against you as a result of giving an undertaking. For example:

- a. You may well not be covered for claims which are based on an obligation which is contractual or akin to being contractual, particularly claims which are or are akin to claims for a breach of warranty, or which involve strict liability for breach. The same applies to undertakings which you are or may be ordered specifically to perform. Claims of this sort might well be caught by an exclusion under the BMIF terms (e.g. clause 3.1(x), concerning liability incurred under a contract), or be outside the scope of the policy altogether.
- b. You are unlikely to be covered for an undertaking to pay money (e.g. an undertaking given during the conduct of litigation to pay photocopying costs to another party).
- c. You are unlikely to be covered for any undertaking which is not given (and given properly) in the course of your practice as a barrister (even if you might nevertheless be obliged legally and/or professionally to comply with it).

28. That is no more than a general outline and represents only the Bar Council's general understanding. The Bar Council cannot advise you or give you any assurances as to what BMIF's policy terms will or will not cover. You must rely on your own inquiries and advice in that regard.

29. If and to the extent that you are insured through BMIF, you may wish to seek their confirmation of whether or not you would be insured in any particular situation. The same course might also be wise in relation to any other insurer.

### **Dos and don'ts**

30. In addition to the above, the Bar Council makes the following practical suggestions regarding professional undertakings given by you as a barrister. These are not regulatory requirements, but the Bar Council believes that they represent good practice:

- a. **Do** try to avoid the need to give a professional undertaking.
- b. **Do** think very carefully before giving a professional undertaking.
- c. **Do** make clear to the recipient of an undertaking whether you are giving it personally or whether it is the undertaking of someone else (and, if so, whom), which is simply being given through you. In this connection, take care in how you phrase this. Previous guidance to solicitors from their regulator indicated that they would be liable personally on an undertaking given simply "on behalf of" a client, and that to avoid this they should expressly disclaim

personal liability on their part. You might be wise to take a similar course, or to use a different form of wording: e.g. “[name of party] undertakes”. This applies not only to all sort of communications but also to court and tribunal orders.

d. **Do not** give a professional undertaking if it is not wholly within your own power to comply with it.

e. **Do** think about the interaction between any professional undertaking and your client’s position. In particular:

i. **Do** consider whether you need - or would be wise - to obtain instructions from your lay or professional client in order be able to give such an undertaking;

ii. **Do** consider what might happen if your client were later to withdraw consent, to give different or conflicting instructions (or to try to do any of those things), or to cease to instruct you; and

iii. **Do** ensure that you obtain any necessary client consent before you give the undertaking. There will be some situations in which this is essential: e.g. if the undertaking would require you to do something that would be a breach of your duties to your client if it were to be done without your client’s consent.

f. **Do** bear in mind that your client might be free to withdraw even ‘irrevocable’ instructions.

g. **Do** ensure that any professional undertaking that you give is in writing, or at least recorded in writing at the time or as soon afterwards as you can manage.

h. **Do** obtain written confirmation, so far as you can, of the discharge of - or of your compliance with - any professional undertaking.

i. **Do not** give a professional undertaking if you are not confident that you will be insured for any liability that you might incur in giving it.

j. **Do not** make any promise or statement, or give any assurance, that might be construed or treated as a professional undertaking by you if that is not what you intend.

31. If you are unsure whether you can or should give a professional undertaking, then you may wish to contact the Bar Council’s Ethical Enquiries Service.

## **Important Notice**

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not “guidance” for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please see [here](#).