

OTLA Submission

Modernization of the Civil Justice System

June 2, 2020

The COVID-19 pandemic has presented many challenges for our health, the economy and the justice system. It does, however, have at least one silver lining – the modernization of Ontario’s antiquated civil justice system.

OTLA supports the excellent work done by the E-Hearings task force in creating best practices for remote hearings.¹ We are pleased to see that the courts are now conducting remote hearings, some of which have even been live streamed to the public. The judiciary, counsel and litigants have also made tremendous efforts to familiarize themselves with various technological platforms for remote proceedings (Zoom, WebEx, Skype, and others). We have made great strides thus far.

OTLA writes because there is still more to be done. As was recently stated by Attorney General Doug Downey, the pandemic provides an “opportunity to look at not just how we do things but why we do things.”²

OTLA supports a thorough analysis of civil litigation and its potential for modernization. OTLA recommends, however, that we be careful not to attempt a complete overhaul of the system in the midst of a crisis. Our focus should first and foremost be on ensuring access to justice for Ontarians during the current pandemic. There are many current challenges that need to be addressed - greater e-filing, promptly opening our courts to more services, conducting trials virtually and addressing other pandemic-caused delays with respect to, for example, examinations for discovery and mediations. These matters require our urgent attention in order to move civil cases forward toward resolution and reduce growing court backlogs.

Once these pandemic-caused challenges are addressed, OTLA recommends we cautiously and strategically review and analyse current civil litigation practices and the potential for modernization. This review should include an analysis of the efficacy of the measures implemented to address the pandemic-caused delays and stoppages. What worked? What didn’t work? Has greater efficiency been achieved? Should further changes be implemented? Is there further potential for modernization?

Thus far, the focus of modernization efforts has been on hearings and court filings. These projects are well underway. OTLA recommends we now expand this initiative to examinations for discovery and mediations. OTLA specifically recommends:

1. Amendments to Rules 24.1 and 31 of the *Rules of Civil Procedure* to require remote examinations for discovery and mandatory mediations in certain circumstances;
2. Amendments to O. Reg. 461/96: *Court Proceedings for Automobile Accidents that Occur on or after November 1, 1996* to require remote mediations when requested by the plaintiff; and
3. Agreed upon Best Practices for Remote Examinations for Discovery and Mediations to ensure the success and security of these proceedings.

While virtual proceedings cannot and should not replace in-person proceedings as the default, they are valuable tools that can and should be utilized in certain circumstances. This is particularly so in the case of the current pandemic where there is no other available means to move civil claims forward.

¹<https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/BestPracticesRemoteHearings/BestPracticesforRemoteHearings13May2020FINALmay13.pdf>

²<https://www.cbc.ca/news/canada/toronto/ontario-courts-modernize-1.5549850>

In its May 13, 2020 *Consolidated Practice Direction*, the Superior Court of Justice called upon the cooperation of all counsel and parties to resolve matters.³ This includes attending remote examinations for discovery and remote mediations, whether prescribed or not. As the court directed, we need to work together to use technology during the current pandemic to service our clients and resolve matters.

The attached package includes OTLA's recommendations with respect to modernization of examinations for discovery and mediations, as well as a summary of the United States' Experience with modernization. The United States has been using technology for remote depositions and mediations for years. They are far ahead of us. It is time we bring our civil justice system into the modern era.

We thank you for your consideration and look forward to working together to further advance our modernization efforts. The future of our justice system depends on it.

³ <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/>

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June 2, 2020

The Honourable Douglas Downey
Attorney General
McMurtry-Scott Bldg 11th, 720 Bay St
Toronto, ON M7A 2S9

Dear Attorney General Downey,

Re: The Need to Amend Rules 24.1 and 31 of the *Rules of Civil Procedure*

Thank you for your excellent leadership and service during this difficult time.

OTLA is impressed with and thankful for your government's quick and thoughtful action with respect to the health and wellbeing of our province.

We write to bring your attention to a serious related issue that has arisen – the delay, and in many cases, complete halt of ongoing civil lawsuits. This will inevitably exacerbate the existing backlog of cases in the Ontario Civil Court system, with consequential increased costs to the Province and litigants.

OTLA believes the solution is simple: amend Rules 24.1 and 31 of the *Rules of Civil Procedure*, R.R.O., Reg. 194 under the *Courts of Justice Act*, R.S.O. 1990, c. C.43¹ to require remote Examinations for Discovery and Mandatory Mediations when no other alternative exists.

Our members represent plaintiffs in civil litigation claims. Since the pandemic struck, many of our members have experienced significant resistance from adverse parties, insurers and counsel to conducting examinations for discovery and mediations remotely. This has halted the progress of those civil lawsuits. Examples include:

- refusing to schedule examinations for discovery and mediations until the pandemic resolves so that counsel can access their “paper files”;
- refusing to use any platform for remote discoveries and/or mediations, claiming it is contrary to their and/or their insurers “policies and procedures”; and
- unilaterally cancelling already scheduled mediations because of the pandemic.

Precious court time has been expended on these disputes. See for example *Arconti v. Smith*, 2020 ONSC 2782². In this case, Justice Myers ordered the examination to proceed by video conference, stating:

“the simplest answer to this question is ‘It’s 2020’. We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively.

¹ <https://www.ontario.ca/laws/regulation/900194>

² <https://www.canlii.org/en/on/onsc/doc/2020/2020onsc2782/2020onsc2782.html?resultIndex=3>

Using it is more efficient and far less costly than personal attendance. We should not be going back.” [paragraph 19]

As Justice Myers further pointed out in *Arconti v. Smith*, there exists no “due process concerns” inherent in video hearings. There are similarly no such concerns with respect to video Examinations for Discovery and Mandatory Mediations. All parties have the same opportunity to participate and be heard. If anything, it makes these proceedings more accessible by reducing the time and cost associated with travel to reporting centres.

The Superior Court of Justice has recently called upon all counsel and parties to cooperate to resolve matters. In the Court’s Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media re: Expanded Operations of Ontario Superior Court of Justice effective May 19, 2020³, the Court notes that this includes attending remote examinations for discovery and mediation where possible.

The courts do not currently have authority to order video conference Mediations or Examinations for Discovery. Because *Arconti v. Smith* dealt with taking evidence for a hearing, Justice Myers had authority per Rule 1.08 of the *Rules of Civil Procedure* to order a video conference examination. Rules 24.1 and 31 do not provide similar authority, nor do they address dispute resolution when proceedings cannot be conducted in person.

To deal with this lack of direction and judicial authority under the *Rules*, OTLA proposes the following amendment to Rule 24.1 (see red below):

PURPOSE

24.1.01 This Rule provides for mandatory mediation in specified actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes. O. Reg. 453/98, s. 1; O. Reg. 198/05, s. 2; O. Reg. 438/08, s. 15.

NATURE OF MEDIATION

24.1.02 In mediation, a neutral third party facilitates communication among the parties to a dispute, to assist them in reaching a mutually acceptable resolution. O. Reg. 453/98, s. 1.

...

MEDIATION SESSION

Time Limit

24.1.09 (1) A mediation session shall take place within 180 days after the first defence has been filed, unless the court orders otherwise. O. Reg. 453/98, s. 1; O. Reg. 438/08, s. 20 (1).

24.1.09 (1.1) If there are no other reasonable means by which to complete the mediation session without unreasonable delay or costs, and facilities for a telephone or video conference are available, the mediation session shall proceed by telephone or video conference.

OTLA further proposes the following amendment to Rule 31 (see red below):

FORM OF EXAMINATION

³ https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/#1_Responsibilities_of_Lawyers_and_Parties_During_Suspension_of_In-Court_Operations_including_Mediation

31.02 (1) Subject to subrule (2), an examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject a person to both forms of examination except with leave of the court. R.R.O. 1990, Reg. 194, r. 31.02 (1).

(2) Where more than one party is entitled to examine a person, the examination for discovery shall take the form of an oral examination, unless all the parties entitled to examine the person agree otherwise. R.R.O. 1990, Reg. 194, r. 31.02 (2).

(3) If there are no other reasonable means by which to complete the oral examination without unreasonable delay or costs, and facilities for a video conference are available, the parties shall proceed by video conference.

Rule 1.08 has allowed for video conferencing of court proceedings for more than 20 years. It initially required party consent but was amended in 2008 to enable the court to require video conferencing at its' own initiative. Per Justice Myers in *Arconti v. Smith*, "[t]his reflects an evolution of the acceptance of the use and perceived value of remote communication technology whereby it can be ordered even where neither party asks for it or wants it." [paragraph 22]

Rules 24.1 and 31 need to similarly evolve. Examinations for Discovery and Mandatory Mediations should not be delayed simply because the parties cannot meet in person. Further, the court system should not be, and does not have the capacity to be, burdened with video conferencing disputes.

Litigants should be required to litigate their claims remotely during the current emergency and other similar circumstances.

As the pandemic winds down and courts re-open, the Court's primary focus will be delayed criminal and family cases. Thus, civil litigants will feel the consequences of the pandemic for quite some time.

The proposed amendments are necessary to enable lawsuits to proceed without court intervention. They will avoid disputes over video conferencing and promote access to justice by enabling resolution of claims without undue delay. They will also help put Ontarians back to work and avoid layoffs within the legal system.

The proposed amendments are also necessary for the future of civil litigation. The technology is readily available and is already being used by our courts, reporting services, mediators and litigants. Many of our United States counterparts have been using this technology to conduct remote depositions and mediations for years. It has worked well for them to reduce the costs and delays of litigation. It is time civil litigation in Ontario moves into 2020.

Thank you for your consideration of this proposal. We are available to discuss this matter further should you so desire.

Again, we thank you and your government for your service and hard work during this difficult time.

Yours truly,



Laura Hillyer
President

June 2, 2020

Falguni Debnath
Senior Legal Officer
Civil Rules Committee
Court of Appeal for Ontario
130 Queen Street West
Toronto, Ontario M5H 2N5

Attention Civil Rules Committee Members,

Re: Proposed Amendments to Rules 24.1 and 31 of the *Rules of Civil Procedure*

OTLA writes with respect to Rules 24.1 (Mandatory Mediation) and 31 (Examinations for Discovery) of the *Rules of Civil Procedure*¹ and the need to modernize these Rules in light of the current pandemic and for the future of civil litigation.

Traditionally, Mandatory Mediations and Examinations for Discovery have been held in conference centres and Official Examiner's Offices with all parties in physical attendance. Because this is not currently possible due to the pandemic, many civil cases have been delayed and/or come to a complete halt. This will inevitably exacerbate the existing backlog of cases in the Ontario Civil Court system, with consequential increased costs to the Province and litigants.

Our members represent plaintiffs in civil litigation claims. Since the pandemic struck, many of our members have experienced significant resistance from adverse parties, insurers and counsel to conducting Examinations for Discovery and Mediations remotely. This has halted the progress of those civil lawsuits. Examples include:

- refusing to schedule Examinations for Discovery and Mediations until the pandemic resolves so that counsel can access their "paper files";
- refusing to use *any* platform for remote discoveries and/or mediations, claiming it is contrary to their and/or their insurers "policies and procedures"; and
- unilaterally cancelling already scheduled mediations because of the pandemic.

Precious court time has been expended on these disputes. See for example *Arconti v. Smith*, 2020 ONSC 2782². In this case, Justice Myers ordered the examination to proceed by video conference, stating in part:

"the simplest answer to this question is 'It's 2020'. We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back." [paragraph 19]

¹ <https://www.ontario.ca/laws/regulation/900194>

² <https://www.canlii.org/en/on/onsc/doc/2020/2020onsc2782/2020onsc2782.html?resultIndex=3>

Because *Arconti v. Smith* dealt with taking evidence for a hearing, the court had authority per Rule 1.08 of the *Rules of Civil Procedure* to order a video conference examination. Rules 24.1 and 31 do not, however, provide the same authority for Mandatory Mediations and Examinations for Discovery.

