

JULY 31, 2020

AD HOC JURY TASK FORCE REPORT



RESUMING TRIALS AMID COVID-19

RECOMMENDATIONS
FOR BEST PRACTICES

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INTRODUCTION

On March 18, 2020, the Kansas Supreme Court issued Administrative Order 2020-PR-016, directing courts to cease all but emergency operations, including jury trials, to protect the health and safety of court users and court staff against the highly infectious Coronavirus disease (COVID-19). The gravity of the COVID-19 crisis still looms today. At this time, there are no specific vaccines or treatments for COVID-19.

Recognizing that COVID-19 spreads primarily through droplets of saliva or discharge from the nose when an infected person coughs or sneezes, jury trials pose particularly difficult challenges. Most trials involve a large number of people and occur in enclosed spaces over the period of a few days or more. On June 2, 2020, the Kansas Supreme Court created the Ad Hoc Jury Task Force to support district courts in planning to resume the operation of jury trials. The Court directed the Task Force to make recommendations for best practices regarding ways to conduct jury trials and grand jury proceedings while protecting the safety of court participants. The Court further directed the Task Force to examine issues and explore possible solutions for the jury summons process, including adequate jury pools and communicating with the public about changes in the jury process. The Court designated the following Task Force Members.

- Honorable Amy Hanley, Task Force Chair, District Court Judge, 7th Judicial District
- Honorable Steven Ebberts, District Court Judge, 3rd Judicial District
- Honorable Lori Bolton Fleming, District Court Judge, 11th Judicial District
- Honorable Laura Lewis, District Court Judge, 16th Judicial District
- Honorable Chris Smith, District Court Judge, 19th Judicial District
- Katherine Stocks, Court Administrator, 10th Judicial District
- Janelle Morel, Chief Clerk, 17th Judicial District
- Kristi Hill, Clerk, 29th Judicial District
- Crystal Gossett, Clerk, 30th Judicial District
- Andrea Skucius, Secretary II, 20th Judicial District
- Mary Kay Howe, Court Reporter, 7th Judicial District
- Paul Brothers, Attorney, Topeka
- Terrence Campbell, Attorney, Lawrence
- Jeffrey Dazey, Attorney, Olathe
- James Howell, Attorney, Wichita
- Kate McKinney, Attorney, Overland Park
- Christopher McMullin, Attorney, Olathe
- Dionne Scherff, Attorney, Overland Park

The recommendations for best practices from the Task Force are listed in the following report. Each judicial district should adapt these recommendations to meet the needs and address the concerns of its own jurisdiction. Each district will be impacted by its location, demographics, and funding. The Task Force recognizes that each jurisdiction is uniquely positioned to address COVID-19 challenges and consider how to conduct a jury trial during this pandemic based on local conditions. There is no single approach, and not all recommendations will be necessary, practical, or feasible in all districts. Each district must choose the recommendations that will protect its jurors while also promoting justice.

EXECUTIVE SUMMARY

The challenges faced by the legal system due to COVID-19 can be opportunities to develop best practices for courts. Courts will be able to evaluate and assess current practices and procedures with potential to evolve practices for the future.

Throughout COVID-19 and our nation's public health emergency, Kansas courts have used this opportunity to move forward in innovation while continuing to serve their communities. Our next step will be prioritizing the health and safety of Kansas jurors and court participants as trials resume and jurors report for their civic duty. The recommendations laid out below balance the protection of jurors and justice.

Communicating with Jurors

The first step in resuming jury trials is communication with the public. Clear and consistent communication educates and builds confidence. Courts must communicate the message in various ways to reach jurors of all ages and backgrounds. The following recommendations will help courts explain the process, manage anxiety, and deliver the message.

- Courts should share plans to ensure the safety of jurors and court participants at the earliest opportunity by using local and social media.
- Court staff should distribute a video message communicating steps the court is taking to protect potential jurors. A **short video** available for use by all districts can be found on the Kansas Judicial Branch website [Ad Hoc Jury Task Force page](#).
- Court staff should include with the initial juror summons a letter noting any changes in the normal process and an insert communicating steps the court is taking to protect potential jurors. A **sample letter and customizable insert** are provided in the attachments section of this report.
- Judges should communicate changes in the process to jurors during jury orientation. The Task Force recommends addressing health and safety measures (including masks, hygiene, and physical distancing), constitutional, and procedural issues such as reminding jurors not to rush deliberations or draw adverse inferences from witnesses wearing masks.
- Court staff at each individual courthouse should ensure adequate signage is used.

Securing Adequate Jury Pools

When jury trials resume in Kansas courts, the process of summoning jurors for service will include new challenges. Courts will need to revise the qualification process to address high-risk groups while still securing adequate jury pools. Moreover, reporting jurors must be appropriately screened to avoid risking the health of the entire pool. Courts should implement the following practices to clear these additional hurdles.

- Judges should liberally grant juror requests to defer for later service, if appropriate reasons are given.
- Judges should ensure entire categories of the population are not excluded from the jury pool in order to ensure a fair cross-section of the community by handling requests for excusal or deferral on an individualized basis instead of creating blanket policies.
- Court staff should increase the number of juror summons to ensure adequate jury pools.
- Judges should consider increasing the number of alternate jurors for each trial.
- Judges should, with caution, and only upon stipulation of the parties, reduce the number of peremptory strikes.
- Judges should, only in civil cases and upon stipulation of the parties, consider conducting trials using smaller juries. The Task Force is also recommending that the Kansas Supreme Court consider adopting a new rule applicable to district courts regarding six-person juries in civil cases.
- Each judicial district should determine whether, upon entry to the building, jurors will be subject to temperature and other physical health screening, or whether jurors will self-monitor those conditions.
- Court staff should modify the language of jury questionnaires to include a supplemental screening portion related to health conditions, contact with COVID-19 positive individuals, and travel that may preclude jury service. Court staff should also add language from K.S.A. 43-159 with regard to juror excusal and an inquiry as to each juror's access to technology. A **sample questionnaire** that includes issues pertaining to COVID-19 is provided in the attachments section of this report.

Utilizing Pretrial Measures to Minimize Length of Juror Service

The use of pretrial measures will further aid in the safe and efficient return of jury trials. When used consistently and appropriately, pretrial measures may result in a decrease in length and number of overall trials. Courts should examine increased use of pretrial conferences, settlement conferences, and mediation, while giving substantial thought to the order in which trials are scheduled.

- Judges should increase the use of settlement conferences and mediations in criminal and civil cases.
- Judges should refine pretrial conferences and orders, and fully examine the possibility of stipulations with the parties to reduce time in trial and length of juror service.
- Judges should prioritize trial settings with emphasis on speedy trial issues and cases where defendants are in custody.

Conducting a Fair Trial While Protecting Juror and Court Participant Safety

Protecting juror health and safety will require a significant increase in preparation and planning. Courts must be flexible and ready to adapt as guidelines change on a daily basis. Health experts have consistently recommended the following measures that courts must address: hand washing, more cleaning and sanitizing, personal protective equipment, and adequate physical distancing.

- Court staff at each individual courthouse should create and implement heightened cleaning and sanitation protocols.
- Court staff at each individual courthouse should create and implement personal protective equipment protocols that comply with the most recent Kansas Supreme Court administrative orders and advice from local health officials. Masks must be worn by all persons in the courthouse and courthouse facilities, unless a judge orders an exception be made for a particular individual or specific courtroom.
- Judges should consider reading an admonition to jurors regarding masks.
- Court staff at each individual courthouse should create and implement infrastructure and protocols to support adequate physical distancing for all court participants including utilizing and/or reconfiguring all available space.
- Judges should develop protocols on physical distancing that will ensure a fair trial, including positioning of participants, attorney/client communication, and sidebars.
- Judges should develop a plan for health and safety issues that may arise during trial such as symptomatic jurors, court participants, or safety non-compliance by trial participants.
- Judges should develop and instruct jurors on guidelines for breaks and juror gathering during those breaks.
- Judges should ensure the public has access to the trial by utilizing a combination of the following means: seating in the courtroom, a live stream broadcast available to the public, and closed-circuit television transmitting to another area of the courthouse. The Task Force is also recommending that the Kansas Supreme Court consider amending Rule 1001 to clarify whether its provisions for juror anonymity and witness rights apply when the live stream broadcast is the only means of public access to the trial.
- Judges should create and implement protocols for handling exhibits, including requiring pre-marking and prohibiting passing exhibits between jurors.
- Judges should develop specific guidelines for the use of interpreters.

Conducting a Fair Trial – Virtually

While virtual proceedings work well for many types of hearings, the transition for jury trials is not as smooth. The right to trial by jury is the bedrock of the judicial system, amplified in a multitude of Constitutional and statutory provisions. Courts should examine the possible use of virtual proceedings for civil cases and grand juries while conducting criminal proceedings in-person, absent a clear waiver from the defendant.

- Judges should conduct criminal jury trials in-person due to Constitutional and statutory barriers, unless a defendant clearly waives the right to in-person proceedings. A **guide for best practices when conducting a virtual trial** is included in the attachments section of this report.
- Judges should conduct jury selection in-person.
 1. Each judicial district should survey and reserve spaces available for trials and specifically, jury selection.
 2. Judges should stage jurors to control and limit interaction in large numbers.
 3. Judges should conduct jury selection in small panels, preferably 12 or less.
- Judges should consider conducting civil jury trials virtually if procedural requirements are waived and technology is available.
- Judges should consider conducting grand jury proceedings virtually.
- Courts should apply for grant funds, including those offered by the Office of Judicial Administration (OJA), and evaluate the use of Coronavirus Aid, Relief, and Economic Security (CARES) Act funds to assist with technology for virtual court proceedings.
- Court staff and judges should collect and share data on trials or parts of trials conducted virtually.

DISCUSSION

Communicating with Jurors



Courts should share plans to ensure the safety of jurors and court participants at the earliest opportunity by using local and social media.

During the COVID-19 crisis, courts should communicate with jurors to manage anxiety and convey actions the court is taking to provide for the health and safety of jurors and court participants. Courts should communicate with jurors at the earliest opportunity—ideally, when jury summons are issued. Information should also be shared with the public through local media and social media.

Courts can improve the likelihood of juror participation by including information on juror safety with the juror summons. This information should include:

- Efforts made to keep jurors and court participants safe
- What to do if jurors need to seek deferral or be excused
- How to get questions about process answered
- How the process will work once jurors arrive at court



Court staff should distribute a video message communicating steps the court is taking to protect potential jurors. A short video available for use by all districts can be found on the [Kansas Judicial Branch website Ad Hoc Jury Task Force page](#).

The Task Force reviewed videos from other states¹ and developed a video message to assuage the concerns of potential jurors. The message contains Kansas-related images along with images of local courthouses and individuals practicing the sanitation protocols described in this report.



Court staff should include with the initial juror summons a letter noting any changes in the normal process and an insert communicating steps the court is taking to protect potential jurors. A sample letter and customizable insert are provided in the attachments section of this report.

The Task Force created the attached letter and a customizable insert to include with the summons as a starting point for districts to communicate with jurors. These resources may be adapted as needed. If resources allow, courts should permit jurors to respond to questionnaires online. Additional information about the jury process should also be provided online. This could increase efficiency, minimize the exchange of paper, and potentially decrease costs.



Judges should communicate changes in the process to jurors during jury orientation. The Task Force recommends addressing health and safety measures (including masks, hygiene, and physical distancing), constitutional, and procedural issues such as reminding jurors not to rush deliberations or draw adverse inferences from witnesses or defendants wearing masks.

Courts and litigants should confer during pretrial hearings about pandemic-specific communication to jurors. This communication to jurors should be shared with the jury pool during informal orientation or opening remarks to the jury pool. Judges should consider communicating with jurors about the following topics.

- *Juror and Court participant safety is a priority for Kansas courts.* Jurors may experience anxiety about coming to court and participating in jury service². Courts should reassure jurors that the judicial system is taking the matter very seriously and has consulted with local and state health officials to ensure the safety of all court users. Introductory remarks should recognize and acknowledge the sacrifice that each juror makes by appearing in person for jury duty, as summoned, in the midst of a global pandemic.³
- *Health and Safety:* Respondents to a national public opinion survey conducted for the National Center for State Courts (NCSC)⁴ in early June 2020 revealed that 70% of respondents said they would be more comfortable in a courthouse if courts enforced physical distancing, checked temperatures at the door, and required court employees and visitors to wear masks. Jury orientation remarks should carefully explain the following basic, universal safety procedures that all court users must practice:
 - Sanitation: Explain the sanitation procedures utilized by the district court, what is being cleaned, and how.
 - Physical Distancing: Remind jurors to maintain adequate physical distancing at all times. Courts may consider language explaining that court security will monitor all lines and staging areas to ensure that all prospective jurors are engaging in physical distancing⁵.
 - Hygiene: Remind all prospective jurors to practice robust hygiene, including washing hands frequently for at least 20 seconds⁶ during all breaks and recesses.
 - Symptomatic Jurors: Explain that jurors who are not feeling well or who have Covid-19 symptoms⁷ must stay home and should contact court staff for further reporting instructions. Give guidance specific to jurors regarding who to contact and how, whether by phone or email.
 - High Risk Jurors: Caution jurors who fit into one of the Center for Disease Control's nine categories⁸ of persons who are at a higher risk for severe illness from Covid-19 about jury service
- Judges should consider addressing these additional topic areas during juror orientation, and also allowing litigants to address them during voir dire.

- *Rushing Deliberations*: Jurors should be reminded that even though we are in the midst of a global pandemic, each case is important, and jurors should not hurry or rush their deliberations⁹. Jurors should be told that they should take all the time they feel is necessary to reach a verdict on all contested issues.
- *Drawing Inferences from Masks*: Jurors may be reminded that they, along with all other court participants, must wear masks at all times while in courtrooms, court offices, or any other facility being used by the court for a proceeding¹⁰. Jurors should be reminded not to draw any adverse inferences¹¹ against witnesses or defendants wearing masks.
- *Assigning Fault*: In the midst of a global pandemic in which the COVID-19 virus is widely known to be spread by close continuous contact with others in enclosed spaces, there is a risk that jurors may place blame on one side or another for bringing a case to trial. Courts should consider remarks during orientation acknowledging anxiety caused by compelled jury service¹², and reminding jurors that, in no circumstance, should any member of the jury assign fault or blame to one side or the other; or ever allow an inference or suggestion of fault or blame to influence the verdict.

Kansas Courts permit deviation from the Pattern Jury Instructions for Kansas (PIK)¹³ if the particular facts in a given case require modification or the addition of some instruction not included in the PIK. The impact of the global pandemic may impact individual trials in unexpected ways. The Pattern Instructions were written before the onset of a global pandemic. Courts should give consideration to instructions that deviate from the PIK by addressing case specific concerns caused by the global pandemic, especially instructions agreed to by the parties.



