

## Question 8 – Undertakings

1. Do you diarize all undertakings in a real estate transaction?

**Results:**

- 50% of respondents diarized the undertakings they gave.
- 58% of respondents diarized the undertakings they received.

**Working Group (WG) comment:**

Undertakings are a crucial part of all real estate transactions and enable efficiency in the closing process notwithstanding outstanding matters which are deemed sufficient to be completed after closing. Under the Rules of Professional Conduct, Rule 7.2-11 states that “a lawyer shall not give an undertaking that cannot be fulfilled and shall fulfill every undertaking given and honour every trust condition once accepted”. To ensure compliance, diarizing the undertaking is a good practice.

2. Do you have a paper or a digital tickler system to diarize fulfillment of outstanding undertakings?

**Results:**

- 25% of respondents indicated they have a paper tickler system.
- Almost 42% indicated having a digital tickler system.
- However, a third of lawyers indicated they have no tickler system.

**WG comment:**

The Law Society of Ontario in its Practice Management Guidelines states that lawyers should implement and maintain reminder systems. Like checklists, a tickler system is a desirable practice tool, if not essential in a busy legal practice. With more software becoming available to assist lawyers in their practices, digital tickler systems often come incorporated in software and simpler to operate. The WG would advocate for all lawyers to maintain a robust tickler system, in whatever format, to ensure all undertakings are satisfied, whether given or received.

3. Do you have an automated reminder system for the fulfillment of outstanding undertakings?

**Results:**

One third of lawyers indicated that they have an automated reminder system.

**WG comment:**

Lawyers, especially busy ones, know the value of a good reminder system. It does not matter if it's automated or not, it is important to have one and use it.

4. Who is responsible to follow up on outstanding undertakings?

**Results:**

- Almost 60% of respondents delegated the responsibility to follow up on undertakings to a responsible assistant.
- 17% to a pending matters clerk.
- 25% to the responsible lawyer.
- No one indicated that they outsource this function.

**WG comment:**

Unless clearly qualified, a lawyer's undertaking is a personal promise and responsibility (see Commentary to Rule 5.1-6). The Law Society of Ontario permits lawyers to delegate tasks to responsible staff members but reminds all lawyers that the ultimate responsibility for meeting deadlines and limitation periods rests with lawyers (see Rule 7.2-11 above).

5. How often do you revisit the outstanding items in your tickler system?

**Results:**

- 58% of respondents indicated they review their outstanding undertakings as necessary.
- 17% on a weekly basis.
- The other respondents were evenly divided between bi-weekly, monthly and quarterly reviews.

**WG comment:**

There is no specified time for a review as long as you are aware that they are outstanding and follow up or take some action to ensure the undertakings are satisfied. It is often easier to attend to a matter when it is fresh but the volume of the practice and whether there is a person dedicated to this task, will influence the frequency of the reviews.

The Law Society indicates that discharges of mortgages should be registered within 60 days of closing (see "Due Diligence in Mortgage or Loan Transactions" found [here](#)).

The Canadian Bankers Association publishes a contact list for mortgage discharge requests and for escalations if discharges are not received in a timely manner. This list is updated from time to time – the current version is dated July 24, 2018 and can be found [here](#).

6. What is your principal method to follow up with the other lawyer for outstanding undertakings?

**Results:**

- 83% of respondents sent letter reminders to the other side.
- 17% sent an email.

**WG comment:**

There is no ideal way to remind the other side of their outstanding undertaking. With the growing adoption and efficiency of emails, the WG presumes we will see this method of sending reminders escalate. The important issue is to ensure that all undertakings are satisfied in a timely fashion.

7. What is your oldest outstanding undertaking (given or received)?

**Results:**

- 50% of respondents indicated that their oldest outstanding undertaking (given or received) was under 3 months.
- 8% indicated their oldest was less than 6 months old.
- 17% of respondents qualified their oldest undertaking as less than one year.
- 17% as more than one year.
- 8% indicated they did not know.

**WG comment:**

Almost 60% of undertakings being less than 6 months outstanding points to great practice management by the majority of lawyers and cooperation by the Bar.

8. How do you deal with files with outstanding undertakings?

**Results:**

- 35% of respondents indicated that they have a special “pending” cabinet to store files closed with outstanding undertakings.
- 35% mark the cover of the file with a list of the undertakings which remain to be fulfilled after closing.
- 14% maintain a register for undertakings.
- Others responded using BFs or a notation on their file list.

**WG comment:**

The method of following up on outstanding undertakings is not as important as having a system that is used, is efficient and ensures that all undertakings are fulfilled in a timely fashion.

9. When a discharge undertaking has been fulfilled do you include a copy of the discharge instrument along with your letter to the other side/client?

**Result:**

100% of respondents indicated that they send a copy of the discharge instrument along with notification of the satisfaction of the undertaking.

**WG comment:**

The WG is pleased to see this unanimous process which enhances credibility and extends a great courtesy to the other side to allow them to confirm the fulfillment of the undertaking in an efficient manner without the need to undertake any additional steps.

10. How many times would you write/contact another lawyer regarding an outstanding undertaking before you would consider reporting the lawyer to the Law Society of Ontario for breach of undertaking?

**Result:**

- 58% of respondents gave the other side 4 or more notices of outstanding matters
- 42% gave 3 notices.

**WG comment:**

The WG concludes this demonstrates the highest degree of courtesy to the Bar. This extends the most opportunities to the other lawyer to attend to the matter they had undertaken. Everyone goes through busy periods or some disruption in their practice which might negatively impact their ability or desire to attend to outstanding undertakings. The high number of reminders demonstrates a high level of cooperation and understanding amongst the Bar. This should not be abused.

11. Would you give the delinquent lawyer one final written notice to comply with the outstanding undertaking, stating that you will report the lawyer if he or she does not comply, before actually reporting the lawyer?

**Result:**

100% of respondents would provide the other side with a FINAL notice before reporting the lawyer for the delinquent work.

**WG comment:**

The WG commends the Bar on this high level of cooperation. This courtesy should not be abused to ensure the Bar continues to enjoy an efficient closing process and maintains trust in this valued practice of accepting undertakings.

12. Do you believe that you have a duty to report a lawyer to the Law Society of Ontario for breach of undertaking, or rather, that your duty is to the client and you otherwise obtain satisfaction of the undertaking?

**Result:**

- 50% of respondents saw it as their duty to satisfy the outstanding matter on behalf of their client.
- 42% agreed although they would do so in combination with a report to the Law Society of Ontario.

**WG comment:**

The WG commends the Bar on this high degree of professionalism which aims to assist the other side to comply with its undertakings, but in the event of a lapse, ensure that their clients are well served. The reluctance of reporting lawyers is understandable but should never be taken for granted. Great cooperation facilitates all of our work to efficiently close transactions on behalf of clients. It is a show of respect for our fellow lawyer and the system we operate in to satisfy all undertakings in the most expeditious manner possible.