

Kansas trial courts virtual courtroom standards and guidelines

November 16, 2020

Governing Authority

Kansas Supreme Court Administrative Order 2020-PR-056 and some Kansas statutes authorize using two-way telephonic or electronic audio-visual communication for any essential or nonessential court proceeding or any portion of a proceeding.

The guidance provided here is to give courts:

- standards for remote proceedings;
- guidelines for meeting the standards; and
- examples of practices under the standards.

The Virtual Court Proceedings Committee identified examples of practices for conducting remote, two way telephonic or electronic audio-visual proceedings. **These practices are not the only way to meet a standard**, but serve as examples of what works. They are offered to help courts and judicial officers develop their own procedures.

Definitions

“Platform” means the conferencing software platform used to conduct a remote court hearing, such as Zoom, WebEx, or BlueJeans.

“Remote hearing” or “remote court proceeding” is any hearing in which the court conducts a part of the hearing using conferencing software platform.

“Chat” is a platform feature that allows participants to send written messages, either to an individual or the collective, while using the software platform.

A. Legal considerations for remote court proceedings

Standard

A remote court proceeding must be consistent with rights under the United States and Kansas Constitutions, including those of a criminal defendant or victim.¹ Persons are not required to waive a constitutional right.

Guidelines

- All Matters
 - At the start of each remote hearing, the court must verify with each participant that they are able to proceed and are aware of the procedure for participating, including the time and method of participating.
 - The court should address with the parties and other persons² having a right to be present that they are waiving any right they may have to be present in the courtroom for the proceeding.

- Criminal Matters
 - A criminal defendant has a constitutional right to be present at every critical stage of the proceedings.³ At the beginning of the remote proceeding, the court should inquire and determine whether the defendant is voluntarily, knowingly, and intelligently waiving the right to be physically present in the courtroom for the proceeding. If the defendant requests to be physically present in the courtroom for the critical stage, then the court should reset the matter for the defendant to physically appear.
 - If a witness is appearing remotely, then the court should—prior to taking testimony— inquire whether the defendant is knowingly and intelligently waiving the right to have the witness appear in person, unless the person’s appearance is excepted by law.⁴
 - A victim of a crime has the right to be present at public criminal proceedings.⁵ If a victim requests to be physically present in the courtroom, then the court should determine and state in open court whether the victim’s request interferes with the constitutional or statutory rights of the defendant.⁶

¹ Kan. Sup. Ct. AO 2020-PR-056.

² For example, interested parties in child in need of care proceedings under Kan. Stat. Ann. §38-2241

³ *State v. McDaniel*, 306 Kan. 595, 600–02, 395 P.3d 429, 437–38 (2017).

⁴ *State v. Busse*, 231 Kan. 108, 111, 642 P.2d 972, 975 (1982); *State v. Hall*, 298 Kan. 978, 987–88, 319 P.3d 506, 512 (2014).

⁵ Kan. Const. art. XV, § 15.

⁶ *Id.*

- Juvenile Offender Matters
 - A juvenile at adjudication has constitutional rights similar to an adult criminal defendant.⁷ At the beginning of the proceeding, the court should inquire and determine whether the juvenile is voluntarily, knowingly, and intelligently waiving the right to be physically present in the courtroom for the adjudication proceeding. If the juvenile requests to be physically present in the courtroom for adjudication, then the court should reset the matter for the juvenile to physically appear.
 - If a witness is appearing remotely, then the court should—prior to taking testimony—inquire whether the juvenile is knowingly and intelligently waiving the right to have the witness appear in person, unless the witness’s appearance is excepted by law.
 - A victim of a crime has the right to be present at public criminal proceedings.⁸ If a victim requests to be physically present in the courtroom, then the court should determine and state in open court whether the victim’s request interferes with the constitutional or statutory rights of the juvenile.⁹
 - Civil, Child in Need of Care, Domestic and Other Noncriminal Matters
 - At the beginning of the proceeding, the court should inquire of each party whether the party consents to the remote court proceeding. If the party does not consent to all or a part of the proceeding to be held remotely, then the court must determine whether the use of a remote court proceeding would promote the opportunity of each party to be heard at a meaningful time and in a meaningful manner.¹⁰ If the matter is a trial, the court should determine whether good cause and compelling circumstances exist to permit remote testimony.¹¹

⁷ *State v. Spates*, 29 Kan. App. 2d 1089, 1096, 36 P.3d 839, 843 (2001); *In re L.M.*, 286 Kan. 460, 471, 186 P.3d 164, 171 (2008).