Court staff should ensure adequate signage is used throughout the courthouse.

In order to ensure jurors and court participants understand safety measures implemented in court offices and courtrooms, court staff should post signs in all areas accessed by the public. The Office of Judicial Administration created signs for use which are available on the judicial branch intranet. Additionally, the customizable insert developed by the Task Force may also be used as signage.



Judges should liberally grant juror requests to defer for later service, if appropriate reasons are given.

During the COVID-19 crisis, courts should liberally defer jurors for later service when a juror makes such a request and provides appropriate reasons. When possible, courts should make these decisions prior to jurors arriving at the courthouse for service. Certain jurors face conditions or situations that make it difficult to complete jury service such as advanced age, health issues, pregnancy, hardships (i.e., new job, providing care for others, no childcare), and working in an essential position. This is especially true during the COVID-19 crisis. In determining whether a juror should be relieved from service, it is first important to understand the difference between the exclusion, excusal and deferral of jurors.

K.S.A. 43-155 establishes that it is “[t]he public policy of this state...that jury service is the solemn obligation of all qualified citizens, and that excuses from the discharge of this responsibility should be granted by the judges of the courts of this state only for reasons of compelling personal hardship or because requiring service would be contrary to the public welfare, health or safety; that all litigants entitled to trial by jury shall have the right to juries selected at random from a fair cross-section of the community in the district wherein the court convenes; and that all citizens shall have the opportunity to be considered for service on juries in the district courts of Kansas.” K.S.A. 43-158 provides for the mandatory exclusion of jurors and K.S.A. 43-159 provides for the permissive excusal of jurors. A judge *shall* exclude a juror from service who falls under any of the subsections of K.S.A. 43-158. A judge *may* excuse a juror from service who falls under any of the subsections of K.S.A. 43-159. However, a permissive excusal from jury service should only be done after careful consideration.

A judge may choose to defer, rather than excuse, a juror’s service until the particular condition or situation has passed. Deferral is in each judge’s discretion and is recommended as a large number of jurors may seek to be relieved of service during the COVID-19 pandemic. Both deferral and excusal should be considered on an individual basis.

When possible, the decision to excuse or defer should be made by the judge prior to the juror arriving for jury service. Early decisions could serve to reduce the number of persons unnecessarily in the building on the day of trial, reduce unnecessary contact between persons, and allow for easier physical distancing. There is no requirement that a defendant or counsel be present for the excusal or deferral of jurors when those decisions are made prior to the commencement of trial¹⁴.



Judges should ensure entire categories of the population are not excluded from the jury pool in order to ensure a fair cross-section of the community by handling requests for excusal or deferral on an individualized basis instead of creating blanket policies.

The Sixth Amendment right to an impartial jury requires that juries be selected from a pool that reflects a fair cross-section of the community. The fair cross-section guarantee applies only to the jury pool, however, and not to the empaneled jury¹⁵. Courts must recognize the Constitutional guarantee of an impartial jury, selected at random, from a fair cross-section of the community. Excluding entire categories of citizens from jury service violates the Constitutional right of every citizen to have a have a jury selected at random from a fair cross-section of the community¹⁶.

To ensure fair cross-section, courts should avoid excluding entire categories of the population from being part of the jury pool and handle requests for excusal or deferral from jury service on an individualized basis.

Caselaw provides guidance on avoiding automatic exclusion of entire groups of the community from the jury pool. Appellate courts have provided examples of what constitutes a distinctive or cognizable group and what does not. In *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975) and *Duren v. Missouri*, 439 U.S. 357, 370, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979), the United States Supreme Court held women were a distinct or cognizable group whose exclusion from jury service created a fair cross-section violation. In *State v. Bailey*, 251 Kan. 156, 159–163, 834 P.2d 342 (1992), the Kansas Supreme Court denied a fair cross-section challenge to the use of voter registration lists for jury panels because people who do not choose to register to vote are not a cognizable group. In *State v. Lewis*, 38 Kan. App. 2d 91, 94–95, 161 P.3d 807 (2007), the Kansas Court of Appeals held a census tract was not a sufficiently cognizable group because, even though a predominant percentage of members of the tract were members of a minority group and of a low-income class, membership in the tract did not conclusively establish a person’s race or economic status.

Caselaw also provides guidance on how to handle an anticipated increase in the number of jurors requesting deferrals or excusals from service due to underlying health conditions and vulnerability to COVID-19. In *State v. Baker*, 249 Kan. 431, 434–435, 819 P.2d 1173 (1991), the Kansas Supreme Court addressed a fair cross-section challenge where the defendant claimed individuals over the age of 60 were over-represented in his jury panel and younger individuals were underrepresented. *Baker*, 249 Kan. at 440. The Court rejected this challenge because the jurors were excused from service based on their own individual situation rather than based on blanket classifications such as race, gender, age, religion, or education level. *Baker*, 249 Kan. at 441.

It is also important to understand the disproportionate impact COVID-19 has had on racial and ethnic minorities. Evidence supports clear racial disparities in both infection and mortality rates. Nationally, African Americans are dying at a rate nearly 2 times higher than their share of the population¹⁷. These statistics hold in Kansas, where African Americans account for 6% of the population, but account of 12% of total cases; and a staggering 28% of deaths¹⁸.

The disproportionate impact of COVID-19 on racial and ethnic minorities must be considered by Courts in determining whether a fair cross-section of the community has been achieved in jury pools.

Treating requests for excusal or deferral on an individualized basis instead of using blanket policies will insulate the process against potential fair cross-section challenges. Overall, to ensure a fair cross-section, courts should refrain from excluding any group of individuals from the jury pool and evaluate every request for excusal or deferment from jury service on an individualized basis.



Court staff should increase the number of juror summons to ensure adequate jury pools.

Courts should consider increasing the number of juror summons issued to ensure adequate jury pools. Unfortunately, no tool exists that can predict with exact certainty the number of additional juror summons needed to ensure an adequate jury pool during the COVID-19 crisis. Some states have concluded that it may be necessary to increase jury summons by as much as twenty-five to fifty percent¹⁹.

According to the National Center for State Courts (NCSC), it is reasonable to expect lower jury yield due to increased requests from prospective jurors to be excused or deferred and possibly increased failure-to-appear rates. COVID-19 also appears to have a disproportionately severe impact on racial and ethnic minorities, which may reduce the demographic diversity of the jury pool. To ensure that the court has enough qualified and available jurors to select juries, it may be necessary to increase the number of prospective jurors summoned²⁰.

The NCSC recently conducted a National Public Opinion Poll, “State of the State Courts in a (Post) Pandemic World²¹.” This poll surveyed 1000 registered voters on their views of various Court-related issues during the COVID-19 crisis. When asked what pandemic-related obstacles exist when reporting for jury duty, 47% replied that they had someone living in their household with an underlying health condition. Further, 19% could not secure childcare, and 14% were the primary caregiver for an elderly family member.

Before increasing the number of jury summons issued, it is recommended that courts consider a number of factors specific to their community to determine whether an increase is merited, and the size of that increase:

- type of case being tried
- length of case
- local juror response rates, under normal circumstances
- prevalence of COVID-19 in the community²²
- any special risks to populations in the community (i.e., manufacturing plants, universities)

- economic hardship in the community, including recent furloughs and layoffs
- general average age of community
- any known increased health conditions in community²³

If it becomes apparent that the number of jurors present for selection is insufficient either in number or to provide a fair cross-section of the community, the court should consider continuing the trial to obtain additional jurors.

The NCSC Center for Jury Studies²⁴ has a tool available to courts that help courts examine their juror response statistics in order to make better decisions on increasing the number of juror summons issued. The United States Census Bureau also has helpful information with regard to demographics of individual counties in each state²⁵.

Court staff should maintain communication with court leadership and jury department staff to determine day-to-day changes to juror yield and tailor protocols accordingly.



Judges should consider increasing the number of alternate jurors for each trial.

Courts should consider whether the number of alternate jurors should be increased based on the length of the particular trial, and the community in which it is held.

It is possible that during the COVID-19 crisis, jurors may be presented with more emergencies during their jury service that may require the increased use of alternate jurors. Additionally, it is possible jurors may develop COVID-19 symptoms, be considered presumptive positive for COVID-19, or test positive for COVID-19. Courts should consider increasing the number of alternate jurors in order to prevent a mistrial if these events occur. It is important to note that using an alternate may not always be beneficial, especially in circumstances where a juror begins to show signs of illness during a trial as exposure may have already occurred. If this happens, the court should immediately consult with local health officials.



Judges should, with caution, and only upon stipulation of the parties, reduce the number of peremptory strikes.

K.S.A. 22-3412 provides for the number of peremptory strikes in a criminal case, and K.S.A. 60-247 provides for the number of peremptory strikes in a civil case. Additional strikes may be allowed in the case of selecting alternate jurors. Absent a statutory change, it is only possible to reduce the number of peremptory challenges in a jury trial by the stipulation of the parties. Any party presented with the option of proceeding with a reduced number of peremptory strikes should also be told on the record that the refusal to do so will not result in any disadvantage in the case. Courts should discuss this issue with the parties at the pretrial conference or in advance of jury selection.



Judges should, only in civil cases and upon stipulation of the parties, consider conducting trials using smaller juries. The Task Force is also recommending that the Kansas Supreme Court consider adopting a new rule applicable to district courts regarding six-person juries in civil cases.

Civil jury trials must consist of 12 jurors unless the parties stipulate to a smaller jury. K.S.A. 60-247 and K.S.A. 60-248 both discuss the number of jurors for civil trials. K.S.A. 60-247(a) states “[t]he court must call enough prospective jurors so that, after challenges for cause and preemptory challenges allowed by law, there will remain 12, or sufficient jurors to be sworn to try the case.” K.S.A. 60-248(a) states “[t]he parties may stipulate that the jury consist of any number less than 12...”

While K.S.A. 60-247(a) contains language that may imply a court can reduce the size of a civil jury on its own volition (“sufficient jurors to be sworn to try the case”), this language does not explicitly authorize such a reduction. The Kansas Supreme Court has held on multiple occasions that under K.S.A. 60-248(a) only a stipulation of the parties can provide for a jury with less than twelve jurors in a civil trial²⁶.

There may be value in civil cases to proceed using a reduced number of jurors in the event all parties stipulate to that procedure. Using smaller juries could reduce the number of jurors needed on site for jury selection and assist courts in moving civil cases forward. Another benefit to using smaller juries in civil cases is that it may allow smaller courtrooms that might not otherwise meet physical distancing requirements to be used for jury trials. Any party presented with the option of proceeding with a smaller jury should also be advised, on the record, that the refusal to do so will not result in any disadvantage in the case.

Additionally, the Kansas Supreme Court should consider adopting a new rule applicable to district courts. Encouraging smaller juries in civil cases helps maintain community health goals by aiding in physical distancing efforts. It should also allow for the speedier resolution of civil cases, which almost always receive a low trial priority and are likely to receive an even lower priority as courts work through the backlog of criminal jury trials that have been delayed since the advent of the COVID-19 pandemic. Juries of fewer than 12 are commonplace in other civil justice systems. For example, juries of six are specifically permitted in the federal courts under Fed. R. Civ. P. 48. Juries of six or fewer are already required, without stipulation, in civil actions brought under Chapter 61 of the Kansas statutes. *See* K.S.A. 61-3302(c).

In *Bourne v. Atchison, T. & S.F. Ry. Co*, 209 Kan. 511 (1972), the Kansas Supreme Court observed that there is “nothing . . . which precludes the . . . court from adopting a rule . . . which declares the parties will be deemed to have stipulated to a six-[person] jury unless written motion or notice requesting a greater number of jurors is filed within a certain time before the case is scheduled for jury trial.” The Task Force recommends such a rule and proposes language that is a straightforward application of the Court’s observation in *Bourne*:

Pursuant to K.S.A. 60-247, K.S.A. 60-248, and *Bourne v. Atchison, T. & S.F. Ry. Co*, 209 Kan. 511 (1972), a party in a Chapter 60 civil action shall be deemed to have stipulated to a six-person jury unless the party files a written motion or notice requesting a greater number of jurors on or before the day the party files its first pleading under K.S.A. 60-207(a).

The Task Force finds no authority to alter the number of jurors in a criminal case.



Each judicial district should determine whether, upon entry to the building, jurors will be subject to temperature and other physical health screening, or whether jurors will self-monitor those conditions.

Each judicial district should continue to ask the questions required by Kansas Supreme Court Administrative Order 2020-PR-054 upon entry to the court facility²⁷. Screening practices vary across the state. In some jurisdictions, temperatures are taken upon entry to court facilities. In others, courts are relying on self-monitoring and answering health questions to screen while still in others, only health questions are asked with no monitoring of temperatures. It is recommended that each judicial district consult with the county health officer to determine the appropriate screening method for those entering court facilities, including jurors.



Court staff should modify the language of jury questionnaires to include a supplemental screening portion related to health conditions, contact with COVID-19 positive individuals, and travel that may preclude jury service. Court staff should also add language from K.S.A. 43-159 with regard to juror excusal and an inquiry as to each juror’s access to technology. A sample questionnaire that includes issues pertaining to COVID-19 is provided in the attachments section of this report.

Jurisdictions report using a variety of jury questionnaires in addition to the standard questionnaire created by the Kansas Judicial Council²⁸. It may be possible to perform early screening of jurors by gathering additional information from jury questionnaires. This is especially important during the COVID-19 crisis, as many jurors may feel they are at heightened risk because of an underlying condition or situation. It is recommended that the language of jury questionnaires be modified to include a supplemental screening portion related to health conditions, contact with COVID-19 positive individuals, and travel that may preclude jury service. It is further recommended that jury questionnaires be modified to also

include language from K.S.A. 43-159 with regard to juror excusal. Finally, for courts considering virtual jury trial processes, it is recommended courts use jury questionnaires to inquire as to each juror's access to technology.

It is also recommended to consider adding voluntary disclosure of race to questionnaires to help ensure a fair cross-section of the community in the jury pool, especially considering racial and ethnic minorities have been disproportionately impacted by COVID-19. Additionally, every juror questionnaire should always include a method by which jurors can update their information with the Court.

Utilizing Pretrial Measures to Minimize Length of Juror Service



Judges should increase the use of settlement conferences and mediations in criminal and civil cases.

Settlement conferences and mediation may be useful in decreasing the number of new jury trials set and eliminating the backlog of existing jury trials. Additionally, both settlement conferences and mediations can be completed by videoconference. It is recommended that settlement conferences and mediations be held within 30 days of the completion of a pretrial conference. No party should be penalized for their unwillingness to participate in a settlement conference or mediation unless required to do so by law or administrative order. Criminal defendants should be advised on the record of their right to refuse to participate in a settlement conference and that this choice will not be held against the defendant.



