

## **RECOMMENDATIONS FOR VIDEOCONFERENCING IN KANSAS COURTS**

### I. INTRODUCTION

As a result of:

- The Kansas Supreme Court Blue Ribbon Commission (BRC) recommendations for the development of videoconferencing standards, increased use of videoconferencing in Kansas courts, development of statewide standards for videoconferencing equipment and technology to be used in the courts, and the exploration of statewide purchasing agreements for such equipment and technology;
- the perceived efficiencies and cost savings from the proper use of videoconferencing in the courts;
- the positive experience of sister states in the use of videoconferencing in courts; and
- legislative directives for the Office of Judicial Administration to develop requirements and guidelines for the use of videoconferencing in certain judicial proceedings;

the Kansas Supreme Court Research Clinic at the University of Kansas School of Law produced papers analyzing the issues relating to the use of videoconferencing in Kansas courts. The authors concluded that, while videoconferencing has the potential to assist in maximizing limited financial and personnel resources, there are a number of issues, especially with regard to constitutional protections for criminal defendants, which need careful study and evaluation.

To assist in that evaluation and the development of standards for use of videoconferencing in all Kansas courts and to provide recommendations for the type of equipment and technology to be used, the Kansas Supreme Court appointed the Kansas Judicial Branch Videoconferencing Committee.

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### III. WHAT IS VIDEOCONFERENCING?

Videoconferencing is an interactive technology that sends video, voice, and data signals over a transmission circuit so that two or more individuals or groups can communicate with each other simultaneously using video monitors.

### IV. BENEFITS OF VIDEOCONFERENCING

Videoconferencing has the potential to make better use of taxpayer resources by:

- Reducing travel requirements for all courtroom participants;
- saving prisoner and patient transportation costs;
- improving courthouse security;
- reducing the cost of health care to prisoners and patients through telemedicine;
- reducing logistical barriers to conducting meetings;
- providing access to additional training and educational opportunities; and
- increasing the efficiency of legal proceedings.

V. APPROPRIATENESS OF VIDEOCONFERENCING IN COURTS

Recognizing that there are benefits to conducting judicial proceedings with all participants present in a formal courtroom and that there are certain proceedings which can be conducted only in such a manner and setting, the committee recommends that videoconferencing be available and utilized in select court proceedings whenever there is good cause for and a recognizable benefit to videoconferencing; whenever adequate equipment, procedural safeguards, and technology exist for effective use of videoconferencing at the hearing; or whenever all participants involved consent to so proceeding.

VI. EXISTING RULES AND STATUTES REGARDING USE OF VIDEOCONFERENCING

A. SCR 145. USE OF TELEPHONE OR OTHER ELECTRONIC CONFERENCE

The court may use a telephone or other electronic conference to conduct any hearing or conference other than a trial on the merits. For a trial on the merits, K.S.A. 60-243(a) applies. The court may require the parties to reimburse the court for any costs incurred.

B. K.S.A. 2013 Supp. 60-243. TESTIMONY OF WITNESSES; EVIDENCE

(a) *Form and admissibility.* At trial, the witness' testimony must be taken in open court, unless otherwise provided by law. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

C. K.S.A. 2013 Supp. 22-2802. BOND PROCEEDINGS

(14) Proceedings before a magistrate as provided in this section to determine the release conditions of a person charged with a crime including release upon execution of an appearance bond may be conducted by two-way electronic audio-video communication between the defendant and the judge in lieu of personal presence of the defendant or defendant's counsel in the courtroom in the discretion of the court. The defendant may be accompanied by the defendant's counsel. The defendant shall be informed of the defendant's right to be personally present in the courtroom during such proceeding if the defendant so requests. Exercising the right to be present shall in no way prejudice the defendant.

D. K.S.A. 22-3205. ARRAIGNMENT

(a) Arraignment may be conducted by two-way electronic audio-video communication between the defendant and the judge in lieu of personal presence of the defendant or the defendant's counsel in the courtroom in the discretion of

the court. The defendant may be accompanied by the defendant's counsel during such arraignment. The defendant shall be informed of the defendant's right to be personally present in the courtroom during arraignment. Exercising the right to be present shall in no way prejudice the defendant.

