

# Solicitor's Certificates and COVID-19

## The current financial environment

### Poll

Are you seeing an increase in requests for solicitor's certificates?

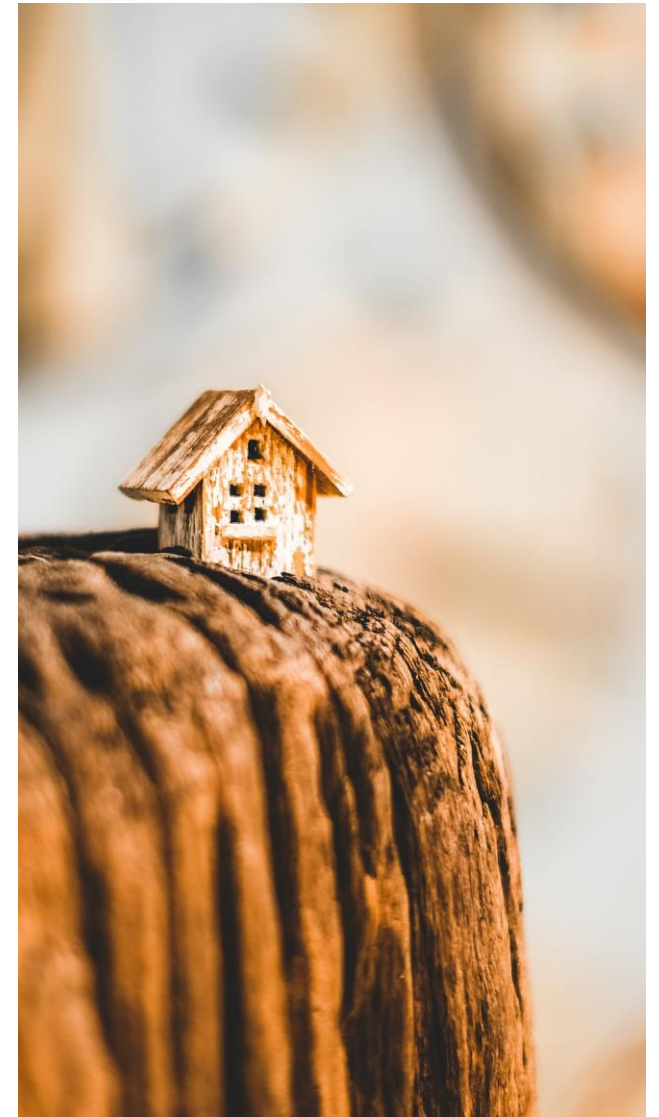


Image by Valentin Petkov on Unsplash

Future financial  
uncertainty



Clients in severe  
financial stress



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## Face to face verification of identity

- Heightened risk that borrowers or guarantors will not be who they claim to be.
- [XPAK Pty Ltd v Scibilia & Ors \[2013\] VCC 1260](#)
- Verification of client identity now more important than ever



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# Face to face verification of identity for solicitor's certificates

## Rule 11 of the Legal Profession Legal Practice (Solicitors) Rules 2015

governs the evidence given  
of any advice you gave  
a borrower or guarantor.

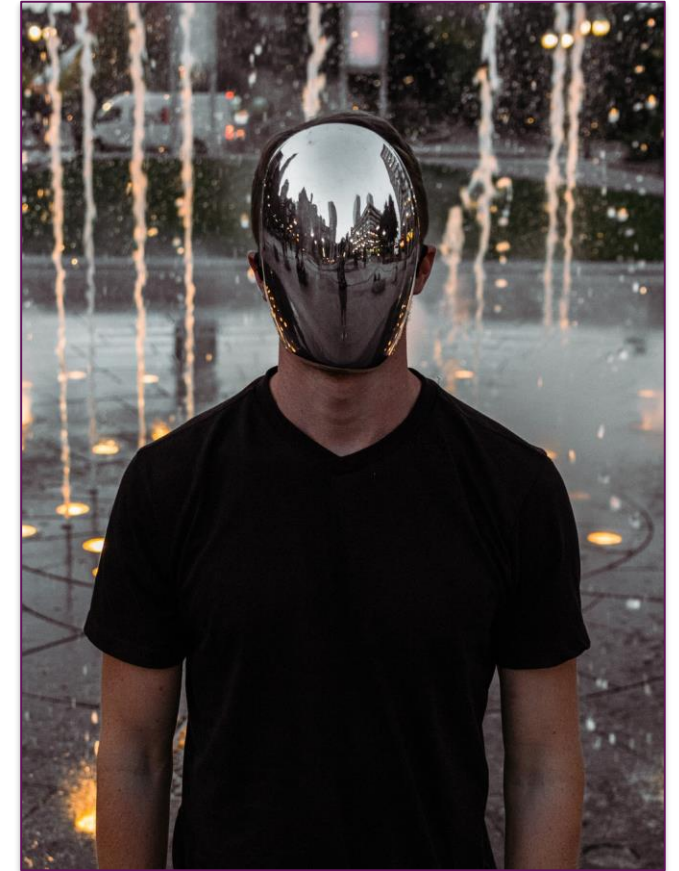


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# Face to face verification of identity for solicitor's certificates

11.1 This rule applies where:

11.1.1 a solicitor is engaged to give advice to a proposed signatory that will be:

11.1.1.1 a borrower, a grantor of a security interest, ..., or

11.1.1.2 a third party mortgagor, guarantor, surety mortgagor or indemnifier ..., and

11.1.2 the solicitor has been asked to provide evidence of the advice.