⁸ Kan. Const. art. XV, § 15

⁹ *Id.*

¹⁰ *In re J.D.C.*, 284 Kan. 155, 155–56, 159 P.3d 974, 976 (2007).

¹¹ Kan. Stat. Ann. § 60-243(a).

B. Integrity of the proceeding

Standard

Virtual court proceedings should be conducted in a manner that promotes the integrity of the judicial system and instills user confidence.

Guidelines

- Maintaining Court Decorum
 - Despite not being physically in a courtroom, the court should continue to remind participants of the following:
 - The proceeding is live. Anything said or done during the proceeding may be overheard or seen by all observers.
 - The proceedings are being recorded. Everything said will be captured and made part of the record just as in a physical courtroom.
 - Courtroom decorum rules still apply. Those participating should continue to operate as if they were inside the courthouse. Standards, for decorum, demeanor, and dress code, still apply.
 - Staff participating in remote proceedings should have a professional background. Courts are encouraged to use pictures of their courtroom as the background.
 - All participants should:
 - dress appropriately for a court proceeding;
 - remain in place when appearing on video or by telephone; and
 - not engage in other activities while appearing for virtual court.
 - Witnesses:
 - A witness may not use notes, papers, phones, computers, or anything else without permission from the court.
 - All electronic devices other than the device facilitating the testimony must be turned off.
 - Counsel and the court may ask at any time to see anything the witness sees or to adjust cameras to ensure compliance with all court directives.
 - No program or window will be open on any computer or electronic device in the witness' possession during testimony. No one is allowed to pass notes by electronic or other means to or from the witness during testimony.

- If a request for sequestration is granted, all witnesses will be moved to the waiting room until their testimony is needed.
- Participant Safety
 - In all matters where a participant’s safety is a concern (for instance, protection order cases or domestic violence cases), the court should take measures to confirm that the participant is speaking freely and without coercion.
 - The court could ask the participant to pan the camera around the room to make sure no one else is present.
 - A volunteer agency (such as Legal Services or a domestic violence advocate) could create a safe space for conducting these hearings and certify to the court the space is safe.

C. Making a record

Standard

A verbatim record must be made of any remote court proceeding whenever an in-person court proceeding would require a record. These guidelines are intended to provide some instructions on how to ensure that any recording made of the remote court proceeding is clear and can be used to accurately develop a transcript.

Guidelines

- Methods for Making a Record
 - The record can be made in any manner that is sufficient to produce a verbatim written transcript as if the hearing were held in person in the courtroom, including the following manners:
 - By use of a Certified Shorthand Reporter (CSR) or Certified Court Reporter (CCR), whether in person or by remote.
 - By an in-court audio recording system.
 - By a recording system that is part of the platform used for the remote court proceeding.
 - For purposes of generating a transcript, courts may use the recording of a remote proceeding generated by the remote proceeding platform. Kansas Supreme Court Rule 360 authorizes courts to use electronic recording equipment to make a record of court proceedings; however, it must comply with specifications set forth by the Kansas

Supreme Court. The electronic recording created pursuant to Kansas Supreme Court Rule 360 is the recording from which a transcript must be produced.