While the Superior Court of Justice has recently called upon all counsel and parties to cooperate to resolve matters and to attend virtual mediations³, more needs to be done to address this issue. OTLA respectfully requests your committee consider amending Rules 24.1 and 31 of the *Rules of Civil Procedure*, R.R.O., Reg. 194 under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 to require remote Examinations for Discovery and Mandatory Mediations when there exists no other alternative.

More specifically, OTLA proposes the following amendment to Rule 24.1 [Mandatory Mediation] (see red below):

PURPOSE

24.1.01 This Rule provides for mandatory mediation in specified actions, in order to reduce cost and delay in litigation and facilitate the early and fair resolution of disputes. O. Reg. 453/98, s. 1; O. Reg. 198/05, s. 2; O. Reg. 438/08, s. 15.

NATURE OF MEDIATION

24.1.02 In mediation, a neutral third party facilitates communication among the parties to a dispute, to assist them in reaching a mutually acceptable resolution. O. Reg. 453/98, s. 1.

...

MEDIATION SESSION

Time Limit

24.1.09 (1) A mediation session shall take place within 180 days after the first defence has been filed, unless the court orders otherwise. O. Reg. 453/98, s. 1; O. Reg. 438/08, s. 20 (1).

24.1.09 (1.1) If there are no other reasonable means by which to complete the mediation session without unreasonable delay or costs, and facilities for a telephone or video conference are available, the mediation session shall proceed by telephone or video conference.

OTLA further proposes the following amendment to Rule 31 [Examinations for Discovery] (see red below):

FORM OF EXAMINATION

31.02 (1) Subject to subrule (2), an examination for discovery may take the form of an oral examination or, at the option of the examining party, an examination by written questions and answers, but the examining party is not entitled to subject a person to both forms of examination except with leave of the court. R.R.O. 1990, Reg. 194, r. 31.02 (1).

(2) Where more than one party is entitled to examine a person, the examination for discovery shall take the form of an oral examination, unless all the parties entitled to examine the person agree otherwise. R.R.O. 1990, Reg. 194, r. 31.02 (2).

³ https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/#1_Responsibilities_of_Lawyers_and_Parties_During_Suspension_of_In-Court_Operations_including_Mediation

(3) If there are no other reasonable means by which to complete the oral examination without unreasonable delay or costs, and facilities for a video conference are available, the parties shall proceed by telephone or video conference.

Rule 1.08 has allowed for video conferencing of court proceedings for more than 20 years. It initially required party consent but was amended in 2008 to enable the court to require video conferencing at its' own initiative. Per Justice Myers in *Arconti v. Smith*, "[t]his reflects an evolution of the acceptance of the use and perceived value of remote communication technology whereby it can be ordered even where neither party asks for it or wants it." [paragraph 22]

Rules 24.1 and 31 need to similarly evolve. Examinations for Discovery and Mandatory Mediations should not be delayed simply because the parties cannot meet in person. Further, the court system should not be, and does not have the capacity to be, burdened with video conferencing disputes. Parties should be required to litigate their claims remotely during the current emergency and other similar circumstances.

As the pandemic winds down and courts re-open, the court's primary focus will be delayed criminal and family cases. Thus, civil litigants will feel the consequences of the pandemic for quite some time.

The proposed amendments are necessary to enable lawsuits to proceed without court intervention. They will avoid disputes over video conferencing and promote access to justice by enabling resolution of claims without undue delay. They will also help put Ontarians back to work and avoid layoffs within the legal system.

As Justice Myers further noted in *Arconti v. Smith*, there exists no "due process concerns" inherent in video hearings. There are similarly no such concerns with respect to video Examinations for Discovery and Mandatory Mediations. All parties have the same opportunity to participate and be heard. If anything, it makes these proceedings more accessible by reducing the time and costs associated with travel to reporting centres.

The proposed amendments are also necessary for the future of civil litigation. The technology is readily available and is already being used by our courts, reporting services, mediators and litigants.

Many of our United States counterparts have been using this technology to conduct remote depositions and mediations for years. It has worked well for them to reduce the costs and delays of litigation. It is time civil litigation in Ontario moves into 2020.

Thank you for your consideration of this proposal. We are available to discuss this matter further should you so desire.

Yours truly,



Laura Hillyer
President

June 2, 2020

The Hon. Rod Phillips
Minister of Finance
Frost Building South, 7th Floor
7 Queen's Park Crescent
Toronto, ON M7A 1Y7

Dear Minister Phillips,

Re: The Need for Remote Mediations in Automobile Insurance Claims

Thank you for your excellent leadership and service during this difficult time.

OTLA is impressed with and thankful for your government's quick and thoughtful action with respect to the health and wellbeing of our province.

OTLA writes to bring your attention to a serious related issue that has arisen – the delay, and in many cases, complete halt to the prosecution of civil claims arising from automobile insurance disputes. We believe the solution to this problem is simple: amend Ontario Regulation 461/96 to the *Insurance Act* to require video conference mediations.

Our members represent plaintiffs in automobile insurance disputes. Since the pandemic struck, many of our members have experienced significant resistance from insurers and their counsel to conducting mediations remotely. This has halted the progress and delayed the resolution of those disputes. Examples include:

- refusing to schedule mediations until the pandemic resolves so that counsel can access their “paper files”;
- refusing to use *any* platform for remote mediations, claiming it is contrary to their and/or their insurers “policies and procedures”; and
- unilaterally cancelling already scheduled mediations because of the pandemic.

Precious court time has been expended on these disputes. See for example *Arconti v. Smith*, 2020 ONSC 2782¹. Justice Myers resolved the dispute between the parties by ordering the examination to proceed by video conference, stating in part:

“the simplest answer to this question is ‘It’s 2020’. We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.” [paragraph 19]

¹ <https://www.canlii.org/en/on/onsc/doc/2020/2020onsc2782/2020onsc2782.html?resultIndex=3>

Because *Arconti v. Smith* dealt with the taking evidence for a hearing, Justice Myers had authority per Rule 1.08 of the Rules of Civil Procedure to order a video conference examination. The court does not have the same authority to order video conference Mediations of automobile insurance disputes.

Section 258.6 of the *Insurance Act*, R.S.O. 1990, c. I.8² requires insurers to mediate automobile insurance disputes. The procedures applicable to insurance mediations are set out in O. Reg. 461/96: Court Proceedings for Automobile Accidents that Occur on or after November 1, 1996³.

Currently there is no requirement within the regulation for mediations to be held by video conference. Without such a requirement, there is also no mechanism for the courts to compel insurers to mediate claims when an in-person mediation is not feasible, such as in the current pandemic.

To deal with this issue, OTLA proposes the regulation be amended to add the following:

(7) The mediation shall be held by video conference if so requested by the Plaintiff.

Insurers currently have little to no incentive to resolve automobile insurance disputes. In fact, they are financially incentivized to delay the resolution of claims. Section 267.5(1) of the *Insurance Act*⁴ limits damages for an accident victims' past income losses to 70% of the gross income lost. Every day a claim is delayed, insurers save and accident victims lose 30 cents of every dollar the victim lost. This, along with the prior government's substantial decrease in the pre-judgment interest rate insurers must pay (from 5% down to 1.3%), financially incentivizes insurers to delay claims.

The pandemic has further exacerbated this issue by forcing claimants to wait until an in-person mediation can be held. This amendment, if adopted, would compel mediation and prevent unnecessary delay.

This amendment also eliminates disputes regarding video conference mediations. There is no judicial capacity to handle, nor should the courts be burdened with, disputes about whether or not an insurer should be required to conduct a mediation remotely.

The Superior Court of Justice has recently called upon all counsel and parties to cooperate to resolve matters. In the Court's Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media re: Expanded Operations of Ontario Superior Court of Justice effective May 19, 2020⁵, the Court notes that this includes "attendance at mediation – whether prescribed or not – where a mediator is willing to engage in a virtual mediation."

As Justice Myers also noted in *Arconti v. Smith*, there exists no "due process concerns" with video conference proceedings. All of the parties have the same opportunity to participate and be heard. If anything, it makes these proceedings more accessible by reducing the time and costs associated with travel.

This amendment would also keep the regulation up to date with technological advancements. The technology is readily available and is already being used by our courts, reporting services, mediators and litigants. Many of our United States counterparts have also been using the technology to conduct video conference mediations for years. It has worked well for them to reduce the costs and delays of

² <https://www.ontario.ca/laws/statute/90i08>

³ <https://www.ontario.ca/laws/regulation/960461>

⁴ <https://www.ontario.ca/laws/statute/90i08#BK281>

⁵ https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/#1_Responsibilities_of_Lawyers_and_Parties_During_Suspension_of_In-Court_Operations_including_Mediation

litigation. For example, counsel would no longer need to travel to conduct mediations. Those in remote communities would also have greater access to dispute resolution services.

This amendment is simple. It requires only one minor regulatory change, and no statutory changes. It would enable Ontarians to continue working in the insurance and legal systems, avoid layoffs, promote early resolution of disputes, and reduce the backlog within Ontario's Civil Court system.

We thank you for your consideration of this proposal. We are available to discuss this matter further should you so desire.

Again, we thank you and your government for your service and hard work during this difficult time.

Yours truly,

A handwritten signature in black ink, appearing to read 'L. Hillyer', with a stylized flourish extending to the right.

Laura Hillyer
President

Best Practices for Remote Examinations for Discovery

A. Introduction

1. These Best Practices apply to Remote Examinations for Discovery. They describe considerations prior to, and conduct during, remote examinations to ensure the integrity of the evidence provided.
2. Before proceeding with a Remote Examination for Discovery, Counsel should carefully consider the circumstances of each case. This includes ensuring the requisite technology is available and the witness is comfortable with the technology. Remote examinations may also be too taxing on some witnesses, particularly those with disabilities. Remote Examinations for Discovery may not be appropriate in all cases.
3. Counsel shall however consent to a remote examination unless to do so would result in significant unfairness, injustice, or prejudice to a party.¹ Counsel has an obligation to move matters forward. Per the Superior Court of Justice *Consolidated Practice Direction* dated May 13, 2020, all counsel and parties are expected to cooperate and engage in every effort to resolve matters.² This includes conducting Examinations for Discovery remotely.
4. Counsel, not their client, has sole discretion to determine the accommodations to be granted to opposing counsel and litigants in all matters that do not affect the merits of the case or prejudice the client's rights. Counsel should not accede to a client's demands that counsel act in an unreasonable or uncooperative manner.

B. Platform to be Used

5. Counsel should consult with the Official Examiner's Office to determine what platform(s) they use to host remote Examinations for Discovery. Counsel must satisfy themselves that the suggested platform is appropriate considering accessibility and security.
6. The platform used should be readily accessible through various operating systems (Windows, IOS, Android etc.) and easy to use.
7. The platform should also be secure. Counsel should familiarize themselves with the security features of each platform. While Counsel should consult research prepared by legal associations regarding appropriate platforms, Counsel is ultimately responsible to ensure they have reviewed the most up to date security information and that the examination proceeds on a secure platform.
8. All examination participants should, if possible, use a hard-wired internet connection or a private or password protected Wi-Fi connection. Participants should avoid using public Wi-Fi because connection speeds are slow, and security is unknown.

¹ See *Arconti v. Smith*, [2020 ONSC 2782 \(CanLII\)](#) at paras. 19, 44.

² <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/>

9. Counsel should consider the hardware and software required for the examination and ensure all participants have the necessary hardware and software to connect to the examination. A useful resource is the Best Practices for Remote Hearings, Appendix B – Recommended Hardware and Software.
10. Counsel should cooperate with each other and should not withhold consent to a particular platform unless there is a good and valid reason to do so.

C. Collaboration with Parties and Counsel Prior to the Examination for Discovery

12. Counsel should collaborate prior to the remote Examination for Discovery and reach an agreement regarding how the remote examination will proceed. These discussions should include whether or not the examination will be recorded, the location of the witness to be examined, and other matters discussed herein.