E. K.S.A. 22-3208. PLEADINGS AND MOTIONS

(7) Any hearing conducted by the court to determine the merits of any motion may be conducted by two-way electronic audio-video communication between the defendant and defendant's counsel in lieu of personal presence of the defendant and defendant's counsel in the courtroom in the discretion of the court. The defendant shall be informed of the defendant's right to be personally present in the courtroom during such hearing if the defendant so requests. Exercising the right to be present shall in no way prejudice the defendant.

F. K.S.A. 22-3434. CHILD VICTIM TESTIMONY

(a) On motion of the attorney for any party to a criminal proceeding in which a child less than 13 years of age is alleged to be a victim of the crime, subject to the conditions of subsection (b), the court may order that the testimony of the child be taken:

(1) In a room other than the courtroom and be televised by closed-circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding; or

(2) outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding if: (A) The recording is both visual and aural and is recorded on film or videotape or by other electronic means; (B) the recording equipment is capable of making an accurate recording, the operator of the equipment is competent and the recording is accurate and has not been altered; (C) every voice on the recording is identified; and (D) each party to the proceeding is afforded an opportunity to view the recording before it is shown in the courtroom, and a copy of a written transcript is provided to the parties.

(b) The state must establish by clear and convincing evidence that to require the child who is the alleged victim to testify in open court will so traumatize the child as to prevent the child from reasonably communicating to the jury or render the child unavailable to testify. The court shall make such an individualized finding before the state is permitted to proceed under this section.

(c) At the taking of testimony under this section:

(1) Only the attorneys for the defendant, the state and the child, any person whose presence would contribute to the welfare and well-being of the child and persons necessary to operate the recording or closed-circuit equipment may be present in the room with the child during the child's testimony;

(2) only the attorneys may question the child;

(3) the persons operating the recording or closed-circuit equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to

see and hear the child during the child's testimony but does not permit the child to see or hear them; and

(4) the court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

(d) If the testimony of a child is taken as provided by this section, the child shall not be compelled to testify in court during the proceeding.

(e)(1) Any objection by any party to the proceeding to a recording under subsection (a)(2) is inadmissible must be made by written motion filed with the court at least seven days before the commencement of the trial. An objection under this subsection shall specify the portion of the recording which is objectionable and the reasons for the objection. Failure to file an objection within the time provided by this subsection shall constitute waiver of the right to object to the admissibility of the recording unless the court, in its discretion, determines otherwise. (2) The provisions of this subsection (d) shall not apply to any objection to admissibility for the reason that the recording has been materially altered.

G. K.S.A. 2013 Supp. 22-3437. FORENSIC EXAMINATIONS

(b)(1) In any hearing or trial where there is a report concerning forensic examinations from a person as provided in paragraph (1) of subsection (a), district and municipal courts may, upon request of either party, use two-way interactive video technology, including internet-based videoconferencing, to take testimony from that person if the testimony is in relation to the report.

(2) The use of any two-way interactive video technology must be in accordance with any requirements and guidelines established by the office of judicial administration, and all proceedings at which such technology is used in a district court must be recorded verbatim by the court.

H. K.S.A.22-3405. PRESENCE OF THE DEFENDANT

(1) The defendant in a felony case shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by law. In prosecutions for crimes not punishable by death, the defendant's voluntary absence after the trial has been commenced in such person's presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes.

I. K.S.A. 2013 Supp. 22-3302. COMPETENCY HEARINGS

(7) The defendant shall be present personally at all proceedings under this section.

J. K.S.A. 2013 Supp. 23-37,111. TAKING TESTIMONY IN ANOTHER STATE. (UCCJEA 111)

(b) A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

K. K.S.A. 2013 Supp. 38-2343. JUVENILE OFFENDER FIRST APPEARANCE

e) First appearance may be conducted by two-way electronic audio-video communication between the juvenile and the judge in lieu of personal presence of the juvenile or the juvenile's attorney in the courtroom from any location within Kansas in the discretion of the court. The juvenile may be accompanied by the juvenile's attorney during such proceedings or the juvenile's attorney may be personally present in court as long as a means of confidential communication between the juvenile and the juvenile's attorney is available.

L. K.S.A. 2013 Supp. 38-2344. JUVENILE OFFENDER DETENTION HEARING

(h) *Audio-video communications.* Detention hearings may be conducted by two-way electronic audio-video communication between the juvenile and the judge in lieu of personal presence of the juvenile or the juvenile's attorney in the courtroom from any location within Kansas in the discretion of the court. The juvenile may be accompanied by the juvenile's attorney during such proceedings or the juvenile's attorney may be personally present in court as long as a means of confidential communication between the juvenile and the juvenile's attorney is available.