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## Face to face verification of identity for solicitor's certificates

Rule 11.2 says you need to  
verify your client's identity by using the  
VOI Standard in  
schedule 8 of the  
[Model Participation Rules](#),  
which requires you to do face to face  
in person VOI

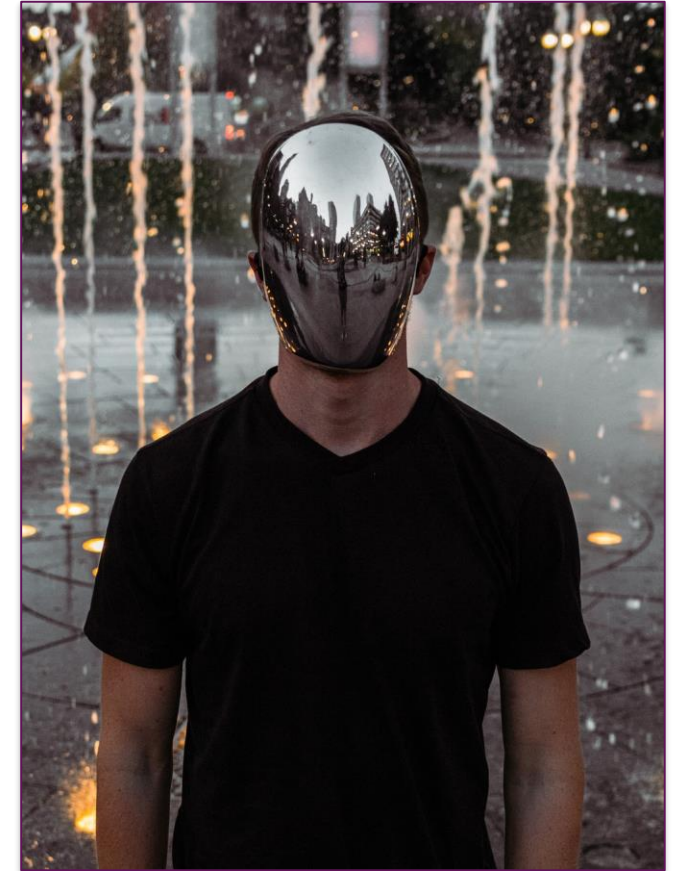


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## Face to face verification of identity for solicitor's certificates

11.2 The **solicitor providing the advice** must verify the identity of the proposed signatory using the **Verification of Identity Standard** contained in **Schedule 8 to the Model Participation Rules** determined by the Australian Registrars' National Electronic Conveyancing Council as adopted and made by each jurisdiction pursuant to section 23 of the Electronic Conveyancing National Law.



Image by Alex Iby on Unsplash



## Face to face verification of identity for solicitor's certificates

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.

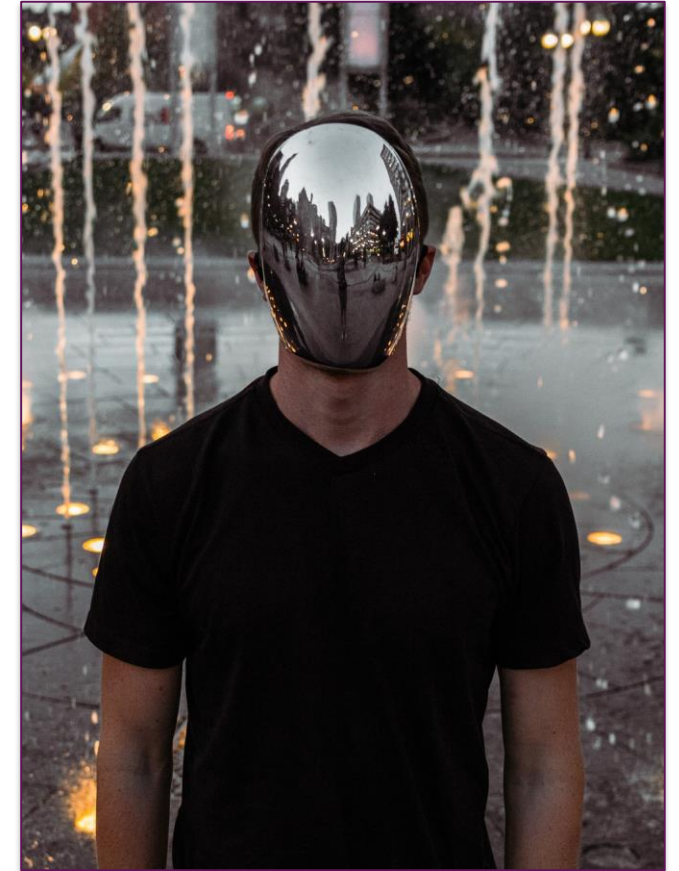


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## Face to face verification of identity for solicitor's certificates

- 11.3 The evidence of advice provided by a solicitor to a borrower must be in the form of:
  - 11.3.1 Law Society of NSW Declaration by Borrower/Grantor of a Security Interest Schedule 1, 1A or 1B, or
  - 11.3.2 Law Institute of Victoria Australian Legal Practitioner's Certificate 1 (Schedule 1).



