

## **RECOMMENDATIONS FOR VIRTUAL BEST PRACTICES**

While constitutional, statutory, and logistical hurdles present challenges to transitioning to virtual proceedings for criminal and civil jury trials and grand juries, some district courts and parties may choose to conduct virtual jury proceedings in whole or in part. Even partial adoption of virtual proceedings may mitigate some risk for viral contagion. Pretrial conferences, motion hearings, jury selection, witness testimony, presentation of exhibits, opening statements, closing arguments, and jury deliberation can all be conducted virtually, with the balance of trial conducted in-person with physical distancing and other precautions. This document presents specific considerations as well as potential solutions for virtual jury proceedings.

### ***General Initial Considerations***

- Before a determination may be made as to whether remote proceedings are advisable, either in whole or in part, the district court should consider the availability of adequate technology for all participants including the judge and court personnel, members of the jury pool, selected jurors, parties, witnesses, interpreters, and counsel. Age, income and socio-economic status, geography, and personal preference may all impact whether relevant individuals have requisite skills and/or hardware such as smartphones, webcams, and computers as well as mobile data and/or broadband internet sufficient to consistently stream proceedings. The court should provide options for jurors with limited access to internet reception or devices to serve so that they are not excluded from the jury pool. Options may include providing internet-enabled workspaces within the courthouse or partnering with local government agencies, public libraries, public schools, or nonprofit organizations that can provide space and internet-enabled devices to prospective jurors. The district court should explore available video conferencing services such as Zoom (or ZoomGov), BlueJeans, and WebEx. Considerations include security; ability to “share screen” by participants; ability for jurors, judge, and parties to view more than a limited number of participants; ability for judge to exercise control over proceedings, for example excluding participants as needed, enabling “waiting rooms,” identifying when someone desires to speak, muting or unmuting participants as needed; blocking or creating chat options between participants; capability to split participants into private “rooms” for conferences, sidebars, deliberations.
- Consider using a virtual bailiff and/or designating a staff person to be “on call” for any technology issues. The person may check in potential jurors as they log on; assist jurors with poorly functioning audio or video (promptly communicating with the court in those instances); and monitor feed during presentation of evidence to alert the court of any issues.
- Create necessary court orders to address any variances from state or local civil procedure rules and parties’ consent, including how to make a record that can be available for an appeal.

### ***Jury Summons and Qualifications***

- Consider a civil jury of fewer than 12 persons (by stipulation of the parties) to allow for a smaller number of summoned jurors.

- Utilize a questionnaire or supplemental questionnaire asking potential jurors about available technology (computer; smartphone; video/webcam; high speed, consistent internet), as well as COVID-related hardship.
- Handle hardship questions prior to trial.
- Provide specific email communication to summoned jurors with instructions for connection at appropriate place and time via court's selected videoconferencing platform.

### ***Juror Orientation***

- Consider recording a video juror orientation that includes a basic tutorial about the videoconferencing system as well as information about jury service and selection.
- Draft orientation remarks to admonish jurors regarding remote distractions and use of devices<sup>1</sup>.
- Offer a uniform virtual background to reduce distraction, clearly identify jurors in their "tile" display by juror number or other uniform naming protocol (other participants should also be appropriately identified by courtroom role and name), and eliminate juror concerns related to exposure of personal spaces, and standardize system.
- Provide frequent breaks as the attention span of jurors may be limited for online proceedings.
- Provide instructions on immediate notification via a chat tool in the videoconferencing platform if jurors experience any technical problems.

### ***Voir Dire***

- Question venire members in small groups of 6 to 9 on video, using the hand-raising or chat features on videoconferencing platform. Email instructions should stagger log-in times to minimize unnecessary wait times.
- Counsel for the parties may waive the right to question the venire panel, instead submitting questions to the court and determining a procedure by which follow-up questions are asked.
- Breakout rooms within the videoconferencing platforms may be used for individual follow-up questioning with specific jurors outside the hearing of the remaining panel.
- If the parties do not wish to waive the right to conduct questioning entirely, consider asking general questions with limited case-specific questions from counsel.
- In the event that counsel conduct voir dire, consider setting reasonable time restrictions. This is particularly important if prospective jurors are being examined in shifts.
- Strikes for cause and peremptory strikes may be made in a private breakout room with all counsel and the district court, after the parties and their counsel have an opportunity to consult in private breakout rooms of their own.

