

## ***Guidance to the Membership: Temporary Alternate Witnessing of Documents Act***

This guidance document is intended to assist members in understanding their obligations under Law Society Rule 18 – Witnessing, Commissioning and Notarizing Documents via Audio-Visual Communication so that members can continue to service their clients in a safe and competent manner throughout the course of the COVID-19 Public Health Emergency.

We are pleased to advise that, on today's date, the *Temporary Alternate Witnessing of Documents Act* (the "Act") came into force.

In accordance with ss. 3(c), 4(1)(d), 5(b)(iii), and 6(1)(d) of the Act, Benchers have approved Law Society Rule 18 - Witnessing, Commissioning and Notarizing Documents via Audio-Visual Communication, which takes effect concurrently with the Act coming into force. In addition to the requirements of witnessing documents via audio-visual communication outlined in the Act, members are required to comply with Law Society Rule 18. The Rule: i) highlights insurance and indemnification requirements; ii) highlights the client identification and verification requirements; iii) requires members to take steps to mitigate the risks associated with witnessing, commissioning and notarizing documents via audio-visual communication; iv) mandates recording requirements; v) mandates additional requirements for the witnessing of wills; and vi) requires members to complete Law Society Form 18.

Notwithstanding the *Temporary Alternate Witnessing of Documents Act*, the best practice for witnessing, commissioning and notarizing documents remains for the member to be in the physical presence of the person signing the document. However, where physical presence is not feasible, members may witness, commission and notarize documents in accordance with the Act and Law Society Rule 18.

**Please note that only members in good standing with the Law Society who carry professional liability insurance or will be indemnified by their employer (for witnessing documents via audio-visual communication) may witness documents in accordance with the Act.**

### **Managing the Risks:**

Members choosing to witness, commission or notarize a document via audio-visual communication must be alert to the following issues:

- Fraud
- Undue influence
- Duress
- Capacity
- Identity theft
- Client left without copies of the documents executed remotely
- Client feels that they did not have an adequate opportunity to ask questions or request clarifying information about the documents they are executing.

**In order to witness a document in accordance with the Act you must be able to mitigate any risks arising.**

To manage some of the risks:

- Consider whether there are red flags of fraud or money laundering in the matter. For more information on red flags, please review the following:
  - [Risk Advisories for the Legal Profession](#);
  - [Guidance for the Legal Profession](#);
  - [Risk Assessment Case Studies for the Legal Profession](#); and
  - [Webinar – Amendments to XV, XVI and V of the Law Society Rules](#).

Most of these documents are available in French on our [website](#).

- Ensure that your audio-visual communication feeds are stable and that you can see and hear all persons at all times.
- Assess whether there is a risk that the client may be subject to undue influence or duress. If there is such a risk, consider if you are able to assist the client at this time without meeting in person. Otherwise,
  - Ask that all individuals in the remote location introduce themselves.
  - Ensure that there is no one else at the remote location who may be improperly influencing the client.
- Determine how to provide the client with copies of the document executed remotely.
- Confirm your client's understanding about the documents they are executing and provide adequate opportunity for them to ask questions during the video conference.
- Be alert to the fact that persons may attempt to use the current circumstances and resulting confusion as an opportunity to commit fraud or other illegal acts. Where lawyers choose to witness, commission or notarize documents via audio-visual communication, they must be particularly alert to red flags in order to ensure that they are not assisting with, or being reckless in respect of any illegal activity.
- Review relevant legislation and/or case law to ensure that you are complying with all requirements when witnessing, commissioning or notarizing documents, including, but not limited to, any obligation to file and/or maintain an original document. Note that the *Temporary Alternate Witnessing of Documents Act* and Law Society Rule 18 do **not** address electronic signatures.
- Maintain Form 18 as required by the Rules.

#### **IF THE RISK(S) CANNOT BE MITIGATED YOU MUST DECLINE TO ACT.**

##### **Witnessing Wills:**

Members must be diligent when witnessing wills to ensure that they are: i) managing the risks outlined above; and ii) complying with all legislation governing the execution of wills. As outlined in s. 6(2) of the Act:

6(2) For greater certainty, where only one of the witnesses to the signing of a will is a lawyer, the words "in the presence of" do not include attendance through the use of audio-visual technology in relation to the witness that is not a lawyer.

Therefore, individuals who are not members of the Law Society may **not** witness a document via audio-visual communication. In accordance with the Rule members are required to record the details of the other witness to the will.

### **Maintenance of Records:**

In accordance with Rule 18.08, members are required to complete Law Society Form 18: Witnessing, Commissioning and Notarizing Documents Via Audio-Visual Communication.

The requirement to complete Form 18 is a minimum requirement. Members are encouraged to record all details relevant to witnessing, commissioning and notarizing documents via audio-visual communication.

**As you know, compliance with the Act, Rules and/or this guidance document may not prevent challenges to documents witnessed via audio-visual communication. However, concurrent documentation may help protect your client from such challenges.**

If you have questions relating to Law Society Rule 18 or how to complete the Law Society Form 18, please contact Angie Whitehead at [awhitehead@lsnl.ca](mailto:awhitehead@lsnl.ca).