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# Face to face verification of identity for solicitor's certificates

## **Solicitor's certificate**

### **PART E**

### **Identification of persons signing documents**

The identity of the guarantor has been verified in accordance with rule 11.2 of the Legal Profession Uniform Legal Practice (Solicitors) Rules 2015



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# Face to face verification of identity for solicitor's certificates

## Summary

- You need to do the verification.
- No reference to timeframe to do the VOI. Could imply a reasonable time to have done the face to face VOI.
- Take VOI seriously - Fraudsters have gone to great lengths in the past to get money
- If the verification of identity can't be done face to face you should not sign the solicitor's certificate

**BUT**



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## Face to face verification of identity for solicitor's certificates

- You can still give advice to your client even if you can't sign the solicitor's certificate
- Offer the financier
  - Client acknowledgement of receiving legal advice
  - Other suggestions?

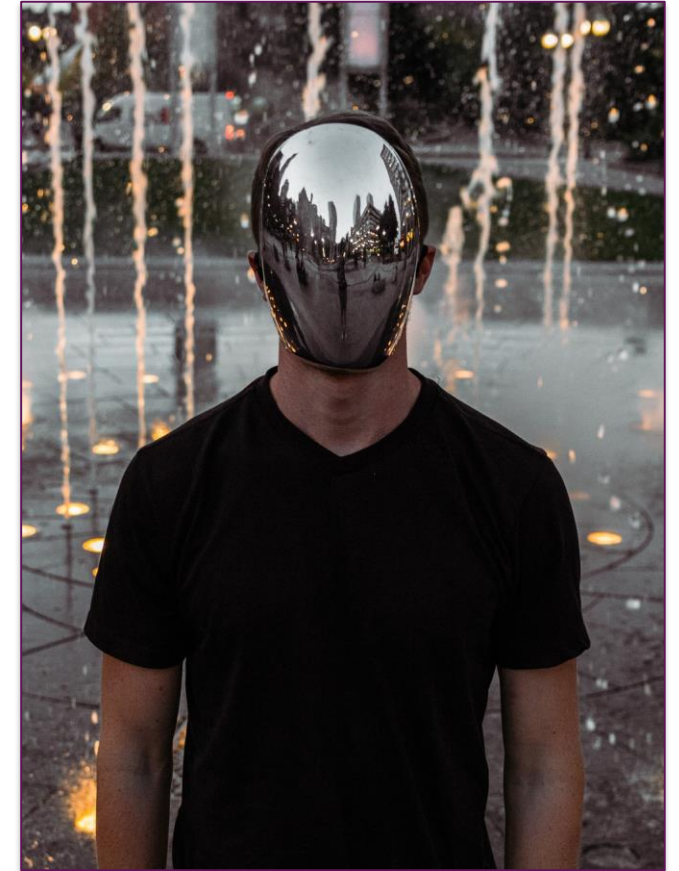


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## Face to face verification of identity for solicitor's certificates

### Armour

- 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

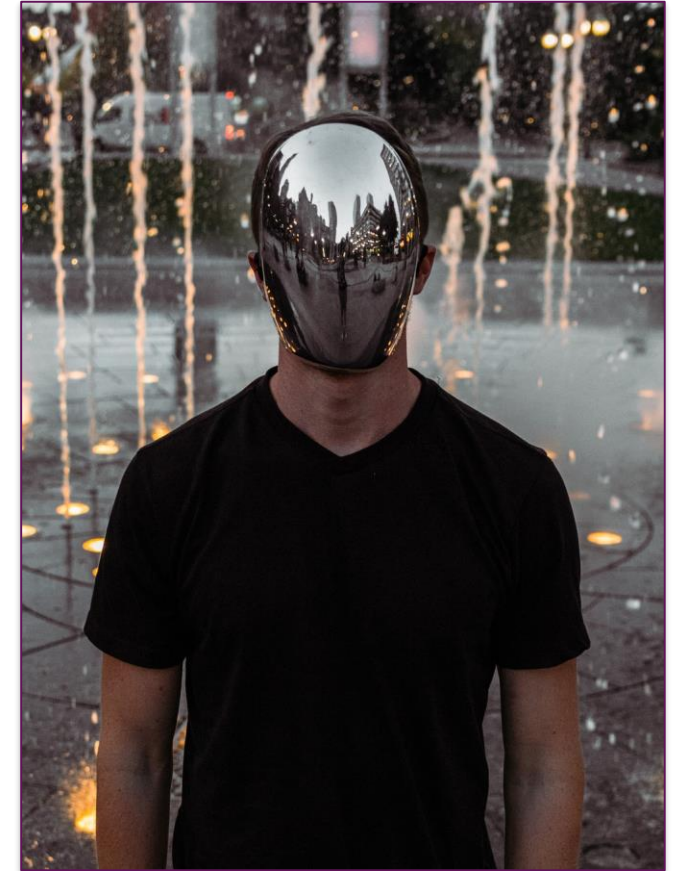


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## Advising clients by video conference

### **In person is always best**

Are there good reasons why you can't do that?