M. K.S.A. 2013 Supp. 38-2249. RULES OF EVIDENCE

(c) In any proceeding in which a child less than 13 years of age is alleged to have been physically, mentally or emotionally abused or neglected or sexually abused, a recording of an oral statement of the child, or of any witness less than 13 years of age, made before the proceeding began, is admissible in evidence if:

- (1) The court determines that the time, content and circumstances of the statement provide sufficient indicia of reliability;
- (2) no attorney for any party or interested party is present when the statement is made;
- (3) the recording is both visual and aural and is recorded on film, videotape or by other electronic means;

- (4) the recording equipment is capable of making an accurate recording, the operator of the equipment is competent and the recording is accurate and has not been altered;
  - (5) the statement is not made in response to questioning calculated to lead the child to make a particular statement or is clearly shown to be the child's statement and not made solely as a result of a leading or suggestive question;
  - (6) every voice on the recording is identified;
  - (7) the person conducting the interview of the child in the recording is present at the proceeding and is available to testify or be cross-examined by any party or interested party; and
  - (8) each party or interested party to the proceeding is afforded an opportunity to view the recording before it is offered into evidence.
- (d) On motion of any party to a proceeding pursuant to the code in which a child less than 13 years of age is alleged to have been physically, mentally or emotionally abused or neglected or sexually abused, the court may order that the testimony of the child, or of any witness less than 13 years of age, be taken:
- (1) In a room other than the courtroom and be televised by closed-circuit equipment in the courtroom to be viewed by the court and the parties and interested parties to the proceeding; or
  - (2) outside the courtroom and be recorded for showing in the courtroom before the court and the parties and interested parties to the proceeding if:
    - (A) The recording is both visual and aural and is recorded on film, videotape or by other electronic means;
    - (B) the recording equipment is capable of making an accurate recording, the operator of the equipment is competent and the recording is accurate and has not been altered;
    - (C) every voice on the recording is identified; and
    - (D) each party and interested party to the proceeding is afforded an opportunity to view the recording before it is shown in the courtroom.
- (e) At the taking of testimony under subsection (d):
- (1) Only an attorney for each party, interested party, the guardian ad litem for the child or other person whose presence would contribute to the welfare and well-being of the child and persons necessary to operate the recording or closed-circuit equipment may be present in the room with the child during the child's testimony;
  - (2) only the attorneys for the parties may question the child; and
  - (3) the persons operating the recording or closed-circuit equipment shall be confined to an adjacent room or behind a screen or mirror that permits such person to see and hear the child during the child's testimony, but does not permit the child to see or hear such person.
- (f) If the testimony of a child is taken as provided by subsection (d), the child shall not be compelled to testify in court during the proceeding.
- (g) (1) any objection to a recording under subsection (d)(2) that such proceeding is inadmissible must be made by written motion filed with the court at least seven days before the commencement of the adjudicatory hearing. An objection under this subsection shall specify the portion of the recording which is objectionable



and the reasons for the objection. Failure to file an objection within the time provided by this subsection shall constitute waiver of the right to object to the admissibility of the recording unless the court, in its discretion, determines otherwise.

(2) The provisions of this subsection shall not apply to any objection to admissibility for the reason that the recording has been materially altered.

N. K.S.A. 2013 Supp. 38-2359. RECORD BY ELECTRONIC MEANS OF TESTIMONY OF CHILD VICTIM ADMISSIBLE IN CERTAIN CASES, LIMITATIONS; OBJECTIONS; RESTRICTIONS

(a) On motion of the attorney for any party to a proceeding pursuant to the Kansas juvenile offenders code in which a child less than 13 years of age is alleged to be a victim of the offense, the court may order that the testimony of the child be taken:

(1) In a room other than the courtroom and be televised by closed-circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding; or

(2) outside the courtroom and be recorded for showing in the courtroom before the court and the finder of fact in the proceeding if: (A) The recording is both visual and aural and is recorded on film or videotape or by other electronic means; (B) the recording equipment is capable of making an accurate recording, the operator of the equipment is competent and the recording is accurate and has not been altered; (C) every voice on the recording is identified; and (D) each party to the proceeding is afforded an opportunity to view the recording before it is shown in the courtroom, and a copy of a written transcript is provided to the parties. The state must establish by clear and convincing evidence that to require the child who is the alleged victim to testify in open court will so traumatize the child as to prevent the child from reasonably communicating to the jury or render the child unavailable to testify. The court shall make such an individualized finding before the state is permitted to proceed under this section.

