

COMMITTEE: ETHICS COMMITTEE

DATE: NOVEMBER 30, 2000

2. APPENDIX 1 OF THE PROFESSIONAL CONDUCT HANDBOOK: WHETHER A LAWYER MAY WITNESS DOCUMENT THROUGH THE USE OF VIDEO CONFERENCING TECHNOLOGY

The Committee gave the following opinion on this issue at the March 2, 2000 meeting:

The Committee was asked whether it is proper for a lawyer to witness a signature as an officer under section 43 of the *Land Title Act* using live interactive videoconferencing.

The Committee noted that in an opinion of April 11, 1996 the Ethics Committee identified the minimum obligations of a lawyer acting as a witness under section 43 of the *Land Title Act*, Appendix 1, Rule 2 of the *Professional Conduct Handbook* and Chapter 4, Rule 1 of the *Professional Conduct Handbook*. The Committee expressed the view that those minimum obligations are:

- (a) to identify himself or herself as a lawyer,
- (b) to verify the identity of the borrower in accordance with section 43 of the *Land Title Act*, and
- (c) to advise the borrower that the lawyer is not protecting the borrower's interests.

It was the Committee's view that there are a number of aspects of these requirements that cannot be met using videoconferencing:

- A lawyer cannot know what document the signer is signing and cannot know for certain that the paper the lawyer must sign was the paper signed by the person who executed the document.
- Off-screen influences and the lack of proximity may detract from the lawyer's ability to verify the identity of the person who signed the document.

Furthermore, the Committee concluded that the words "appeared before" in section 43 require an actual physical appearance before the officer and not an appearance through the use of videoconferencing technology.

The Committee considered representations from counsel for a title insurance company, that the March 2, 2000 opinion was erroneous. Counsel submitted that his client has a process in place that would permit a lawyer to witness a document pursuant to section 43 of the *Land Title Act* through the use of video technology where the borrower appears before the lawyer via real time videoconference. He submitted that his client's procedure permits the lawyer to comply with the requirements of section 43 and meet the Ethics Committee's minimum obligations set out in the above minute. He suggested that it would be appropriate for the Ethics Committee to give an opinion that the use of video technology to meet the requirements of section 43 is not proscribed, provided the continuity of the relevant documents can be established.

Counsel pointed out that the requirements of section 43 differ from the requirements imposed on a lawyer who swears an affidavit or takes a solemn declaration under Appendix 1 of the *Professional Conduct Handbook*. Appendix 1, paragraph 1 precludes a lawyer swearing an affidavit or taking a solemn declaration unless the deponent is physically present before the

lawyer. Section 43 has no such requirement and the Ethics Committee's March 2, 2000 opinion has the effect of reading a requirement into the statute that is not there.

Counsel argued that the procedure devised by his client permits a lawyer to know what document the signer is signing and also know that the paper the lawyer must sign to comply with section 43 is the paper signed by the person who executed the document. He submitted further that it is not reasonable for the Committee to conclude that off screen influences and the lack of proximity could impact on the borrower identifying himself or herself to the lawyer as the person named in the instrument. He pointed out that section 43 states that the borrower simply has to acknowledge that he or she is the person named in the instrument. There is no obligation on the Officer to verify the identity of the person who signs the document. Also, section 43 does not require the Officer to certify that the signature was made in the absence of outside influences.

Counsel submitted that the words "appeared before" in section 43 do not require the Ethics Committee to conclude that an actual physical appearance is required. He stated that there is no case law to suggest that these words must be read to require a physical appearance.

It was the Committee's view that in determining a lawyer's ethical obligations in relation to section 43, it is appropriate to consider continuity issues. The Committee was not satisfied that an acceptable procedure for insuring continuity can be devised using the videoconferencing process. The use of videoconferencing to meet the requirements of section 43 requires that the relevant document be under the control of someone other than the lawyer between the time of the individual's "appearance" and the time the document is signed by the lawyer.

While it is true that section 43 does not say expressly that the Officer must verify the identity of the borrower, in the Committee's opinion it would not be proper for a lawyer to sign as a witness under the section if the lawyer is doubtful of the identity of the person who is represented to the lawyer as the borrower.

In addition, the Committee continued to be of the view that the plain meaning of the words "appeared before" requires a physical appearance. The Committee acknowledged that the position advanced by counsel that the words "appeared before" do not preclude an "appearance" by video technology is an arguable one at law. However, a position that is arguable at law is not an adequate basis on which to determine an ethical standard, which may be wider, but cannot be narrower than the legal one.

For these reasons, the Committee declined to alter its opinion of March 2, 2000.