

## Best Practices for Remote Commissioning

Remote or virtual commissioning is the practice of a person administering an oath or declaration of a deponent or declarant without being in their physical presence.<sup>1</sup> Effective August 1, 2020, Ontario legislation permits remote commissioning, provided that certain conditions are met.

This Law Society of Ontario resource supports lawyers and paralegals with remote commissioning by:

- I. Outlining the conditions lawyer and paralegal commissioners are required by law to meet; and
- II. Recommending best practices for lawyers and paralegals to mitigate the risks associated with not being in the physical presence of the deponent.

The Law Society suggests using this resource alongside the Law Society's [Remote Commissioning Checklist](#), which is a tool developed for lawyers and paralegals to document the process used when remote commissioning.

### I. Conditions for Remote Commissioning:

Commissioning, including remote commissioning, is governed by provincial legislation and is not regulated by the Law Society. In Ontario, section 9 of the [Commissioners for Taking Affidavits Act](#) (the "Act") states that an oath or declaration must be taken by the deponent or declarant in the physical presence of a commissioner and that an oath or declaration may be taken without being in the physical presence of a commissioner only if the conditions set out in [O. Reg. 431/20, Administering Oath or Declaration Remotely](#) (the "Regulation"), are met.

To engage in remote commissioning, lawyers and paralegals must meet the following conditions as set out in the Regulation:

1. The commissioning takes place by an electronic method of communication in which the commissioner and the deponent can see, hear, and communicate with each other in real time throughout the entire transaction.
2. The commissioner confirms the identity of the deponent.
3. A modified version of the jurat is used that indicates:
  - a. Commissioning was administered in accordance with the Regulation, and
  - b. The location of the commissioner and the deponent at the time of commissioning.

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<sup>1</sup> For simplicity, this resource uses the terms **remote commissioning** for the practice of administering an oath or declaration; **commissioner** for the person administering the oath or declaration; and **deponent** for the person making the oath or declaration.

4. The commissioner takes reasonable precautions in the execution of the person's duties, including ensuring that the deponent understands what is being signed.
5. The commissioner keeps a record of the transaction.

It is important for lawyers and paralegals to note that there is nothing in the *Act* or its Regulation that obliges a receiving party to accept a document that has been commissioned remotely.

## **II. Best Practices for Remote Commissioning:**

Lawyers and paralegals must comply with the conditions set out in the Regulation outlined above when choosing to engage in remote commissioning. Lawyers and paralegals should also be aware of the risks associated with remote commissioning. While the Regulation's requirements help to mitigate such risks, the Law Society recommends that lawyers and paralegals consider adopting the additional risk mitigation strategies identified below. For more information on the risks of providing remote commissioning services, lawyers and paralegals should consult the Law Society's [Remote Commissioning](#) resource and [Frequently Asked Practice Management Questions regarding COVID-19](#) on this topic.

This best practice resource takes a step-by-step approach outlining how to:

- A. Determine Whether Remotely Commissioned Documents will be Accepted
- B. Prepare for the Remote Meeting
- C. Facilitate Introductions and Address Third Party Issues
- D. Confirm Identity
- E. Commission the Affidavit, and
- F. Document the Process and Retain Records.

Remote commissioning is a new practice, and is expected to evolve as new remote meeting platforms and security safeguards are developed. The Law Society will continue to explore potential enhancements to these best practices, and will update these recommendations as appropriate.

### **A. Determine Whether Remotely Commissioned Documents will be Accepted:**

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1. If only providing commissioning services to a deponent, urge the deponent to determine whether the party receiving the document is willing to accept a remotely commissioned document. If the receiving party is unsure or unable to accept it, provide or encourage the deponent to seek in-person commissioning services.
2. If providing legal advice and commissioning services to the deponent, determine whether remotely commissioned documents will be accepted. For example:
  - a. Review the applicable court or tribunal's website for relevant practice directions.
  - b. If applicable for the matter, review other government or regulatory websites for direction or guidelines.
  - c. Make inquiries of the receiving party.