### ***Pretrial Conference***

- Use pretrial conferences to rule on pending motions, stipulate to exhibits, discuss jury instructions to the extent possible, and practice use of relevant technology (including screen share, breakout rooms, etc.).
- Establish an expected trial schedule including any limitations/restrictions and recesses. Determine if participants will disconnect and reconnect for recesses or remain connected with audio/video muted.

### ***Open Proceedings for Public/Media Viewing***

- Courts should consider livestreaming proceedings in the event of a completely remote trial and even in the case of an in-person trial, to reduce the number of people in the courtroom.<sup>2</sup>
- Live stream should not be recorded or recordable.
- The district court should also consider call-in options for those lacking reliable internet service.
- Consider interpreters, closed captioning, and/or ADA accommodations for livestream.

### ***Trial Procedures***

- Administer juror oath virtually.
- Establish procedure for handling sidebar conferences, unimpeded communication between counsel and clients; conferences during jury recesses, displaying three-dimensional exhibits to jurors, etc.
- Witnesses
  - Live testimony may be presented by videoconference; in civil trials, K.S.A. 60-243 expressly permits testimony via contemporaneous transmission from a different location in some circumstances. Parties will need to stipulate (or trial court must order) that good cause exists for presentation of testimony by these means.
  - Consider the need for an interpreter or ADA accommodation for witness.
  - Advise witnesses of the need to be alone in a quiet room without electronic devices other than the one being used to connect.
  - Each party must be responsible for ensuring witnesses have access to the necessary technology (and should practice using technology prior to trial).
  - Witness must remain in virtual “waiting room” until called to testify and cannot view livestream of trial until after testified.
  - Oath: There is no language prohibiting the court from giving a witness who is participating via videoconference the required oath.<sup>3</sup> A prior committee<sup>4</sup> of the Kansas Supreme Court recommended that the best practice is for a virtually present witness (who is present in another jurisdiction) to be administered the oath twice:

by the court receiving the testimony and also by an authorized person in the witness's jurisdiction. The committee recommended the following language to add to the oath being administered in the scenario where the witness is out of state: "Understanding that breach of this oath may subject you to prosecution for the crime of perjury in the state of Kansas and under the laws of the state of Kansas, do you solemnly swear...."

- Parties should consider using previously recorded video deposition testimony by agreement even if witness is otherwise available. Designations and objections can be handled pre-trial to streamline the presentation.
  - Provide pre-marked exhibits electronically to remote-testifying witness and/or share screen.
  - Virtual testimony (or pre-recorded video deposition) can be displayed to virtual jury or to jury convened in-person in courtroom. Even if the jury is in the courtroom, remote testimony will limit the exposure of trial participants to additional individuals and potential viral transmission.
  - In-person witness testimony should be assisted by microphone since the jury will no longer be seated together in a jury box but is more likely to be seated in a less dense formation throughout the courtroom. Sanitation of microphones will be necessary between witnesses.
- Exhibits
    - Exhibits should be pre-disclosed, pre-marked, and potentially pre-admitted before trial.
    - Courts should provide a deadline for objections and consider additional pre-trial hearing by video to argue and decide such objections.
    - Once the final set of exhibits is established, the parties should provide a link or downloadable file for the court and all parties (or exchange paper exhibits).
    - Court and parties should agree in advance on procedure for handling additional and/or rebuttal exhibits not previously marked and exchanged.
    - Cases with three-dimensional exhibits/physical evidence should consider conducting at least a portion of the trial in-person to permit jurors to review said evidence. In the alternative, photographs of said evidence can also be admitted and considered via virtual technology.
    - Whether trial is conducted entirely remotely or only in part, exhibits may be displayed to witnesses and the jury by screen share or app such as TrialDirector or TrialPad, during trial. If the jury is present in the courtroom and technology is used to limit exposure to exhibits, the use of multiple screens to display exhibits to the judge, parties, witness, and jurors should be considered.
    - After each party rests and before the jury is sent to deliberate, the court and the parties should collate all admitted exhibits to a single link or file to be shared with

the jurors upon request. It should also be provided to the court reporter to retain for inclusion in the record on appeal as necessary.