Judges should refine pretrial practices and orders, and fully examine the possibility of stipulations with parties to reduce time in trial and length of jury service.

Jury trials are most efficient when issues that can be raised are resolved on the record pretrial²⁹. “Pretrial conferences are vital to resolve as many issues as possible, to limit movement in the courtroom and to avoid delay and unnecessarily lengthening jury trials.”³⁰

Parties should be encouraged to review K.S.A. 60-216 (c) pertaining to matters to be considered at the pretrial conference, and Kansas Supreme Court Rule 140 pertaining to the final pretrial conference procedure.

In an effort to reduce the time spent in trial, courts are encouraged to be diligent during pretrial conferences to simplify the issues, determine the issues of law that may eliminate or affect the trial of issues of fact, and obtain admissions and stipulations to avoid unnecessary proof of an issue. Any modification of trial processes, such as reducing the number of jurors or peremptory strikes, should be resolved at the time of the pretrial hearing and be included in a pretrial order.



Judges should prioritize trial settings with emphasis on speedy trial issues and cases where defendants are in custody.

Kansas courts face a backlog of jury trials in all case types. However, certain cases merit expeditious handling once jury trials are able to resume. Courts should prioritize trial settings with emphasis on speedy trial issues, and cases where defendants are in custody. Courts should consider applicable statutory and Constitutional speedy trial rights.

Defendants may waive statutory speedy trial rights under appropriate circumstances. In considering those waivers, the State’s need for swift resolution of a case should also be considered.

Even though it is recommended to prioritize criminal cases, civil cases remain important, and litigants in those cases also deserve to have their trials heard as soon as possible. Courts are encouraged to consider solutions to advance civil cases that might otherwise lag until the backlog of criminal cases is resolved. Parties in a civil case might consent to a bench trial in order to have the case resolved more quickly. Judges can also be cross designated to hear cases where needed, both within and outside their judicial districts. Judicial districts are encouraged to work together to create a priority system that resolves all pending cases as quickly as possible.

Conducting a Fair Trial While Protecting Juror and Court Participant Safety



Court staff at each individual courthouse should create and implement heightened cleaning and sanitation protocols.

Before resuming jury proceedings in any court facility or courthouse, the Chief Judge should consult with the local public health authorities and review the most current Centers for Disease Control guidelines to ensure local health conditions and facility readiness are enough for expanding judicial proceedings to include jury trials. The following minimum requirements are recommended.

- Courtrooms, auxiliary areas used for trial proceedings, and areas used for jury deliberations and breaks (including restrooms, eating areas, stairwells, and elevators) should be sanitized every day. High-touch surfaces such as chairs, tables, door handles, counters, etc., should be wiped down frequently with disinfectant wipes.
- Court staff should remove all surplus furniture, fixtures, and conveniences from the courtroom to minimize the need for sanitization.
- The witness stand, including the seat and microphone, should be sanitized after each witness testifies.
- Storage should be provided for jurors’ personal belongings and items acquired during the trial, such as pens and notebooks, using resealable bags for each

individual juror. Each evening court staff should collect and securely store the items, then return the bags to the individual juror the next day. Alternatively, jurors could be instructed to bring their own writing instruments, water bottles, snacks, and lunches. When provided by the court or the individual juror, each jurors' items should be stored separately.

- Hand sanitizer and disinfectant wipes should be available in all areas used by jurors.
- Restrictions on the number of people in elevators and stairwells should be posted.
- All signage regarding cleaning and safety protocols should be posted in English and Spanish and should comply with the Americans with Disabilities Act (ADA).

The following additional measures should be considered:

- Options to expedite juror entrance, including a separate entrance to the building, should be investigated.
- HEPA air filters in existing units or free-standing HEPA filtration systems should be installed to maintain appropriate air quality for each courtroom and courthouse.
- Self-serve refreshments and vending machine use for jurors should be discontinued.
- Markers should be placed on the floor to designate appropriate physical distancing space.
- Magazines and newspapers should be removed from break areas and jurors may be asked to bring their own reading material.
- Direct counsel to remove all items from counsel tables at the lunch break and the end of each day to allow for deep cleaning of the area.



Court staff at each individual courthouse should create and implement personal protective equipment protocols that comply with the most recent Kansas Supreme Court administrative orders and advice from local health officials. Masks should be worn by all persons in the courthouse and courthouse facilities, unless a judge orders an exception be made for a particular individual or specific courtroom.

Administrative Order 2020-PR-090 is in effect as of the writing of this report. This administrative order requires that, absent an exception granted by the judge “within the courtroom or other hearing room”... “employees, judicial officers, and members of the public must comply with Executive Order 20-52, and amendments thereto, while in courtrooms, court offices, or any other facility being used by the court for a proceeding.” Executive Order 20-52 requires “...any person in Kansas shall cover their mouth and nose with a mask or other face covering when they are...inside, or in line to enter, any indoor public space;” Additionally, the executive order requires masks or face coverings “[w]hile outdoors in public spaces and unable to maintain a 6-foot distance between individuals (not including

individuals who reside together) with only infrequent or incidental moments of closer proximity.” When current Kansas Supreme Court administrative orders change, courts should re-evaluate protocols to and ensure they comply with the most recent administrative orders and advice from local health officials.

Courts should provide masks for all jury trial participants if adequate resources are available in that court’s jurisdiction. Masks must be worn by all persons in the courthouse and courthouse facilities, including, the public, jurors, litigants, witnesses, court staff and any person participating in or required for attendance at trial unless a judge orders an exception be made for a particular individual or specific courtroom. Courthouse and courthouse facilities include all public common areas, restrooms, elevators, stairwells, lounge areas, eating areas, courtroom and any room used for jurors for breaks, gathering or deliberations. After careful consideration, and in accordance with 2020-PR-090, courts may excuse the use of facial masks at times during trial.

In order to protect the safety of jurors and court participants while also ensuring compliance with the Sixth Amendment Confrontation Clause, face shields or clear masks should be worn by witnesses and defendants. Examples are provided in the attachments section of this report.

While wearing masks is an important part of keeping court participants safe, judges should be aware of mask fatigue. Wearing masks for long periods of time can be uncomfortable. It is important to allow court participants to take breaks from wearing masks. Breaks are needed for occasional face wiping and fresh air. If possible, allow jurors to go outside on breaks. If inclement weather prevents jurors from going outside, a judge can order that jurors are allowed to remove masks for a specified number of minutes during the break or designate space in the courthouse where jurors can remove masks while maintaining physical distance.



Judges should consider reading an admonition to jurors regarding masks.

There are several legal issues for courts to consider when requiring the use of masks in a criminal trial.

The Sixth Amendment of the U.S. Constitution assures the right of an accused “to be confronted with the witnesses against him.” The confrontation right applies to two distinct types of statements: (1) those made out of court and are deemed testimonial in nature³¹; and (2) those made within the confines of trial. The right to confrontation determines the manner in which the testimony must be presented. This recommendation focuses on trial testimony and the right to rigorous cross-examination.

“There are four elements of confrontation which serve the purposes of the Confrontation Clause by subjecting the testimony against the accused to rigorous adversarial testing: (1) the physical presence of the witness; (2) a requirement that the witness’s be under oath, which both impresses upon a witness the seriousness of the proceeding and guards against false testimony by the threat of a perjury charge; (3) cross-examination of the witness by defense counsel; and (4) observation of witness demeanor by the jury which

aids in the assessment of witness credibility.” *Maryland v. Craig*, 497 U.S. 836, 845-846, 110 S. Ct. 3157 111 L.Ed.2d 666 (1990).

There are not any reported cases on the specific issue of whether a court should allow a testifying witness to wear a face mask due to a public health concern. However, the following synopsis includes cases involving comparable issues³²:

Partial Witness Face Covering cases upheld under the Confrontation Clause analysis. All these cases involve instances where the safety of the witness was the concern.

- Court allows witness to testify in dark sunglasses during a murder trial; After objection and a hearing outside the presence of the jury, the Court “concluded that however ‘partially’ the defendant’s right to confrontation would be infringed was outweighed by the necessity of having her provide critical testimony in a serious case.” *Morales v. Artuz*, 281 F. 3d 55 (2d Cir 2002).
- Court finds witness wearing dark or tinted glasses does not create substantial likelihood of a miscarriage of justice. *Commonwealth v. Lynch*, 789 N.E.2d 1052 (Mass 2003).
- Court permits witness to testify wearing dark sunglasses and a scarf that covered her head due to safety concerns. *People v. Brandon*, 52 Cal. Rptr. 3d 427 (Ct. App.2006).
- Court allows witness to testify under a pseudonym while wearing a wig and false facial hair. *People v. Smith*, 869 N.Y.S.D.2d 88 (App. Div. 2008).

Partial Witness Face Covering cases deemed to violate the Confrontation Clause.

- Court allows witness to testify in a disguise that hid almost all of his face from view; With respect to the demeanor element, the court focused on the jury’s inability to observe the witness’s eyes and facial expressions. The Court of Appeals of Texas described the disguise as “leaving visible only Vasquez’s ears, the tops of his cheeks, and the bridge of his nose....” While conceding that the witness’s tone of voice and body language remained accessible the court described the face as the most expressive part of the body” and thus critical in assessing credibility. *Romero v. State* (Romero I), 136 S.W.3d 680 (Tex. Ct. App. 2004), *aff’d.*, 173 S.W.3d 502 (Tex. Crim. App. 2005).
- Court permits witness to testify in a full-face mask and identifying information about the witness was prohibited; In finding the Confrontation Clause violation, the appellate court was primarily concerned with inability to observe the demeanor of the witness. *People v. Sammons*, 478 N.W.2d 901 (Mich. Ct. App. 1991).

Although the Confrontation Clause is not applicable to civil jury trials, judges should consider some of the same issues that arise in criminal trials. Credibility of witnesses is often the deciding factor in civil verdicts. Just as in criminal trials, civil jurors closely observe facial expressions when evaluating the veracity of witnesses. Consequently, masks worn by

witnesses are of equal import in a civil trial where a jury must determine liability, fault and damage.

The following language about the wearing of masks is suggested for use as an admonishment to the jury during trial.

During this trial, the parties, attorneys, witnesses, court staff, and the judge must wear masks unless the court grants an exception. You should not draw any conclusions or prejudice any party in any way solely based upon a court participant wearing a mask during this trial.



Court staff at each individual courthouse should create and implement infrastructure and protocols to support adequate physical distancing for all court participants including utilizing and/or reconfiguring all available space.

Adequate physical distancing continues to be recognized as a key factor in preventing the spread of COVID-19 and protecting the public's health and safety during the pandemic. As requirements for physical distancing could change in the future, courts should keep in contact with local health authorities, review current guidelines and recommendations of local, state and federal health authorities, and adhere to current Kansas Supreme Court administrative orders.

All areas in the courthouse, including courtrooms, jury assembly rooms, private conference rooms, jury deliberation areas, jury break rooms, restrooms, elevators, stairwells, etc., should provide for adequate physical distancing between any two individuals. Courts should utilize all available space in the courtroom to ensure adequate physical distancing and must be mindful that all jurors must be able to see, hear, listen, reason with one another, debate and deliberate together without outside interruptions. The sanctity of the deliberation process must always be protected.

Courts should consider re-configuring the courtrooms to allow for distance between jurors, counsel, witnesses, and court staff. Additional measures such as Plexiglass or other types of clear barriers may be utilized between the judge, witnesses, the court reporter, court staff, attorneys, and jurors. Examples of barriers which could be used are included in the attachment section of this report and on the Kansas Judicial Branch website [Ad Hoc Jury Task Force page](#).

Courts may also limit the number of jury trials that start on a particular day, or in a particular area of the building, to reduce the population in the jury staging areas to allow for adequate physical distancing. Judges should coordinate schedules with other courthouse activities to help minimize lines that may form upon entry into the building.

If there is no suitable location in the court facilities to conduct jury proceedings in a manner consistent with physical distancing protocols, the court should explore feasible alternative facilities, such as school gymnasiums, community centers, or other public facilities within the county.

K.S.A. 20-347 allows for the holding of judicial proceedings at locations other than the county courthouse.

“The chief judge in each judicial district, with the approval of the supreme court, may provide for holding court in locations within such judicial district, other than in the courthouses of the several counties within such district, whenever suitable facilities are available for such purpose.”

This specific statute seems to apply equally to both criminal and civil trials. “All trials on the merits must be conducted in open court and, subject to K.S.A. 20-347, and amendments thereto, in a regular courtroom³³.” A sample letter courts can use to make this request is included in the attachments section of this report.



Judges should develop protocols on physical distancing that will ensure a fair trial, including positioning of participants, attorney / client communication, and sidebars.

The right to a trial by jury is a bedrock foundation of the American judicial system and as such, courts must guard each litigant’s right to a jury trial. Courts should therefore make every effort to continue holding jury trials while being conscious of the safety concerns of the participants. The Judges should issue guidelines for positioning of trial participants during examination, *voire dire*, and arguments. Witnesses should be instructed to remain outside the courtroom until called to testify unless the witness has a constitutional or statutory right to remain in the courtroom. The courtroom should be marked to indicate where counsel can stand when addressing the court, witnesses, and jury to ensure adequate physical distancing. Courts should prohibit attorneys from approaching witnesses, staff, and the judge during all phases of the trial, absent specific leave of the court.

Judges should also issue guidelines for positioning during deliberations. The presiding judge and bailiff must ensure that no one can stand outside the doors and overhear jurors during deliberation, as they will presumably be talking louder than usual because of physical distancing. Judges should consider posting the bailiff, court security officer, or other court personnel designated by the judge outside the courtroom door. The jury should be directed to tell the bailiff, waiting outside the deliberation room, when they have question or a verdict. The judge may also consider having only the jury foreperson write jury questions and complete the verdict form.

Criminal proceedings require a robust attorney-client relationship which must remain conflict free. Courts should be mindful of an attorney’s ethical obligations as well as the defendant’s Sixth Amendment right to effective representation when considering any requests by the parties to relax physical distancing protocols.

Since physical distancing could impair or create obvious difficulties with attorneys communicating privately with their client during courtroom proceedings, the judge should consider relaxing the physical distancing requirement if the attorney and client mutually agree. Absent a mutual agreement, attorneys should prepare their clients to communicate by writing notes rather than whispering, and, if needed, make requests of the presiding judge for

a brief recess to speak privately with clients. Alternatively, disposable headphones and electronic devices with communication applications such as Skype or FaceTime could be used for interaction between attorney and client.

After each break in the trial, before the jury is present, the presiding judge should ask the defendant whether he/she was able to speak with his/her attorney and place the answer on the record.

