

WITNESSING DOCUMENTS DURING THE COVID-19 PANDEMIC

ISSUE

Given the social distancing measures introduced in the State of Victoria, the question has arisen as to whether a Notary Public can witness documents remotely. Clearly, the issue arises because it would be convenient both for Notaries and their clients to be assisted in this way given the downturn in the number of clients, and also would be protective of the relevant health concerns of Notaries and their clients given existing social distancing requirements.

OFFICE OF JOHN PEARCE SOLICITOR & NOTARY PUBLIC

Notwithstanding the fact that it would be pragmatic and attractive in the current circumstances of the pandemic, this Office will not be party to witnessing documents remotely by, say, Skype or Zoom. Firstly, it is the view of Professor Peter Zablud, an eminent common law notary, that it would be unethical for a Notary to remotely witness a document. Secondly, since Notaries are necessarily practising Solicitors, current Victorian legislation does not permit the remote non-electronic witnessing of documents. In other words, where witnesses to a hand signature are required, the witness must be physically present with the signatory, or at least within the signatory's line of sight.

REASONS

Law Institute of Victoria (LIV) - COVID-19 Guidance on witnessing documents electronically

Recently, on 25th March 2020, the Law Institute of Victoria released a paper entitled, "***COVID-19 Guidance on witnessing documents electronically.***"

The paper states at the outset that the LIV has raised issues to witnessing of documentation with the Attorney General and is awaiting further advice as to whether emergency legislation will be passed in relation to non-contact witnessing.

Whereas the paper covers more than the abovementioned topic, this office takes notice of the following statement in the paper:

5.1 Can I witness the signing of a document using via skype, face, zoom or other similar platforms? Current technology does not meet the requirements for attesting a document...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 (signatory) is signing voluntarily – there could be somebody behind the camera, or outside the room, who is placing the (signatory) 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 ...*
- Witnessing signatures is a big issue for many firms and 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....*

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, 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 purpose 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.*

Law Institute of Victoria – Practice Note for Victorian practitioners taking Will and Enduring Power of Attorney Instructions during COVID-19

Can I use video conferencing to witness a will or power of attorney?

It is not currently possible to witness a will or an enduring power of attorney via video conferencing or telephone. This turns on the requirement that the signing occur “in the presence of” ...

In relation to the prospect of using video conferencing to witness documents we can only consider existing authorities at present. The existing authorities require witnesses to be physically present when the testator acknowledges his/her signature. The testator must be able to see the witnesses sign although it is not necessary for the testator to choose to look.

A will has been held to be validly signed where the testator signed it, the witness then took it to another room to sign in circumstances where the testator could (from their position) have seen the witness sign...

There are currently no legal authorities or precedents in Victoria that...video witnessing will be accepted as a formally valid will or power of attorney.

Legal Practitioners' Liability Committee (LPLC) – Practice Paper – Video Conferencing Risks

The LPLC considers you should not witness signatures via video conferencing. In many cases when witnessing documents, the witness attests to being in the presence of the person signing the documents. Watching someone sign a document on a screen who is not in the same room as you is unlikely to be considered “in the presence of.” It is also difficult for the witness to be sure that document that is subsequently sent to them to sign is the same document they saw signed on the screen.

In a separate email conversation with Ms Heather Hibbert of the LPLC, Ms Hibbert stated that “witnessing where the legislation requires “in the presence of”: is not clear that it includes video presence is our view.”

NOTARIAL PRACTICE IN THE COVID-19 CLIMATE

Clients should be aware that, when they want a document notarised, that this generally means one of the following:

1. The Notary witnesses a person’s signature on a document, after having physically met the person and after having conducted an ID check.
2. The Notary actually sights a purported original document, and then provides a Notarial Certificate certifying that it is a true and correct copy of the purported original.
3. The Notary is provided with what purports to be an original document, then does due diligence to ensure it is not fake or a forgery, then provides a Notarial Certificate certifying that it is an authentic original.

Given the above, and given these challenging times, the following comments might be helpful in some cases:

- A. *In cases where notarial witnessing is required, clients must physically attend the Notary's office and be subject to effective social distancing protocols.*
- B. *In circumstances when witnessing is not possible because the signatory has already signed, or cannot sign in the physical presence of the Notary, it is worth asking the entity which is relying on the notarised document whether it would meet its requirements if the Notary, having done due diligence, provides a Notarial Certificate certifying that the signed document is an authentic original document (rather than a certification of having physically witnessed the document).*
- C. *In circumstances where witnessing is not required but a certification as to a document being an authentic original or a true and correct copy of a purported original, the use of Australia Post or a courier service could be useful in the current COVID-19 social distancing climate. Notarial interventions do not always require a meeting.*
- D. *The OFFICE OF JOHN PEARCE SOLICITOR & NOTARY PUBLIC has two locations. The Melbourne Central Business District and the Eastern Suburbs Home Office. For the foreseeable future the Melbourne CBD Office is closed. However, there are a limited number of appointments available for the Home Office. Be aware that social distancing protocols are in place. If you wish to minimise the time you spend at the appointment, where applicable consider emailing ahead of the appointment copies of documents to be notarised, as well as identity documents. Upon arrival, the Notary will ask you whether you have been feeling unwell, whether you have recently returned from overseas or on a domestic flight, or whether you have been interacting with others who have been feeling unwell or who have recently returned from overseas or a domestic flight. Clients are required to answer truthfully and a file note will record the client's answer. Clients are required to sit at the table in the covered enclosed area outside the Home Office and to avail themselves of the hand sanitiser. Please bring your own pen to the appointment and take it with you when you leave. The Notary will be wearing rubber gloves and a mask and will speak to you through the window from the Home Office. Documents will be passed between you and the Notary via the window.*

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