If the client is unwell or high risk for COVID-19 –  
should they be borrowing or guaranteeing  
money?

**If you do need to give them advice -  
use video conferencing not phone**



Image by Gabriel Benois on Unsplash

# Video conferencing

## POLL

- who has done video conferencing with clients yet?
- What software have you used?

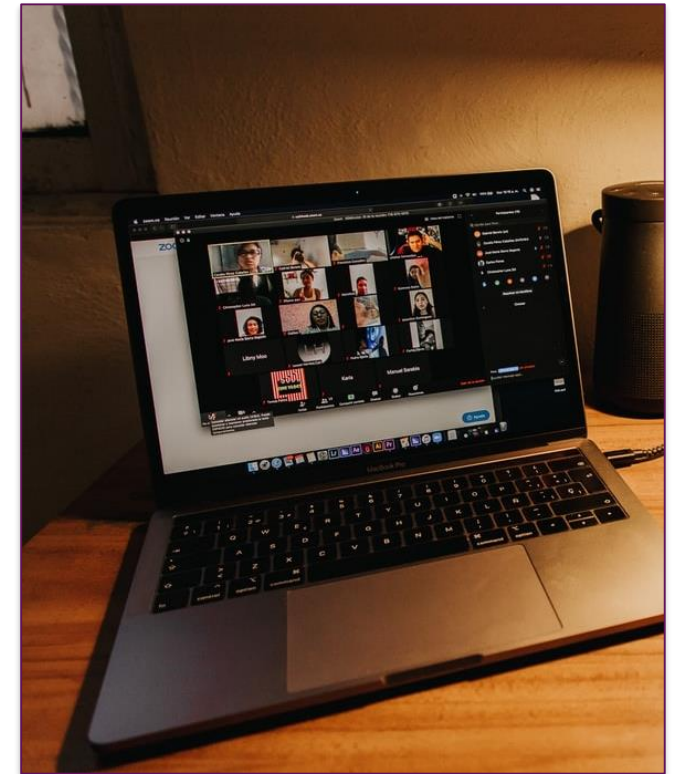


Image by Gabriel Benois on Unsplash



# Advising clients by video conference

## Benefits

- Visual cues about hearing and understanding
- Remember you are certifying that the client is

**signing freely, voluntarily and without pressure from  
borrower or any other person**

[Bulletin: Video conferencing in the COVID-19 era](#)

[Blog: Solicitors' certificates – risky business in COVID-19](#)

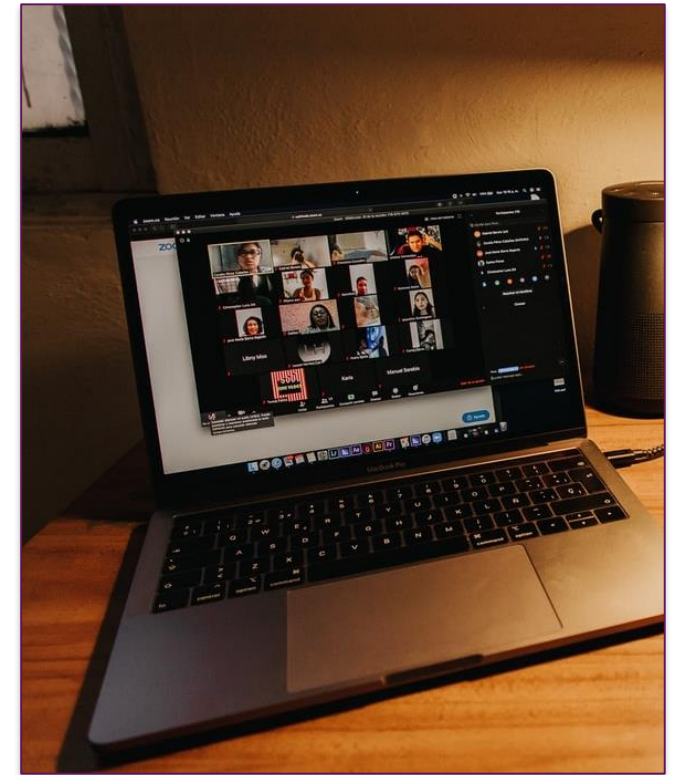


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## Video conferencing - Risk management tips

### 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?

### How will you assess capacity?

[Tips for assessing capacity via video conferencing during COVID19.](#)