Bench conferences, or sidebars, are a common method of communications between court and counsel during trial. Judges should designate how and where sidebar conversations will occur (preferably in an area that will be frequently sanitized) to ensure adequate physical distancing while maintaining the confidentiality of the discussion.

Issues that need to be addressed outside of the presence of the jury should be handled before trial. For unexpected or new issues that arise during trial, discussion may occur during a scheduled break outside of the presence of the jury, either in chambers or in open court. Alternatively, if technology allows, white noise (to prevent the jury from hearing) or the combination of headphones and sensitive microphones (allowing only the judge, counsel, and the court reporter to hear and be heard) can be used. Judges may also consider using a Plexiglass or other transparent barrier between the parties and the judge with appropriate microphones. In extraordinary circumstances, the jury may be excused from the courtroom during trial.



Judges should develop a plan for health and safety issues that may arise during trial such as symptomatic jurors or court participants, or safety non-compliance by trial participants.

Issues may arise during trial relating to suspicion of illness and non-compliance with court safety protocols (use of masks, physical distancing, etc.) Prior planning will aid in managing these issues. After consultation with local health officials, judges should develop a written protocol that addresses isolating or excluding a person who exhibits signs and symptoms of illness and informing other jurors of the illness. The plan should designate court personnel responsible for initiating any protocols as well as court personnel responsible for acting once health and safety has been compromised. The protocol should consider options for permitting the trial to continue.

K.S.A. 60-248(f) provides guidance for civil trial continuations when the jury trial has begun. “The court may discharge the jury: (1) Because of sickness of a juror, or other necessity found by the court; (2) by the parties' consent; or (3) when it satisfactorily appears that there is no probability of the jurors reaching a verdict.”

In a criminal trial, K.S.A. 22-3423 states that the court may terminate a trial and order a mistrial at any time that a termination is necessary if the court finds:

- (a) It is physically impossible to proceed with the trial in conformity with law;
- or (b) There is a legal defect in the proceedings which would make any

judgment entered upon a verdict reversible as a matter of law and the defendant requests or consents to the declaration of a mistrial; or (c) Prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the prosecution; or (d) The jury is unable to agree upon a verdict; or (e) false statements of a juror on voir dire prevent a fair trial; or (f) The trial has been interrupted pending a determination of the defendant's competency to stand trial.

In any jury trial proceeding, the presiding judge must include all parties (and if a criminal trial, the defendant) in any decision and/or action relating to the jury. Additionally, any action/decision taken by the court should be stated on the record.



Judges should develop and instruct jurors and court participants on guidelines for breaks and juror gathering during those breaks.

A significant component of jury collaboration comes from their interaction with each other outside the presence of the judge and counsel. These interactions include initial assembly each day, breaks, and recesses. To maintain juror and court participant safety during these times, guidelines must be implemented for physical distancing.

Those guidelines specific to juror breaks and gatherings should include when and where they will occur, whether jurors will be allowed to exit, use of eating areas and restrooms, use of equipment such as the refrigerator and microwave in the jury room, and storage of personal items. Judges may also want to situate chairs against walls to increase capacity in the jury room, use a larger room, or use the courtroom itself to provide for appropriate physical distancing during breaks and the deliberation process.



Judges should ensure the public has access to the trial by utilizing a combination of the following means: seating in the courtroom, a live stream broadcast available to the public, and closed-circuit television transmitting to another area of the courthouse. The Task Force is also recommending that the Kansas Supreme Court consider amending Rule 1001 to clarify whether its provisions for juror anonymity and witness rights apply when a live stream broadcast is the only means of public access to the trial.

The public and the press have the right to view court proceedings that are not otherwise closed or confidential according to the law. As a result of physical distancing and other restrictions, there may not be enough room in the courtroom for members of the public or the press to attend in-person. If courtroom space is an issue, the judge should first determine who will be allowed to be physically present, giving particular consideration to those participants with a statutory or constitutional right to be present, including victims of crimes.

Openness does not necessarily require allowing the public to be physically present at the trial. For members of the public and press, the judge can consider providing access to the jury trial using a live stream broadcast, controlled by the court, to reduce the number of people in the courtroom, while maintaining transparency in judicial operations.³⁴

However, it will be important to ensure the live stream does not impact availability. Citizens should be able to watch at home and call-in options could also be considered for those lacking reliable internet service.³⁵ In fact, the Kansas Supreme Court, in deciding that even administrative, quasi-judicial hearings should be open to the public, reiterated the importance of public proceedings by stating, “Passing to the question of public trial, we believe it may generally be said that proceedings of a judicial nature held behind closed doors and shielded from public scrutiny have long been repugnant to our system of justice. The concept that trials and judicatory hearings be open to the public gaze is inherent in our idea of due process.”³⁶ Access to a remote proceeding “must be provided to the public either during the proceeding or immediately after” via recording³⁷.

Additionally, this live stream broadcast will likely be affected by Supreme Court Rule 1001 restrictions such as juror anonymity and witness rights. Due to those possible restrictions, the judge may also direct that closed-circuit television be transmitted to the jury assembly room, conference room, or other vacant space to ensure that members of the press have the opportunity to view the trial exactly as if they were in the courtroom. Courts should develop a plan for managing media requests and media access, while maintaining physical distancing, including the use of a media pool to limit the number of people in the courthouse.

The following language regarding open courts is suggested for use in jury trials.

Our state constitution requires that our courts be open to the public. To provide open and public access while also maintaining physical distancing, these proceedings may be [live streamed to the public on a channel such as YouTube] [transmitted by closed-circuit television to another area in the courthouse]. This will allow the public to observe the trial. The court will not retain a recording of this live stream at the conclusion of these proceedings.

The Task Force is also recommending that the Kansas Supreme Court consider amending Rule 1001 to clarify whether its provisions for juror anonymity and witness rights apply when a live stream broadcast is the only means of public access to the trial.



Judges should create and implement protocols for handling exhibits, including requiring pre-marking and prohibiting passing exhibits between jurors.

Judges control the admission of documentary evidence in a jury trial. Due to COVID-19, the handling of exhibits must have further supervision. Written protocols should include some or all of the following practices: limiting number and type of expected exhibits; requiring pre-marking and pre-exchanging of exhibits; prohibiting passing exhibits between jurors; using exhibit notebooks; providing sufficient copies of documentary exhibits; providing gloves for jurors; using technology for publication; publishing exhibits at the end of trial instead of

during trial; placing exhibits on the witness stand before the witness takes the stand; prohibiting attorneys from physically approaching witnesses.



Judges should develop specific guidelines for the use of interpreters.

Interpreters provide a critical and unique function during a trial. The judge should consult with the parties, court staff, and the interpreter on implementation of physical distancing and mask protocols. Courts must plan for situations such as an increase in the interpreter’s need for repetition and clarification.

For interpreted testimony where the interpreter is physically present in the courtroom, the interpreter typically sits or stands near the witness or litigant. It may be necessary to plan for additional space to accommodate physical distancing. The judge should also discuss with counsel and the interpreter prior to trial how to handle objections to interpreted testimony.

For simultaneous interpreting during in-person events, the interpreter should be provided with wireless equipment, so they do not have to remain near the Limited English Proficiency (LEP) person. Where wireless equipment is not available, work or personal cell phones can be used to call the LEP person and use their cell phones as *ad hoc* interpreting equipment. As a last resort, the interpretation can be performed in the consecutive mode, with the court planning for extra time accordingly.

For American Sign Language interpreters, both the interpreter and the relevant participant may need to be exempted from requirements to wear masks. Facial expressions and other nonverbal communications are vital components of providing such effective interpretation.

Conducting a Fair Trial – Virtually



Judges should conduct criminal jury trials in-person due to constitutional and statutory barriers, unless a defendant clearly waives the right to in-person proceedings. A guide for best practices when conducting a virtual trial is included in the attachments section of this report.

The Task Force understands that COVID-19 is a highly infectious disease and may pose a serious health risk to some members of the venire who would be required to personally appear for the jury trial.³⁸ However, those health risks and concerns must be balanced against the many constitutional and statutory rights impacted by the use of a virtual proceeding in a criminal case.

- Sixth Amendment Confrontation Clause: An accused has a right to face their accusers face-to-face, including the “critical right” to conduct a cross-examination.³⁹ Referencing *Maryland v. Craig*, 497 U.S. 836 (1990)⁴⁰, our courts have held that a defendant’s right to confront a witness is not absolute, particularly where important public policy needs to be served.⁴¹

- Sixth Amendment Right to Counsel: An accused has a 6th Amendment right to counsel, a right that is so basic to a fair trial that any impediment could never be deemed harmless.⁴² A defendant’s right to counsel mandates that counsel’s representation be effective.⁴³ Procedures put in place during the current pandemic already strain the quality of representation counsel can offer.⁴⁴ Virtual proceedings impinge the ability of a defendant to freely communicate, in real time, with his or her counsel. Moreover, effective counsel must “perform essential Sixth Amendment functions” like pretrial investigations, discovery review, and discussing with their client trial strategies, procedures, and outcomes.⁴⁵
- First and Sixth Amendment Open Proceedings: Keeping proceedings open to the public helps ensure fairness in the judicial system, promoting public confidence and providing a means for citizens to check the use and possible abuse of judicial power.⁴⁶ In determining whether a proceeding must be open to the public the court must 1) consider whether there has been a historical presumption of access; and 2) evaluate whether access to the given proceeding would contribute to the self-governing function promoted by openness.⁴⁷ Courts are required to exhaust alternatives to closure before closing proceedings that do not meet the test⁴⁸. In fact, for a court to close a proceeding, it must generally find that there is a compelling interest involved and the closure must be narrowly tailored to that interest.⁴⁹
- K.S.A. 22-3403: The parties may agree to a felony trial by the court but, absent an agreement, all other felony trials must be by jury.⁵⁰
- K.S.A. 22-3404: Misdemeanor trials must be tried to the court unless a jury trial is requested in writing.⁵¹
- K.S.A. 22-3405: A defendant must be present⁵² at the arraignment, at every stage of the trial including the impaneling of the jury⁵³, when the verdict is returned, and at sentencing. However, except for trials for crimes punishable by death or life without the possibility of parole, a defendant may voluntarily be absent after the trial has started. Such absence does not prevent the trial from continuing.

Criminal defendants have many constitutional and statutory rights regarding jury trials.⁵⁴ In-person proceedings also offer substantial, meaningful, and varied intangible benefits to all parties, critical to fostering the goals of the justice system.⁵⁵ Therefore, a court should only consider conducting virtual criminal proceedings when the defendant waives⁵⁶ numerous rights.⁵⁷ Moreover, the unreliability of virtual platforms is a concern,⁵⁸ as is the potential unavailability of required technology for use by some courts, parties, witnesses, and jurors. To minimize the risk of legal challenges to the jury system, especially in criminal cases, courts must mitigate to the greatest extent possible the impact of the “digital divide” on the demographic characteristics of the jury pool⁵⁹.

As a result, the Task Force does not recommend the use of virtual technology for criminal jury trials. The Sixth Amendment right to effective counsel could be negatively impacted by the use of virtual proceedings in criminal matters. If a defendant waives his or her right to in-person proceedings, courts must make every effort to ensure procedures are in place to protect a defendant’s critical right to counsel.

Despite an accused's or litigant's waiver of constitutional and statutory rights, conducting a fully virtual jury trial is not without risks and warrants special care. For example, there is a question of whether parties can accurately gauge the credibility of witnesses testifying over video. There is little doubt that gestures, facial expressions, and body language are lost, to a certain degree, when conducting proceedings virtually. Additionally, jurors may not feel the onus of responsibility of their duties when they are tuning in from the comfort of their living rooms. The judge, counsel, and defendant will always need to be able to see the jurors. Likewise, the jury should be able to have constant visuals of all relevant parties.

The court must also consider how it will ensure the defendant has uninterrupted communication with counsel. If the parties agree to conduct all or part of the jury trial via remote technology, there are myriad considerations that the court and attorneys must consider before moving forward. These considerations are applicable to both criminal and civil proceedings conducted online or via videoconferencing technology. Included in the attachments section of this report is a guide for best practices when conducting a virtual trial.



Judges should conduct jury selection in-person.

- 1. Each judicial district should survey and reserve spaces available for trials and specifically, jury selection.**
- 2. Judges should stage jurors to control and limit interaction in large numbers.**
- 3. Judges should conduct jury selection in small panels, preferably 12 or less.**

Jury selection, in most cases, will need to proceed in-person. Due to concerns related to the reliability and availability of technology to potential jurors necessary to conduct meaningful remote jury selection, remote technology-assisted jury selection is not practical in most situations. Courts can mitigate the health risks of those involved by adopting measures to ensure adequate physical distancing⁶⁰ and adequate sanitization,⁶¹ while also mandating masks and screening participants for sickness. District courts must follow guidelines outlined in the most current Kansas Supreme Court administrative orders before conducting in-person trials.⁶²

Each judicial district should conduct a comprehensive survey of available spaces in which judicial proceedings could occur. Each jurisdiction will have different space resources available. Judicial districts should be creative and look for spaces such as unused courtrooms, conference rooms, off-site public spaces (such as community centers, school auditoriums, municipal meetings spaces, other government meeting chambers), and private spaces such as hotel meeting rooms, conference centers, and theaters.

If a district chooses to utilize a non-court space for jury selection, it must ensure the physical safety of participants and provide security measures equal to that provided at the courthouse such as x-ray machines, metal detectors (wand or walk-through), and magnetometers. This includes secure entrances/exits.⁶³ Additionally, if a judicial district elects to use an offsite location, it must consider access to transportation, parking, meals, restrooms, audio/video systems, and technology. Finally, as jury trials are often cancelled at the last minute, courts are encouraged to include language in any outside vendor contract that would allow for cancellation on short notice.

Judges should work with court staff to establish a process to stage summoned jurors which will reduce chances of group interaction. Staging may be accomplished by incorporating any of the following practices: Staggering prospective juror arrival times to avoid bottlenecks; Issuing a number to potential/summoned jurors; Utilizing a texting system for check-in⁶⁴; Creating a specific jury duty link on the district court’s website that allows online check-in and provides further instruction on juror service⁶⁵;

Judges should instruct court staff should keep groups small whenever possible. The Task Force recommends panels of 12, or smaller, spaced out for arrival throughout the day or week. Depending on available space, the venire panel should be spread out in the courtroom in order to maintain adequate physical distancing. Panelists should sit six feet apart and attorneys should stand an adequate physical distance away from the front row of the venire panel. Panelists should sit in every other row and should wear masks unless the judge grants an exception.

Patience is paramount. Jury selection will likely take longer than it did before the COVID-19 crisis. Judges should involve trial counsel in the process of planning for jury selection and all parties should be reminded to exercise patience throughout this process. Attorneys should examine small panels at a time for cause. Those passed for cause from each panel will be released. The process of examining small panels, one at a time, continues until a sufficient number of panelists remain to conduct peremptory challenges.

