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COVID-19 Guidance on witnessing documents electronically

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This document has been prepared as guidance for LIV members to respond to issues arising from COVID-19.

LIV acknowledges the FAQ prepared by the Law Society of New South Wales on electronic witness of signatures (2018) which were further developed.

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Guidance on witnessing documents electronically

1. Introduction

The LIV are receiving a high level of queries regarding the witnessing of documents as a result of COVID-19. Our focus remains on supporting the health and well-being of legal practitioners, their staff and clients. This guidance has been prepared to assist members to consider the options and potential risks of using electronic systems for the witnessing of selected documents.

The LIV have raised issues related to witnessing of documentation with the Attorney General and are awaiting further advice as to whether emergency legislation will be passed in relation to non-contract witnessing.

2. Federal Court Special Measures

The Federal Court issued a practice note on [Special Measures in Response to COVID-19](#) on 23 March 2020 and the LIV is requesting that other State Courts take a similar stance. A summary follows:

4. Signatures on Documents and Affidavits

4.1 To facilitate the electronic filing of all documents, if access to scanning technology is limited, the Court will temporarily allow documents to be signed electronically, including by having the person signing the document type their name in the relevant space in the signature block in lieu of physically signing the relevant document.

4.2 The Court also acknowledges that remote working arrangements may pose significant challenges to having affidavits sworn or affirmed. The Court will accept the filing of unsworn affidavits on the understanding that, if required, these will later be sworn or affirmed when circumstances allow.

3. Potential Emergency Legislation

A *COVID Legislation Amendment (Emergency Measures) Bill 2020* has been drafted in NSW which may alter arrangements for the signature and witness of documents under emergency regulation. The LIV expects a similar Bill to be proposed in Victoria. If approved, this will enable the making of regulations that may override the provisions of existing acts to prescribe altered arrangements for the signature and witnessing of documents. The regulations may only be made where Parliament is not sitting and is unlikely to sit within two weeks after the regulations are made, and where, in the Minister's opinion, the regulations are in accordance with health advice and reasonable to protect the health, safety and welfare of persons.

4. Guidance for Conveyancing

The Australian Registers National Electronic Conveyancing Council have issued [Guidance on Client Authorisations](#) which has been shared via Law News.

5. Questions and Answers based on the current Victorian legislative framework

This following Q&As are provided based on current Victorian legislative requirements for:

- Verification of Identity (excluding conveyancing services)
- Affidavits (such as for Probate applications)
- Enduring Powers of Attorney and Appointments of Medical Treatment Decision Makers.
- Statutory Declarations
- Wills

Wills do not require a qualified witness, so can be mailed, couriered or sent to a client electronically as a secured pdf with instructions about the signing so face to face contact can be avoided.

5.1 *Can I witness the signing of a document via skype, face, zoom or other similar platforms?*

Current technology does not meet the requirements for attesting a document (see question 4 below). Specifically, the attesting witness:

- a) is not physically present for the signing; and
- b) cannot be certain that the document that is later received is in fact the same one that the witness saw being signed;
- c) it can sometimes be more difficult to be certain that the witness is signing voluntarily – there could be somebody behind the camera, or outside the room, who is placing the witness under duress;
- d) does not sign at the time of witnessing the signature; and
- e) may have difficulty, if so required, giving direct admissible evidence in a court of the signing, because their evidence relies on conclusions (opinion) about circumstances that occurred outside of their view, and worse, would need to be augmented by evidence of the very person whose ability to disavow the document is sought to be ameliorated by the attestation process.

While systems could be devised to deal with some of these issues, not all are capable of being addressed.

It is important to note the legislation for common documents says, “in the presence of” and there is no clarity on whether that means physical presence

Witnessing signatures is a big issue for many firms as there is no clarity around what ‘in the presence of’ means in relation to witnessing signatures for affidavits, statutory declarations, wills, powers of attorney etc.

Whether it means physical presence only or whether video conferencing will do. There was a case of *Pell v The Queen* [2019] VSCA 186 late last year where the Court of Appeal stated in the presence of did include video conferencing in the context of arraigning an accused in the presence of the jury panel. Judge Weinberg concluded that video conferencing achieved the necessary requirements in that context, but was dependent on the circumstances and legislative context. It is not therefore clear whether the same can be said for witnessing signatures.

5.2 *Can I witness the signing of a document electronically not using specific software?*

Signing a document electronically has many meanings. Electronic signatures can take a variety of forms such as a person typing their name into a contract or email with

contractual terms, a person pasting a scan of their signature into a soft copy contract in the execution block, a person using an electronic signature platform to click to insert a typed or handwriting font into the execution block or the use of an e-pen or finder to sign a name on a tablet.

More advanced software like DocuSign allow for signers to identify up to two witnesses to sign an agreement in a legal and confidential manner. DocuSign eWitness captures the witness information in a Certificate of Completion to support any legal disputes.