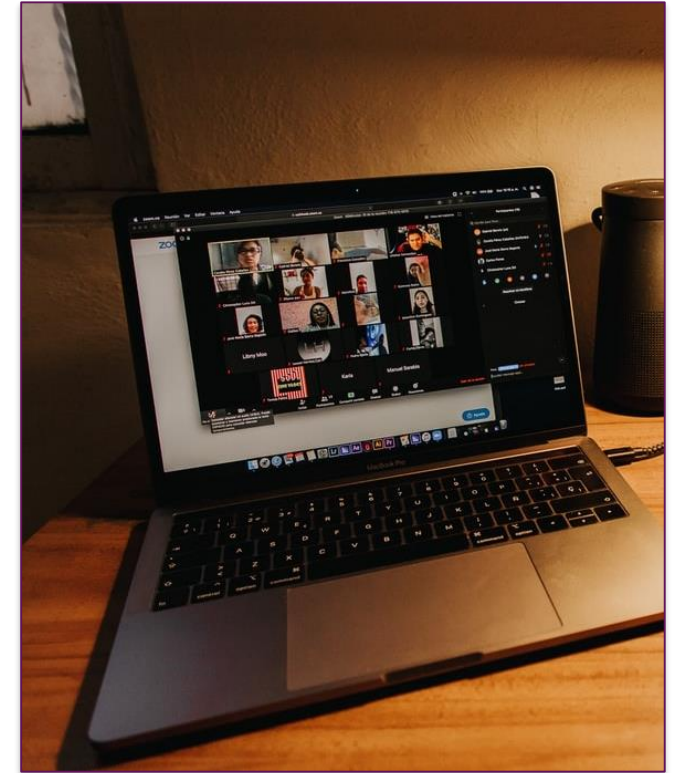


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## Video conferencing - Risk management tips

### Consider duress

- Are you satisfied the client is not acting under duress or another's influence?
- 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 or have?
- Are they listening outside the door?

**Has any one been in this situation? What could you do?**



Image by Gabriel Benois on Unsplash

## Critical issues for advising on mortgages and guarantees

- **Who is the client?**
  - More than one person involved – Husband and wife, business partners...
- **You need time to read and digest the documentation before giving advice**
  - Ask for the documentation ahead of time and carefully read it.



Image by Alice Pasquale on Unsplash



## Critical issues for advising on mortgages and guarantees

### What are the crucial clauses to read and advise on?

- Joint and several
- Default provisions
- Interest rates
- Unusual provisions??



Image by Alice Pasquale on Unsplash

## Critical issues for advising on mortgages and guarantees

- **Consequences for guarantor if borrower defaults.**
  - Warn your client of the:
    - risks of default by the borrower,
    - financial and other consequences for them if that occurs, including losing their home or going bankrupt
- **Be vigilant when it is an improvident transaction.**
  - Who is getting the benefit of the borrowing?



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## Critical issues for advising on mortgages and guarantees

### Improvident transactions

- In Provident Capital Ltd v Papa [2013] NSWCA 36

*A reasonable solicitor giving her independent legal advice in relation to the transaction would not in my view have failed to draw to Mrs Papa's attention, in **strong terms**, that her home and livelihood was dependent upon the viability and prospects of the gymnasium... and to recommend, again in **strong terms**, that **she obtain financial advice**...*

*A solicitor's obligation is not simply to explain the legal effect of documents but to advise his or her client of the **obvious practical implications** of the client's entry into a transaction the subject of advice.*



## Critical issues for advising on mortgages and guarantees

- **Keep very good written records**
  - what was said to and by the client
  - What you observed about the client's demeanour

See our [File note – meeting to advise about a guarantee](#) as a starting point for preparing a note before your meeting with the client.



Image by Alice Pasquale on Unsplash



File note – meeting to advise about a guarantee

|  |  |              |           |
|--|--|--------------|-----------|
| Date:  | Start time:  | End time:    | Author:   |
| Attendee (client):                           |  |              | File no.: |
| Conflict considered if more than one client  | Same interest in the transaction?<br>Same assets or value of assets at risk? |              |           |
| Interpreter name:<br>Or reason why not       |  |              |           |
| Interpreter address:                         |  |              |           |
| Documents reviewed                           |  |              |           |
| Lender                                       |  |              |           |
| Borrower(s)                                  |  |              |           |
| Mortgagor(s)                                 |  |              |           |
| Guarantor(s)                                 |  |              |           |
| Purpose of the loan                          |  |              |           |
| Loan amount                                  | \$   |              |           |
| Interest rate                                | %  | Penalty rate | % payable |
| Security description<br>Vol/folio or address |  |              |           |

Summary of explanation to client – regarding guarantee and mortgage

- ☐ The lender has agreed to lend money to the borrower.
- ☐ You are being asked to provide your property as security for the repayment of all money owing to the lender.
- ☐ To do that you are asked to sign the documents referred to above.
- ☐ These documents entitle the lender to register a
  - ☐ first mortgage