Judges should instruct litigants that one person at a time will speak. Questioning should be deliberate and focused. Attorneys should use a microphone and PA system, if available. It has been shown that forceful vocalization can project droplets surprisingly far. This happens when lawyers use their “courtroom voice” or by venire panelists speaking up so that trial participants can hear their answers. Smaller panels will help mitigate noise in the courtroom resulting in less need for anyone to project their voice. Judges should consider setting time restrictions, particularly if prospective jurors are being examined in small panels, to maintain efficiency. The judge and court staff should distance themselves from the panel and each other while in the courtroom.

Judges should instruct panelists to follow all posted courthouse safety protocols, including maintaining adequate physical distancing in hallways, stairwells, and elevators and washing their hands. Hand sanitizer should also be made available. To minimize the number of people present, jury selection can be made open to the public through the use of a live stream broadcast or closed-circuit television.



Judges should consider conducting civil jury trials virtually if procedural requirements are waived and technology is available.

If all litigants waive the relevant statutory procedural requirements under K.S.A. 60-238, K.S.A. 60-239, K.S.A. 60-243, and K.S.A. 248, and the court is satisfied with the availability of adequate technology, Kansas law permits, and judges are encouraged to consider conducting technology-assisted remote civil jury trials. In the absence of consent of the

parties or adequate technology to conduct an entire civil jury trial remotely, judges are encouraged to consider conducting portions of the jury trial procedure via remote technology to minimize the potential for viral transmission which accompanies in-person proceedings. As noted above, the health concerns related to the COVID-19 crisis must be balanced with the rights and needs of civil litigants in the utilization of technology to conduct remote jury trials. Litigants in a civil jury trial are not afforded the array⁶⁶ of constitutional and statutory rights as a defendant in a criminal proceeding. However, there are statutory procedural hurdles as well as logistical challenges to consider before conducting an entirely remote civil jury trial. Virtual civil jury trials may be possible in relatively simple two-party lawsuits, if the appropriate technology is available to the court, members of the venire panel, selected jurors, the parties, and their counsel. In instances with more than two litigants, complicated facts and legal theories, inconsistent or unavailable technology for all participants, or resistance to the loss of the “human factor” of a jury trial, judges are encouraged to explore the utilization of technology in only certain portions of the trial.



Judges should consider conducting grand jury proceedings virtually.

A person who is the subject of a grand jury inquiry lacks rights comparable to those granted a defendant in a criminal proceeding.⁶⁷ Therefore, courts may consider utilization of virtual platforms to select grand jurors and conduct grand jury proceedings. However, a court should only consider the use of a virtual platform if it can maintain secrecy regarding juror selection and deliberations.⁶⁸ All three types of grand jury proceedings in Kansas are considered secret,⁶⁹ with the number of participants and the nature of their participation limited. Because the legal threshold and standards in a grand jury proceeding are significantly less than those in a criminal jury trial,⁷⁰ this is an area of the law which may be ripe for a virtual hearing format. To ensure the grand jury proceedings stay secret, the Task Force recommends the following; using a secure and robust online platform to ensure confidentiality; i.e., a professional or industrial version of the virtual platform; amending the juror oath to conform to the proceedings and concerns; using a secure method to share documents or evidence.



Courts should apply for grant funds, including those offered by the Office of Judicial Administration (OJA), and evaluate the use of Coronavirus Aid, Relief, and Economic Security (CARES) Act funds to assist with technology for virtual court proceedings.

Court resources vary widely among the state’s 105 counties. Some county governments support court technology infrastructure but others do not have the resources to do so. In addition, more than half of the courts across the state serve rural areas where reliable internet service is sometimes unavailable. To overcome this barrier, courts should apply for grant funds, including those offered by OJA, and evaluate the use of CARES Act funds to assist with technology for virtual court proceedings.



Court staff and judges should collect and share data on trials or parts of trials conducted virtually.

The courts' need to resume jury trials in the immediate future does not provide sufficient time to conduct a pilot program as other states have done⁷¹. However, OJA can collect data and input from courts and attorneys utilizing these technologies.

Individual judges and districts across Kansas (as well as any criminal defendants, civil litigants, and their counsel) who intend to explore and evaluate the feasibility of conducting virtual jury trials may utilize the recommendations in the virtual best practices attachment to this report. Each participating judge and district should report to OJA its results, findings, and recommendations, including specific information regarding technical issues and fiscal impacts. Participating attorneys should also be provided a method to submit feedback at the conclusion of any jury trial conducted virtually, either in whole or in part. OJA should then synthesize the information into quantitative data reports and best practices for future use.

CONCLUSION

This report and attached resources will be made available for use by all judicial districts, distributed electronically on the Kansas Judicial Branch website [Ad Hoc Jury Task Force page](#). The Kansas Judicial Education Advisory Committee has expressed interest in providing webinars based on the Task Force's work. The Task Force recommends the following webinar topics:

- Communicating with Jurors Pretrial and During Orientations
- Securing an Adequate Jury Pool
- Utilizing Pretrial Measures to Minimize Juror Service
- Conducting a Fair Trial While Protecting Juror and Court Participant Safety
- Virtual Best Practices for Trials

The health and safety of jurors and court participants is a priority for Kansas courts. As trials resume, the Task Force recommendations should be reviewed and implemented in the manner that best suits each individual district. Current circumstances surrounding COVID-19 are fluid and districts will need to continuously identify and evaluate issues that require further analysis. At the direction of the Kansas Supreme Court, the Task Force may supplement or modify its recommendations as health guidelines and court operations change.

¹ Examples: Pima County, AZ: <https://youtu.be/9IC9mnTDNdE>
Allen County Superior Court, Allen County, Indiana,
<https://www.youtube.com/watch?v=eycZsxIEcH4&feature=youtu.be>.
Utah: <https://youtu.be/udQfVPe2a5M>
San Francisco Superior Court: <https://www.youtube.com/watch?v=reXqrrOC5lg>

² National Center for State Courts, *State of the State Courts in a (Post) Pandemic World* (accessible online: <https://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide/state-of-the-state-courts-in-a-post-pandemic-world>) National Multimodal Survey, June 8-11, 2020: 55% of respondents cited at least one obstacle to reporting to jury service, if called (including 14% indicating primary caregiver to an elderly family member; 19% could not secure childcare; 47% someone in household with an underlying health condition); further, respondents to the survey indicated feeling especially uncomfortable reporting for jury duty and serving for jury duty during the global pandemic.

³ See Message from the Presiding Judge Regarding Jury Service in San Francisco, available at <https://www.youtube.com/watch?v=reXqrrOC5lg>

⁴ National Center for State Courts, *State of the State Courts in a (Post) Pandemic World* (accessible online: <https://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide/state-of-the-state-courts-in-a-post-pandemic-world>) National Multimodal Survey, June 8-11, 2020.

⁵ See San Francisco Superior Court, Updated Information for Prospective Jurors (“Sheriff’s Deputies will monitor the lines of prospective jurors entering the courthouse in order to ensure that jurors are engaging in social distancing. Masks are required at all times when inside the courthouse.”) available at https://sfsuperiorcourt.org/sites/default/files/images/Letter%20to%20Prospective%20Jurors%20-%202nd%20rev_1.pdf?1592495624750

⁶ See Centers for Disease Control and Prevention, Handwashing: Clean Hands Save Lives, Posters for the General Public, available at https://www.cdc.gov/handwashing/pdf/19_309599-A-Frankson_Handwashing.pdf

⁷ See Centers for Disease Control and Prevention, Symptoms of Coronavirus (“People with COVID-19 have had a wide range of symptoms reported – ranging from mild symptoms to severe illness. Symptoms may appear 2-14 days after exposure to the virus. People with these symptoms may have COVID-19: Fever or chills; Cough; Shortness of breath or difficulty breathing; Fatigue; Muscle or body aches; Headache; New loss of taste or smell; Sore throat; Congestion or runny nose; Nausea or vomiting; Diarrhea”), available at <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>

⁸ See CDC, “People Who Are at Higher Risk for Severe Illness,” (“people 65 years and older, people living in homes or long-term care facilities, people with chronic lung disease or moderate or severe asthma, people who have serious heart conditions, people who are immunocompromised, people with severe obesity, people with diabetes, and people with chronic kidney disease undergoing dialysis, people with liver disease”), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html>

⁹ Courts may consider using something along the lines of a modified Deadlocked Jury / Allen instruction to encourage jurors not to rush their deliberations: **Ex.** “Like in all cases, this is an important case. Even though this case was tried during a global pandemic, your safety is a priority for Kansas Courts, and this Court has made every effort to follow the recommendations of health professionals. You should not hurry your deliberations. You may be as leisurely in your deliberations as the occasion may require and take all the time you feel necessary.” *Adapted from* PIK 4th 68.140 (Deadlocked Jury).

¹⁰ 2020-PR-090

¹¹ For example: “A defendant in a criminal trial is a court participant and must also wear a facemask at all times. You must not draw any inference of guilt from the fact that the defendant wears a mask in court, and you must not consider this fact in arriving at your verdict.” *Adapted from* PIK 4th 51.080 (Defendant’s Failure to Testify).

¹² National Center for State Courts, *State of the State Courts in a (Post) Pandemic World* (accessible online: <https://www.ncsc.org/topics/court-community/public-trust-and-confidence/resource-guide/state-of-the-state-courts-in-a-post-pandemic-world>) National Multimodal Survey, June 8-11, 2020.

¹³ *State v. Bernhardt*, 304 Kan. 460 (2016) (“The use of PIK instructions is not mandatory but is strongly recommended. The pattern instructions have been developed by a knowledgeable committee to bring accuracy, clarity, and uniformity to jury instructions. They should be the starting point in the preparation of any set of jury instructions. If the particular facts in a given case require modification of the applicable pattern instruction or the addition of some instruction not included in PIK, the district court should not hesitate to make such modification or addition. However, absent such need, PIK instructions and recommendations should be followed.”); citing to *State v. Dixon*, 289 Kan. 46, Syl. ¶ 1 (2009).

¹⁴ See *Baker*, 249 Kan. at 442.

¹⁵ See *Taylor v. Louisiana*, 419 U.S. 522, 538, 42 L. Ed. 2d 690, 95 S. Ct. 692 (1975).

¹⁶ See *State v. Baker*, 249 Kan. 431(1991) (examining whether any distinctive group had been excluded from venire); see also *Duren v. Missouri*, 439 U.S. 357 (1979)(holding exclusion of all women from jury pool violates fair cross-section requirement). In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. *Duren*, 439 U.S. at 364.

¹⁷ <https://www.npr.org/sections/health-shots/2020/05/30/865413079/what-do-coronavirus-racial-disparities-look-like-state-by-state>.

¹⁸ See The COVID Racial Tracker, <https://covidtracking.com/race/dashboard>; see also <https://www.kansas.com/news/rebuild/article242680156.html>.

¹⁹ California Judicial Branch Pandemic Continuity of Operations Resource Guide. https://newsroom.courts.ca.gov/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/262/files/20205/202006022330/Pandemic%20Working%20Group%20Resource%20Guide.pdf, page 55.

²⁰ “Technology Options for Jury Trials and Grand Jury Proceedings,” http://www.ncsc-jurystudies.org/_data/assets/pdf_file/0032/38786/RRT-Technology-Remote-Options-Jury-Trials.pdf.

²¹ “State of the State Courts in a (Post) Pandemic World.” National Center for State Courts, <https://nationalcenterforstatecourts.app.box.com/s/n7w8zu89tbayfjr0qz6h7mn6nrg0x6qh/file/680542851103>.

²² Rates of local infection can be found by consulting the county health officer, or by utilizing the resources from the Kansas Department of Health and Environment, <https://www.coronavirus.kdheks.gov/>.

²³ County Health Rankings and Roadmaps, Robert Wood Johnson Foundation, provides a tool to compare the health outcomes of Kansas counties. <https://www.countyhealthrankings.org/>.

²⁴ <http://www.ncsc-jurystudies.org/>, p. 2.

²⁵ <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

²⁶ *Bourne v. Atchison, T. & S. F. Ry. Co.*, 209 Kan. 511, 516–517, 497 P.2d 110 (1972); *Holt v. Frito-Lay, Inc.*, 217 Kan. 56, 60, 535 P.2d 450 (1975); *Glynos v. Jagoda*, 249 Kan. 473, 478–479, 819 P.2d 1202 (1991). At the time of these rulings, K.S.A. 60-247(a) contained similar language to its present version. See K.S.A. 1990 Supp. 60-247(a).

²⁷ Kansas Supreme Court Administrative Order 2020-PR-054 requires that anyone entering a courthouse or other court office must be denied access as follows:

- If the person has been in close contact with someone who has been diagnosed with, or is suspected to have had, COVID-19 within the last 14 days;
- If the person is experiencing two or more of the COVID-19 symptoms identified by the Centers for Disease Control and Prevention; or
- If the person has traveled to an area subject to COVID-19 travel restrictions imposed by the Kansas Department of Health and Environment within the previous 14 days or if the Department recommends self-isolation or quarantine after return.

²⁸ <https://www.kansasjudicialcouncil.org/sites/default/files/Juror%20Questionnaire%20%287-2013%29.pdf>.

²⁹ Jury Management Subgroup of the COVID-19 Continuity of Court Operations During a Public Health Emergency Workgroup Best Practice Recommendations at 17. (June 1, 2020).

³⁰ Id.

³¹ *Crawford v. Washington*, 541 U.S. 36 (2004)

³² For further review, please see Marc C. McAllister, *The Disguised Witness and Crawford's uneasiness with Craig: Bringing Uniformity to the Supreme Court's Confrontation Jurisprudence*, 58 Drake L. Rev. 481 (Winter 2010) and Steven R. Houchin, *Confronting the Shadow: Is Forcing a Muslim Witness to Unveil in a Criminal Trial a Constitutional Right, or an Unreasonable Intrusion?*, 36 Pepp. L. Rev. 823 (April 2009).

³³ Kansas Law & Practice, Code of Civil Procedure. Annotated. § 60-104 (5th ed.). September 2019 Update

³⁴ 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>.

³⁵ Lartey, Jamile. *The judge will see you on Zoom, but the public is mostly left out*, The Marshall Project, April 13, 2020, <https://www.themarshallproject.org/2020/04/13/the-judge-will-see-you-on-zoom-but-the-public-is-mostly-left-out>. According to the Federal Communications Commission, by the end of 2017, 21.3 million Americans lacked access to high-speed internet. Reynolds, Matt. *Could Zoom jury trials become the norm during the coronavirus pandemic?* ABA Journal, May 11, 2020, <https://www.abajournal.com/web/article/could-zoom-jury-trials-become-a-reality-during-the-pandemic>.