(a) Video Recording

13. An agreement should be reached regarding whether or not the examination will be recorded, the use that will be made of the recording and who, if anyone, will have access to the recording option on the platform.
14. The Examination for Discovery should not be recorded by any means without the explicit written consent of all parties.
15. Counsel should clarify with the Official Examiner's Office whether it intends to video record the examination as a second means to create the transcript. If the Official Examiner's Office so intends and the parties are agreeable, the Official Examiner's Office should be instructed in writing to delete the video recording once the transcript is completed. Following the examination, Counsel should require written confirmation from the Official Examiner's Office that the video recording has been deleted.
16. All participants should confirm in writing that they are not recording the Examination for Discovery through the platform's recording feature or by any other means. All participants should also confirm and agree in writing that any recording cannot and will not be used in the lawsuit or at trial. In the absence of written confirmation of this agreement, disputes may arise regarding the future use of such recordings.

(b) Location of Witness

17. The client/witness to be examined should be situated in the least disruptive location possible for the Examination for Discovery. The key requirement is that the integrity of the witness's evidence be maintained. Counsel should consider the following options in consultation with the Official Examiner's Office where required:
 - a) The witness remains at home. The camera can be set up in a way to show most of the room and verify the witness is alone.

- b) The witness attends at an Official Examiner's Office and is placed alone in a sanitized conference room with the necessary video/audio equipment.
 - c) The witness attends at Counsel's office. Counsel should remain at a safe distance and ensure that the room being provided is sanitized. Counsel shall ensure that the room is set up with the necessary video/audio equipment.
18. During the Covid-19 pandemic, examinations taking place outside the home require a commitment to provide bio-security, including sanitizing before and after contact with surfaces, hand washing, and ensuring the witness has no symptoms.

(c) Other Matters to Discuss

19. Counsel should also discuss and reach an agreement with respect to the following prior to the examination:
- i. **Viewing Documents:** Counsel should consider how documents will be put to the witness and whether screen sharing will be used. If screen sharing is to be used, counsel should ensure any privileged or confidential material is removed from their screen.
 - ii. **Refusals given Video/Audio Delays:** Counsel should undertake to allow for time for refusals to questions. Delays in video or audio transmissions can occur, making refusals and other counsel interjections more difficult.
 - iii. **Connectivity Issues:** The examination should not begin, resume or continue unless and until all participants are connected. Should a participant become disconnected, the examination should immediately cease until the participant is reconnected. The participants should exchange phone numbers in the event any participant is unable to connect or re-connect. If reconnection by video is not possible, consideration should be given to continuing the examination by telephone. If that is untenable, the examination shall be rescheduled.
 - iv. **Marking Exhibits:** Counsel should reach an agreement regarding exhibits and whether they will be provided electronically to the reporter. Counsel should agree to accept digital exhibit stamps and digital signatures where available. Counsel may wish to pre-mark exhibits and agree upon the documents that will form exhibits prior to the examination. Counsel should consider creating an electronic brief of documents for use while questioning the witness and sharing same with opposing counsel prior to the examination. If Counsel wishes to have the witness mark or modify a document during the examination (i.e., to indicate a precise location), the witness may do so by way of Undertaking.
 - v. **Breaks:** Counsel should be courteous to all participants and allow for occasional disruptions given the location of participants during the

examination. Counsel should discuss how to deal with disruptions and plan for necessary breaks.

- vi. **Securing the Integrity of the Evidence:** All Counsel should instruct their witness that the examination is confidential. Counsel should take every precaution to ensure the witness understands and maintains confidentiality of the examination. This includes, but is not limited to, ensuring the witness is isolated in a private room and does not communicate with anyone else by phone, tablet, computer or other means during the examination.
20. The agreement between Counsel should be reduced to writing and included in the Discovery Plan. See **Appendix A** for a Draft Discovery Plan for Remote Examinations for Discovery.

D. Client Preparation

21. Counsel should prepare their client for the Examination for Discovery using the same platform that will be used at the Examination for Discovery. This will allow:
- a) The client to become comfortable with the platform and providing evidence by video;
 - b) Counsel to ensure the client has appropriate technology and internet capacity to conduct the examination; and
 - c) Counsel to ensure the client will be situated in a private room with minimal distractions.
22. If the platform to be used is not available for the Client preparation meeting, Counsel should use an alternate available and approved video platform to at least provide the client with the opportunity to become comfortable with speaking over a video medium.
23. Counsel are bound by the Rules of Professional Conduct, and should consult same regarding recording of any client communications. Counsel cannot record solicitor-client communications without the explicit consent of their client and in compliance with the Rules of Professional Conduct.
24. Counsel should remind their clients of the importance of solicitor-client privilege and clients should be discouraged from recording any meetings with their Counsel.
25. Counsel should advise their clients in person and in writing that they are not permitted to record the Examination for Discovery by any means.
26. During the preparation meeting, Counsel should ensure their clients have the appropriate tools for the Examination for Discovery. This includes verifying that:
- a) the client's device (phone, IPAD, laptop, or computer) is working properly;
 - b) the client has a working video camera and microphone; and
 - c) the client has a home internet connection capable of handling video conferencing software.

27. Counsel should discuss and prepare the client for the location in which the client will be situated during the Examination for Discovery. This includes discussing the room that will be used if the client is to remain at home and advising the client to keep all pets, children and other people out of the room as much as possible during the examination.
28. Counsel should instruct their clients that the examination is a confidential proceeding and that other people cannot be present in the room with them during their examination. If childcare is an issue for the client, the examination should take place at the most convenient time for the client to allow for child care. If this is not possible, Counsel should consider whether the examination can proceed by video conference.
29. Counsel should discuss an appropriate dress code with their clients and review video conferencing etiquette.
30. Clients should be seated at a desk or table within their home to encourage alertness. Counsel should remind their clients to sit in a comfortable chair at their desk or table.
31. Counsel should advise clients that Counsel may need to object to or refuse a question. Video and audio delays may make objections difficult and as such, clients should be advised to pause before answering questions to allow for counsel to interject if necessary. Clients should be reminded to immediately stop speaking if Counsel interjects.
32. Counsel should advise their clients that the examination will not begin until all participants are connected. Should any participant become inadvertently disconnected, the examination will immediately cease until such time as all participants are reconnected. Counsel should confirm the client's contact information and have same available on the day of the examination in the event the client is unable to connect to the examination.
33. Counsel should advise their clients that breaks will be afforded as needed and determine if the client has any specific requirements for breaks. Counsel should also advise their clients of any pre-planned breaks. Clients should be advised to disconnect their audio and video during any and all breaks to maintain privacy.
34. Counsel should remind clients that the camera and audio will be during the entire video conference examination. Clients should be mindful of their activities, movements and facial expressions during the examination. Clients should also be mindful of, and minimize, any noises they, or others around them, make.
35. Counsel should consider whether they need to use the preparation meeting to commission an Affidavit of Documents.
36. A Checklist for Client Preparation for Remote Examinations for Discovery is attached at **Appendix B**.

E. Connectivity

37. Counsel should work together to ensure connectivity for all participants and that the platform is working properly.

38. Counsel should consider using a direct internet connection vs. a Wi-Fi connection. Counsel should also consider joining audio through the phone for a better audio connection. This also provides redundancy should Counsel briefly lose internet connection or video.
39. If possible, the participants should use private internet connections or a password protected Wi-Fi connections. Wherever possible, Parties should avoid using public Wi-Fi connections and unsecured Wi-Fi hotspots because connection speeds are slow and security is unknown.
40. The Official Examiner's Office should host the remote meeting if possible.
41. In smaller centres or where the Official Examiner's Office or counsel have not previously conducted a remote Examination for Discovery, all parties should consider doing a 15 minute trial run in advance of the examination to ensure all equipment and connections work as intended. If this is done a few days or a week prior to the examination, connectivity concerns can be addressed.
42. All participants should join the remote meeting 10 minutes prior to the start of the Examination for Discovery to test connectivity and equipment.

F. The Examination for Discovery

(a) At the Commencement of the Examination

43. Counsel should ensure that all participants can hear and see everyone present before they go on the record. All participants should be instructed to immediately advise if their equipment stops working or if sound is interrupted.
44. Counsel should have an alternative method of communication arranged with their clients in the event of connection difficulties. Counsel should have the client's phone number or email and clients should be instructed to expect their counsel to contact them if they cannot connect or reconnect to the examination. Counsel should be mindful of their obligation to refrain from discussing the evidence or their client's testimony with the client after the examination begins and prior to its conclusion.
45. Prior to examining a witness, Counsel should confirm the following on the record:
 - a) The witness is alone in a private room. If necessary the witness may be asked to move the camera around the room to verify their location and that they are alone. Counsel may also wish to consider a second camera in the witness room to allow for the entire room to be within view.
 - b) The witness understands the examination is confidential and that he or she cannot communicate by any means with anyone else during the examination. Counsel should again, confirm at the end of the examination, that the witness has not communicated with anyone during the examination.

- c) The witness is not equipped with a device for texting/other communication during the Examination for Discovery.
- d) The agreement with respect to video recording. This includes confirming that no participant will record the proceeding unless authorized in writing to do so and that no participant will use any such recording at trial.

(b) Ensuring a Successful Examination

- 46. Counsel should be patient, civil and cooperative when conducting the examination by remote means generally and when specifically dealing with connectivity problems and delays in audio and visual connections.
- 47. Participants should expect technological problems and mishaps (i.e., disconnections, sound loss, delays in audio and video, etc.) and ensure that all participants agree the examination be continued once the issue is resolved.
- 48. If technological problems and mishaps persist, Counsel should consider whether it is in their client's best interest to adjourn the process to another day.
- 49. Counsel should dress professionally for the Examination for Discovery, in the same manner and style as if the examination was being conducted in person.
- 50. In order for a successful remote Examination for Discovery, Counsel should also:
 - Consider how the witness will be sworn. If the client does not have a bible present to be sworn in, Counsel should consider whether the client is comfortable with an Affirmation.
 - Remind the witness that only one person may speak at a time and to be mindful of delays with audio or video.
 - Encourage participants to speak slowly. This is particularly important during a remote Examination for Discovery, to ensure that the audio is clear and the testimony is preserved. Participants should be encouraged to speak slower if needed. Participants should be asked to spell names for clarity.
 - Remind participants that the camera and microphone will be on throughout the remote Examination for Discovery. Participants should be mindful of facial expressions and noise during the examination. Participants should act professionally at all times.
 - Ensure shared documents can be viewed by all participants. If document sharing will be used by Counsel, Counsel should ensure all participants can view the document prior to commencing any questions regarding the document.

- Minimize background noise where possible. Counsel should use headsets if available. All alerts and reminders should be muted on participant devices. All participants should be reminded to turn off their cellphones.
 - Advise witnesses to refrain from eating during the examination. Drinks should be limit to non-alcoholic drinks. Participants should also be mindful that eating and drinking during the examination may interfere with the recording.
 - Consider how notes will be taken. Participants who wish to take notes during the examination should attempt to do so in a manner that will not interfere with the audio recording. Typing with the microphone on may disrupt the recording and examination.
 - Minimize distractions. As much as possible, participants should use a neutral background for the Examination for Discovery.
 - Ensure privileged or confidential information and documents are not within camera view or viewable during screen sharing. Participants should be mindful that the camera will show parts of the room they are in and/or their screen if screen sharing is used. Counsel should ensure any privileged or confidential information is removed from view. Counsel may wish to use appropriate digital backgrounds if needed.
 - Provide participants breaks as needed to make them comfortable throughout the process. During breaks, Counsel should ensure their client's microphone and video are turned off and they are not visible by opposing counsel.
51. It is recommended that Counsel also review the Best Practices for Remote Hearings - Appendix C, On-Screen Tips for Counsel, Parties and Witnesses. Counsel should consider forwarding this document to their clients as an aid in preparing for their Examination for Discovery.

Schedule A
Draft Discovery Plan for Remote Examination for Discovery

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

X

Plaintiffs

- and -

Y

Defendants

- and -

Z.

