

FAQ ON ELECTRONIC WITNESSING OF SIGNATURES

1. CAN I WITNESS THE SIGNING OF A DOCUMENT BY SKYPE?

No. At this time the technology does not meet the requirements for attesting the 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) cannot 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.

2. CAN I WITNESS THE SIGNING OF A DOCUMENT ELECTRONICALLY?

Only if your method of signing and witnessing meets the minimum requirements for attesting the document. In the context of electronic signing, there is 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 meet these requirements.

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 decided cases, 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.

3. CAN I WITNESS THE SIGNING OF A DOCUMENT USING ONLINE OR CLOUD BASE 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.

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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 (*Seal v Claridge* (1991) 7 QBD 519; *Freshfield v Reed* (1842) 9 MN & W 404; 152 ER 181; *Ellison v Vikicevic* (1986) 7 NSWLR 104 at 112; *Netglory v Caratti* [2013] WASC 364 at [144]-[147]; *Brown v Tavern Operator* [2018] NSWSC 1290 at [465]-[466],[496]);
- (b) certifies that the document attested was signed by the witness (*Freshfield v Reed* (1842) 9 MN & W 404; 152 ER 181; *Ellison v Vikicevic* (1986) 7 NSWLR 104 at 112);
- (c) certifies that the document was signed voluntarily, so that it was the signatory's own act (*Freshfield v Reed* (1842) 9 MN & W 404; 152 ER 181; *Burns v Lorac Mining* (1985) 4 FCR 301 at 303); and
- (d) represents that they attested at the time they witnessed the signature by the signatory (*Netglory v Caratti* [2013] WASC 364 at [150]-[170]; *Brown v Tavern Operator* [2018] NSWSC 1290 at [468]-[478],[496]).

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. 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 (*Netglory v Caratti* [2013] WASC 364 at [146], [309]; *Ellison v Vikicevic* (1986) 7 NSWLR 104 at 112); *Brown v Tavern Operator* [2018] NSWSC 1290 at [464],[466]);
- (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 (*Shah v Shah* [2001] 3 WLR 31; [2002] QB 35; [2001] 4 All ER 138; [2001] EWCA Civ 527);
- (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; and
- (d) in the case of incorrect witnessing by a solicitor, there is a potentially greater risk of the person making the attestation being liable for misleading conduct or negligence (Seddon N, *Seddon on Deeds*, The Federation Press, Sydney, 2015), and an added risk of being found to have engaged in unsatisfactory professional conduct;
- (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.

Disclaimer: This publication provides general information of an introductory nature about the electronic witnessing of signatures. It is a general guide only and is not exhaustive of issues which may be encountered. This publication is not intended and should not be relied upon as a substitute for legal or other professional advice. While every care has been taken in the production of this publication, no legal responsibility or liability is accepted, warranted or implied by the authors or The Law Society of New South Wales and any liability is hereby expressly disclaimed. Current as at 24 August 2018. © 2018 The Law Society of New South Wales, ACN 000 000 699, ABN 98 696 304 966. Except as permitted under the *Copyright Act 1968* (Cth), no part of this publication may be reproduced without the specific written permission of The Law Society of New South Wales.