- When using videoconferencing technology or telephonic equipment without a certified court reporter participating, a suggested practice is for duplicate recording methods, such as using the platform's recording capability and simultaneously using the court's recording equipment. You will get the best audio quality if you can feed the platform audio into the court's recording system. If a direct feed into the recording system is not possible due to equipment limitations, place a microphone from the recording system near the speaker emitting audio of the remote court hearing.
- Using Platform Software for Recording
 - The following guidelines should be observed if the platform software audio-video recording of the remote proceeding is the method used for creating a record of the proceeding:
 - The court should verify that the default recording format used by the platform may be used by people who prepare transcripts. In most platforms, the generated recording is in MP4 format.
 - The "dial in" or "call in" options can be used if audio quality is an issue. When a participant is first starting the meeting, the participant can change the audio option to "call in" or "dial in," then follow the instructions to connect to the meeting. The participant will then be connected by video, the same as before, but the audio will be through the participant's phone line. When frequent pauses or buffering occurs, this option frequently improves audio quality.
 - If the platform software is used to record the hearing, the recording should be downloaded to the court's own network daily. The recording should be stored in the same network location as recordings made through the court's in-person equipment. Whenever possible, the recording should be made in or converted to a format that is readable by common court transcription software.
- Provide Instruction to Participants
 - Advise parties to speak slowly and to wait until prompted to speak. **At a minimum, parties who appear by telephone should be instructed to identify themselves each time they speak.**
 - Courts must be vigilant in ensuring quality recording so an accurate transcript can be prepared. Because of software time delay when participating by telephone or videoconference, parties may be more likely to overlap when talking. Judges should frequently remind parties to talk slowly and to not interrupt. If overlap occurs, judges should ask parties to repeat what they said and encourage parties to only speak when they

have been prompted to do so, unless there is an objection or some other reason to speak out of turn.

- When multiple people talk at once, it interferes with the platform’s ability to determine which participant to display if the platform default is to show the video feed of the person speaking. Using “gallery view” will allow the court to see all participants and the court reporter or recorder to know who was speaking.
- Identify Participants by Name
 - When possible, participants should be instructed to display their full names on the screen. The court may direct participants to edit their name display or use host functions to edit participant names.
 - When a participant calls in, the default setting may be for the phone number to display on the screen. If the platform allows it, the host or co-host should change the phone number to the participant’s name.

D. Court use of platform software

Standard

The court should be familiar with the platform software and use its features to ensure a fair, orderly hearing.

Guidelines

- Designate a Cohost
 - Some platforms allow designating a cohost. Judges can be the host and a staff member, either a clerk or other court employee, can be cohost and manage participants.
 - In advance of any remote hearing, the host or co-host should:
 - Test the remote videoconference audio and video, including as many participants as possible.
 - Test audio and video recording.
 - Preview lighting, background, camera location, and screen name for the judge and court officials.
 - Charge all device batteries. If using a laptop, it should be plugged in or fully charged. Have a fully charged cell phone or other mobile device available as a backup, and keep a charger nearby, as videoconference session can drain batteries quickly.

- Monitor Audio and Recording
 - During the meeting, the host or cohost should monitor sound to ensure that it is functioning, speech is clearly heard, and the in-court recording system or platform is recording.
- Troubleshoot Audio Echo in a Meeting
 - Some common causes of audio echo, or feedback, during a remote meeting, are:
 - A participant who called in by phone is also using computer audio at the same time.
 - A participant has computer or telephone speakers too close together.
 - There are multiple computers with active audio in the same conference room.
 - A participant's speaker volume is too loud, so the participant's microphone is picking up its own speaker's sound, creating a feedback loop. The participant can turn down the speaker volume to solve this.
 - Most of the time, feedback can be eliminated if there is only one audio source.
 - Audio quality will likely improve if participants use headphones and a microphone.
- Using Other Platform Features
 - Different platforms offer different options, and the host and cohost should be familiar with the capabilities of the platform the court uses so these features can be readily used. Courts need to determine which features work best for their individual needs. Not all platforms support every function listed:
 - **Waiting room.** When the host enables the waiting room function, it allows the host to individually admit participants and prevent participation by individuals who are not litigants in that case.
 - **Mute upon entry.** This setting automatically mutes participants upon entry into the remote courtroom.
 - **Raise hand.** Participants who want to get the court's attention may click a button to "raise their hand." The host can then unmute them so they can speak. If the court wants participants to raise their hands before speaking, the court should advise participants of this expectation.
 - **Chat.** The chat function allows participants to type text during the proceeding, either to the group as a whole or privately to certain individuals. The host can set chat parameters to allow the host and participants to chat with only the host, with everyone publicly or privately, or with no one.