### ***Jury Instructions and Deliberations***

Jurors will not interact on a personal level throughout trial if not physically together in the courthouse, which will impact how deliberations unfold on a human level. Statutes, on their face, appear to require jurors to be “together” for deliberations. The default then would be in favor of in-person deliberation regardless of the means by which the rest of the trial is conducted. However, if the parties waive an in-person deliberation, the district court should consider:

- Ensuring the panel can discuss privately and securely within the video conferencing platform.
- Instructing the jury that no one in their household can observe, listen, or participate in deliberations and that jurors may not discuss deliberations with any non-jury members including their own household.
- Offering real time support with an “IT Bailiff” who monitors technology and ensures all participants are able to hear and respond during deliberations.<sup>5</sup> The trial court and parties may also consider permitting the Bailiff to monitor remote deliberations by watching the videoconferencing feed without sound to assure confidentiality while assuring that no juror leaves the room (except for agreed breaks) or does anything prohibited, such as consume alcohol.
- Ensuring jurors do not perform personal research while connected online<sup>6</sup>
- Jurors should be advised of the court’s preferred means of communication during the virtual trial. For example, the private chat function on the videoconferencing platform could be utilized or the jury could simply email or text the IT bailiff. Any jury communication should be read into the record as well as printed and retained in the court file.
- Instructions and verdict forms must be converted to PDF (including fillable PDF verdict forms) and provided to jurors prior to deliberations.
- If in-person deliberations are preferable, all participants should endeavor to procure sufficient space to allow jurors to seclude themselves in a physically distanced fashion during deliberation. The courtroom itself may be the easiest location for deliberation if it is not scheduled to be used for other hearings.
- Even if jurors are present in the courtroom in a physically distanced fashion for trials and the presentation of evidence, the participants may consider electronic versions of exhibits, testimony, and all jury instructions. This will minimize the passing of paper between various people in the courtroom and during deliberations. The jury room should include a computer or tablet to permit viewing of exhibits during in-person deliberation.

## ***Grand Jury Proceedings***

- Private, secure videoconferencing platform should be identified for use.
- The platform must permit the prosecutor, court reporter, witness and grand jurors to participate when the grand jury is hearing testimony, but there must be capability for (and a person from DA's office or district court tasked with ensuring) exclusion of all but the grand jurors during deliberations.
- Minimum number/quorum required and one participant should be tasked with managing the number of grand jurors in attendance in every session to confirm quorum.
- Grand juror instructions and oaths must be modified to address remote participation including but not limited to requirement of privacy such that no member of the grand juror's household can see the computer screen or hear the audio of any testimony. The instruction should be repeated for each session.
- Exhibits should be provided to grand jurors via a link to a secure server. The documents should be available for viewing but not for download or printing.
- Similarly to instructions above, grand jurors should be provided with fillable PDFs to facilitate the return of a true bill/no true bill.

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<sup>1</sup> Consider necessary court orders addressing exceptions to Kansas Supreme Court Rules 1001 and 1002, Media and Non-Media Use of Electronic and Photographic Devices in Judicial Proceedings.

<sup>2</sup> The Seventh Judicial District has created a YouTube channel to stream proceedings in an effort to reduce unnecessary persons inside the court. See <https://www.youtube.com/channel/UC6aHtmhsNdkqYoYpY67NKhA>.

<sup>3</sup> See K.S.A. 20-3105; K.S.A. 54-101; K.S.A. 60-418.

<sup>4</sup> Kansas Judicial Branch Videoconferencing Committee's 2014 report entitled "Recommendation for Videoconferencing in Kansas Courts."

<sup>5</sup> Consider Kansas Supreme Court Rule 171, Bailiff's Oath or Affirmation.

<sup>6</sup> The court must instruct jurors to isolate themselves in a part of their homes so that others in their household could not view or listen to (or influence) the deliberations. Jurors would also need to be instructed not to do any internet research or discuss the case, as they would be instructed in an in-person trial.