



Barreau
de l'Ontario

Virtual Commissioning

COVID-19 UPDATE: The guidance below does not apply in the context of COVID-19. In the context of COVID-19, lawyers and paralegals should consult the Law Society's Frequently Asked Practice Management Questions about COVID-19.

Best Practice Recommendation: Continue with In-Person, not Virtual, Commissioning [1]

Tools and platforms for virtual commissioning of documents are becoming increasingly prevalent. The Law Society is aware that some members of the legal professions in Ontario have used such tools to commission documents, either through web-based video technology like Skype® or FaceTime® or through commercially available “remote online notarization” software.

This resource aims to provide general guidance and information to lawyers and paralegals on the practice of virtual commissioning. Specifically, this resource defines virtual commissioning and briefly explains the governing legislation, identifies the risks associated with it, communicates the Law Society's recommendation not to engage in virtual commissioning at this time, and discusses the potential for legislative reform in this area.

At a Glance:

- In view of technological developments, current Ontario commissioning legislation is ambiguous about whether oaths and declarations must be taken in person.
 - At this time, there are also risks to clients, lawyers, paralegals, and other commissioners associated with the virtual commissioning of documents.
 - Based on the current law, and until further notice, the best practice for commissioning documents 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). Commissioners should not engage in virtual commissioning.
 - Legislative reform may help to clarify the impact of technological developments and the resulting ambiguity in the applicable legislation.
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Virtual Commissioning Defined:

In Ontario, the practice of commissioning is governed by provincial legislation, the *Commissioners for taking Affidavits Act*. Commissioners for taking affidavits are entitled to administer oaths and take affidavits and statutory declarations. These are typically important legal documents that have evidentiary value in court and confirm accuracy for government offices. The commissioner is responsible for verifying the deponent's identity, administering an oath, witnessing the deponent's signature, and executing the document by signing the *jurat* (which includes the date on which and the location where the document was executed).

Virtual commissioning is an authentication and signature process for taking affidavits and statutory declarations that uses audio-visual technology. It is therefore not conducted in the physical presence of the commissioner. An example of virtual commissioning is a lawyer who meets with a client via Skype® or FaceTime® and directs the client to sign the relevant legal document that is visible to the lawyer through video. The client then returns the original executed document to the lawyer who, upon receipt, signs the document as a witness to the client's signature. Another example is a client and a lawyer logging into the

same platform to view and electronically sign the same document simultaneously, despite being in different physical locations.

Applicable Legislation, Case Law, and Ethics Opinions:

Section 9 of Ontario's *Commissioners for taking Affidavits Act* currently requires that "every oath and declaration shall be taken by the deponent *in the presence of* the commissioner or notary public" [emphasis added].

In view of technological developments, this provision is ambiguous about whether oaths and declarations must be taken in person.

To date, Canadian case law and ethics opinions have not supported a legal interpretation that would extend the "in the presence of" requirement to virtual interactions. For more information, please see:

- *First Canadian Title Company Limited v. The Law Society of British Columbia*, [2004] BCSC 197.
- *Law Society of Upper Canada v. Wong*, 2009 ONLSHP 60 at paras. 141-145 and 192, affirmed on this issue [2011] ONLSAP 15, para. 52.
- *Law Society of Saskatchewan Ethics Rulings*, [2017] SKLSPC 3 and 4 ("Providing Legal Advice via Technology").

Risks of Virtual Commissioning:

In addition to the concerns about the interpretation of "in the presence of", the following have been identified as risks to clients, lawyers, paralegals, and other commissioners:

- **Fraud and Identity Theft:** Where in-person meetings between the commissioner and the client are reduced or eliminated, there are greater risks of fraud and identity theft.
- **Undue Influence:** In a virtual commissioning method, there is a greater risk that undue influence will go undetected. The commissioner may not be able to sufficiently assess whether there are any off-screen influences or other persons coercing the deponent.

- **Reduced Level of Client Service:** Without safeguards in place, there is a risk that the client is left without copies of documents they have executed virtually. There is also a risk that the client may not feel they have had an adequate opportunity to ask questions or request clarifying information about the documents they are executing, which risk is heightened by the lack of physical proximity.
- **Technological Limitations/Uncertainty:** Given varying video quality and network connections, as well as the fact that live streaming video and audio can be manipulated, it may be very difficult for a commissioner to confidently verify the distinct attributes of the document commissioned.

Law Society's Recommendation and the Potential for Legislative Reform:

Administering oaths and taking affidavits and statutory declarations without being in the same location as the deponent has the potential to improve access to legal services and create efficiencies for commissioners and clients. As a result, many American states have recently enacted laws facilitating virtual commissioning. The legislation typically requires a comprehensive suite of technological safeguards to be present, which mitigates some of the risks that may be heightened through the use of an online interface.

In 2019, the Ministry of the Attorney General consulted the Law Society about commissioning and notarizing of documents, including virtual commissioning. The Law Society highlighted the serious risks associated with virtual commissioning identified above, but acknowledged that these risks could potentially be overcome with appropriate safeguards and that further exploration into legislative reform was warranted.

However, without legislative change, the best practice for commissioning documents remains for a lawyer or paralegal who is acting as a commissioner to be in the *physical presence* of the deponent to commission the document(s).

The Law Society will provide updates to the legal professions about virtual commissioning if legislative changes are introduced.

Related Resources:

[Commissioner for Taking Affidavits and Notary Public](#)

[Mobile Commissioning for Lawyers: Delegation and Supervision Responsibilities, Risks, and Practice Tips](#)

[Mobile Commissioning for Paralegals: Responsibilities, Risks, and Practice Tips](#)

[Client Identification and Verification Requirements for Lawyers](#)

[Client Identification and Verification Requirements for Paralegals](#)

[1] Virtual commissioning is also commonly referred to as “remote commissioning”.

Please note that this resource does not address or provide guidance on the use of electronic signatures. Please consult the *Electronic Commerce Act, 2000* for more information on this topic.