(b) At the taking of testimony under this section:

(1) Only the attorneys for the juvenile, the state and the child; any person whose presence would contribute to the welfare and well-being of the child; and persons necessary to operate the recording or closed-circuit equipment may be present in the room with the child during the child's testimony;

(2) only the attorneys may question the child;

(3) the persons operating the recording or closed-circuit equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during the child's testimony but does not permit the child to see or hear them; and

(4) the court shall permit the juvenile to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the juvenile.

(c) If the testimony of a child is taken as provided by this section, the child shall not be compelled to testify in court during the proceeding.

(d) (1) Any objection by any party to the proceeding that the recording under subsection (a)(2) is inadmissible must be made by written motion filed with the court at least seven days before the commencement of the proceeding. An objection under this subsection shall specify the portion of the recording which is objectionable and the reasons for the objection. Failure to file an objection within the time provided by this subsection shall constitute waiver of the right to object to the admissibility of the recording unless the court, in its discretion, determines otherwise.

(2) The provisions of this subsection shall not apply to any objection to admissibility for the reason that the recording has been materially altered.

## VII. TYPES OF HEARINGS WHEREIN VIDEOCONFERENCING SHOULD BE PERMITTED

Whenever there is a recognizable benefit to videoconferencing and whenever adequate equipment and technology exist, the committee recommends that videoconferencing be allowed and utilized in the following hearings or situations:

### A. CIVIL PROCEEDINGS

1. Videoconferencing may be used in any hearing, conference, or trial, including:
  - a. Case management conferences;
  - b. pretrial conferences;
  - c. hearings on motions;
  - d. class action maintenance and certification hearings;
  - e. garnishment proceedings;
  - f. habeas corpus proceedings pursuant to K.S.A. 2013 Supp. 60-1501 and 1507;
  - g. hearings and trials pursuant to the Act for Commitment of Sexually Violent Predators pursuant to K.S.A. 59-29a01 *et seq.*, provided, however, that the person shall be personally present at all evidentiary hearings held pursuant to the Act.
  - h. Any other proceedings pursuant to Chapter 59;
  - i. temporary custody proceedings under the Care and Treatment Acts; and
  - j. cross-jurisdictional hearings. Judges often travel to other counties to conduct court proceedings. Videoconferencing between jurisdictions would allow judges to conduct some proceedings from their home counties, reducing travel costs and time spent outside their jurisdictions.

## B. CRIMINAL PROCEEDINGS

1. Use of videoconferencing involving the defendant at a remote location or testimony of a witness from a remote location should be allowed in the following hearings in felony criminal cases unless good cause is shown why videoconferencing should not be utilized:
  - a. Appearances pursuant to *Rothgerry v. Gillespie County, Texas*, 554 U.S. 191, 128 S.Ct. 2578, 171 L.Ed. 2d 1366 (2008) to determine if the right to counsel has attached and if counsel should be appointed prior to the filing of charges or pursuant to *County of Riverside v McLaughlin*, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed. 2d 49 (1991) for timely probable cause determinations after a warrantless arrest;
  - b. initial appearances before a magistrate pursuant to K.S.A. 2013 Supp. 22-2901;
  - c. bond hearings as provided by K.S.A. 2013 Supp. 22-2802 (with revisions);
  - d. arraignment wherein the defendant stands mute or enters not guilty plea(s) as provided by K.S.A. 22-3205 (with revisions);
  - e. non-evidentiary motion hearings as provided by K.S.A. 2013 Supp. 22-3208 (with revisions);
  - f. forensic examination testimony pursuant to K.S.A. 2013 Supp. 22-3437;
  - g. expungement hearings pursuant to K.S.A. 2013 Supp. 21-6614;
  - h. proceedings pursuant to allegations of violation of conditions of house arrest;
  - i. initial appearances after arrest for violating conditions of probation or community corrections assignments;
  - j. scheduling conferences and hearings; and
  - k. child victim testimony as provided in K.S.A. 22-3434.
2. Videoconferencing should not be utilized in any competency hearings, evidentiary pretrial motion hearings, preliminary examinations, or arraignments wherein the defendant enters a plea of no contest or guilty, or in any trial wherein a jail or prison sanction is a sentencing option unless good cause is shown why videoconferencing should be allowed.
3. Use of videoconferencing should be allowed at any hearing or trial, except a competency hearing conducted pursuant to K.S.A. 2013 Supp. 22-3302, held in a misdemeanor criminal or traffic infraction case wherein a jail sanction is not a sentencing option.