- ☐ second mortgage or
- ☐ caveat
- over your property.
- ☐ Where the secured property is personal property the Lender will register its interest in the secured property on the Personal Property Securities Register (PPSR). Upon registration the lender will receive a token. Information on documents registered on the PPSR are publicly available for searching.
- ☐ The borrower must repay all money owing to the lender failing which demand can be made on the borrower and/or you to pay **all money owing to the lender, which may be more than was borrowed**. The lender does not need to ask the borrower to pay the money back first. They can ask you to pay it first.
- ☐ The borrower and you must comply with the terms of the lending documents which usually provide that the borrower and/or owner of the Secured Property must:
  - ☐ insure the secured property
  - ☐ pay all expenses, rates, taxes and charges in respect of the secured property
  - ☐ keep the secured property in good repair
  - ☐ obtain consent of the lender to any changes to the secured property such as demolition.
- ☐
- ☐ The borrower and you will be in default where they fail to comply with the terms of the security documents. Examples of defaults are:
  - ☐ all money owing to the lender is not paid by the due date.
  - ☐ the borrower or you go into bankruptcy, enters into an arrangement with creditors, has a receiver or liquidator appointed.
  - ☐ there is an unsatisfied judgment against the borrower or you.
- ☐
- ☐ Where there is a default the lender may seek possession of the secured property and is entitled to any rent or other earnings derived from the secured property. The lender may choose the secured property you provided over any other property provided by the borrower as security.
- ☐ The lender is entitled to sell any security property in order to recover the amount lent plus interest plus expenses in selling the property.
- ☐ The lender will determine how much is owing to the lender.
- ☐ Usually the lender will write to a party at the address given on the security documents.
- ☐ On repayment of all money owing to the lender the borrower is entitled to request a form of release and/or discharge from the lender.
- ☐ The most important thing to know is you could lose your property.
- ☐ Because of this serious risk you should obtain independent financial advice about the ability of the borrower to pay back the loan.
- ☐ If lender is a bank that the borrower has previously used you should ask the lender to provide information about the borrower's financial position.

Other information discussed

Client's questions and statement of understanding



## Critical issues for advising on mortgages and guarantees

- **Keep very good written records**

- what was said to and by the client
- What you observed about the client's demeanour

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 advice in writing**

- This is fundamental to good practice and even more important in the COVID-19 environment



Image by Alice Pasquale on Unsplash

## Critical issues for advising on mortgages and guarantees

- **Charge an appropriate fee for the doing all this work**
  - Educate your clients about importance of work – not just witnessing
  - Write an article for your website about the importance of getting advice about mortgage and guarantee documents and what can go wrong.



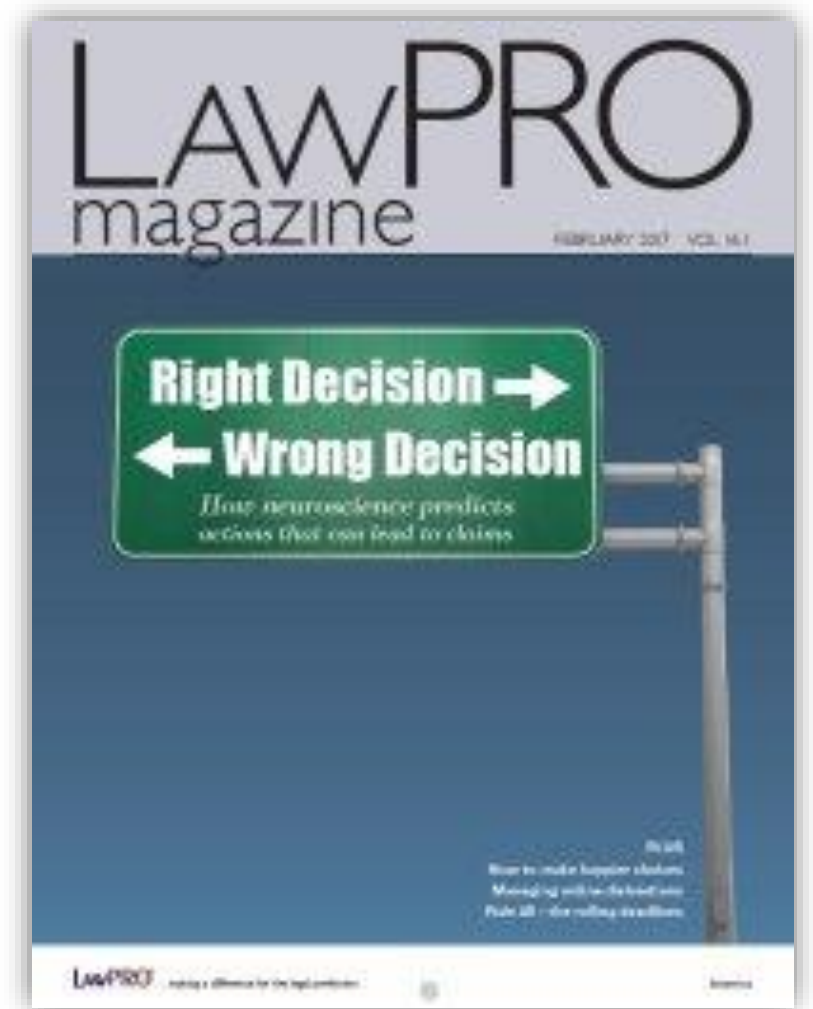
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## Why clients don't hear you