Third Party

PROPOSED DISCOVERY PLAN

1. The parties to this action, by their lawyers, hereby agree to the following scope of documentary discovery, subject to subsequent agreement in writing or any Order the Civil Court shall make to the following Discovery Plan made pursuant to Rule 29.1 of the *Rules of Civil Procedure*.

SCOPE OF DOCUMENTARY DISCOVERY

2. Each party shall disclose in an Affidavit of Documents, as required by Rule 30.03, every document relevant to any matter in issue in the action that is or has been in possession, control or power of the party.
3. The parties have an obligation to take reasonable steps to preserve all potentially relevant documentation.
4. Any document in respect of which privilege is claimed by a party shall only be disclosed as requested by *Rule 30.03*.
5. The Defendants shall disclose any insurance policy under which an insurer may be liable to satisfy, indemnify, or reimburse a party for all or part of Judgment and/or costs in this action, but no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action.

AFFIDAVITS OF DOCUMENTS

6. The parties agree to serve their respective draft Affidavits of Documents and all Schedule “A” productions at least 14 days in advance of the examinations for discovery.

PRODUCTION OF DOCUMENTS

7. Every document relevant to any matter in issue in the action that is in the possession or control of a party to the action shall be produced to all parties unless privilege is claimed in respect of the document.
8. The Defendants undertake to pay the Plaintiffs for the costs incurred in obtaining relevant documentation to be produced.
9. Relevant productions of the parties may include, but is not limited to:

Productions of the Plaintiffs

(a)

Productions of the Defendants

(a)

EXAMINATIONS FOR DISCOVERY

10. The parties named in this action shall be produced for oral examination for discovery as provided by Rule 31. The parties agree that reasonable attempts have been made to accommodate the schedules of counsel and the person to be examined.
11. The parties agree to the following schedule of the remaining oral examinations:

DATE at ...

(1) The Defendants,

12. The parties agree that examinations for discovery of all parties shall be completed on or before _____, or as ordered by the Court.
13. The parties agree that the examinations for discovery will proceed remotely by way of videoconference through a recognized legal reporting agency. To that end, the parties agree to the following in relation to the remote examinations:

(a) **Platform for Examination:** The parties agree to use the video conferencing platform proposed by the Official Examiner’s Office. The Official Examiner shall host the remote examination. If possible, the parties agree to test the platform in advance to confirm that there are no connectivity difficulties.

- (b) **Connectivity:** The examination shall not commence, resume or continue unless and until all participants are connected. Should a participant become disconnected, the examination shall immediately cease until the participant is reconnected. Counsel will exchange phone numbers and ensure they have contact information for their client/witness readily available in the event any participant is unable to connect or re-connect.
- (c) **Location of Witness:** Counsel will ensure their client/witness is situated in a private location for the examination for discovery and, that all potential disruptions are minimized. The key requirement is that the integrity of the client/witness's evidence be maintained. The location of the client/witness for the duration of the examination will be agreed-upon with that in mind.
- (d) **Marking Exhibits:** Counsel will send any exhibits to the reporter electronically. The parties shall accept digital exhibit stamps and digital signatures where available.
- (e) **Securing the Integrity of the Evidence:** Counsel undertake to instruct their client/witness that the examination is a confidential proceeding. Counsel shall take every precaution to ensure their client/witness understands and complies with same. This includes but is not limited to ensuring the client/witness is isolated in a private room and does not communicate with anyone else by any means, including but not limited to phone, tablet, computer or other device, during the examination.
- (f) **Use of Video Recording:** The parties agree that the examination for discovery will not be recorded by any means by any participant other than the Official Examiner without the explicit written consent of all counsel and parties. The parties further agree that any recording of the proceeding cannot and will not be used in the lawsuit or at trial.
- (g) **Video Recording for Purposes of the Transcript:** In the event the Official Examiner's Office video records the examination as a second means to create the transcript, the parties agree that the Official Examiners Office will be instructed in writing to delete the recording once the transcript is completed. Counsel will require written confirmation from the Official Examiner's Office that the recording will be and has been deleted.

ANSWERS TO UNDERTAKINGS, MOTIONS, AND OTHER MATTERS

- 14. The parties will provide answers to undertakings and, if applicable, questions taken under advisement within 120 days of the hearing of their respective examinations for discovery.
- 15. Motions arising out of discoveries will be scheduled with the court within 90 days of the deadline for providing answers to undertakings.
- 16. Pursuant to Rule 29.1.04 of the Rules of Civil Procedure, the Parties will update this Discovery plan as necessary to reflect any changes. Updates will be in writing.

17. The Discovery Plan is signed by the parties' counsel and shall bind the parties.

This Discovery Plan is agreed upon by the parties hereto.

Date

Per: _____
Lawyers for The Plaintiffs

Date

Per: _____
Lawyers for the Defendants,

Schedule B
Checklist for Client Preparation for Remote Examinations for Discovery

The client should be prepared on the same platform to be used for the examination. If the platform is not available, the client should be prepared on a similar platform.

The following should be reviewed and discussed with the client:

1.	Solicitor client privilege and recording of the client preparation session <ul style="list-style-type: none"> • Counsel cannot record the session without the explicit consent of the client. • Counsel should discourage the client from recording the session (and any meetings with their Counsel) to maintain privilege. 	
2.	Connectivity	
	a) Does the client have a secure connection (i.e., password protected)? Remind the client that public Wi-Fi connections should not be used if possible.	
	b) Does the client have appropriate technology and internet capacity to conduct the examination, including: <ul style="list-style-type: none"> • Is the client's device working properly? • Does the client have a working video camera? • Does the client have a working microphone with appropriate sound quality? • Does the client have a home internet connection capable of handling video conferencing? 	
	c) Is the client comfortable with the technology to be used?	
	d) Advise the client to join the remote examination at least 10 minutes prior to the start time to test connectivity and equipment.	
4.	The plan to address technology or connectivity issues	
	a) Advise the client that the examination will immediately cease should any participant be disconnected and will not resume unless and until all participants are connected.	
	b) Arrange an alternative method of communication with the client should the client become disconnected. Counsel should confirm the client's phone number or email address and have it accessible during the examination.	

	The client should also have a means to contact Counsel should the client become disconnected and unable to reconnect.	
	c) Advise the client to notify Counsel immediately if their audio or video is interrupted or fails during the examination.	
	d) Forewarn the client that if connectivity issues persist, the examination may need to continue by telephone or be rescheduled.	
4.	The Location the client will be situated during the examination (if the Official Examiners Office or Counsel's office is not being used)	
	a) Is the room private?	
	b) Should the camera be repositioned to allow for proper viewing of the client and/or the room?	
	c) Is the lighting in the room appropriate so that the client can be viewed on camera?	
	d) Is the client's background appropriately neutral such that it will not distract during the examination?	
	e) Should any inappropriate or potentially offensive signage or other items in the client's room be removed?	
	f) Ensure any privileged or confidential material is not visible on camera.	
	g) Ensure the client has a comfortable chair and desk or table to sit at during the examination.	
5.	The importance of confidentiality and privacy & how same will be maintained	
	a) Advise the client that the examination is confidential. Take every precaution to ensure the client understands and maintains the confidentiality of the examination.	
	b) Advise the client to keep all pets, children and other people out of the room during the examination and problem-solve any difficulties the client may have doing so.	
	c) Forewarn the client that opposing counsel may require the client to reposition or move the camera to view the entire room to ensure privacy.	
	d) Advise the client not to communicate with anyone by phone, tablet computer, or any other means during the examination. Ensure the client	

	removes any such devices so they are not accessible during the examination.	
	e) Advise the client that they should not bring, or use, any notes during the examination. All such items should be removed from the room.	
6.	The prohibition on recording the examination	
	a) Advise the client that audio or video recording or photographing the examination is strictly prohibited.	
	b) Advise the client that any accidental recording or photograph must be immediately deleted and cannot under any circumstances be disseminated to others.	
	c) Advise the client that he or she may be required to confirm on the record and/or in writing that no such recording or photograph has been made or disseminated.	
	d) Confirm the prohibition in writing to the client	
7.	Dress code and video conferencing etiquette	
	a) Advise the client to dress appropriately. <ul style="list-style-type: none"> The client should dress in the same manner as if the examination was being conducted in person, including fully dressing from the waist down. The client should avoid wearing any distracting or busy clothing. 	
	b) Advise the client only one person should speak at a time and to refrain from interrupting or speaking over any other participant.	
	c) Advise the client to speak slowly at all times.	
	d) Advise the client to spell names for the reporter.	
	e) Advise the client to remove all distractions from their room including: <ul style="list-style-type: none"> Ensuring that any noises or notifications on their computer or device are silenced; Turning off their cell phones; and Ensuring pets and children do not interrupt the examination and if possible, that appropriate arrangements have been made for their care. 	

	f) Advise the client not to eat during the examination and to limit drinks to non-alcoholic beverages in non-distracting containers.	
	g) Advise the client that the camera will be on them during the entire examination and to mindful of their activities, movements, and facial expressions.	
	h) Advise the client that the audio will also be on during the entire examination and to avoid and minimize any unnecessary noises.	
8.	Interruptions and Breaks	
	a) Advise the client to remain patient throughout the examination as there may be video or audio delays that interrupt the proceeding.	
	b) Discuss with the client any breaks that he or she may require to minimize disruptions and plan accordingly.	
	c) Advise the client of any additional planned breaks throughout the examination (i.e., lunch).	
	d) Advise the client to mute their audio and stop their video during any and all breaks to maintain privacy.	
9.	Objections and refusals	
	a) Explain the need for Counsel to interject or refuse questions and the difficulty with same due to video and audio delays.	
	b) Advise the client that they should pause before answering questions to allow for counsel to interject if necessary.	
	c) Advise the client that they should immediately stop talking if counsel injects or speaks.	
10.	How the Oath will be administered <ul style="list-style-type: none"> Does the client have a bible at home? Or is the client comfortable giving a solemn affirmation? 	
11.	Review and commission the Affidavit of Documents, if required	

Best Practices for Remote Mediations

A. Introduction

1. These Best Practices are important considerations for Counsel and Mediators both before and during remote Mediations.
2. In deciding whether to proceed with a remote Mediation, Counsel should consider the circumstances of each case carefully. A remote Mediation may not be appropriate in every case.
3. Counsel does however have an obligation to move matters forward and shall consent to a remote Mediation unless to do so would result in significant unfairness, injustice, or prejudice.
4. Per the Superior Court of Justice *Consolidated Practice Direction* dated May 13, 2020, all counsel and parties are expected to cooperate and engage in every effort to resolve matters.¹ This includes attending a remote mediation – whether prescribed or not – where a mediator is willing to conduct the mediation remotely.

B. Neutrality of the Mediator Must be Maintained

5. The Mediator should host the remote Mediation and maintain control over the platform at all times.
6. In order to preserve the neutrality of the Mediator, the parties should enter a “virtual waiting room” each time they log on. Once all parties are logged on and in the waiting room, the Mediator may admit the parties into the Mediation.

C. The Mediation Agreement

7. The parties should sign a Mediation Agreement which permits them to participate in the remote Mediation and outlines the terms of proceeding.
8. Each Mediator will likely have his or her own preferred form of agreement. Counsel should request a copy of the Mediator’s form in advance of the Mediation to ensure they are agreeable to the terms.
9. The Mediation Agreement should indicate the Mediator will be the host of the Mediation and will maintain control of the platform at all times.

¹ <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/>

10. The Mediation agreement should also include the following:
- a) The agreed upon secure online platform to be used for the Mediation and execution of documents;
 - b) How connectivity issues will be addressed, including a technology fail protocol;
 - c) All planned participants and how privacy will be maintained;
 - d) A commitment to an interruption free proceeding;
 - e) How caucuses will be facilitated and a caucus fail protocol;
 - f) A prohibition against video or audio recording of the mediation; and
 - g) Other rules regarding for example breaks, communication, using the mute function, and using the chat function.