- ◆ The court may want to use the chat feature for general instructions or to help resolve technical difficulties.
 - ◆ The court should exercise caution when using the chat feature because it may result in ex parte communication between a judge and party or record a confidential communication. **Chat records may inadvertently appear in the platform’s recording. Therefore, the court should advise participants that the chat feature may not preserve confidentiality.**
 - ◆ Witnesses should not be allowed to use the chat feature while testifying.
 - ◆ Participants should be prohibited from communicating with other participants during the hearing, unless permission is granted by the Court.
- **Remove disruptive participants.** Most platforms allow a host to remove a participant if needed. If the court is using the waiting room feature, a participant can be returned to the waiting room. That participant cannot rejoin the meeting on their own and can only be readmitted by the host.
 - **Hold.** A host can temporarily remove a participant from the remote courtroom, while the rest of the participants continue the meeting. When one or more participants are put on hold, the attendees’ video and audio connections are disabled. This might be used when the judge wants to speak to the attorneys (without a witness hearing) or address an issue with only court personnel.
 - **Play sounds when participants enters or leaves meeting.** A host can configure settings to play a sound when someone enters or leaves a proceeding. This will help the court and the recorders and operators track participants in the hearing.

E. Attorney-client communication

Standard

During any court proceeding by telephonic or audio-visual communication, the court must provide a method for confidential communication between a party and the party’s counsel.

Guidelines

- Breakout Rooms
 - Some platforms allow an attorney to meet privately with a client remotely in a breakout room. Breakout rooms should be considered a private place that counsel and client can speak openly and preserve attorney-client privilege. As such, breakout rooms should not

be recorded under any circumstances. However, each platform varies, and courts should fully research breakout rooms for each platform and be cautious of specifics.

Zoom

- Recording: Platform recording will only record the main room, regardless of what room the meeting host is in. The in-court audio recording system will record the room where the participant who is recording is located.
- Ending the breakout room: The host can set a predetermined amount of time and bring participants back into the main room. If the host does not want to put a time constraint on the breakout room, the host can send a time warning to participants in the breakout room to let them know they should wrap up. Participants in the breakout room can rejoin the hearing when they are done meeting.
- Communicating with breakout room: There is no ability to communicate between the main room and the breakout room, so if the host (judge or clerk, typically) needs to communicate with participants in a breakout room, the judge or clerk would have to enter the breakout room. If the host is recording the main meeting using the in-court audio recording system, then the recording will follow the host and record the breakout room.

BlueJeans

- Recording: Platform recording will record all breakout rooms also. In-court audio recording system will record the room where the participant who is recording is located.
- Ending the breakout room: The host can enter the breakout room or remove people from the breakout room. The host can also end all breakout rooms at one time. Participants in breakout rooms are warned their session is ending. The warning time can be set by the host.

- Chat as Alternative to Breakout Room

- If a private breakout room is not available on the platform, another option to allow private attorney-client communication must be provided. Most platforms allow for private chat between participants. However, before this method is considered as an option, the court should verify the platform does not preserve the chat or allow creating a transcript from those chats at a later date.

- Other Methods

- If private communication is not available within the platform, courts must allow an alternate method, such as:
 - Allow counsel and the client to leave the remote proceeding to discuss privately by telephone or another method, then rejoin the remote proceeding.

- Allow counsel and the client to communicate during the hearing by some other method that is not connected to the platform, such as email or text message.

F. Public and Media Access

Standard

Public and media access to remote court proceedings should be provided either during the proceeding or shortly afterward, unless the proceeding is closed or access would otherwise be limited by statute or rule.

Guidelines

- Recording Proceedings
 - Recording any remote proceeding by any person other than the court is prohibited. The court should advise that any party, attorney, witness, or other person who creates an unauthorized recording of any portion of a remote court hearing may be held in contempt of court, for which the court may impose sanctions following a hearing, and may face other penalties.
- Post Daily Dockets
 - Courts should post their daily dockets in a public location including the court's website, if available, and indicate on the docket which hearings will be held remotely. Instructions for accessing remote hearings should also be provided.
- Livestream Proceedings
 - The court may stream the court proceeding live online. If livestreamed, the court may include a watermark on the livestream video that states whether recording and rebroadcasting the proceeding are prohibited. If livestreamed, the court should delete the livestream immediately following the end of the remote hearing.
 - If livestreamed, the platform's meeting ID(s) should not be provided to the public or media unless requested. This will avoid disruption and keep the remote courtroom secure.
 - Livestreaming may not be appropriate for sealed or sensitive cases. In those cases, complying with the open court requirement by allowing remote attendance, as described below, may be preferable.

