

Witnessing or swearing documents must be taken seriously

GRANT FEARY, DEPUTY DIRECTOR, LAW CLAIMS

Failure to adhere to all formal requirements when witnessing or swearing documents can lead to misconduct charges (including strike-off) and will also place your insurance cover in jeopardy

It is important for lawyers to be scrupulous about proper witnessing of documents, even where it may be inconvenient to do so.

A lawyer in a firm in a regional area in NSW was acting for two clients in a land transaction. The clients lived some distance away and needed to make statutory declarations that their Certificate of Title had been lost so that a new Certificate could be issued. When the lawyer sent out the Declarations to the clients he included a pen in the envelope along with a Post-it Note on which he had written

*"Pls sign the stat dec in the marked places
I will witness your signature when you return
them and complete all balance details.
Please send the same pen back."*

The lawyer subsequently resigned from the firm to establish his own practice. The clients' son returned the documents to the firm where another lawyer told him the documents were not in proper form and they had to be completed again.

The firm reported the lawyer to the NSW regulator of the legal profession, the Legal Services Commissioner (LSC). The lawyer gave evidence that he was motivated by a desire to assist his clients (who were elderly) and who might have had difficulty themselves in attending a prescribed functionary to have the documents executed properly. The lawyer denied that he intended to falsely witness the declarations once they were returned to him. The LSC charged the lawyer with professional misconduct which charge the NSW Civil and Administrative Tribunal found was made out. The lawyer was fined \$2,500.

With respect to NSW Tribunal, it is difficult to think of any sensible explanation for including the pen and requesting its return other than he did intend to falsely witness the clients' signatures once the documents were returned to him. In my view, the lawyer was extremely fortunate that he did not actually sign the documents in question: if he had done so then it is likely that the penalty would have been much more severe. In *LPCB v Rowe* [2012] SASFC 144 a practitioner was suspended for a lengthy period for, in effect, falsely witnessing an affidavit even though what was done was more convenient for the client.

In this case the practitioner was acting for a husband in contested property settlement proceedings in the Federal Magistrates Court (Family Division). The proceedings were due to be heard in the Broken Hill Registry of the Court and the client was a resident of Broken Hill. The practitioner carried on practice in Adelaide. The practitioner met the client on a Sunday in her office to finalise the client's affidavit. There were no administrative staff available to type the client's affidavit and the client had to return to Broken Hill for work the following day. It was agreed between the client and the practitioner that the client would sign blank pages onto which the practitioner would arrange for the text of the affidavit (in accordance with the client's instructions) to be printed.

The practitioner was the subject of disciplinary proceedings which led to the Full Court. The majority in the Full Court (Peek and Blue JJ) noted that there was no dispute that the practitioner had engaged in serious unprofessional conduct even though there was no financial gain to be had by the practitioner in pursuing the course of action, the affidavit as filed accorded with the client's instructions and the course of action was pursued only to minimise inconvenience for the client.

Their Honours said:

"By completing and filing the purported affidavit, the practitioner represented that on Sunday, 27 May 2007, the client had read and signed the typed document and had sworn



before her that the contents were true. That representation was false." [para 66]

Their Honours also said that a practitioner may engage in a single act of unprofessional conduct which is of such gravity that demonstrates in itself that the practitioner is not fit and proper to remain on the roll of practitioners. In other cases, however, an isolated act of unprofessional conduct of a practitioner who otherwise has a good record may be considered as not demonstrating that the practitioner is not fit and proper to remain on the roll. In those circumstances, the protection of the public and the administration of justice does not require the most severe order which the Court could make. In this case, the practitioner had already surrendered her practising certificate. The majority ordered that she be precluded from holding a practising certificate for three years.

Justice White took a different view. His Honour considered that the process of having a purportedly sworn affidavit filed, representing that had been properly sworn, was conduct involving a "substantial ... failure to meet the standard of conduct observed by competent legal practitioners of good repute" at 29 and he would have made an order striking the practitioner's name from the roll of practitioners.

The strict requirements relating to the witnessing of documents apply with even more force to affidavits or affirmations sworn or declared by practitioners. See *LPCC v Thomas* [2017] SASFC 159 for a recent example where a practitioner's name was struck from the roll in part because the practitioner (albeit in his personal capacity as the executor of the estate of an acquaintance) had sworn a false affidavit.

Importantly it must be noted that the SA Professional Indemnity Insurance Scheme **excludes** coverage for claims brought about by a “*dishonest or fraudulent act or omission*” of the insured practitioner. For the purposes of this exclusion the Scheme documents define “*dishonest or fraudulent act or omission*” as including permitting or committing knowingly or recklessly:

- the witnessing (or purported witnessing) of the signing or execution of a

document without seeing the actual signing or execution of it; or

- the making of a representation (including but not limited to, a representation by way of a certificate, acknowledgment or other document) which was known at the time it was made to be false.

Any practice such as solicitors’ affidavits being signed by the deponent and left in a colleague’s in tray for “*countersigning*”,

leaves both practitioners open to disciplinary proceedings and with no insurance cover. Such things should never occur. Convenience is not to the point in considering whether the presentation of an affidavit which has not been properly sworn and witnessed amounts to unprofessional conduct, or, indeed whether that conduct is “*fraudulent*” or “*dishonest*” by reason of the definitions in the Scheme documents.