## B. JUVENILE PROCEEDINGS

1. Use of videoconferencing should be allowed at the following hearings conducted under the Juvenile Offender Code:
  - a. Juvenile offender first appearances pursuant to K.S.A. 2013 Supp. 8-2343, and
  - b. juvenile offender detention hearings pursuant to K.S.A. 2013 Supp. 38-2344.
2. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location in all child in need of care proceedings, including trials.

## C. APPELLATE ORAL ARGUMENT

Use of videoconferencing should be allowed at the discretion of the court.

## D. PROCEEDINGS INVOLVING AN INTERPRETER

For good cause, the court may permit an interpreter to participate by telephone or videoconferencing in any civil or criminal proceeding, other than trial in a criminal case. Though discouraged, in exceptional cases, the court may allow an interpreter to participate in a criminal trial from a remote location.

## VIII. OATHS

A witness testifying from a remote location inside the state of Kansas may be administered an oath by the judge, court reporter, court clerk, or notary public in the courtroom where the videoconferenced testimony will be received.

An unresolved issue exists as to where and by whom the oath should be administered to a witness testifying from a remote location outside the state of Kansas so as to insure Kansas jurisdiction on those rare occasions when a perjury prosecution results from the testimony. The best practice is to require the oath of such be administered in accordance with and by a person authorized to administer the oath pursuant to the law of the jurisdiction wherein the witness is located AND by the judge, court reporter, court clerk, or notary public in the courtroom where the videoconferenced testimony will be received. In every instance, it is recommended that the oath be administered from the Kansas courtroom and begin with the phrase “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....”

IX. PROCEDURES FOR THE USE OF VIDEOCONFERENCING IN CIVIL PROCEEDINGS

- A. In all civil actions, the court may conduct hearings and admit oral testimony, subject to cross-examination, by use of live videoconferencing in accordance with the following procedures.
1. **Written Notice.** Any party may, by written notice at least seven days prior to the scheduled hearing or proceeding, request the use of videoconferencing. Such notice shall include the name and IP address of the witness who will testify by videoconferencing and the date and time the witness will testify.
  2. **Emergency Circumstances.** The court may shorten the procedural time periods provided in this rule upon a showing of good cause.
  3. **Costs.** The party or parties, other than the court, requesting use of videoconferencing for any hearing or proceeding shall be responsible for any additional use or other fees over and above those normally incurred by the venue county in connecting from one court site to another site within the district or collaboration area.
  4. **Arrangements.** In all cases, it will be the responsibility of the party requesting the use of videoconferencing to establish and make arrangements to carry out the videoconferencing procedures required in order for the court to hear the case as a videoconferencing hearing or proceeding.
  5. **Exhibits.** Whenever videoconferencing is to be used to conduct a hearing or proceeding, evidentiary exhibits should be exchanged with all other parties and submitted to the court, as appropriate, prior to the commencement of the hearing or proceeding.
  6. **Rules of Civil Procedure.** All proceedings held by videoconferencing will be governed by the Kansas Rules of Civil Procedure. Courtroom decorum during videoconferencing hearings will conform to the extent possible to that required during traditional court proceedings.
  7. **Other Recordings.** No recording shall be made of any videoconferencing proceeding except the recording made as the official court record.
  8. **Administrative Procedures.** The following administrative procedures are applicable to all videoconferencing proceedings:
    - a. **Off-Camera Presence.** During a hearing involving videoconferencing, all off-camera persons at any participating

videoconferencing terminal site should be identified for the record. This shall not apply to members of the public located in general public seating areas of any courtroom.