3. If there are practice directions or guidelines in place for the matter, follow them. To the extent that the best practices below do not contradict the practice direction from the court or tribunal, or the guidelines provided by applicable regulatory or government authority, consider following them.
4. If there are no practice directions or guidelines in place for the matter, consider following the best practices below.

## **B. Prepare for the Remote Meeting:**

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5. Select a remote meeting platform that offers security features and other process safeguards that facilitate adherence to the Regulations as well as these best practices.
6. Determine the purpose of the meeting (e.g., only to commission an affidavit, to commission an affidavit and provide legal advice, etc.) as privilege and confidentiality may attach to the video conference and the presence of others may impact clients' rights.
7. 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 example, for deponents who require disability-related accommodations, consider using a remote meeting platform that supports
  - Use of interpreters
  - Assistive technologies such as dictation services or screen-readers, or
  - Closed-captioning functionality.

For more information, review the "Special Cases" section of the Ministry of the Attorney General's [Guide for Newly Appointed Commissioners for Taking Affidavits](#).

8. Determine whether the remote 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.
9. If the remote 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 remote meeting.
10. 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.
11. Ensure that the jurat(s) to the commissioned affidavit indicates that:
  - Commissioning was administered in accordance with the Regulation, and

- The location of the commissioner and the deponent at the time that commissioning was administered.

For example:

**If deponent and commissioner are in same city or town:**

Sworn (or Affirmed or Declared) remotely by ..... (person's name) at the (City, Town, etc.) of ..... in the (County, Regional Municipality, etc.) of ....., before me on ..... (date) in accordance with [O. Reg. 431/20](#), Administering Oath or Declaration Remotely.

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Commissioner for Taking Affidavits

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

Sworn (or Affirmed or Declared) remotely by ..... (person's name) of (City, Town, etc.) of ..... in the (County, Regional Municipality, etc.) of ....., before me at the (City, Town, etc.) of ..... in the (County, Regional Municipality, etc.) of....., on ..... (date) in accordance with [O. Reg. 431/20](#), Administering Oath or Declaration Remotely.

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Commissioner for Taking Affidavits

12. 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 remote 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.
  
13. Review the settings of your remote 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.
  
14. 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 remote 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.

15. 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:**

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16. Have your copy of the affidavit and exhibits in front of you along with a blank copy of the Law Society's [Remote Commissioning Checklist](#), which you should complete during the meeting or immediately thereafter.
17. If you are recording the meeting, inform or remind all participants that the meeting is being recorded.
18. Ensure that both you and the deponent can hear and see all of the parties attending the video conference.
19. 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.
20. 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.
21. Take any appropriate steps, if applicable, to protect privilege or confidentiality and/or to ensure that there is no undue influence or duress.

### **D. Confirm Identity:**

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22. Request that the deponent show the front and back of their current government-issued photo identification.
23. 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.

24. 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:

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

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

When commissioning remotely:

28. Ensure that you and the deponent both have a paper copy of the affidavit, including all exhibits, in front of them.
29. 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.
30. 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's [Guide for Newly Appointed Commissioners for Taking Affidavits](#).

31. 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(s) 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 remote means, to indicate compliance with the Regulation, and, if applicable, to reflect that you and the deponent were in different cities or towns.
32. Complete the jurat(s) and mark any exhibits as noted above.

33. Attach the commissioned affidavit to the copy of the affidavit that was in front of you during the video conference.
34. 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.
35. 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.
36. 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 and Retain Records:**

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37. If you have not done so, complete the Law Society's [Remote Commissioning Checklist](#).
38. If the meeting was recorded, store the recording in a secure location and ensure that you will have access to this file for as long as required.
39. If the meeting was not recorded, ensure that you have detailed notes of the minutes of the meeting.
40. Retain a record of the remote commissioning. This may include keeping any or all of the following documents:
  - Log of the remote commissioning performed
  - Copy of the document(s) commissioned
  - Completed Law Society [Remote Commissioning Checklist](#)
  - Audio-visual recording of the remote commissioning, or
  - Notes that you prepared.