



Video conferencing in the COVID-19 era



This bulletin has been revised subsequent to its first publication on 9 April 2020 to reflect the introduction of the COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020 (Vic).

This bulletin covers:

- Using video conferencing to take instructions and give advice
- Using video conferencing to do VOI in property transactions
- Risk issues with video conferencing and with solicitors certificates
- Risk issues with video conferencing to witness wills and affidavits

In this current environment when we are all trying to minimise contact with other people to avoid the spread of COVID-19 this bulletin highlights some risk management issues around video conferencing especially for witnessing wills and solicitors certificates.

Instructions and advice

When you can't see your clients face to face video conferencing has obvious benefits over a phone call as it gives you visual cues as to whether they have heard and understood what you have said, or whether they want to ask a question. You can usually easily record the meeting, with the client's permission of course, and send it to the client to watch and listen to again.

Risk management tips

Taking instructions and giving advice is now routinely undertaken via video conferencing but you need to bear in mind the following issues.

- **Clarity of communication** – What is the quality of the sound and picture? Can you see the client well enough to recognise them, assess their body language and facial expressions? Can you both hear each other without risk of words dropping out? Take extra time to make sure the client has really understood your advice by asking them to express the advice back to you in their own words.

- **Nature of the matter or transaction** – Are you satisfied the client is not acting under duress or another’s influence? Is the matter one in which the client is being asked to assume an obligation or carry a risk that is potentially disadvantageous to them (such as a finance transaction or guarantee)? Is there someone else in the room putting pressure on them? Can you be sure if you ask the other person to leave that they will? This is particularly important for advice and instructions involving wills and powers of attorney.
- **Keep good file notes** – You should make good notes of how the meeting was conducted, who was present, how long it took, what instructions you received, what advice you gave and what you observed if there was anything unusual about the client’s demeanour. Where the matter involves the client taking a risk, warn them of the risk and ask them to explain their reason for taking it – then record their answer in your file note.
- **Confirm advice in writing** – This is fundamental to good practice and even more important in the COVID-19 environment. You may be working from home, under greater stress and not in your normal routine. A short email to the client after the meeting to record the essential aspects of their instructions and your advice not only helps to give you a frame of reference when you come back to the client’s matter, but could be the difference in years to come if there is some later dispute or claim.

There is a range of software to choose from including Zoom, GoToMeeting, WebX, Microsoft Teams, Skype, Face Time, WhatsApp, Google Hangouts Meet and others. Try doing a search of the term ‘best video conferencing software’ to choose the right software for your needs. When choosing, look at the security of any video conferencing software you are using and ensure the privacy settings are appropriate.

Verification of identity (VOI)

Transactions involving interests in land

- Using video conferencing to verify identity is not part of ARNECC’s safe harbour steps (see VOI Standard, Rule 2, schedule 8 of [Model Participation Rules \(MPR\)](#)).
- Verifying identity via video conferencing may be considered part of the reasonable steps test ([ARNECC Guidance Note 2](#), question 13 and [ARNECC’s March 2020 notice](#)) but ARNECC counsels caution and makes it clear the onus remains on a subscriber.
- The proposed changes by ARNECC from 1 July 2020 to require all VOI to be done face-to-face (version 6 MPR) have been deferred until further notice.

The safest course if you cannot do a face to face VOI is to ask the client to use a VOI agent such as Australia Post or ZipID.

Other transactions – common law duty to take reasonable steps

Practitioners acting in matters outside of the ARNECC VOI obligations still have a common law duty to take reasonable steps to be satisfied that their client is who they claim to be. Using video conferencing can certainly help as part of the reasonable steps required to be taken.

Some things to consider doing if using video conferencing are:

- ask the client to send you certified copies of the identification documents to be received before the meeting
- during the video conference ask the client to hold up the originals of the verification documents to the screen so you can compare them to the copies you hold and the client in the video conference
- keep a good written record of what you did on the assumption that it might end up being tested in court
- be alert during the conference for any behaviours that might raise suspicions about the client's identity.

Solicitors certificates

Require face to face verification

Verifying identity when giving a solicitors certificate needs to be done face-to-face in person and the recent ARNECC notice does not change that because:

- rule 11 of the [Legal Profession Legal Practice \(Solicitors\) Rules 2015](#) (Rules) governs how evidence is to be given of any advice you gave a borrower or guarantor
- rule 11.2 of the Rules says you need to verify your client's identity by using the VOI Standard in schedule 8 of [Model Participation Rules](#), which requires you to do face-to-face VOI
- rule 11.3 says you must use the [LIV form of solicitors certificate](#) and that certificate says you verified the identity of the person in accordance with rule 11.2.

If the verification of identity can't be done face-to-face you should not sign the solicitors certificate. However, there is nothing stopping you from giving advice to a guarantor or borrower via video conferencing about their obligations as a borrower or guarantor. The risk management tips raised earlier about using video conferencing should be followed.

An acknowledgement signed by the client that they received the advice from you may satisfy the lender in lieu of a solicitors certificate.