³⁶ *Adams v. Marshall*, 212 Kan. 595, 601, 512 P.2d 365, 371 (1973).

³⁷ Administrative Order 2020-PR-056

³⁸ American Board of Trial Advocates COVID-10 Task Force: *Guidance for Conducting Civil Jury Trials During the COVID-19 Pandemic* (2020), page 6; National Foundation for Infectious Diseases: 2019 Novel Coronavirus (Covid-19) Outbreak, <https://www.nfid.org/infectious-diseases/19036/>.

³⁹ *State v. Lamb*, 14 Kan. App. 2d, 664, 667, 798 P.2d 506 (1990).

⁴⁰ The *Craig* test considers whether “a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation” by determining if the “denial of confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.”⁴⁰ Some valid public policies courts have considered have to do with child victims testifying in sex crime cases, combating terrorism, and the state’s interest in resolving criminal matters. Other considerations include whether a witness is subject to the subpoena power of the U.S. and the health of the witness (or the witness’s inability to travel). Regarding the second prong of reliability, courts have focused their analysis on the oath, cross-examination, and observation of the witness’s demeanor.

⁴¹ *Lamb*, 14 Kan. App. 2d at 670-71.

⁴² *Chapman v. California*, 386 U.S. 18, 43, 87 S. Ct. 824 (1967).

⁴³ *State v. Sharkey*, 299 Kan. 87, Syl. ¶ 2, 322 P.3d 325 (2014); *State v. Galaviz*, 296 Kan. 168, 174-75, 291 P.3d 62 (2012).

⁴⁴ See NACDL’s June 2020 Statement, pages 4-5, 8-9 (discussing how the pandemic is threatening defendants’ right to counsel).

⁴⁵ NACDL’s June 2020 Statement, pages 8-9.

⁴⁶ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 599, 100 S. Ct. 2814 (1980). The right to openness in criminal trials includes jury voir dire (*Presley v. Georgia*, 558 U.S. 209, 213, 130 S. Ct. 721 (2010)) and suppression hearings (*Waller v. Georgia*, 467 U.S. 39, 43, 104 S. Ct. 2210 (1984)). However, the Supreme Court of the United States has not required the right to a public trial to attach to all proceedings. For example, the right to a public trial has not explicitly been extended to side bars or in-chambers conferences. *State v. Gonzalez*, No. 112,841, 2016 WL 3202555, at *11 (Kan. Ct. App. 2016), *aff’d* 307 Kan. 575, 412 P.3d 968 (2018). Additionally, conferences concerning discovery and scheduling matters, typically limited in substance, are not necessarily required to be open to the public. See *Hage v. U.S.*, 35 Fed. Cl. 737, 742 (1996).

⁴⁷ *Press-Enterprises, Co. v. Sup. Ct. of Cal.*, 478 U.S. 1, 9, 106 S. Ct. 2735 (1986) (“*Press II*”).

⁴⁸ *Press-Enterprises, Co. v. Sup. Ct. of Cal.*, 464 U.S. 501, 509-10, 104 S. Ct. 819 (1984) (“*Press I*”).

⁴⁹ *Press I*, 464 U.S. at 510. A handy guide regarding openness is available from the National Center for State Courts entitled *Livestream Bench Card*, available at https://www.ncsc.org/data/assets/pdf_file/0014/40361/RRT-Technology-Livestream-Public-Access-Benchcard.pdf.

⁵⁰ *State v. Frye*, 294 Kan. 364, 372, 277 P.3d 1091, 1097 (2012).

⁵¹ There is no constitutional right to a jury trial in a misdemeanor case. However, a person accused of a misdemeanor has a statutory right to a jury trial if they make a demand under K.S.A. 22-3404. *State v. Woolverton*, 52 Kan. App. 2d 700, 707, 371 P.3d 941, 946 (2016).

⁵² “Present” has been interpreted to mean physically present. In fact, the Kansas Supreme Court has interpreted it to mean more than just physical presence—instead, it requires that “a defendant will be informed about the proceedings so he or she can assist in the defense.” *State v. Calderon*, 270 Kan. 241, 245, 13 P.3d 871, 875 (2000). This includes the right to translation services. However, trial courts are permitted to proceed without the defendant’s physical presence if said party is being disruptive. See *Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L.Ed.2d 353 (1970); *United States v. Songer*, 842 F.2d 240, 242–43 (10th Cir. 1988). Aside from the trial itself, the court makes a determination of whether the defendant needs to be present at other proceedings by considering whether or not the exclusion of the defendant would interfere with his or her opportunity to test the state’s evidence and whether it would affect his or her opportunity to defend against the charges. *State v. McDaniel*, 306 Kan. 595, 601–02, 395 P.3d 429, 438 (2017). The right to be present espoused in K.S.A. 22-3405(a) is “analytically and functionally identical to the requirements under the Confrontation Clause and the Due Process Clause of the federal Constitution that a criminal defendant be present at any critical stage of the proceedings.” *State v. Killings*, 301 Kan. 214, 241, 340 P.3d 1186 (2015).

⁵³ See also *State v. Lopez*, 271 Kan. 119, 129–30, 22 P.3d 1040 (2001) (impaneling the jury is a critical stage of the trial process); *Rosales-Lopez v. U.S.*, 451 U.S. 182, 188, 101 S. Ct. 1629, 1634 (1981) (same). K.S.A. 22-3405 is the statutory codification of the rights provided under the 5th, 6th and 14th Amendments to the U.S. Constitution. *State v. Haynes*, No. 106,850, 2013 WL 3970167, at *2 (Kan. Ct. App. 2013) (unpublished opinion). It permits a trial court to proceed with a trial when the defendant freely and voluntarily waives their right to be present. *State v. Salton*, 238 Kan. 835, 838, 715

P.2d 412, 415 (1986). “Impaneling the jury” includes jury selection and voir dire. See *State v. Kahler*, 307 Kan. 374, 386, 410 P.3d 105 (2018), *cert. granted*, 139 S. Ct. 1318 (2019) (discussing voir dire and jury selection interchangeably); *U.S. v. Morales*, 758 F.3d 1232, 1237 (10th Cir. 2014) (discussing a court’s refusal to impanel a new jury but permitting the defendant to address concerns during voir dire); *State v. Robinson*, 306 Kan. 431, 434, 394 P.3d 868 (2017) (discussing a defendant’s request “to impanel a new jury that would be subject to voir dire questioning regarding” a specific issue).

⁵⁴ “The right of a criminal defendant to be tried by a jury of his peers, rather than by the court alone, is ‘fundamental to the American scheme of justice.’” *State v. Irving*, 216 Kan. 588, 589, 533 P.2d 1225, 1227 (1975), citing, *Duncan v. Louisiana*, 391 U.S. 145, 88 S. Ct 1444 (1968). Victims also have rights to participate in the trial process.

⁵⁵ This committee questions whether virtual proceedings can offer the same reliability provided by in-person proceedings. See NACDL’s June 2020 Statement, pages 9-10, for a deeper discussion on this topic. The NACDL specifically contends virtual trials would offend the constitution in “several respects.” NACDL’s June 2020 Statement, page 9. Research has shown that virtual proceedings result in 1) significantly disadvantaged bail outcomes for defendants and 2) a greater likelihood (double) that an asylum request is denied; moreover, jurors generally believe remote testimony suffers a lack of credibility. Victory Trial Consulting: *Jury Trials During the Coronavirus Epidemic*, 2020.

⁵⁶ To waive the right to trial by jury, the defendant must personally waive the right, either in writing or in open court, after being advised by the court of his or her right to trial by jury. *Irving*, 216 Kan. at 589-90; *State v. Schenk*, No. 114,564, 2016 WL 6822037, at *8 (Kan. Ct. App. 2016). “The use of virtual mechanisms in lieu of in-person hearings in criminal cases may only be employed with the informed and voluntary consent of the accused and with the assistance of counsel and adequate other safeguards.” NACDL’s June 2020 Statement, page 5.

⁵⁷ See Kansas Supreme Court Administrative Orders 2020-PR-45, filed May 1, 2020; 2020-PR-049, filed May 1, 2020; 2020-PR-054, filed May 27, 2020; 2020-PR-055, filed May 27, 2020; 2020-PR-056, filed May 27, 2020; 2020-PR-76, filed June 16, 2020. Administrative Order 2020-PR-045 authorizes the use of two-way audio-visual communications in any court proceeding including trial, where consistent with an individual’s constitutional rights. This order was restated on May 27, 2020 in Administrative Order 2020-PR-056. That order has not been rescinded or amended at this time. See also Kansas Supreme Court Rule 145, Use of Telephone or Other Electronic Conference. However, it is the conclusion of this work group that criminal trials, including jury selection, cannot be done remotely absent a knowing and informed waiver of constitutional and statutory rights by the defendant.

⁵⁸ Warren, Tom. *Zoom faces a privacy and security backlash as it surges in popularity*. The Verge, April 1, 2020, <https://www.theverge.com/2020/4/1/21202584/zoom-security-privacy-issues-video-conferencing-software-coronavirus-demand-response>; O’Flaherty, Kate. *Zoom alternatives: 5 options for people who care about security and privacy*, Forbes, April 4, 2020, <https://www.forbes.com/sites/kateoflahertyuk/2020/04/04/zoom-alternatives-5-options-for-people-who-care-about-security-and-privacy/#589c7b88371f>.

⁵⁹ See generally, “The Jury Manager’s Toolbox: A Primer on Fair Cross-Section Jurisprudence,” National Center for State Courts, 2010.

⁶⁰ Kansas Supreme Court Administrative Order 2020-PR-76 requires that in-person hearings be conducted “with no more than the amount of people who can remain socially distanced at least 6 feet apart throughout the courtroom or any other facility being used by the court for a proceeding.”

⁶¹ Kansas Supreme Court Administrative Order 2020-PR-76 requires that all surfaces be cleaned between in-person hearings.

⁶² Kansas Supreme Court Administrative Order 2020-PR-76 states that a court “not operating under 2020-PR-49 may gather people for the purpose of jury proceedings . . . on the following conditions.” The Order continues by listing 11 items a court must present as a plan to its departmental justice before proceeding.

⁶³ Using an offsite location and providing security and sanitation at said location has fiscal implications that might prevent taking such action. Districts are encouraged to consult with their local sheriff’s office.

⁶⁴ For example, Wyandotte County’s Treasury Department uses a text check-in system, which tells people when to arrive at the building. The Office of Judicial Administration and the Third Judicial District both use a text-based system to alert staff when their buildings are closed due to inclement weather. For smaller districts, Google Voice might be a viable system: <https://support.google.com/voice/answer.com>.

⁶⁵ Information on websites could 1) educate jurors on procedures; 2) update jurors on safety measures in place to mitigate risk during the pandemic; 3) provide online check-in. Website infrastructure could be a barrier for districts with fewer resources or jurors lacking access to a computer, phone, or internet service.

⁶⁶ “There is no due process right to a jury trial in a state court civil action. This is true because the due process clause of the Fourteenth Amendment to the Constitution of the United States does not apply to a jury trial in a civil proceeding in a state court. A trial by jury in suits at common law in state courts is not a privilege or immunity of national citizenship which the states are forbidden by the Fourteenth Amendment to abridge.” *Waggener v. Seever Sys., Inc.*, 233 Kan. 517, 522-23, 664 P.2d 813 (1983). The 7th Amendment of the US Constitution was not incorporated by the 14th Amendment and so is not applicable to states. See *In re O'Brien*, No. 103,711, 2011 WL 3250568, at *6 (Kan. Ct. App. 2011) (unpublished opinion). As noted above, Section 5 of the Bill of Rights of the Kansas Constitution guarantees the right to a trial by jury as that right existed at common law when our state’s constitution was created. *Enerpipe Ltd.*, 309 Kan. at 1133-34. “The trial of all jury issues demanded should be by jury unless the court upon motion, or of its own initiative, finds that a right of trial by jury of the controlling issues does not exist under the constitution and statutes.” *Hindman v. Shepard*, 205 Kan. 207, 215-16, 468 P.2d 103, 111 (1970).

⁶⁷ Grand juries are creatures of statute; a grand jury’s function is investigatory and accusatory and does not determine the guilt or innocence of an accused. *State v. Snodgrass*, 267 Kan. 185, 190, 979 P.2d 664, 668 (1999). “Unlike a jury trial or preliminary hearing, a district judge does not preside over the grand jury proceedings, nor does a defendant have a right to be present or call or cross-examine witnesses. The county attorney has a limited role in the grand jury proceedings and, contrary to the opinion of the district court, has no responsibility to make a record or ensure that the jurors are qualified.” *Snodgrass*, 267 Kan. at 190.

⁶⁸ The United States District Court for the Southern District of New York reportedly began offering grand jurors the option of connecting and deliberating via a videoconferencing system in April.

⁶⁹ *Levine v. U.S.*, 362 U.S. 610, 617, 80 S. Ct. 1038, 1043, 4 L. Ed. 2d 989 (1960); *Matter of T.H.*, 23 Kan. App. 2d 471, 483, 932 P.2d 1023, 1033 (1997); K.S.A. 22-3012.

⁷⁰ Primarily, the legal standard for a criminal indictment in a grand jury is probable cause versus a criminal trial’s requirement of proof beyond a reasonable doubt. Additionally, a grand jury indictment is not a finding of guilt—it is merely a proceeding that begins the criminal trial process.

⁷¹ The Supreme Court of Florida issued an order (AOSC20-31) on June 8, 2020, providing for the creation of a pilot program for civil jury trials, assuming the parties consent and the case at hand is “conducive to a remote proceeding.” See the order at <https://www.floridasupremecourt.org/content/download/637270/7239413/AOSC20-31%20Amendment%201.pdf>.

