

Best Practices for Virtual Commissioning during COVID-19

The Law Society of Ontario has developed this resource to support lawyers and paralegals in the practice of law and delivery of legal services in the context of the Coronavirus (“COVID-19”) pandemic. This is an unprecedented situation and the Law Society is here to help the professions by recommending a consistent approach to virtual commissioning and creating a checklist to assist with documenting their new processes.

This resource begins with a reminder to lawyers and paralegals about the Law Society’s interpretation that virtual commissioning is permitted in the context of COVID-19. The best practices that follow are designed to assist lawyers and paralegals in mitigating the risks associated with not being in the physical presence of the deponent. These practices take a step-by-step approach outlining how to

- Determine if there is an applicable Practice Direction
- Prepare for the Virtual Meeting
- Facilitate Introductions and Address Third Party Issues
- Verify Identity
- Commission the Affidavit, and
- Document the Process.

The Law Society recommends using this resource alongside the [Law Society’s Virtual Commissioning Checklist](#), which is a new tool for lawyers and paralegals to document the process they have used for virtual commissioning.

I. Virtual Commissioning Permitted:

Commissioning is governed by the [Commissioners for Taking Affidavits Act](#) and is not regulated by the Law Society. Although the law is evolving in this area, the best practice for commissioning documents outside the context of COVID-19 remains for the lawyer or paralegal who is acting as a commissioner to be in the physical presence of the deponent to commission the document(s). For more information, please review the Law Society’s [Virtual Commissioning](#) resource.

However, as a result of COVID-19, until further notice:

- The Law Society will interpret the requirement in section 9 of the *Commissioners for Taking Affidavits Act* that “every oath and declaration shall be taken by the deponent in the presence of the commissioner or notary public” as not requiring the lawyer or paralegal to be in the physical presence of the client.
- Rather, alternative means of commissioning such as commissioning via video conference will be permitted.

For more information, consult the Law Society’s [Frequently Asked Practice Management Questions regarding COVID-19](#).

II. Best Practices for Virtual Commissioning:

As a lawyer or paralegal, if you choose to use virtual commissioning, you should comply with evolving standards and manage the risks of virtual commissioning using best practices.

A. Determine if there is an applicable Practice Direction:

1. Review the applicable court or tribunal's website for practice directions about whether requirements for affidavits are being modified in the context of COVID-19.
 - For example, some courts, such as the [Superior Court of Justice \(Commercial List\)](#) (see paragraphs 13 and 14) and the [Superior Court of Justice \(Civil and Family\)](#) (see section B.6), have modified their requirements relating to affidavits during COVID-19.
 - For links to Ontario's court and tribunal websites, see the Ontario Bar Association COVID-19 Action Plan pages: [Status – Courts](#) or [Status – Tribunals](#).

If applicable for your matter, review other government or regulatory websites for direction or guidelines.

2. If there are practice directions or guidelines in place for your matter, follow them.

To the extent that the steps below do not contradict the practice direction from the court or tribunal or guidelines provided by applicable regulatory or government authority, you may wish to follow the best practices below.

3. If there are no practice directions or guidelines in place for your matter, consider following the best practices below.

B. Prepare for the Virtual Meeting:

4. Determine the purpose of the meeting (e.g., only to commission an affidavit; to commission an affidavit and provide legal advice) as privilege and confidentiality may attach to the video conference and the presence of others may impact clients' rights.
5. Consider whether the deponent requires accommodation or there are any special circumstances to address (e.g., the deponent cannot read, understand the language, etc.) and take appropriate steps.
 - For more information, review the "Special Cases" section of MAG's [Guide for Newly Appointed Commissioners for Taking Affidavits](#).
6. Determine whether the virtual meeting will be recorded. For more information on the considerations for recording clients, see the Law Society's [Frequently Asked Practice Management Questions regarding COVID-19](#) on this topic.
7. If the virtual meeting will be recorded, ensure that all persons who will be attending are informed of your intention to record the meeting. Where possible, provide such information in advance in writing. If this is not possible, inform the parties at the beginning of the virtual meeting.
8. Where possible, request and obtain from the deponent a high-resolution digital image (e.g., photograph or scan) of both sides of the current government-issued photo

identification document that the deponent intends to use as proof of identity. Ensure that the entire document is visible and that the digital image is clear and legible.

9. If you prepared the affidavit and/or will be sharing or sending a copy to the deponent, ensure the affidavit makes clear that it will be commissioned by virtual means and the method that was used.

For example, amend the jurat(s) and the way in which any exhibits are marked to include the words “by video conference” and, if applicable, to reflect that you and the deponent were in different cities or towns:

If deponent and commissioner are in same city or town:

Sworn (or Affirmed or Declared) before me *by video conference* at the (City, Town, etc.) of in the (County, Regional Municipality, etc.) of, on (date).
.....

Commissioner for Taking Affidavits

If deponent and commissioner are **not** in same city or town:

Sworn (or Affirmed or Declared) before me *by video conference*
From (City, Town, etc.) of in the (County, Regional Municipality, etc.)
of..... (Location of deponent),
To (City, Town, etc.) of in the (County, Regional Municipality, etc.)
of..... (Location of commissioner),
On (date).