11. Important considerations with respect to each of these matters are set out below.

a) Secure Platform For The Mediation & Execution of Documents

12. A secure online platform should be used for the remote Mediation. The Mediation Agreement should indicate the agreed upon secure online platform.
13. When scheduling the Mediation, Counsel should speak with the Mediator to determine the Mediator's preferred choice of platform (i.e., Zoom, WebEx, GotoMeeting, etc). Counsel should also research and obtain the most up to date data on the security of the platform to be used prior to agreeing to proceed. The security and confidentiality of the Mediation proceeding must be maintained at all times.
14. Counsel should also agree upon and use a secure online platform for the transmission and execution of documents (i.e., docusign.com or other comparable platform). In the event original signatures are required or preferred, copies for execution may be transmitted for printing and signing.
15. Prior to Mediation, Counsel and parties should download and familiarize themselves with the necessary hardware and software for the selected platform. The parties should prepare their computer, screens, microphone, camera and phone ahead of time by ensuring that they are functioning properly and are charged to capacity or plugged in. "Appendix B" to the Best Practices for Remote Hearings – Recommended Hardware and Software to run online events is a useful resource to review for this purpose.

b) Connectivity & Technology Fail Protocol

16. All parties will require a connection to the internet.

17. The parties should avoid using a public Wi-Fi connection because connection speeds are slow and security is unknown. If possible, the parties should use a hard-wired internet connection (Ethernet Connection) or a password protected private Wi-Fi connection. The parties should avoid using unsecured public Wi-Fi connections or Wi-Fi hotspots and should advise the other parties in advance of the Mediation should they not have access to a secure Wi-Fi connection.
18. A laptop/tablet with a camera and microphone are preferred for remote Mediations. Smartphones are not recommended.
19. All parties should join the Mediation 10-15 minutes prior to the start time to address any connectivity issues.
20. The parties should agree upon a technology fail protocol in the event the technology fails to operate properly or delays the Mediation. This should include ensuring the Mediator and counsel have telephone numbers for all parties involved in the Mediation and consideration of holding the Mediation by conference call if there is no other way to continue the Mediation remotely.

c) Ensuring Privacy is Maintained

21. The Mediation is a private proceeding. The Mediation Agreement should include an undertaking that Counsel will take all necessary steps to ensure the privacy and confidentiality of the proceeding. This includes, but is not limited to:
 - a) Determining where the client will be situated physically during the Mediation (i.e. the client's home or the lawyer's office).
 - b) Determining who, if anyone, will be present with the client during the Mediation.
22. At all times, the client should be in a private room where the client will not be overheard by others. All individuals in each virtual room should be identified at the onset of the Mediation.
23. Parties should check their physical settings and ensure that they are visible for the Mediation (i.e., light sources behind the party may cause a shadow). The camera should also be set up to provide a view of the entire room or permit an occasional scan of the room to ensure privacy of the proceeding.

d) An Interruption Free Proceeding

24. The Mediation Agreement should include an agreement that all parties take all reasonable precautions to ensure an interruption-free proceeding.
25. The parties should cooperate and make best efforts to ensure the Mediation is interruption free. This includes, but is not limited to, scheduling the Mediation at convenient times for all parties, making necessary arrangements where possible for child care, and removing animals from the room.

26. The parties should turn off all mobile devices, computers and tablets that are not being used during the remote Mediation. The parties should also disconnect any sound or notifications on their devices to minimize noise during the Mediation.
27. The parties should plan for and allow frequent breaks to address unanticipated and unpreventable interruptions. The parties should also cooperate with one another and maintain patience should interruptions occur.

e) How to Caucus - Private Meetings & Caucus Fail Protocol

28. At times, the Mediator may need to caucus with each party separately. The Mediation Agreement should include an agreed upon format for caucus, as well as a protocol in the event confidentiality of the caucus is breached.
29. The online platform should permit the mediator to “mute” one party while continuing to communicate with the other party for a caucus.
30. The Mediation should also offer a remote ‘breakout room’ which is not accessible to any other party to the Mediation. This can be offered through the agreed upon secure online platform. In the alternative, each party may secure a separate, online platform which the Mediator will have access to during caucus.
31. The parties should agree upon a caucus fail protocol. If a party, for whatever reason overhears the private caucus between the Mediator and any other party, the party should immediately end the remote Mediation session and contact the Mediator by telephone, email or text to advise of the failure.

f) Video and Audio Recordings Prohibited

32. Mediations are private, without prejudice settlement proceedings. The Mediation Agreement should prohibit video, audio, or any other recording of any part of the Mediation proceeding. This includes screenshots of the Mediation session.
33. The Mediation Agreement should also include an agreement that the Mediation will not be transmitted via live or deferred video or audio relay to any other person or party.
34. The Mediation Agreement should also require that any accidental recordings be destroyed immediately and not disseminated to others.
35. Counsel and the Mediator should advise and remind clients during the Mediation session that they are not to record any part of the Mediation by any means.

g) Other Rules regarding breaks, using the mute function, using the chat function

36. The Mediation Agreement should also address other matters including for example:
- a) An agreement regarding regular breaks throughout the Mediation. This will help ameliorate fatigue and reduce interruptions.
 - b) Instructions to mute devices and turn off video during breaks to maintain privacy.
 - c) Instructions to refrain from using the chat feature during the Mediation due to the risk of the message being viewed by all parties. Should Counsel need to communicate with their clients by text or similar means, they should use a separate secure communication platform such as WhatsApp.

D. Preparing the Client for the Remote Mediation

37. Counsel should ensure that the client has the appropriate technology and knowledge to mediate the matter remotely. This includes confirming that:
- a) the client's device (IPAD, laptop, computer or as a last resort, phone) is working properly and has the appropriate application installed;
 - b) the client's device has a working camera and microphone; and
 - c) the client has an appropriate space to conduct the Mediation either at the client's home or in a secure room at Counsel's office.
38. Counsel should arrange an alternative mode of communication with their client in the event the technology fails during the Mediation. The client's phone number and email should be accessible during the Mediation. The client should be advised to immediately contact their Counsel through this alternative mode should their equipment fail (i.e. sound is interrupted or stops working).
39. In advance of the Mediation, Counsel should prepare their client for the Mediation by using the same platform that will be used at the Mediation. This will provide the client with an opportunity to become comfortable with the platform. In addition, it will allow Counsel to ensure that their client has appropriate technology and internet capacity to participate in the Mediation.
40. Counsel should ensure the client is aware of proper online platform etiquette, particularly for successful communication during openings and caucuses. This includes advising the client only one person should speak at a time and to be wary that there may be a delay with sound or video.
41. Counsel should also discuss an appropriate dress code with their clients. This includes ensuring clients are dressed from the waist down.

E. Matters to Address During the Mediation Session

42. The Mediator should set and remind the parties of the ground rules for the Mediation during his or her opening statement. This includes but is not limited to:
 - a) The requirement that only one person speak at a time;
 - b) how to address each other;
 - c) how the parties should make it known they wish to speak;
 - d) the importance of privacy of the Mediation; and
 - e) the prohibition on audio and video recording.
43. To ensure the success of a remote Mediation, Counsel and all parties should be mindful of the following:
 - a) **Their background:** The parties should choose a solid neutral wall and remove any distracting clutter and personal items. Similarly, any privileged or confidential material should be removed from camera view.
 - b) **Their positioning in front of the camera:** The parties should sit close to the camera. The camera should be positioned at eye level to enable a clear view of the parties face.
 - c) **Their attire:** The parties should ensure they are fully dressed and their attire is appropriate for Mediation. They should avoid wearing bright colours or patterns that cause distracting effects on screen.
 - d) **Their visibility:** The parties should ensure their lighting does not cause shadows or limit visibility on screen.
 - e) **Their gestures:** The parties should avoid using hand gestures or non-verbal cues that may not be captured on camera.
44. The parties should look directly at their webcam when speaking, not the screen.
45. The parties should use headphones with a microphone for clear communication and to reduce background noise. The parties should speak directly into their microphone and ensure they are not muted before speaking. A regular speaking voice should be used as the online forum can amplify or exaggerate sounds.
46. The parties should ensure that only one person speaks at a time. The parties should be mindful of any lag or latency in the audio to ensure that a party is done speaking before the next party begins.
47. The parties should use the mute option on their microphone when not speaking.

48. For additional useful tips to ensure a successful remote Mediation, the parties should refer to “Appendix A” to the Best Practices for Remote Hearings – On-Screen Tips for Counsel, Parties and Witnesses. Counsel should consider sharing this document with their clients prior to Mediation.

The United States Experience The U.S. Courts' Response to COVID-19

OTLA has had several meetings with the heads of the United States ("US") State Trial Lawyers Associations, as well as representatives of the American Association for Justice in an effort to garner information to assist with the necessary modernization of Ontario's Civil Justice System.

In the wake of the current COVID-19 pandemic and even before, the US Civil Justice system has embraced technology. Unlike in Canada, the United States courts have the power to enact Orders to amend court procedures. They are not required to await legislative changes. This has resulted in US court processes being very quickly amended to adapt to the current emergency.

The US experience provides Ontarians with many examples from which to choose, when determining how to modernize our justice system. The following is a summary of the documentation and information provided by OTLA's US contacts. It outlines some of the approaches taken in the US thus far with respect to modernization and the current emergency. Should any further specifics or documentation be required with respect to the information noted below, OTLA is ready and able to assist.

1. States Accepting New Originations/Notice of Actions to Commence Lawsuits
2. Substituted Service
3. Remote Swearing/Oaths
4. Remote Depositions and Discovery
5. Remote Mediations
6. Remote Motions and Hearings
7. Remote Trials
8. COVID Task Force

1. States Accepting New Originations/Notice of Actions to Commence Lawsuits

- **Montana** – Accepting filing of new complaints.
- **New Hampshire** – Allowing filing of new cases and motion practice.
- **North Dakota** – Allowing new lawsuits to be filed, receiving trial dates, and setting scheduling orders if they do not require a hearing.
- **Oregon** – Allowing filing of new cases.
- **Utah** – Allowing filing of new cases and motion practice.
- **Virginia** – Allowing filing new cases and motion practice.

2. Substituted Service

- **Alabama** – Please see this [Order](#) allowing for electronic service after the initial complaint.
- **Idaho** – Please see this [overview](#) allowing for full electronic filing and electronic service of documents.
- **North Dakota** – Please see [Rule 3.5](#) allowing full electronic filing and service of documents.
- **Washington** – Please see [Rule 30](#) allowing electronic filing and service.
- **New Hampshire** – Please see this [Supreme Court Order](#) (Section 3) allowing for electronic filing and service of pleadings.

3. Remote Swearing/Oaths

- **Alabama** – Please see this [Order](#) allowing for remote administration of oath.
- **Florida** – Please see this [Order](#) allowing for remote administration of oath.
- **Massachusetts** – Please see this [Order](#) allowing for remote administration of oath.
- **New Jersey** – Video Deposition Stipulation issued allowing a court reporter to be in a different room than the witness for the administration of the oath.
- **Indiana** – Please see this [Supreme Court Order](#) allowing for remote administration of oaths.
- **Washington** – Please see this [Order](#) allowing remote oaths and affirmations, which are also allowed via statute.

4. Remote Depositions and Discovery

General Tips

- Here is a [good article](#) on how to conduct a remote deposition from a practical standpoint.

Jurisdictional Approaches

- **California** – Please see this [Emergency Rule](#) (Rule 11) allowing remote depositions during the state of emergency related to the COVID-19 pandemic.
- **Illinois** – Please see this Cook County [Administrative Order](#) (Sections 1.3, 3.1, 4.5) that is encouraging attorneys to move cases along and not use this as a time to delay.
- **Kentucky** – Passed a bill allowing remote depositions.
- **Pennsylvania** – Please see this [Order](#) which encourages use of technology in order that matters are not delayed.
- **Indiana** – Please see this [Supreme Court Order](#) allowing remote depositions, and suspending anything that can be interpreted as prohibiting the use of audio-video communications for this purpose during this time.
- **Utah** – Allows for expedited discovery disputes meaning a call with a Judge within 7 days of dispute.