AD HOC JURY TASK FORCE REPORT

ATTACHMENTS



RESUMING TRIALS AMID COVID-19

RECOMMENDATIONS FOR BEST PRACTICES

Outline of Applicable Legal Authority

Kansas Statutes Annotated	
Cite	Description
K.S.A. 20-3105	Oaths, affirmations and acknowledgments
K.S.A. 21-6817	Departure sentencing; hearing; notice; findings of fact and conclusions of law; order; upward durational departure sentencing; procedures and jury requirements
K.S.A. 22-3001	Grand juries; summoning; petition; jury instructions; membership; quorum
K.S.A. 22-3003	Oaths of jurors
K.S.A. 22-3004	Presiding juror and deputy presiding juror
K.S.A. 22-3006	Compensation; recording methods; employees
K.S.A. 22-3008	Witnesses; immunity
K.S.A. 22-3010	Who may be present
K.S.A. 22-3012	Secrecy of (grand) jury proceedings and disclosure
K.S.A. 22-3014	Witness fees
K.S.A. 22-3403	Method of trial of felony cases
K.S.A. 22-3404	Misdemeanor; cigarette or tobacco infraction and traffic infraction case; method of trial
K.S.A. 22-3405	Presence of defendant
K.S.A. 22-3408	Trial jurors
K.S.A. 22-3410	Challenges for cause
K.S.A. 22-3411a	Felony trials; number of jurors
K.S.A. 22-3412	Jury selection: peremptory challenges; swearing of jury; alternate or additional jurors
K.S.A. 22-3420	Conduct of jury after submission
K.S.A. 22-3423	Mistrials
K.S.A. 43-155	Jury service; declaration of public policy
K.S.A. 43-156	Right to serve as a juror; qualification as elector
K.S.A. 43-158	Jury service; persons excluded from jury service
K.S.A. 43-159	Jury service; exclusions from jury service by court
K.S.A. 43-162	Jury service; preparation of jury lists
K.S.A. 43-165	Rules governing jury service, enforcement; unexcused nonattendance of juror; penalty
K.S.A. 43-166	Summoning jury panel, when; notice; return of jury list; use of first class mail in lieu of restricted delivery
K.S.A. 43-174	Jury service; disqualifying information
K.S.A. 54-101	Officers authorized to administer oaths

Outline of Applicable Legal Authority

Kansas Statutes Annotated	
K.S.A. 54-104	Form of commencement and conclusion of oaths
K.S.A. 60-216	Pretrial conferences; case management conference
K.S.A. 60-216	Pretrial conferences; case management conference
K.S.A. 60-238	Right of trial by jury; demand; waiver
K.S.A. 60-239	Trial by jury or by the court
K.S.A. 60-243	Testimony of witnesses; evidence
K.S.A. 60-247	number of peremptory strikes allowed in a civil case
K.S.A. 60-248	Jury Trial Procedure
K.S.A. 60-418	Oath
K.S.A. 61-3302	Jury Trial Procedure

Outline of Applicable Legal Authority

Case Law	
Cite	Description
<i>Adams v. Marshall</i> , 212 Kan. 595, 601, 512 P.2d 365, 371 (1973)	“Passing to the question of public trial, we believe it may generally be said that proceedings of a judicial nature held behind closed doors and shielded from public scrutiny have long been repugnant to our system of justice. The concept that trials and judicatory hearings be open to the public gaze is inherent in our idea of due process.”
<i>Bourne v. Atchison, T. & S.F. Ry. Co.</i> , 209 Kan. 511 (1972)	Only a stipulation of the parties can provide for a jury with less than twelve jurors in a civil trial
<i>Chapman v. California</i> , 386 U.S. 18, 43, 87 S. Ct. 824 (1967)	An accused has a 6 th Amendment right to counsel, a right that is so basic to a fair trial that any impediment could never be deemed harmless.
<i>Commonwealth v. Lynch</i> , 789 N.E.2d 1052 (Mass 2003)	Witness wearing dark or tinted glasses does not create substantial likelihood of a miscarriage of justice.
<i>Crawford v. Washington</i> , 541 U.S. 36 (2004)	The Sixth Amendment of the U.S. Constitution assures the right of an accused “to be confronted with the witnesses against him.” U.S. Const. amend. VI The confrontation right applies to two distinct types of statements. The first type of statements are those made out of court and are deemed testimonial in nature.
<i>Duncan v. Louisiana</i> , 391 U.S. 145, 88 S. Ct 1444 (1968)	A defendant's right to a jury of his peers is "fundamental to the American scheme of justice."
<i>Duren v. Missouri</i> , 439 U.S. 357 (1979)	Held women were a distinct or cognizable group whose exclusion from jury service created a fair cross-section violation; "In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."
<i>Gard v. Sherwood Construction Co.</i> , 194 Kan. 541, 549, 400 P.2d 995 (1965)	The right to a trial by jury is "a basic and fundamental feature of American jurisprudence."
<i>Glynos v. Jagoda</i> , 249 Kan. 473, 819 P.2d 1202 (1991)	Only a stipulation of the parties can provide for a jury with less than twelve jurors in a civil trial
<i>Hage v. U.S.</i> , 35 Fed. Cl. 737, 742 (1996)	Conferences concerning discovery and scheduling matters, typically limited in substance, are not necessarily required to be open to the public
<i>Hilburn v. Enerpipe Ltd.</i> , 309 Kan. 1127, 442 P.3d 509 (2019)	Section 5 of the Kansas Constitution Bill of Rights states that “[t]he right of trial by jury shall be inviolate.” “It is a substantial and valuable right and should never be lightly denied. The law favors trial by jury, and the right should be carefully guarded against infringements.” Miller, 295 Kan. at 647, 289 P.3d 1098 (quoting Gard, 194 Kan. at 549, 400 P.2d 995); see also Miller, 295 Kan. at 696, 289 P.3d 1098

Outline of Applicable Legal Authority

Case Law	
<i>Hindman v. Shepard</i> , 205 Kan. 207, 468 P.2d 103 (1970)	"The trial of all jury issues demanded should be by jury unless the court upon motion, or of its own initiative, finds that a right of trial by jury of the controlling issues does not exist under the constitution and statutes."
<i>Holt v. Frito-Lay, Inc.</i> , 217 Kan. 56, 60, 535 P.2d 450 (1975)	Only a stipulation of the parties can provide for a jury with less than twelve jurors in a civil trial
<i>Illinois v. Allen</i> , 397 U.S. 337, 90 S. Ct. 1057, 25 L.Ed.2d 353 (1970)	The right to translation services is included in a defendant's right to be informed about the proceedings so the defendant can assist in the defense. However, trial courts are permitted to proceed without the defendant's physical presence if said party is being disruptive.
<i>Karnes Enterprises, Inc. v. Quan</i> , 221 Kan. 596, 561 P.2d 825 (1977)	Outlines guidelines used by courts to determine whether a civil action requires a jury trial.
<i>Maryland v. Craig</i> , 497 U.S. 836 (1990)	"There are four elements of confrontation which serve the purposes of the Confrontation Clause by subjecting the testimony against the accused to rigorous adversarial testing: (1) the physical presence of the witness; (2) a requirement that the witness's be under oath , which both impresses upon a witness the seriousness of the proceeding and guards against false testimony by the threat of a perjury charge; (3) cross-examination of the witness by defense counsel; and (4) observation of witness demeanor by the jury which aids in the assessment of witness credibility."
<i>Matter of T.H.</i> , 23 Kan. App. 2d 471, 932 P.2d 1023 (1997)	All three types of grand jury proceedings in Kansas established under KSA 22-3001 et seq, are considered secret
<i>Miller v. Johnson</i> , 295 Kan. 636 (2012)	The right to a trial by jury "is a substantial and valuable right and should never be lightly denied. The law favors trial by jury, and the right should be carefully guarded against infringements." Miller, 295 Kan. at 647, 289 P.3d 1098 (quoting Gard, 194 Kan. at 549, 400 P.2d 995); see also Miller, 295 Kan. at 696, 289 P.3d 1098
<i>Morales v. Artuz</i> , 281 F. 3d 55 (2d Cir 2002)	Witness allowed to testify in dark sunglasses during a murder trial. After objection and a hearing outside the presence of the jury, the Court "concluded that however 'partially' the defendant's right to confrontation would be infringed was outweighed by the necessity of having her provide critical testimony in a serious case."
<i>People v. Brandon</i> , 52 Cal. Rptr. 3d 427 (Ct. App.2006)	Witness permitted to testify wearing dark sunglasses and a scarf that covered her head due to safety concerns.
<i>People v. Sammons</i> , 478 N.W.2d 901 (Mich. Ct. App. 1991)	Witness permitted to testify in a full-face mask and identifying information about the witness was prohibited. In finding the Confrontation Clause violation, the appellate court was primarily concerned with inability to observe the demeanor of the witness.
<i>People v. Smith</i> , 869 N.Y.S.D.2d 88 (App. Div. 2008)	Witness testified under a pseudonym while wearing a wig and false facial hair.
<i>Presley v. Georgia</i> , 558 U.S. 209, 213, 130 S. Ct. 721 (2010)	The right to openness in criminal trials includes jury voir dire

Outline of Applicable Legal Authority

Case Law	
<i>Press-Enterprises, Co. v. Sup. Ct. of Cal.</i> , 464 U.S. 501, 104 S. Ct. 819 (1984)	Rather than just closing some proceedings that do not meet the test, courts are required to exhaust alternatives to closure. In fact, for a court to close a proceeding, it must generally find that there is a compelling interest involved and the closure must be narrowly tailored to that interest
<i>Press-Enterprises, Co. v. Sup. Ct. of Cal.</i> , 478 U.S. 1, 106 S. Ct. 2735 (1986)	The test for determining whether a proceeding must be open to the public is: "1) The court must first consider whether there has been a historical presumption of access; 2) Next, the court evaluates whether access to the given proceeding would contribute to the self-governing function promoted by openness."; "The court must first consider whether there has been a historical presumption of access; next, the court evaluates whether access to the given proceeding would contribute to the self-governing function promoted by openness."
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555, 100 S. Ct. 2814 (1980)	"[T]he First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal"
<i>Romero v. State</i> (Romero I), 136 S.W.3d 680 (Tex. Ct. App. 2004)	Witness allowed to testify in a disguise that hid almost all of his face from view. With respect to the demeanor element, the court focused on the jury's inability to observe the witness's eyes and facial expressions. The Court of Appeals of Texas described the disguise as "leaving visible only Vasquez's ears, the tops of his cheeks, and the bridge of his nose...." While conceding that the witness's tone of voice and body language remained accessible the court described the face as the most expressive part of the body" and thus critical in assessing credibility.
<i>Rosales-Lopez v. U.S.</i> , 451 U.S. 182, 101 S. Ct. 1629, 1634 (1981)	Impaneling the jury is a critical stage of the trial process
<i>Schultz v. Kansas Gas & Elec. Co.</i> , 7 Kan. App. 2d 500, 644 P.2d 484, 486 (1982)	A civil jury comprised of less than twelve people requires unanimity.
<i>State v. Bailey</i> , 251 Kan. 156	fair cross-section challenge to the use of voter registration lists for jury panels denied because people who do not choose to register to vote are not a cognizable group
<i>State v. Baker</i> , 249 Kan. 431 (1991)	Kansas Supreme Court addressed a fair cross-section challenge where the defendant claimed individuals over the age of 60 were over represented in his jury panel and younger individuals were under represented. The Court rejected this challenge because the jurors were excused from service based on their own individual situation rather than based on blanket classifications such as race, gender, age, religion, or education level. <i>Baker</i> , 249 Kan. at 441.
<i>State v. Bates</i> , 226 Kan. 277, 597 P.2d 646 (1979)	"Even when a mistrial is declared without the consent of the defendant or upon his motion, a retrial is still constitutionally permissible if the judge exercised sound discretion in determining justice required a mistrial. The test to be applied in assessing the judge's discretion in declaring a mistrial and discharging the jury from giving a verdict is whether there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."

Outline of Applicable Legal Authority

Case Law	
<i>State v. Bernhardt</i> , 304 Kan. 460 (2016)	“The use of PIK instructions is not mandatory but is strongly recommended. The pattern instructions have been developed by a knowledgeable committee to bring accuracy, clarity, and uniformity to jury instructions. They should be the starting point in the preparation of any set of jury instructions. If the particular facts in a given case require modification of the applicable pattern instruction or the addition of some instruction not included in PIK, the district court should not hesitate to make such modification or addition. However, absent such need, PIK instructions and recommendations should be followed.”
<i>State v. Calderon</i> , 270 Kan. 241, 245, 13 P.3d 871, 875 (2000)	“Present” has been interpreted to mean physically present. In fact, the Kansas Supreme Court has interpreted it to mean more than just physical presence—instead, it requires that “a defendant will be informed about the proceedings so he or she can assist in the defense.”; (“The due process right exists to the extent that a fair and just hearing would be thwarted by the defendant's absence, and to that extent only.”
<i>State v. Cox</i> , 297 Kan. 648, 655, 304 P.3d 327 (2013)	the 6 th Amendment guarantees the right to a speedy and public trial by an impartial jury.
<i>State v. Frye</i> , 294 Kan. 364, 372, 277 P.3d 1091, 1097 (2012)	The defendant and prosecuting attorney, with the consent of the court, may submit the trial of any felony to the court. All other trials of felony cases shall be by jury.; (“[N]ot only was Frye entitled to a jury trial under the federal and state Constitutions, but, pursuant to Kansas statutory law, a bench trial required the explicit approval of all concerned: the defendant, the prosecutor, and the court.”
<i>State v. Galaviz</i> , 296 Kan. 168, 174-75, 291 P.3d 62 (2012)	A defendant’s right to counsel mandates that counsel’s representation be effective.
<i>State v. Gonzalez</i> , (Kan. Ct. App. 2016), <i>aff’d</i> 307 Kan. 575, 412 P.3d 968 (2018)	the right to a public trial has not explicitly been extended to side bars or in-chambers conferences.
<i>State v. Irving</i> , 216 Kan. 588, 589, 533 P.2d 1225, 1227 (1975)	To waive the right to trial by jury, the defendant must personally waive the right, either in writing or in open court, after being advised by the court of his or her right to trial by jury.
<i>State v. Kahler</i> , 307 Kan. 374, 386, 410 P.3d 105 (2018)	“Impaneling the jury” includes jury selection and voir dire
<i>State v. Killings</i> , 301 Kan. 214, 241, 340 P.3d 1186 (2015)	The right to be present espoused in K.S.A. 22-3405(a) is “analytically and functionally identical to the requirements under the Confrontation Clause and the Due Process Clause of the federal Constitution that a criminal defendant be present at any critical stage of the proceedings.”
<i>State v. Lamb</i> , 14 Kan. App. 2d, 664, 798 P.2d 506 (1990).	An accused has a right to face their accusers face-to-face, including the “critical right” to conduct a cross-examination.
<i>State v. Lewis</i> , 38 Kan.App.2d 91	A census tract was not a sufficiently cognizable group because, even though a predominant percentage of members of the tract were members of a minority group and of a low-income class, membership in the tract did not conclusively establish a person’s race or economic status