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Commissioner for Taking Affidavits

10. Depending on the circumstances, because both you and the deponent need to have a copy of the affidavit and exhibits, if any, in front of you during the virtual meeting, either
 - a. Share or send an electronic copy of the affidavit and exhibits to the deponent, or
 - b. Ensure that you received a copy of the affidavit and its exhibits from the deponent.
11. Review the settings of your virtual meeting platform and configure them to ensure that it is secure. For example, this may include
 - a. Enabling the requirement for a unique password to be used for each meeting, and/or
 - b. Disabling the ability for attendees to join before the host.

12. Provide secure login instructions to the deponent along with any instructions about the affidavit and its exhibits. This may include instructions to
 - a. Read the affidavit and its exhibits in advance of the virtual meeting,
 - b. Prepare a list of any questions the deponent has about the document, and/or
 - c. Note any required revisions to the affidavit or its exhibits.
13. Just prior to the meeting, login to test that the video feeds are stable and that the audio is of a suitable quality.

C. Facilitate Introductions and Address Third Party Issues:

14. Have your copy of the affidavit and exhibits in front of you along with a blank copy of the [Law Society's Virtual Commissioning Checklist](#), which you should complete during the meeting or immediately thereafter.
15. If you are recording the meeting, inform or remind all participants that the meeting is being recorded.
16. Ensure that both you and the deponent can hear and see all of the parties attending the video conference.
17. Ask
 - a. All parties present to identify themselves and document those present.
 - b. The deponent to use the camera to scan the entire room to determine if there are any other third parties present.
 - c. The deponent not to mute their audio or turn off their video feed during the meeting.
18. If any third parties are present, consider whether
 - a. There is an impact on privilege or confidentiality (if applicable), and/or
 - b. There is a risk of undue influence or duress.
19. Take any appropriate steps, if applicable, to protect privilege or confidentiality and/or to ensure that there is no undue influence or duress.

D. Verify Identity:

20. Request that the deponent show the front and back of their current government-issued photo identification.
21. Compare the video image of the deponent and the image and information in the deponent's government-issued photo identity document to reasonably satisfy yourself that it is the same person and that the document is valid and current.

Note that in the context of COVID-19, recently expired identification documents may still be considered valid and current. See the Law Society's [Frequently Asked Practice Management Questions regarding COVID-19](#) on this topic for more information.

22. If you are not recording the meeting, consider taking a screenshot or photo of the deponent with the front and back of their government-issued photo identity document and retaining this screenshot or photo. Before doing so, inform the deponent.

E. Commission the Affidavit:

When providing legal advice or services in addition to commissioning, before or during the meeting:

23. Provide adequate opportunity for the client to ask questions about the affidavit and its exhibits, if any.
24. Inquire if any corrections are required.
25. Confirm that the client understands the documents.

When commissioning virtually:

26. Ensure that you and the deponent both have a paper copy of the affidavit, including all exhibits, in front of them.
27. Review each page of the affidavit and exhibits on the video conference to verify that the pages that you and the deponent have are identical. During this process, ask the deponent to initial each page to illustrate that no pages were added after the fact and observe this being completed.
28. At the conclusion of the review,
 - a. Administer the oath, affirmation, or declaration
 - b. Listen to the deponent verbally confirm the oath, affirmation, or declaration
 - c. Observe the deponent sign the affidavit, and
 - d. Ask the deponent to electronically share or send a high resolution copy of the signed affidavit with exhibits to you.

For more information on administering the oath, affirmation, or declaration, consider reviewing the Ministry of the Attorney General ("MAG")'s [Guide for Newly Appointed Commissioners for Taking Affidavits](#).

29. Upon receipt of the electronic copy of the signed affidavit from the deponent, you should print it and
 - a. Compare each page of the copy received from the deponent against the copy reviewed with the deponent during the video conference and ensure they are identical.

- b. If not previously done, amend the jurat and the way in which the exhibits, if any, are marked to ensure it is clear that the affidavit and its exhibits are commissioned by virtual means.
- 30. Complete the jurat and mark any exhibits.
- 31. Attach the commissioned affidavit to the copy of the affidavit that was in front of you during the video conference.
- 32. Share or send an electronic copy of the commissioned affidavit to the deponent so that they have a record of the document that was commissioned.
- 33. Determine whether you need an original copy with the deponent's signature of the commissioned affidavit. If so, ask the deponent to send you their original signature copy by document delivery service.
- 34. If the deponent needs an original copy with the commissioner's signature, you can send your fully commissioned originally signed copy to the deponent by document delivery service while retaining copies for your records.

F. Document the Process:

- 35. If you have not done so, complete the [Law Society's Virtual Commissioning Checklist](#),
- 36. If the meeting was recorded, store the recording in a secure location and ensure that you will have access to this file as long as required.
- 37. If the meeting was not recorded, ensure that you also have detailed notes of the minutes of the meeting.