5. Remote Mediations

Jurisdictional Approaches

- **New Jersey** – parties are participating in video mediations, including Zoom mediations.
- **Washington** – parties are participating in virtual mediations.
- **Wisconsin** – parties are participating in video mediation through Zoom.

6. Remote Motions and Hearings

General Tips

- Here is a [good article](#) on conducting hearings remotely and common issues to anticipate.

Jurisdictional Approaches

- **Michigan** – see in depth State Court Administrative Office [Standards and Guidelines](#) for conducting remote court proceedings, including best practices.
- **Alabama** – Standing Order on Virtual Hearings giving authority to each judge or referee to require that any non-jury court proceeding be conducted by video or audio conference.

- **California** - Please see this [Emergency Rule](#) (Rule 3) regarding use of technology for remote appearances.
- **Pennsylvania** – Please see this [Supreme Court Order](#) (pages 4-5) which encourages use of technology in order that matters are not delayed.
- **New Jersey** – Here is a [news release](#) about New Jersey’s transition to virtual hearings and motions. They have now held over 8,000 remote proceedings.
- **Oregon** – Please see this [Order](#) (section 6) allowing for motions for be heard remotely. Judge and staff are at the courthouse on motion days so argument is recorded.
- **Texas** – Please see [this article](#) regarding remote hearings proceeding through Zoom in an effort to keep state courts as operational as possible. They have held more than 10,000 remote proceedings. They have also set up a [YouTube page](#) where you can watch the hearings.
- **Florida** – Please see this [Supreme Court Order](#) encouraging judges to take all necessary steps to facilitate conducting proceedings with the use of technology to maintain judicial workflow.
- **Montana** – Please see this [COVID-19 Memo](#), encouraging courts to continue using remote-hearing or telephone hearings for most cases.
- **Idaho** – Please see the Supreme Court’s [Information, Instructions, and Support for Zoom hearings](#) page for the use of remote hearings to reduce in-person court sessions in response to COVID-19.
- **Indiana** – Please see the [Supreme Court’s Order](#) permitting the use of telephone or video technology in lieu of in-person appearances, and permitting courts to live-stream proceedings.
- **Maryland** – Please see this [Order](#) allowing proceedings for emergency and other matters to advance remotely. Skype has been used as a platform, with court staff and judges on call remotely.
- **New Hampshire** – The courts have been using video and telephone for hearings and proceedings where possible instead of in-person appearances while postponing non-emergency matters (see this [update and resources page](#)). Please also see this Judicial Branch [News Release](#) allowing for cases that had been scheduled to take place in late March and early April to proceed by remote oral arguments via Cisco WebEx as of April 29, 2020. These are also being streamed live.
- **Virginia** – in Chesterfield County, parties can appear remotely for emergency hearings, as well as non-emergency hearings as long as it is on consent, pending approval of the presiding judge. Further information can be found [here](#).

7. Remote Trials

General Tips

- Here is a [helpful article](#) that was written by a trial consultant about considerations for rebooting jury service and trials.
- Here is another [article](#) discussing civil jury trials in the wake of COVID-19.

Jurisdictional Approaches

- **Michigan** – Please see this [Supreme Court Memorandum](#) in regards to the State Court Administrative Office’s (“SCAO”) remote jury trial pilot project. The first phase will involve a mock trial to develop recommended practices related to remote jury trial components such as *voir dire*, exhibits, witnesses, and deliberations. In the second phase, SCAO will partner with trial courts to conduct remote jury trials and then share the resulting recommendations with courts statewide.
- **New Jersey** – Please see this [news release](#) stating that New Jersey has already held three virtual non-jury trials. Please also see this [Notice to the Bar](#) which provides guidance on remote proceedings in the trial courts.
- **Texas** - See this [link](#) for an article about the one day bench Zoom trial that recently happened.
- **Florida** – Please see this [Order](#) (II. C) allowing non-jury civil trials to be conducted remotely, subject to the discretion of the judge.
- **Ohio** – The state held an in-person criminal jury trial on consent recently as the judge did not want to delay. The defendant tested negative for COVID-19 days prior, and was advised to self-quarantine and monitor his symptoms for six days in case the test was a false negative. Unfortunately, he collapsed during the proceedings, causing the matter to be adjourned. For more details, please read this [article](#).
- **Kentucky**- The state also completed an in-person jury trial that started before the pandemic but wrapped up in April. They listened to evidence in a courtroom reconfigured specifically to protect them from the virus. Here is an [article](#) summarizing the events.
- **Utah** – For trials coming up, a press release announced that judges are inquiring about video bench trials. For more, see this [article](#).
- **Oregon** – See this [Order](#) (2. c.) allowing for non-jury trials to be held by remote means if feasible and permitted by law, including with the consent of the parties.

8. COVID Task Force

- **Alabama** – Alabama State Bar is starting a Bench & Bar COVID-19 Task Force. See the [link](#) here.

- **Florida** – Chief Justice of the Supreme Court created a task force to plan for the full return to court operations. See the [article](#) here.

Ontario Trial Lawyers Association
Video Conferencing: A Guide to Litigate in a Secure and Private Manner

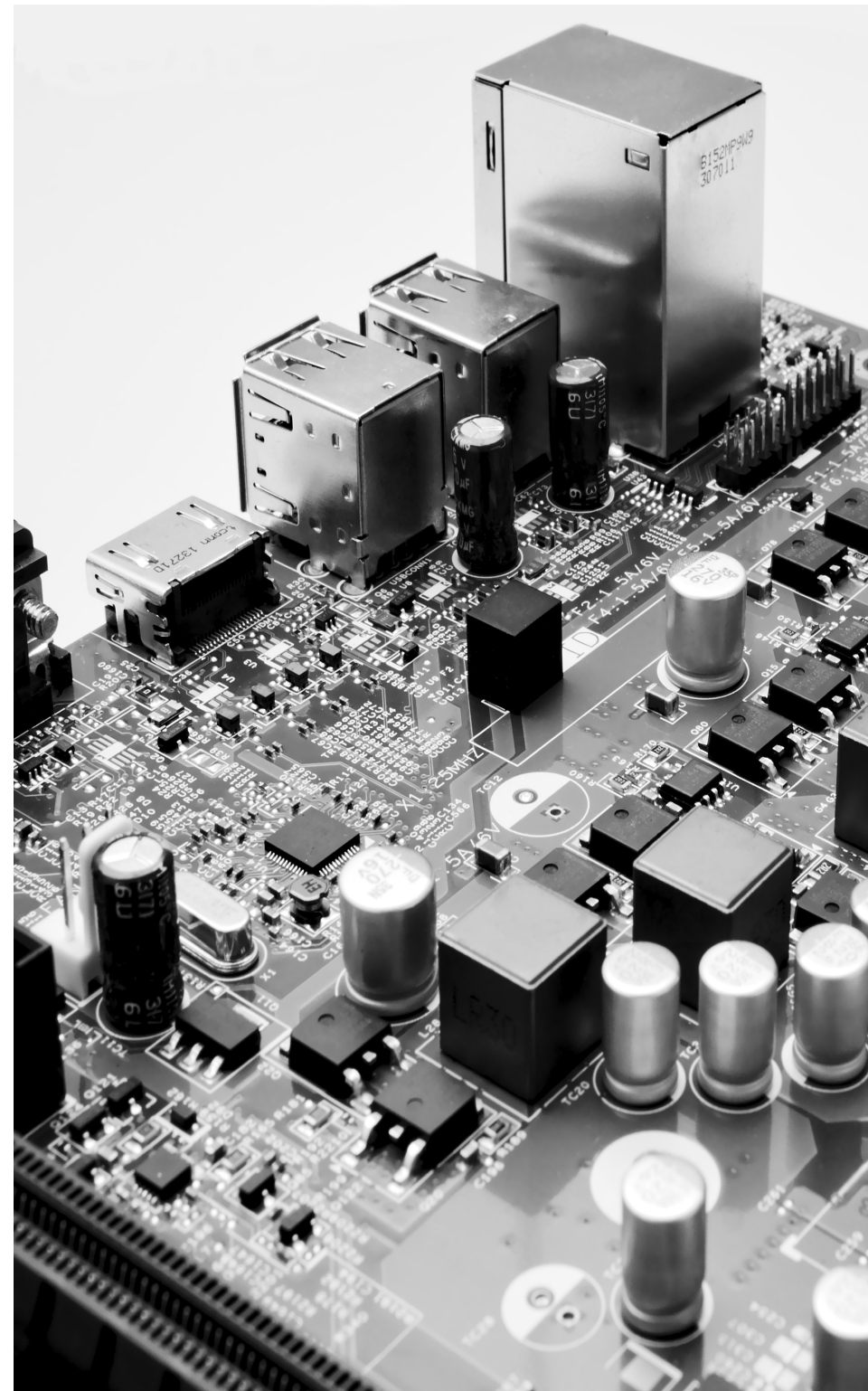


“
*...in 2020, use of readily available technology is part
of the basic skillset required of civil litigators and courts.*

- Justice F. L. Myers
Arconti et al v. Smith, 2020 ONSC 2782

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Executive Overview.

Lawyers are working remotely in light of the current pandemic crisis and as a result implementing technological solutions, such as video conferencing to maintain their practice and service their clients with as little disruption as possible.

The use of technology can have indisputable benefits to the legal industry, which is often viewed of as 'archaic'. Many lawyers have discovered that litigation can be practiced in a more time efficient and cost-effective way through the use of technology. Similarly, courts and other legal institutions have been open minded and have implemented modern approaches to enable access to justice for litigants.

While there are risks associated with the use of technology, these risks can be effectively managed. The legal industry should seize this opportunity and bring about technological advancements that are long overdue.

As with any new practice models, risks need to be identified and inherent harm must be evaluated. Practices to mitigate harm must be designed so that residual harm, if any, can be minimized.

Privacy and security risks are inherent in the use of technology, including video conferencing. There has been an uptake in privacy and security breaches, as more businesses and institutions have transitioned to online technologies to continue their practice remotely. This increase in breaches has resulted in class action lawsuits, regulatory investigations, remediation costs, and reputational harm.

These breaches are, however, largely due to the lack of preparedness on the part of businesses including a lack of accountability/governance, a lack of policies and procedures, a lack of staff training, a lack of technological and administrative tools to assist in identifying vulnerabilities, and a lack of cyber insurance. These breaches can be effectively managed.

Prior to the pandemic, video conferencing was not used widely by the legal sector, despite the *Rules of Civil Procedure* allowing for the use of video conferencing in court proceedings. According to the *Rules*, parties must agree and/or be ordered by the presiding judge to use video conferencing, after evaluating objections. One objection currently being raised (mostly by insurers) is the lack of security of video conference platforms. This objection can be effectively managed if all parties implement strong privacy and security practices, as required by the *Rules of Professional Conduct*, *LawPro*, and the *Personal Information Protection and Electronic Documents Act* (PIPEDA).

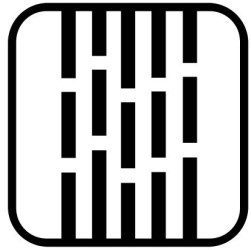
If law firms and insurers take a proactive approach to protect their clients' personal information from unauthorized access, risks can be effectively managed and law firms, insurers and the courts can benefit from the modernized and practical way of convening litigation.

This Guide is meant to identify a law firm's obligation to protect its clients' personal information while engaging in a video conference call. Recommendations are outlined to enhance the law firm's privacy and security posture and effectively minimize the risk of a breach.

90% of legal professionals believe they need to do more to show employees and consumers they are protecting personal data

(2019 Data Protection Report, Shred-It)

About Bamboo Data Consulting.



Trusted **Leaders**. Passionate Collaborators.

Sharon Bauer is the founder of Bamboo Data Consulting, a consulting firm specializing in privacy, security, data strategy and a range of cutting-edge technology ethics work. Bamboo Data Consulting was founded to help businesses, government and non-profit organizations meet their strategic business goals by using data in a responsible and ethical way.