You must ensure the chosen method of signing and witnessing meets the minimum requirements for attesting the document in accordance with the relevant legislation. In the context of electronic signing, dependent on the chosen signature form, there may be a higher risk that the following requirements will not be met:

- a) you need to be physically present at the time the document is signed by the signatory;
- b) you need to sign (and know that you are signing) the same document, not a separate copy of it; and
- c) you need to sign at the time you witness the document being signed by the signatory.

It will require some care, and an understanding of how the technology that is being used operates, to satisfy the legislative requirements which apply in the particular circumstances.

Difficulties with some of these problems will be obvious, if present, but a more subtle problem is that most technologies will create a new copy of a document with every signature, so that the witness signs a different (although substantially identical) document to the one signed by the signatory. While the signing of a separate document that is known to be an identical electronic copy ought not, in principle, reduce the reliability of the process, in the absence of common law authority, or a statute, permitting that, it is better to err on the side of caution and use only processes in which it can be said that the document attested is the same document signed by the signatory.

Bendigo and Adelaide Bank Ltd v Pickard [2019] SASC 123 the court said two directors electronically signing in different locations did not sign the same document.

5.3 Can I witness the signing of a document using online or cloud based document signing services?

No. Even if you are physically present when the witness signs, these services will not generally meet the requirements outlined under question 2 above, including because the document is relayed via the cloud service so that it is a copy (often an altered copy) of the document signed by the signatory, that has been taken out of your view and control before being delivered to you for attestation. Electronic witnessing should only be done with software running on a device that is in your custody.

5.4 What are the minimum requirements for attesting a document?

By attesting a document, the attesting witness, being a person who does not have a personal interest in the document:

- a) certifies that they were present at the time the document was signed;
- b) certifies that the document attested was signed by the witness;
- c) certifies that the document was signed voluntarily, so that it was the signatory's own act; and

- d) represents that they attested at the time they witnessed the signature by the signatory.

Each of these functions is directed at one thing – providing independent verification in the event that a party seeks to deny their signature. It follows that the duty cannot be fulfilled if there is any part of the process that is conducted in such a way that the witness is later able to deny any of the matters in paragraphs (a) to (c) above, and the duty in paragraph (d) above serves to protect the integrity of the certification process.

5.5 What are the consequences of invalid witnessing?

The consequences of incorrectly witnessing a document depend on the proper construction of the provision imposing the requirement, but where a document has been incorrectly witnessed:

- a) the document may not have the intended, or any, legal effect;
- b) in some (but not all) cases there may be an estoppel against the person whose signature was apparently witnessed, so that the document will nevertheless be treated as a deed;
- c) making the attestation may be misleading or dishonest conduct on the part of the attesting witness, with potential liability in misleading conduct, deceit or negligence;
- d) in the case of incorrect witnessing by a solicitor there may be an added risk of being found to have engaged in unsatisfactory professional conduct; and
- e) where the beneficiary of a promise in the deed misses out and is not able to make out reliance for the purposes of estoppel (as is more likely, for example, if the beneficiary of the promise is not a party), they could look to the witness for compensation.

Signing a statutory declaration as a false witness is an offence.

Please note that it is an offence to sign a statutory declaration if not statutory declaration witness, and offence to purport to be statutory declaration witness¹.

In a case involving a NSW-based lawyer who signed a statutory declaration as a witness when he hasn't witnessed the execution or signing of that declaration, nor had he administered the statutory declaration as required by legislation, the NSW Civil and Administrative Tribunal noted:

*"Falsely and inaccurately representing that they have witnessed a signature on a document or that a person has taken a solemn oath before them is dishonourable conduct unbecoming a legal practitioner."*²

5.6 Can LIVC provide additional guidance?

The LIV have sought feedback from the Succession Law Committee and other stakeholders on other appropriate guidance that could be provided to members.

There are divergent views to whether signing filing notes of instructions, to avoid the formalities of execution. Some believe it is sensible in these circumstances, whereas some practitioners are more risk averse and recommend an endorsement for an insurer and board before avoiding the formalities of execution.

¹ *Oaths and Affirmations Act 2018* (Vic) s. 31

² Jerome Doraisamy, 'Regional NSW practitioner guilty of professional misconduct', *Lawyers Weekly* (NSW), 18 December 2018 <<https://www.lawyersweekly.com.au/sme-law/24687-regional-nsw-practitioner-guilty-of-professional-misconduct>>

King Wood Mallesons published an article on 23 March 2020 on practical tips on how to sign contract electronically, noting the law on electronic contracts and electronic execution is unclear.

5.7 Are there non-traditional ways of witnessing?

Practitioners may consider implementing alternative arrangements to witnessing documents, other than the traditional office witnessing, as a result COVID-19. Alternatives may include signing in an open space, park or using a drive through model similar to processes being used by some General Practitioners.

As a matter of precaution, in the event the manual process of posting original Will documents is lengthy and in some circumstances burdensome, some practitioners may advise their clients to sign copies of their draft Wills in order to constitute an Informal Will under the *Wills Act 1986* (Vic). Should the client not be able to properly execute the will before passing away, the Probate Court can then determine whether the Informal Will is valid in the circumstances.



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