**'Putting your best brain forward'** by Nora Rock,  
LawPro Magazine: February 2017

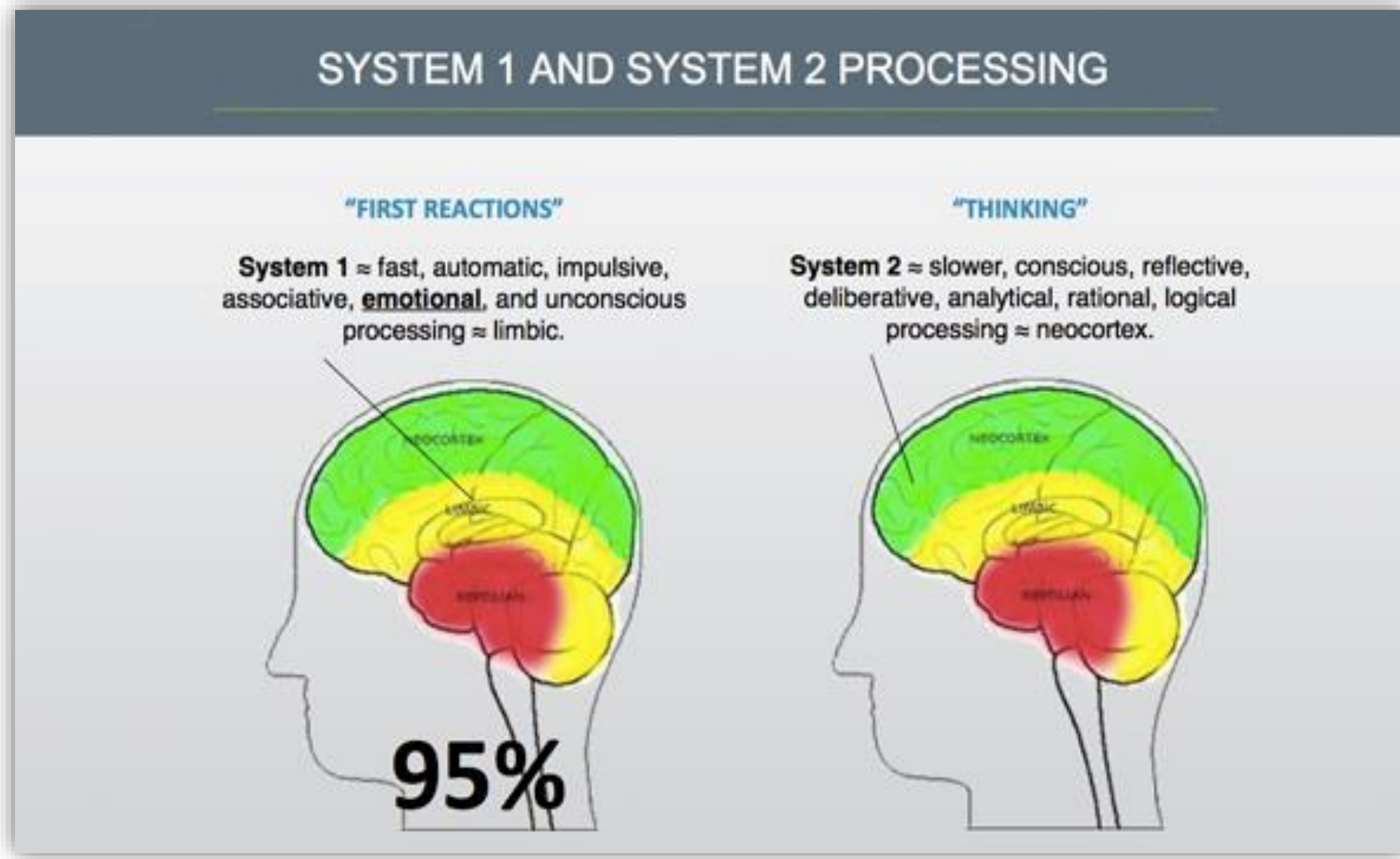
(<http://www.practicepro.ca/LawproMag/default.asp>).

Daniel Kahneman: Thinking fast and slow





# Putting your best brain forward



## Putting your best brain forward

- **Bias**
  - confirmation bias - clients may be listening to you and trying to reinforce what is already in their own mind
- **Fight or flight** - impairs our ability to think and our memory

## Strategies / solutions

No easy answers

- **Stories**
- **Time**
- **Essentials**
  - Asking client what they understand the worst-case scenario could be?
  - Write down what they said
  - Precedent file note
  - Written letter of advice or copy of file note
  - Amado checklist - on website