Bamboo Data Consulting enables growth, innovation, and transformation by bringing expertise to privacy and security solutions to ensure compliance with regulations, standards and best practices.

Sharon is a privacy consultant and lawyer. She provides strategic risk management and privacy compliance advisory and legal services. Sharon works with diverse private and public organizations, from startups to multinational corporations in industries such as technology, financial services, telecommunication, healthcare, education, marketing, and retail.

Sharon frequently conducts privacy risk assessments against international privacy legislations such as PIPEDA, GDPR, HIPAA, and CCPA to identify privacy gaps and make recommendations for remediation. She designs and implements privacy programs, including policies, compliance plans, and staff training programs. She conducts vendor privacy due diligence and data reviews in preparation for mergers and acquisitions. Sharon acts as a virtual Chief Privacy Officer for various organization where she provides ongoing privacy advisory services.

Prior to founding Bamboo Data Consulting, Sharon was a senior manager at KPMG where she led the national privacy team and developed the Privacy by Design Certification Program. Sharon assisted multiple multinational companies embed privacy practices into their processes, services, and products for the purpose of being certified by an accredited body.

Sharon started her career as an insurance litigator for 10 years representing plaintiffs.

Sharon frequently speaks and publishes on emerging privacy trends and technologies. She has taught courses on Canadian privacy legislation and Privacy by Design. She frequently contributes to The Lawyer's Daily on privacy matters.

Video Conference Lifecycle.

Embedding privacy and security into virtual litigation



Getting Started.

Conduct due diligence on video conference service providers and implement privacy and security management/accountability within your law firm

Review Agreements & Privacy Policies

As a law firm, you are the custodian of your clients' sensitive personal information and therefore have a responsibility to protect it. When engaging with third parties, vendors or service providers ("Vendors"), such as video conference Vendors, you must conduct due diligence on the Vendor to investigate whether it has appropriate privacy and security safeguards in place to protect your clients' personal information. *While you may outsource processes and services to Vendors, you cannot outsource your responsibility to protect the personal information your clients entrust you with.* Therefore, if a Vendor experiences a breach involving the personal information you disclosed to it, your law firm may be liable.

33% of breaches are a result
of vendor breaches (Beazley, 2017)

When negotiating/reviewing service agreements, (a) limit the way in which the Vendor may use the personal information, (b) limit who the Vendor can disclose the information to (e.g. fourth party vendors), and (c) limit how long the Vendor may retain the information. Make sure the Vendor has appropriate privacy and security safeguards (e.g. certifications, attestations) to protect the personal information and, if possible, ensure the Vendor stores the personal information in Canada. If the personal information is stored outside of Canada, you must inform your clients that their personal information will reside in a different jurisdiction and the laws of that jurisdiction will govern their personal information.

Recommendations:

- ❑ Although it may not always be possible to negotiate video conference licensing agreements, to protect your clients' personal information, be aware of the following provisions in the licensing agreement or identify them within the Vendor's Privacy Policy:
 - How will the platform use personal information?
 - Who will the platform share personal information with?
 - Where will the personal information be stored or processed?
 - How long will the platform retain personal information?
 - How can an individual access their personal information?

Getting Started.

Conduct due diligence on video conference service providers and implement privacy and security management/accountability within your law firm

Develop / Re-Visit Your Privacy Policies

Video conference calls allow you to collect personal information that you otherwise may not have collected, such as images of the call, visual recordings and audio recordings. Law firms may collect personal information that they otherwise would not have collected but for video conferencing (e.g. audio recordings). Review your Privacy Policy (or Retainer Agreements) to ensure it addresses the collection of the newly acquired personal information and the way in which you intend to use it. As a precaution, seek meaningful and informed consent (e.g. signed Consent Form) from clients to engage in video conference calls and provide them notice of the risks such as privacy breaches or that their personal information may be governed by the laws of a different jurisdiction. The Office of the Privacy Commissioner of Canada (OPC) provides guidance on preparing Privacy Policies in order to rely on informed and meaningful consent (https://www.priv.gc.ca/en/privacy-topics/collecting-personal-information/02_05_d_56_tips2/).

Law firms should develop written and formalized internal policies and procedures to address privacy and security (e.g. Work From Home Policy, Clean Desk Policy, Internal Privacy Policy, Retention Policy, Electronic Communication Policy), which are accessible to all staff and provide clarity, uniformity and accountability towards the implementation of privacy practices.

Staff should be trained on internal privacy procedures, including their responsibility to protect clients' personal information. Staff should also be trained to identify and report a privacy breach and be educated on ways to avoid being a victim to social engineering. Training your staff will significantly reduce the risk of a privacy or security breaches.

1 in 4 breaches are a result of social engineering

Recommendations:

- ❑ Develop or update your Privacy Policy (or Retainer) to ensure it reflects the following:
 - What personal information you are collecting (e.g. recordings)
 - How that personal information will be used
 - How long you intend to retain personal information
 - What security safeguards you have in place to secure personal information
 - What jurisdiction personal information will be stored in (e.g. United States) and that laws of that jurisdiction will apply to the personal information
- ❑ Have your client sign a Video Conferencing or Electronic Communication Consent Form acknowledging, amongst other things:
 - The law firm may rely on electronic communication to discuss sensitive information
 - Despite reasonable privacy and security measures, the law firm cannot guarantee personal information will be protected due to evolving online threat landscape
 - The client will implement security measures (e.g. strong passwords) to protect themselves and reduce the risk of a security breach
 - The client will not share a video conference link or password with anyone who is unauthorized to attend
 - The client will not record a video conference session
 - The client will not share documents containing sensitive personal information via video conference platform
- ❑ Develop an internal policy (e.g. Electronic Communication Policy, Video Conferencing Directive) to streamline electronic communication practices and reduce the risk of a privacy and security breach. All staff should use the same video conference platform and default settings.
- ❑ Train staff on: (a) acceptable video conference practices, (b) appropriate settings on the platform, and (c) how to identify privacy or security risks and method of immediately reporting the risks or breaches.

Getting Started.

Conduct due diligence on video conference service providers and implement privacy and security management/accountability within your law firm

Accountability and Oversight

The OPC made references to the importance of developing a privacy culture by setting a tone from the top (https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada/the-personal-information-protection-and-electronic-documents-act-pipeda/pipeda-compliance-help/pipeda-compliance-and-training-tools/gl_acc_201204/). Instilling a privacy culture starts with the development of a privacy governance structure. A Privacy Officer or a designated staff must be made accountable for developing, implementing, monitoring and overseeing privacy and security within the law firm and report/escalate concerns to the partner(s).

Recommendations:

- ☐ Ensure a designated individual within your law firm is accountable for overseeing and managing video conferencing, including:
 - Be responsible for or informed of the privacy and security practices of the firm to ensure alignment with the video conference platform
 - Develop video conferencing best practices / policies
 - Stay informed of latest news and releases relating to video conferencing in order to assess and manage evolving risks
 - Stay informed of industry best practices (e.g. caselaw, LawPro, Law Society)
- ☐ Ensure staff are aware of who the designated individual is for video conferencing so they may address questions or concerns with that individual.
- ☐ Delegate to the designated individual the responsibility to assess and/or approve deviation from or exception to the firm privacy and security practices (e.g. using a different video conference platform, removing a default setting).

***Fundamentally, in order to be compliant and effective,
a privacy-respectful culture needs to be cultivated.***

(Office of the Privacy Commissioner of Canada)

Setting Up.

Set appropriate default settings on the video conference platform and develop privacy and security best practices for video conferencing

Initial Steps to Enhance Security

To minimize security breaches, it is necessary to protect the law firm's network to prevent a bad actor from penetrating the network and retrieve your clients' personal information or hold it hostage in exchange for a ransom. The risk of a security breach increases when lawyers work remotely as they may no longer be protected by a secure environment.

Recommendations:

- ☐ Use a virtual private network (VPN) when accessing firm data remotely or logging onto a video conference call remotely.
- ☐ Ensure the VPN is appropriately secured (e.g. use Multi-Factor Authentication).
- ☐ Use Multi-Factor Authentication for all accounts (including video conference platforms) to make them more difficult to access by cybercriminals.
- ☐ If working from home, make sure that your home modems/routers are well secured.
- ☐ Install and keep antivirus and anti malware technologies up-to-date on all devices.
- ☐ When setting up a video conference account, use work email addresses and never a personal account.
- ☐ Use unique and strong passwords to create your account – consider using a password manager (e.g. 1Password to manage your passwords and create strong randomized passwords).
- ☐ Regularly update the video conference application on devices to enhance its security and enable new functionalities which may provide further privacy and security measures.

“...remote workers have become a weak link that threat actors are targeting and that user credentials in offsite computing (home) environments are increasingly at risk...”
(ITWorld Canada, March 2020)

Review Permission Settings

The data minimization privacy principle provides that data should only be collected if it is necessary to carry out a service. Law firms should not collect personal information which is not essential to provide a service, such as representing a client. Similarly, if a law firm is to disclose personal information to a Vendor, it should only disclose what is necessary for the Vendor to carry out its services. As such, law firms should review the permission settings on video conference applications to ensure they are not disclosing information which is not necessary for the functionality of the service. For example, while it may be convenient to allow the platform to gain access to your contact list, it may also provide the Vendor more information than is necessary, therefore creating a risk that the Vendor may misuse the data or experience a breach involving your data.

Recommendations:

- ☐ Carefully review permission settings when installing the Platform or when there are updates to the Platform.
- ☐ Consider whether access permissions are necessary (e.g. access to your location, access to your contact list, access to your photos). Be cautious and do not grant access unless necessary.

Setting Up.

Set appropriate default settings on the video conference platform and develop privacy and security best practices for video conferencing

In an effort to reduce (a) video conference hacking (recently known as “Zoombombing”), (b) personal information disclosed to the video conference Vendor, and (c) the risk of disclosing confidential information to other parties on the video conference call, it is necessary to take proactive measures and adjust default settings.

Review and Enable / Disable Default Settings

Recommendations:

- ☐ Depending on the video conference platform, either enable or disable default settings so that it results in the following default functions, which can be adjusted accordingly:
 - All video conferences are private
 - Video conference recording is disabled
 - ‘Auto-save’ recordings, transcripts, or whiteboard content is disabled to prevent the video conference Vendor from saving the content onto the platform on the cloud
 - Screen-sharing is disabled, other than for the host
 - File transfers are disabled
 - Participants are muted upon entry
 - Participants cannot send private 1:1 messages to each other
 - Make break-out rooms available
 - Guests must wait for the host to join

Sending / Receiving Video Conference Invitation

Recommendations:

- ☐ When scheduling a video conference call, generate a unique password to make the call private and accessible only to invited participants.
- ☐ Send recipients of a video conference invitation the unique conference password in a separate email.
- ☐ If you are a recipient of a video conference invitation, before accepting the invitation, calling into the conference, or clicking on any link, review the email address of the sender and confirm it belongs to the sender so you do not fall prey to a social engineering attack.
- ☐ If you are expecting a large group or individuals whom you do not know, enable registration, which will allow you, as the host, to view the email address of each registrant and compare it to those in attendance on the call.
- ☐ Ensure the title of the video conference does not breach confidentiality or privacy.

Starting a Video Conference.

Set expectations upfront about privacy and security so all parties are informed and can provide meaningful consent

Mind Your Surroundings / Environment

Lawyers have an obligation to take all measures to maintain solicitor-client confidentiality and protect their clients' personal information. Similar to the way lawyers should be mindful of having conversations with their clients in private or removing confidential documents from their desk when they have a visitor, lawyers should maintain that level of confidentiality regardless of their surroundings or environment. A privacy breach or breach of confidentiality can occur when someone overhears or sees information they should not whether by physical or electronic means.