Outline of Applicable Legal Authority

Case Law	
<i>State v. Lopez</i> , 271 Kan. 119, 22 P.3d 1040 (2001)	Impaneling the jury is a critical stage of the trial process
<i>State v. McDaniel</i> , 306 Kan. 595, 395 P.3d 429, 438 (2017)	Aside from the trial itself, the court makes a determination of whether the defendant needs to be present at other proceedings by considering whether or not the exclusion of the defendant would interfere with his or her opportunity to test the state’s evidence and whether it would affect his or her opportunity to defend against the charges.
<i>State v. Robinson</i> , 306 Kan. 431, 394 P.3d 868 (2017)	Discussing a defendant’s request “to impanel a new jury that would be subject to voir dire questioning regarding” a specific issue
<i>State v. Salton</i> , 238 Kan. 835, 838, 715 P.2d 412, 415 (1986)	A trial court may proceed with a trial when the defendant freely and voluntarily waives their right to be present.
<i>State v. Sharkey</i> , 299 Kan. 87, 322 P.3d 325 (2014)	A defendant’s right to counsel mandates that counsel’s representation be effective.
<i>State v. Sherman</i> , 2016, 378 P.3d 1060, 305 Kan. 88	The mistrial statute creates a two-step process for the trial court to declare a mistrial based on prejudicial conduct: (1) the trial court must determine if there was some fundamental failure of the proceeding, and (2) if so, the trial court moves to the second step and assesses whether it is possible to continue without an injustice.
<i>State v. Snodgrass</i> , 267 Kan. 185, 190, 979 P.2d 664, 668 (1999)	Grand juries are creatures of statute; a grand jury’s function is investigatory and accusatory and does not determine the guilt or innocence of an accused. “Unlike a jury trial or preliminary hearing, a district judge does not preside over the grand jury proceedings, nor does a defendant have a right to be present or call or cross-examine witnesses. The county attorney has a limited role in the grand jury proceedings and, contrary to the opinion of the district court, has no responsibility to make a record or ensure that the jurors are qualified.”
<i>State v. White</i> , 2003, 67 P.3d 138, 275 Kan. 580	Terminating a trial and declaring a mistrial are largely within the discretion of the district court.
<i>State v. Woolverton</i> , 52 Kan. App. 2d 700, 707, 371 P.3d 941, 946 (2016)	There is no constitutional right to a jury trial in a misdemeanor case. However, a person accused of a misdemeanor has a statutory right to a jury trial if they make a demand under K.S.A. 22-3404
<i>Taylor v. Louisiana</i> , 419 U.S. 522	The fair cross section guarantee applies only to the jury pool, however, and not to the empaneled jury
<i>U.S. v. Morales</i> , 758 F.3d 1232, 1237 (10th Cir. 2014)	Discussing a court’s refusal to impanel a new jury but permitting the defendant to address concerns during voir dire
<i>Waggener v. Seever Sys., Inc.</i> , 233 Kan. 517, 522-23, 664 P.2d 813 (1983)	There is no due process right to a jury trial in a state court civil action. This is true because the due process clause of the Fourteenth Amendment to the Constitution of the United States does not apply to a jury trial in a civil proceeding in a state court. A trial by jury in suits at common law in state courts is not a privilege or immunity of national citizenship which the states are forbidden by the Fourteenth Amendment to abridge.”
<i>Waller v. Georgia</i> , 413 U.S. 467, 43, 104 S. Ct. 2210 (1984)	The right to openness in criminal trials includes suppression hearings

COVID-19 Jury Trial Checklist

- Develop plan for communication with public using social media, court website, or local news outlet (consider Task Force video)
- Use pretrial conferences, settlement conferences, and mediation
- Consider virtual proceedings for part or all of trial or grand jury
- Modify language in juror summons to include COVID concerns (consider Task Force questionnaire)
- Send Task Force COVID letter and insert with juror summons
- Increase number of juror summons
- Develop plan for deferral or excusal of certain jurors
- Survey available spaces for jury selection and / or trial
- Determine the process for screening jurors
- Develop staging process for jurors to stagger arrival times and minimize interaction
- Ensure adequate signage about health and safety protocols is posted
- Create and implement protocols for heightened cleaning and sanitizing
- Create and implement mask protocols (comply with KSC administrative orders)
- Create and implement building / facility protocols for adequate physical distancing (reconfigure space, limits on number of people in elevators, Plexiglass barriers)
- Develop protocols for trial participants to ensure adequate physical distancing (sidebars and attorney / client communication)
- Develop a plan for storage of juror personal items and pens/paper used for notes
- Develop a plan for juror breaks (identify specific restrooms and eating areas for use)
- Develop a plan for handling exhibits including photocopies and technology needed
- Develop a plan for interpreters, including adequate physical distancing

- Ensure public access through seating, live stream, or closed-circuit television
- Develop a plan for managing juror health concerns and safety non-compliance issues that arise during trial
- Address COVID and other procedural issues during jury orientation
- Examine small panels of 12 or less with adequate physical distancing
- Provide microphone and PA system for all participants
- Admonish jury during trial regarding masks and open court proceedings
- Use courtroom or other larger space for jury deliberations
- Collect and share data with OJA on any virtual proceedings

LETTER TO POTENTIAL JURORS

Dear Prospective Juror,

We find ourselves living in extraordinary times due to the COVID-19 virus. Each of us has been affected in some way by this pandemic. There are many efforts underway within our court system, both locally and statewide. We have purposely implemented these efforts in an attempt to slow the spread of the COVID-19 virus. When you report for jury duty, you will notice significant changes in the daily operation of court functions. As demonstrated in this short video on the Kansas Judicial Branch website [Ad Hoc Jury Task Force page](#), your health and safety are our priority.

What we're doing to protect you:

- **Cleaning and sanitizing**
- **Physical distancing**
- **Symptom screening**
- **Requiring masks and providing hand sanitizer**

What we need you to do:

- **Wash your hands**
- **Wear a mask**
- **Tell us if you are sick**
- **Tell us if you are at high risk**

Certain health conditions, as well as contact with or travel to certain geographical areas, may result in the need to excuse or defer your jury services. Questions about the process and requests for excusals and/or deferrals should be directed to _____.

Given the constant changes in health guidelines, there is a possibility your date to report for jury duty may change. **The evening before the jury trial, please call the jury trial recording phone line at (____)_____ after 5:00 p.m.** The recorded message will inform you whether the trial is still proceeding, and indicate whether you need to appear. If there is no answer or message, you should appear for jury duty as ordered.

We appreciate your participation in this important process and commend you for upholding your civic duty of jury service in these challenging times.

Thank you and stay safe,

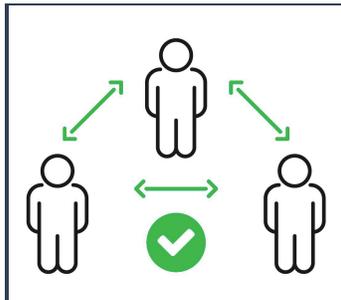
Jury Clerk



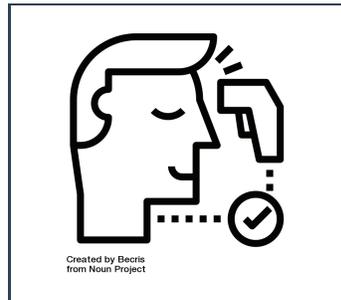
What we're doing to protect you:



**Cleaning and
sanitizing**



**Physical
distancing**



**Symptom
screening**



**Masks and
hand sanitizer**

What we need you to do:



**Wash your
hands**



**Wear a
mask**



**Tell us if
you are sick**



**Tell us if you
are high risk**

How to reach us:

Together, we're protecting justice!

_____ County District Court

Confidential Juror Questionnaire

NOT A PUBLIC RECORD

Name	Gender M F
City of Residence	Age
E-mail	
The Court may send you text notifications related to jury service please provide a working mobile number to receive text alerts	Phone: _____

Age of child(ren), if any:

Total years of residence in Kansas _____ In _____ County _____

List of prior residences, if any: _____

Highest Level of education completed: _____

List any vocation or professional training: _____

Retired? If yes, please list last employment: _____

Your occupation and employer: _____

For business owners, please describe its nature and employee count: _____

Marital status: Single Married Divorced/Separated Widowed

If not single, enter spouse/ex-spouse information: Name _____

Retired? If yes, please list last employment: _____

Their occupation and employer: _____

If they are a business owner, please describe its nature and employee count:

Yes No Have you ever been convicted of or plead guilty/no-contest to a felony?

If yes, what year (if multiple, enter date of most recent) _____

Yes No Are there any pending charged filed against you?

If yes, where and what: _____

Yes No Have you ever served as a juror?

Yes No Have you or any member of your immediate family been a PARTY to any CIVL SUIT? If yes, when, in what Court and the general nature of the case: _____

Yes No Has a CLAIM for damages for PERSONAL INURY ever been made against you? If yes, state whether the claim was made against you or by you, when and for what reason: _____

Yes No Are you related to or a close friend of any LAW ENFORCEMENT OFFICER?

Yes No Do you require any accommodation(s) to serve as a juror? If yes, please provide details as reasonable accommodation will be made if possible: _____

Yes No Are you requesting to be excused from jury service? If yes, explain any serious and compelling reason as to why: _____

Yes No Has someone else assisted you in filling out this questionnaire?, If yes, enter their name and the reason assistance was needed: _____

I SWEAR OR AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE ABOVE STATEMENTS, REPRESENTATIONS, AND ANSWERS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

Signature of Juror

Juror Name: _____

ADDITIONAL JUROR QUESTIONNAIRE REGARDING COVID-19

The following questions will assist the court to determine your eligibility as a prospective juror within the next four to six weeks. Kansas Supreme Court Rule 167 provides that juror questionnaires are not public records and are not subject to disclosure under the Kansas Open Records Act.

Please answer the following questions and return to the court within one week. You may remit your answers via encrypted e-mail at (example@yourcourt.com) or via postal mail.

Please contact the jury coordinator immediately where any answers to the following questions change at [jury email] or [jury phone]

1. Have you been exposed to COVID-19?

YES NO

If yes, approximate date of exposure:

2. Have you tested positive for COVID-19?

YES NO

If yes, approximate date of exposure:

3. Are you currently experiencing any symptoms of COVID-19 (including fever, cough, sore throat, respiratory illness, or difficulty breathing) and been told to quarantine?

YES NO

If yes, what date were you instructed to quarantine?

4. Are you an employee who has been laid off due to COVID-19 and have recently returned to work?

YES NO

If yes, where are you employed, how long were you laid off, and when did you return to work?

5. Are you over age 60, or a person of any age with an underlying medical condition that puts you at a higher risk of developing serious health complications from COVID-19?

YES NO

If yes, please explain:

Juror Name: _____

6. Do you live with or provide direct care for a vulnerable person?

YES NO

If yes, please explain:

7. Do you have children at home who require your direct supervision due to school and/or daycare closings? Note: Only answer YES if there is NO ONE else in the household who can provide care during your jury service.

YES NO

If yes, please explain:

8. Have you done any of the following in the last 14-days:

a. Traveled internationally: YES NO

Location(s): _____

b. Traveled outside of Kansas: YES NO

Location(s): _____

c. Traveled on a river boat or cruise ship: YES NO

Location(s): _____

If you answer “yes” to any of the above questions, your jury service may be deferred. You will receive written confirmation of the court’s determination by electronic or postal mail. Jurors who are deferred will receive a new summons later this year or in early 2021.

I SWEAR OR AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE ABOVE STATEMENTS, REPRESENTATIONS, AND ANSWERS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

SIGNATURE OF JUROR

Juror Name: _____

TECHNOLOGY
Pre-Screening Questionnaire

You may be asked to serve as a juror-from-home using a video conference platform. Please complete the questions below to indicate your eligibility.

Do you have EACH of the following:

1. A private and quiet space? Yes No
2. Access to a reliable internet connection? Yes No
3. Access to a tablet, smart phone, or desktop or laptop computer with a camera? Yes No
4. The physical ability to watch and listen to court proceedings using a computer or phone? Yes No
5. The general ability to watch and listen to court proceedings without interruption or distraction? Yes No
6. I cannot serve as a juror-from-home because:

If you answered “no” to any of the above, you are not excused from jury service. If the Court determines that you are not able to complete your service at the courthouse, you will be notified.

I SWEAR OR AFFIRM UNDER THE PENALTIES OF PERJURY THAT THE ABOVE STATEMENTS, REPRESENTATIONS, AND ANSWERS ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

SIGNATURE OF JUROR

LETTER REQUESTING ALTERNATE LOCATION FOR TRIAL

(Court Letterhead)

Date

Departmental Justice
301 S.W. 10th Ave.
Topeka, KS 66612-1507

RE: Case Name
_____ County District Court Case No. _____

Dear Justice _____:

I am writing to you in your capacity as the Departmental Justice for our Judicial District. The _____ County case identified above involves the charges/claims of: (insert brief explanation of charges/claims). The case scheduled for a _____ day jury trial beginning on the _____ day of _____, 20_____.

I have consulted with the attorneys and the Clerk of the County District Court. We all conclude that trying a case of this nature in the current courtroom is not feasible and would bring into serious doubt the ability of the court to assure the parties a fair trial. This is not based upon the typical “change of venue” grounds.

Rather, the impediment to a fair trial which I address in this letter arises from the inadequate court facilities about the safety concerns of the attorneys, witnesses, jurors and court staff during this time of required social distancing for the course of this trial. There is little room in the “well” of the courtroom for the attorneys, the defendant and their support staff. They simply would not have enough room in trial for their books, papers, computers and other equipment and materials.

As stated, no change of venue is requested. The parties wish to try the case to jurors who are citizens of _____ County. Therefore, the only provision in law which the attorneys and I determined to be applicable in this case is K.S.A. 20-347, which states in its entirety:

“The chief judge in each judicial district, with the approval of the supreme court, may provide for holding court in locations within such judicial district, other than in the courthouses of the several counties within such district, whenever suitable facilities are available for such purpose.”

I propose to hold the trial in this case at (name of outside venue). The parties and their respective attorneys are requesting and consenting to the relocation of the trial.

The cited statute requires approval of the Supreme Court. I request that the Supreme Court consider the proposed relocation of the trial from the _____ County Courthouse to the (name of outside venue), and if the Court concludes it to be appropriate and proper, consent to the relocation.

If you need any additional information from me, please let me know as your convenience, and I will immediately furnish whatever I can. Thank you very much for your time and attention to this matter.

Sincerely,

Chief Judge
_____ Judicial District

Copies:

EXAMPLES OF BARRIERS, FACE SHIELDS, AND CLEAR MASKS

Below are some examples of barriers and clear face shields which could be utilized in courtrooms to offset the concerns of wearing masks during a jury trial.



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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 devices¹.
- 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.ⁱⁱ
- 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.ⁱⁱⁱ A prior committee^{iv} 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.^v 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^{vi}
- 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.

ⁱ 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.

ⁱⁱ 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>.

ⁱⁱⁱ See K.S.A. 20-3105; K.S.A. 54-101; K.S.A. 60-418.

^{iv} Kansas Judicial Branch Videoconferencing Committee's 2014 report entitled "Recommendation for Videoconferencing in Kansas Courts."

^v Consider Kansas Supreme Court Rule 171, Bailiff's Oath or Affirmation.

^{vi} 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.