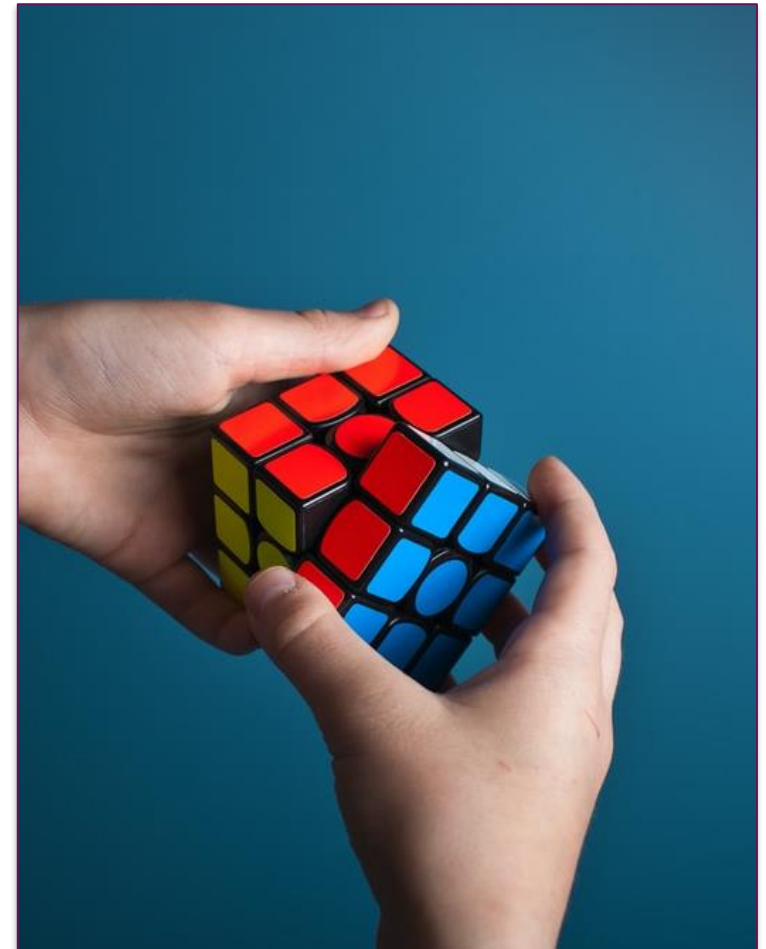


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## Proactive practice management

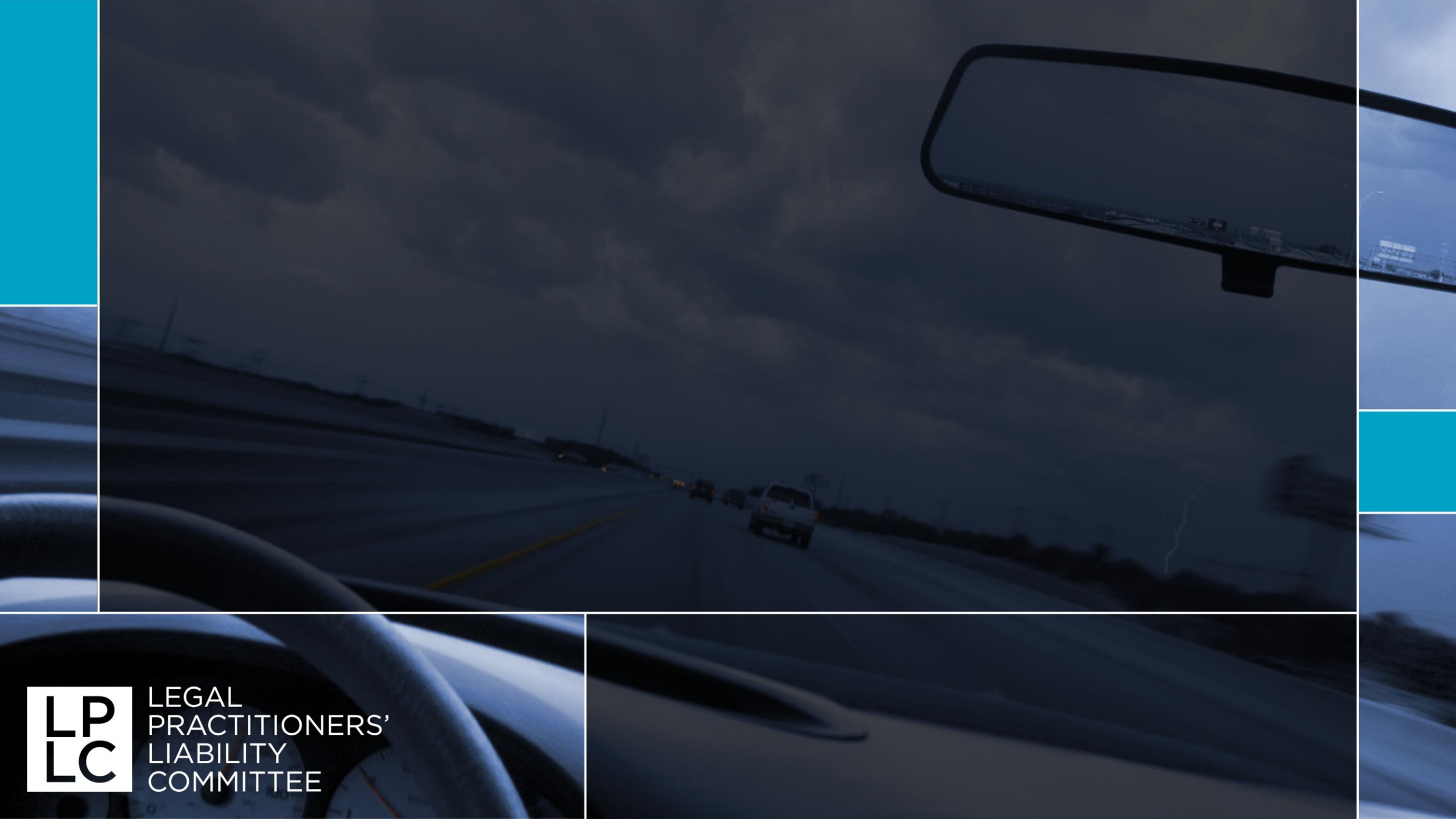
**Review or write a [firm policy](#)** about how this work will be handled. Our recently revised [Key Risk Checklist: Solicitor's certificates for borrowers or surety providers](#) will help you fill out your policy

**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 - [Keep managing mortgage risk](#).





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LIABILITY  
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