

Solicitors' certificates – risky business in COVID-19



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

Providing solicitors' certificates in these matters is risky at the best of times, but where there is uncertainty about future financial and property market stability and clients under severe financial stress, extreme care needs to be taken.

Face to face verification of identity

Past experience has shown that when people are financially desperate, some use deception to borrow money. In this current economic environment more people will be financially distressed and this heightens the risk of borrowers presenting to practitioners who are not who they claim to be.

Verification of client identity in all cases is paramount to safeguard against identity fraud.

Verifying identity when giving a solicitor's 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 solicitor's certificate](#) and that certificate says the identity of the borrower or guarantor was verified in accordance with rule 11.2.

If the verification of identity can't be done face to face you should not sign the solicitor's 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 in our [bulletin on 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 solicitor's certificate. If the lender insists on a solicitor's 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.

More than just witnessing

We all know that signing a solicitor's certificate involves more than merely witnessing documents. You are certifying that you have advised the client on the general nature and effect of the loan or guarantee documents. Many of the claims we receive centre around allegations that the client was not given the appropriate advice, although the practitioner says otherwise.

When people are stressed, they do not always think clearly or remember what they have been told. In this context it is vital that you are very clear in your explanations to clients and that you confirm your advice in writing. It may take both oral and written explanations before the client understands the risks.

Where possible give the client time to think about the decision before they sign. For more information on helping clients hear what you are saying see an

article called ['Putting your best brain forward'](#) by Nora Rock.

Critical issues for advice

The critical issues to consider and actions to take when advising a borrower or guarantor and providing a solicitor's certificate are set out below.

- **Who is the client?** Where there is a conflict you shouldn't act for more than one party in the transaction, particularly husband and wife guarantors, as their interests are often not completely aligned. The same may be said for business-partner directors of a borrower company if the two directors have different assets at risk.
- **You need time to read and digest the documentation before giving advice.** Ask for the documentation ahead of time and carefully read it and advise the client of the relevant and unusual provisions, particularly the default provisions and interest rates.
- **Consequences for guarantor if borrower defaults.** Warn your client of the risks of default by the borrower, and the financial and other consequences for them if that occurs, including losing their home or going bankrupt.
- **Be vigilant for improvident transactions.** Most solicitor's certificates involve the client giving a mortgage over property as security for monies advanced. Who is getting the benefit of the borrowing? If not the client, why are they choosing to mortgage their property and put it at risk for another's benefit? If the answer does not withstand objective scrutiny, warn the client against entering

into the transaction in strong terms and document that advice. This is particularly important where the client:

- o is elderly
 - o is inexperienced in business or financial matters
 - o has English language difficulties
 - o appears under pressure from adult children or from their spouse.
- If the client does not heed your advice, consider whether you should cease acting in the matter.
 - Keep very good written records of what was said to and by the client. See our [File note –meeting to advise about a guarantee](#) as a starting point for preparing a note before your meeting with the client.
 - Confirm your advice in writing to the client.
 - Charge a fee that properly reflects the work required.

Proactive practice management

In order to ensure all of these steps are taken and done well, now is a good opportunity to:

- **review or write a [firm policy](#)** about how this work will be handled.

Our recently revised [Key Risk Checklist: Solicitor's certificates for borrowers or surety providers](#) will help you fill out your policy

- **prepare a proforma file note** to use when you see clients. You can use our [File note – meeting to advise about a guarantee](#) as a good starting place and adapt it to suit your needs
- **prepare a precedent letter** to send to clients confirming the advice you gave in conference or in preparation for a conference with the client. This letter can be based on our [File note – meeting to advise about a guarantee](#).

For more information on the risks of solicitor's certificates see our practice risk guide - [Managing mortgage risk](#).