- Attending the Hearing
 - For cases not statutorily sealed but still sensitive, publishing the platform’s meeting information and allowing attendance may be preferable to livestreaming. This method allows the court to monitor who is attending.
 - The court may allow observers into the remote court proceeding but mute them, thereby allowing observation of the open court proceeding but not participation.
 - The court may allow observers into the courtroom where the remote court proceeding is occurring so the observer can view the remote court proceeding. This may be accomplished by having the proceeding broadcast on a television or monitor in the courtroom or other designated location.
 - The court may post a recording of the proceeding on the court’s website for a limited time following the hearing. If this is used, the prohibition against duplicating the proceeding will still apply.

G. Logging requirements

Standard

All audio or audio-video recordings of remote court proceedings should be logged as to date, time, case number and party name so that they may be located in the event transcription of the proceeding is required.

Guidelines

- Logging recordings
 - Logs for remote hearings should be kept in the same manner and location as logs for other court recordings.
 - The court should make sure log information and the recording, whether by platform or local recording system, is provided to the local court clerk where the case is filed.
 - Storage for audio-video files needs to be large, secure, and accessible.
 - The court should use tools available through the platform to help keep accurate logs and information.

H. Exhibits

Standard

Materials that are intended to be used as evidence at or during a proceeding must be submitted to the court as directed for introduction into evidence as exhibits. Such materials shall not be filed with the clerk of the court prior to the proceeding.

Guidelines

- Exhibits should be premarked and submitted electronically to court and counsel and accompanied by a master exhibit list. Courts should follow established timelines for submitting exhibits prior to the proceedings.
- Courts may direct exhibits be uploaded to a centralized, secure storage platform that allows participants access to exhibits prior to and during proceedings. If cloud-based storage areas are used, designated links should be provided by the court to all participants prior to the proceeding.
- The use of electronic exhibit stickers for marking documents prior to a proceeding is recommended. This should be completed by the process recommended by the trial judge. Electronic stickers require document exhibits to be maintained in PDF format. For easier exhibit identification and access during a proceeding, documents should be saved in separate files.
- At the conclusion of a proceeding, PDF exhibits should be “flattened” to prevent modifications.
- Exhibits admitted or proffered for the record should be maintained under the same protocols as exhibits admitted or proffered for the record in in-person proceedings.

I. Provide meeting information to parties

Standard

The court shall provide adequate notice to the parties and ensure that the parties are able to participate remotely.

Guidelines

- The court can provide remote court proceeding information to parties either by email, traditional mail, or by any means of service of process authorized by statute or Supreme Court rule.
 - The court should approve a form notice of hearing that advises participants of the correct software, meeting ID, and time of hearing.
 - The notice should include concise instructions for joining by video AND for joining by phone audio only.
 - The notice should contain contact information for court personnel who can provide specific, detailed instructions.
 - If the party does not have email or the ability to join by video, the notice or the party providing the notice should provide the telephone number and meeting code to join the meeting so that person can participate by telephone.

J. Business processes in support of remote courtroom

Standard

Courts must be able to support their fundamental business processes when establishing a remote courtroom. This includes the ability to operate as if the court was using its traditional brick-and-mortar courthouse. The court needs to account for electronically filing documents, electronically signing orders to document the court's hearings, and maintaining court decorum. Each court will have slightly different business processes to account for local differences.

Guidelines

- Electronic Signatures
 - If a court uses an audio-visual means for remote court, the court should also have the means to access signatures and provide documents electronically or by other means.

K. Failure to appear in remote court

Standard

Failure to appear for remote proceedings should have the same consequences as failure to appear for in-person proceedings at the discretion of the court.

Guidelines

- Failure to Appear
 - The document that requires a participant to appear for a remote court proceeding needs to include language that failing to appear for the remote proceeding carries the same consequence as missing an in-person proceeding.

- Reasonable Accommodations
 - The court should evaluate reasonable accommodation if a participant tells the court they are unable to or desire not to appear remotely, or if the court determines that the participant has made a good faith attempt to participate but was unable to because of technical difficulties such as loss of signal or connectivity.