

## Editor's Note

ESSAR Insurance Services Limited, Managers of the Professional Indemnity Scheme in collaboration with Panel Solicitors MinterEllison LLP, issue this quarterly bulletin to highlight risk management issues learned from their handling of claims.

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## Attestation and certification of documents

### Introduction

Claims often arise from solicitors attesting documents, administering oaths/affirmations/declarations, or producing certified true copies. Such claims often involve allegations that the solicitors failed to discharge their duties, or that the solicitors assumed responsibility to advise by carrying out the relevant task but breached such assumed responsibility. These tasks seem simple but involve clear duties and risks. This bulletin summarises key obligations and risk-mitigation measures.

### Attesting documents, administering oaths / affirmations / declarations

The Hong Kong Solicitors' Guide to Professional Conduct ("**SG**") and The Law Society of Hong Kong's Practice Direction L ("**PD L**") set out the duties of a solicitor when attesting documents or administering oaths/affirmations/declarations. In summary:

- A solicitor must personally supervise or verify all signing and attestation (Principle 2.04 Commentary 3(b)).
- A solicitor must only administer oaths/affirmations/declarations for a client of a different firm (Principle 13.08 Commentary 2).
- Where a document is required by law or practice to be witnessed by a solicitor, that solicitor must be physically present (PD L §1). For other documents, the solicitor firm's appointed clerk may witness, provided that the clerk must be physically present and his signature must be verified by the solicitor (PD L §2).
- The full names of the witnessing solicitor/clerk and their firm must appear legibly below their signatures unless the names appear elsewhere in the same document (PD L §4).

A solicitor must ascertain (Principle 13.08):

- the identity of the deponent – if necessary, the deponent's identity document should be checked;
- the deponent's competency to depose/declare;
- the deponent's understanding of depositing/declaring truth; and
- that the exhibits match references in the documents.

A solicitor must refuse to proceed if:

- the solicitor notes that the document is incomplete – however, the solicitor has no responsibility for the contents of the document (Principle 13.08 Commentary 3);
- there is good reason for the solicitor to believe that the document is false (even if that is unknown to the deponent/declarant) – however, the solicitor has no duty to read through the document (Principle 13.08 Commentary 4); and
- the solicitor or his firm acts for any party in the matter or is otherwise interested. This principle does not apply where a solicitor is taking statutory declarations in his capacity also as a China-Appointed Attesting Officer ("**CAAO**", see below) for the purpose of such declarations being used in or connected with Mainland China, provided that there is a note stating such purpose endorsed on the document (Principle 13.09 and Commentary 3).

## **Certifying documents**

A solicitor's duty in producing a certified true copy is to ensure that the copy accurately reproduces the original document. This involves comparing the two documents and, if satisfied that they are identical, certifying the copy accordingly (*De Monsa Investments Ltd v Whole Win Management Fund Ltd* [2011] 5 HKC 321 at 330).

This duty does not extend to verifying the authority of the signatory or the validity of the underlying transaction. The fact that a document is a certified copy does not mean that the circumstances under which the original document was executed could not be challenged (*Tan Kah Eng v Tan Eng Khiam* (unreported, HCA 9640 / 1999) at §115).

## **Additional duties of CAAOs**

In addition to duties largely similar to those outlined above, solicitors acting as CAAOs are subject to more duties because a CAAO's certification goes to both the authenticity and the legality of the documents. According to the Provisional Regulations of the PRC on Public Notarization (the "**Provisional Regulations**"), CAAOs must, among other things (Provisional Regulations Article 3):

- Regarding authenticity, make inquiries with the relevant authorities or persons to verify that the relevant contents and matters are true and accurate.
- Regarding legality, confirm that the relevant contents and matters comply with both Hong Kong and Mainland China laws.

## **Risk management takeaways**

### For all solicitors

- Keep abreast of and be familiar with all relevant statutory and regulatory materials including the SG, PD L, Provisional Regulations, relevant statutory provisions (such as the Oaths and Declarations Ordinance (Cap. 11)) and guidance notes / circulars issued by relevant bodies.
- Maintain a clear boundary between attestation/certification and legal advisory work, by, for example, explaining your role at the outset and avoiding taking steps (such as correcting the documents) which may confuse your role.
- Keep written records of your work by, for example, taking attendance notes to record the material facts, such as the date, time, location of the meeting with the deponent, the steps taken to ascertain the matters outlined above, and your explanation of your role.
- Implement internal guidelines/trainings and governance system on the compliance with the relevant requirements within your firm.

### For in-house solicitors

- If you are employed by a non-solicitor employer (save for a few exceptions), only administer affidavits/oaths/declarations and certify documents if you have a current practising certificate, your name is on the roll of solicitors, and you are not suspended from practice (The Law Society of Hong Kong's Practice Direction N §2).
- Avoid administering affidavits/oaths/declarations in matters with which your employer company is concerned.
- If you are required to attest or certify documents by your employer, explain your role in this capacity.

### For CAAOs

- Take heightened risk management measures as higher standards of duty apply.
- Obtain all necessary original documents and supporting materials.
- Review relevant Hong Kong and Mainland China laws regularly.
- Keep detailed notes of the steps taken to review the authentication and legality of the relevant contents and matters.

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