Recommendations:

- ☐ Hardwire the internet connection which will avoid unstable WIFI connection, audio quality and overall attendee experience.
- ☐ Ensure you are in a private and safe location where you may have a confidential conversation without interruption and without others listening in.
- ☐ Turn off your smart devices such as Google Home, Alexa, Siri etc.
- ☐ Minimize background noise or use a headset with a mic to reduce noise.
- ☐ Test the audio and speaker before you begin the video conference.
- ☐ Close documents, windows, browsers on your device which you do not wish for anyone to see (e.g. email / calendar notifications).

In the Waiting Room

Setting a tone about the expectation of privacy and security at the forefront of a video conference will ensure all parties are aligned and any initial issues or concerns can be dealt with upfront.

Recommendations:

- ☐ Develop terms for engaging in the video conference call (e.g. one person speaks at a time, no screen grabbing, no recording, steps to take if you lose connection) and post them in the waiting room so all participants can review them in advance of the video conference call.
- ☐ Mute all participants in the waiting room to avoid discussion amongst parties.
- ☐ Confirm everyone in the waiting room is authorized to be a part of the video conference call and once you have done so admit authorized individuals.

Starting the Discussion

Inform callers whether they can be heard or seen via video so that they do not accidentally disclose confidential information. If you intend to record the video conference call, you must seek explicit consent to do so and reveal the purpose for doing so.

Recommendations:

- ☐ Once you let authorized parties in the video conference call, lock the meeting room to prevent anyone else from joining.
- ☐ Once parties enter a video conference call, inform them whether their sound and/or video is on or off and who controls those features.
- ☐ Confirm the rules of the video conference call.
- ☐ Pursuant to the Law Society's *Rules of Professional Conduct* (Rule 7.2-3), inform other parties to the call whether you will be recording the video conference call and seek explicit consent to do so.

During a Video Conference.

Monitor and maintain privacy and security throughout the video conference call

Maintaining Privacy During the Video Conference

Recommendations:

- ☐ Enable enter / exit chime so that there is notification if someone joins or leaves the video conference.,
- ☐ Be aware of who is entering the call and ensure others on the line are aware of their presence.
- ☐ Be mindful of what might be visible on your video, such as:
 - Documents containing personal or confidential information
 - Other windows/browsers (e.g. email notifications, confidential documents) that are open on your device that may become visible during screen share
- ☐ If the chat feature is enabled, be mindful if your chat is visible to everyone or a particular individual on the video conference call.
- ☐ Mute your mic if you are not talking to avoid revealing information if you talk to someone off the video conference call.

Breakout Room

Recommendations:

- ☐ Before speaking in a breakout room, ensure only intended parties are present.
- ☐ If parties expect confidentiality / privacy in a breakout room, such as in a mediation, the party who enters and exits the breakout room, such as a mediator, should enable the “knock” feature to give warning to those in the breakout room that he/she will be entering. If this feature is not available, the party entering and exiting the breakout room, should provide notice of his/her intention to enter by calling or texting the other party to give warning.

Ending a Video Conference / Post-Video Conference.

Take extra precaution to ensure the video conference ended and securely protect any recordings

Ending a Video Conference Call

Recommendations:

- ☐ Inform the parties to a video conference call of your intention to leave the call if you are leaving earlier than others.
- ☐ Ensure you log out of the video conference call when you leave the video conference.
- ☐ If a party to a video conference call is expected to leave the discussion while others remain on the call, ensure that party has left and is not a silent listener.

Post-Video Conference Call

Law firms should only retain personal information for as long as necessary to fulfill the purpose for which they collected the information for or as prescribed by law. While the Law Society provides guidance to lawyers on retention considerations, law firms should be mindful of non-compliance with PIPEDA and consider what the risk is by retaining video recording, images and a copy of a chat. If a law firm retains information obtained via the video conference call, it will need to implement proportional security measures to protect that information.

Personal information should only be retained for as long as is necessary to achieve the purpose it was originally collected for.

Recommendations:

- ☐ If a conversation, picture or voice recording of a video conference call is to be shared, seek permission to do so from those individuals involved in the call and provide information of the intended purpose for sharing the information.
- ☐ Any recording or copies of images or chats should be saved in the client file, ensuring it is secure and it is accessed only by staff who require access to it. Do not save it in a local folder that does not have proper privacy and security controls.
- ☐ Consider revising your Retention Policy to include video conference recordings and monitor compliance with the retention period.

Breach Preparedness.

Privacy and security is never guaranteed; be proactive and mitigate the harm to both clients and the law firm

Breach Management Plan

Pursuant to PIPEDA, law firms are legally required to notify the OPC when they experience a privacy breach that results in a “real risk of significant harm to an individual”. Law firms must keep a record of all privacy incidents and breaches for 24 months. A regulatory investigation or lawsuit for breach of privacy will evaluate the law firm’s breach preparedness and ability to minimize the harm once a breach is identified.

“Know what personal information you have, where it is, and what you are doing with it. When and where do you collect personal information? Where does that information go? Who can access it, and what do they do with it? You must understand your data before you can protect it!” – Office of the Privacy Commissioner of Canada, 2019

Recommendations:

- ❑ Develop or update the firm’s Breach Management Plan, which should include the following information:
 - What to do if staff identify a breach
 - How to respond to a breach, including timelines and owners for each task
 - How to contain the breach and retain forensic investigators who are prepared to immediately intervene
 - Who to report a breach to, both within the firm and outside the firm (e.g. breach coach, privacy experts), with their up to date contact information
 - A process to determine whether the breach should be reported to the Office of the Privacy Commissioner of Canada and how to notify clients affected by the breach
 - How to prepare a record of the breach and how long to retain that record

Cyber Insurance

Given the excessive risk of a privacy and security breach, to mitigate the financial harm to the law firm, it is advisable to obtain cyber insurance, which will not only offset costs but take steps to remediate technical and administrative vulnerabilities.

Recommendations:

- ❑ Obtain cyber insurance to mitigate risk exposure by offsetting remediation costs post-breach such as legal fees, damages, expert fees, technical fees, and other recovery costs.
- ❑ When purchasing cyber insurance, consider the following:
 - Review the difference between a stand-alone policy and an extension to an existing policy
 - Review the deductible
 - Ensure there is coverage to first and third parties
 - Identify whether the policy covers all cyber attacks, non-malicious action by an employee, and social engineering attacks

**Well over
28 million
Canadians were
affected by a
data breach in
2019**

Video Conference Tools: A Comparison.

The following table provides a comparison of four Video Conference tools: (1) Zoom, (2) Microsoft Teams, (3) Cisco Webex, and (4) Citrix GoTo Meetings. The four selected tools should not suggest that they are the most secure tools on the market, but rather the ones that are the most widely used in the legal industry at the present time.

From a security perspective, all four tools comply with multiple industry leading information security standards that are designed to provide an adequate level of security for its customers.

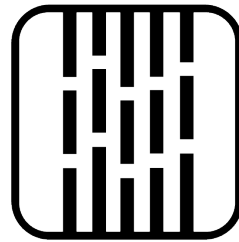
Tools/ Functionality	Zoom	Microsoft Teams	Cisco Webex	Citrix GoTo Meetings
Meeting Room Security	<p>Can secure the meeting room with password.</p> <p>Supports multi-factor authentication for all users.</p> <p>Can lock the meeting room so no one can join once the meeting is started.</p> <p>Has waiting room feature.</p> <p>Supports screenshot watermarking and audio signature.</p>	<p>Does not have password protection for meetings but has settings to control who can join the meeting through lobby settings and structured meetings.</p> <p>Has meeting lobby for attendees waiting.</p> <p>Supports multi-factor authentication for all users.</p>	<p>Can secure the meeting room with password.</p> <p>Can lock the meeting room.</p> <p>Has meeting lobby for attendees waiting.</p>	<p>Can secure the meeting room with password.</p> <p>Can lock the meeting room.</p>
Breakout Rooms	Yes	No	No	No
Meeting Recording	<p>Yes</p> <p>Recording can be stored on cloud or local machine.</p> <p>Cloud recording can be password protected.</p>	<p>Yes</p> <p>Recording is stored in cloud (Microsoft Stream).</p>	<p>Yes</p> <p>Recording is available with paid plans and can be stored on cloud or local machine.</p> <p>Recording can be password protected.</p>	<p>Yes</p> <p>Recording can be stored on cloud or local machine.</p>

Tools/ Functionality	Zoom	Microsoft Teams	Cisco Webex	Citrix GoTo Meetings
Data Residency	Can be stored in Canada. Paid subscribers can opt-in or out of specific data center regions.	Can be stored in Canada.	Can be stored in Canada. Paid plans are required.	Data centers are located in North America. No specific information for data center in Canada.
Video Encryption	Yes	Yes	Yes	Yes
Chat Encryption	Yes	Yes	Yes	Yes
End to End Encryption	No	Yes	Yes	Yes
Meeting Transcript	Yes	Yes	Yes	Yes
Security Certificates	<ul style="list-style-type: none"> • SOC 2 (Type II) • FedRAMP (Moderate) • GDPR, CCPA, COPPA, FERPA and HIPAA Compliant (with BAA) • TrustArc Certified Privacy Practices • PEU/U.S. and Swiss/U.S. Privacy Shield Certification 	<ul style="list-style-type: none"> • SOC 1 (Type II) • SOC 2 (Type II) • SOC 3 • ISO 27001:2013 • ISO 27017:2015 • ISO 27018 • NIST Cybersecurity Framework • EU GDPR • FedRAMP 	<ul style="list-style-type: none"> • SOC 2 (Type II) • ISO 27001 • Privacy Shield Framework Certified • FedRAMP 	<ul style="list-style-type: none"> • SOC 2 (Type II) • SOC 3 • EU/U.S. and Swiss/U.S. Privacy Shield Certification • TRUSTe Verified Privacy • BSI C5
Screen Sharing	Yes	Yes	Yes	Yes
Chat Setting	<p>Can be disabled.</p> <p>Can be restricted to chat with meeting host only.</p>	Can be disabled.	Can be disabled.	Can be disabled.
File Sharing	Yes	Yes	Yes	No

Glossary

- **Audio Watermark** – An audio watermark is a unique electronic identifier embedded in an audio signal, typically used to identify ownership of copyright.
- **Encryption** – Converting information or data into code for the purpose of preventing unauthorized access.
- **End-to-End Encryption** – A system of communication whereby on those parties communicating can read the messages, preventing third parties from accessing the data while it is in transit from one party to the other.
- **FedRAMP** - The Federal Risk and Authorization Management Program (FedRAMP) is a government-wide program that provides a standardized approach to security assessment, authorization, and continuous monitoring for cloud products and services.
- **ISO 27001** – Specification for an information security management system of policies and procedures that includes all legal, physical, and technical controls involved in an organization's information risk management process.
- **Multi-Factor Authentication** – An authentication method whereby a device user is only granted access after authenticating him/herself twice using multiple credentials.
- **Privacy Breach** – The misuse of personal information or unauthoritative access to personal information, whether intention or unintentional.
- **Privacy Shield** – An agreement between the EU and the US allowing for the transfer from the EU to the US. The agreement is designed to create a program for deemed companies to have adequate protection and therefore permitted to transfer information cross-border.
- **Security Breach** – Unauthorized access to an organization's protected network.
- **SOC** – An audit which evaluates internal controls, policies and procedures. SOC 1 is a report about internal controls over financial reporting; SOC 2 is a report about security, availability, processing, integrity, confidentiality or privacy controls; and SOC 3 is a publicly available report about security, availability, processing, integrity, confidentiality or privacy controls.
- **Social Engineering** – A method of manipulating someone to do something, such as reveal personal information, they otherwise would not do.
- **Visual Watermark** - The Watermark feature superimposes an image, consisting of a portion of a meeting participant's own email address, onto the shared content they are viewing and the video of the person who is sharing their screen.
- **Virtual Private Network** – A connection between a private network and public network whereby a user can send and receive data in an encrypted manner so that the data remains private even if the connection is intercepted.

The information contained herein is of a general nature. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation. Bamboo Data Consulting's services do not constitute an audit, assurance or legal opinion. The management of those entities which implement the practices contained in this report have the responsibility, among other things, to identify and ensure compliance with laws and regulations applicable to its activities.



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