If the lender insists on a solicitors certificate you could refer them to rule 11.8 which prohibits a solicitor, such as a solicitor acting for the lender, from aiding, abetting, counselling or procuring another solicitor to breach rule 11. [Section 39 of the Uniform Law](#) also makes it an offence for anyone, and this would include a lender, to induce a law practice or practitioner to breach the Uniform Law or any rules.

Hazards of Solicitors certificates

In the current financial environment requests from practitioners for advice on loans and guarantees, particularly from second and third tier lenders, appear to be increasing.

Now is a good opportunity to refresh yourself and your staff with LPLC's extensive resources in relation to the perils of advising in relation to mortgages and guarantees and providing Solicitors certificates:

- [File note – meeting to advise about a guarantee](#)
- [Key Risk Checklist: Solicitors certificates for borrowers or surety providers](#)
- [Keep managing mortgage risk](#)

Witnessing documents

Witnessing the execution of documents such as wills, powers of attorney, affidavits and statutory declarations are going to be increasingly hard as health and safety considerations associated with the pandemic and social distancing requirements increase. These documents all require the witness to be 'in the presence of' the person when they sign the document.

The physical presence concerns have been addressed in the COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020 (Vic). (the regulations) which came into operation on 12 May 2020 and will sunset after six months. The regulations allow wills, powers of attorney, affidavits and statutory declarations to be executed electronically and witnessed via audio video link.

Witnessing wills

A separate outline of the issues to consider when complying with the regulations for witnessing wills and a template form of file note has been prepared and can be found in the LPLC Bulletin [Witnessing wills by audio visual link under COVID-19 Omnibus – what lawyers need to know](#).

Witnessing a will by video conference can now result in a valid will but only if the prescriptive requirements are complied with. Use of video conferencing does not detract from a lawyer's obligation to ensure the client has capacity and is not subject to undue influence or acting under duress. It also requires competent use of technology that may be outside the capability of some testators and witnesses and so may not be a practical option in many situations.

A validly executed will is always the desired objective. Nevertheless, it's possible an invalidly executed will may be later proved as an informal will, and in urgent situations an informal will is better than no will.

Risk management tips

- First ask: do you need to witness the documents? In most cases the answer will be no. While witnessing signatures for wills and powers of attorney or even affidavits is a usual and convenient thing for practitioners to do for their clients it is not necessarily a duty they must perform.
- At this time when there is not a total lockdown in place there may be instances where witnessing the execution of the will could be safely done in person with the right precautions. Ask yourself:
 - can you view the signing from behind glass or across the room or outside to maintain social distancing measures?
 - can gloves be worn or hand sanitiser used before and after signing?
- If you are unable to see clients in person to witness their signatures you can still have a video conference to explain the contents of the will as you would normally do. You should then send them the documents with clear written instructions on:
 - how to have the documents executed
 - who can witness their signatures
 - the importance of any time restrictions.
- Remote witnessing of wills and powers of attorney is now legally possible, but whether you can or should utilise this option will depend on the circumstances at hand and on your competence at handling the technology and prescriptive process required to create a valid remotely executed will or power of attorney under the new COVID-19 regulations.
- If the situation calls for urgency but:
 - you cannot meet the client face-to-face; and
 - remote witnessing is not a viable option for you in the circumstances –

you may need to advise your client on the option of creating an informal will. You will need to explain to them the consequences and requirements of an informal will. The Court of Appeal of the New South Wales Supreme Court in *Howe v Fischer* (2014) NSWCA 286 said the most that could be required of a practitioner if they were aware of any factors that might frustrate the making of an informal will was to explain the option of making an informal will to the client and the possibility that the court might be expected to declare it a final will if necessary later.

- An informal will is a document that has not been properly executed as a will. The Supreme Court of Victoria has the power under section 9 of the Wills Act 1997 (Vic) to admit an informal will to probate if it is satisfied that that person intended the document to be his or her will. The court will have regard to:
 - any evidence relating to the manner in which the document was executed
 - any evidence of the testamentary intentions of the testator, including evidence of statements made by the testator.
- If you are satisfied the client understands and approves the contents of the will you can ask them to sign the document and write a statement on it that the document records the testator's intentions and they intend the document to be their last will. You might ask the testator to confirm to you in writing they have done this and where they have put the informal will.
- For LPLC articles on informal wills
 - [Informal wills should be front of mind](#)
 - [Informal wills – the next instalment](#)
 - [iWill](#)

Changes to witnessing requirements

The [Federal Court](#), [Family Court](#), [Federal Circuit Court](#) and [County Court of Victoria](#) have all published on their website statements about accepting unwitnessed affidavits. Practitioners should check the details for each court, as they are all slightly different, and explain the arrangements to their clients.

The Law Institute of Victoria has asked the Victorian Attorney General to enact emergency legislation to override the need for face-to-face witnessing. Some of the issues raised here may be clarified soon. For more information on witnessing documents by video conference see the Law Institute of Victoria's [Practice Note for Victorian practitioners taking Will and Enduring Power of Attorney Instructions](#) during COVID-19 and our Law Institute Journal article [Video conferencing risks](#).