- b. Chief Clerk or Court Administrator Duties. Unless otherwise directed by the chief judge or the trial judge conducting the hearing, the chief clerk, court administrator, or his or her designee for the judicial district shall be responsible for the following:
  - (1) Ensuring that the videoconferencing equipment is ready and functioning properly in advance of any hearing, so that there will be no interference with the punctual commencement of a hearing.
  - (2) Providing participants an opportunity to become familiar with use of the videoconferencing equipment and courtroom procedure prior to commencement of the hearing.
  - (3) Setting the videoconferencing system configuration as designated by the presiding judge. The presiding judge shall consider the objections or concerns of any party.
  - (4) Monitoring audio and video quality, making adjustments, and providing technical assistance throughout the hearing as necessary.
  - (5) Ensuring that any court documents or exhibits that the parties or judge will require prior to or during the course of the hearing are sent to the judge prior to commencement of the hearing.
  - (6) Being familiar with problem management procedures, including steps to be taken in performing initial problem determination, identity and location of individual(s) who should be contacted if initial problem resolution attempts fail, and service call placement procedures.
9. Technical Standards. The following technical standards should be followed when practical:
  - a. To optimize picture clarity, the room should have diffused lighting and window shades to block external light.

- b. To optimize viewing, monitors should be placed in a darkened area of the room and be of sufficient size and number to allow convenient viewing by all participants.
- c. Cameras and microphones should be sufficient in number to allow video and audio coverage of all participants, prevent crowding of participants, facilitate security, and protect confidential communications.
- d. Audio and visual recordings must be synchronized and undistorted.
- e. All hearing participants should speak directly into their microphones.

X. PROPOSED RULES OF CRIMINAL PROCEDURE RELATING TO VIDEOCONFERENCING

- A. GENERAL PROVISIONS. When the appearance of a defendant or counsel is required in any court, subject to the provisions of this rule, the appearance may be made by the use of an interactive audiovisual device system, including videoconferencing equipment. An interactive audiovisual device shall, at a minimum, operate so as to enable the court and all parties to view and converse with each other simultaneously. Any interactive audiovisual system must meet or exceed minimum operational guidelines adopted by the judicial administrator.
- B. REQUIREMENTS. In utilizing an interactive audiovisual device system, all of the following are required:
  - 1. An interactive audiovisual system shall, at a minimum, operate so as to enable the court and all parties to view and converse with each other simultaneously.
  - 2. A full record of the proceedings shall be made as provided in applicable statutes and rules.
  - 3. Provisions shall be made to allow for confidential communications between the defendant and defendant's counsel prior to, during, and immediately after the proceeding.
  - 4. Provisions shall be made to ensure compliance with all victims' rights laws.
  - 5. Provisions shall be made to allow the public a means to view the proceedings as provided by law.

6. Provisions shall be made for use of interpreter services when necessary. In cases requiring interpreters for non-English speaking or hearing-impaired defendants, absent compelling circumstances, the interpreter shall be present with the defendant, and provisions shall be made to enable simultaneous appearance of both the defendant and interpreter.
7. The court shall ensure that each party has adequate opportunity to speak privately with counsel, including, where appropriate, suspension of the audio transmission and recording or allowing counsel to leave the conference table to communicate with the client in private.
8. Good Cause. The court shall consider the following factors to determine whether “good cause” exists:
  - a. Whether a timely objection has been made;
  - b. whether any undue surprise or prejudice would result;
  - c. the convenience of the parties, counsel, and the court;
  - d. the cost and time savings;
  - e. the importance and complexity of the proceeding;
  - f. whether the proponent has been unable, after due diligence, to procure the physical presence of a witness;
  - g. the convenience to the parties and the proposed witness, and the cost of producing the witness in relation to the importance of the offered testimony;
  - h. whether the procedure would allow effective cross-examination, especially where documents and exhibits available to the witness may not be available to counsel;
  - i. whether the surroundings maintain the solemnity and integrity of the proceedings and thereby impress upon the witness the duty to testify truthfully;
  - j. whether the witness is presently in prison or incarcerated; and
  - k. such other factors as the court may, in each individual case, determine to be relevant.



## C. PROCEEDINGS

1. HEARINGS WITH THE PARTIES' CONSENT. Appearance by interactive audiovisual device, including videoconferencing, shall be permitted in the discretion of the court at any proceeding with the prior written stipulation of the parties at any felony trial, contested probation violation hearing, felony sentencing, or felony probation disposition hearing.
2. VIDEOCONFERENCE REQUIRED IN SOLE DISCRETION OF THE COURT. Appearance by an interactive audiovisual system may be required in the sole discretion of the court and without the consent of the parties at:
  - a. *Rothgerry, Riverside*, and initial appearances before a magistrate;
  - b. any proceeding in a traffic infraction or misdemeanor case wherein a jail sanction is not a sentencing option;
  - c. forensic examination testimony pursuant to K.S.A. 2013 Supp. 22-3437;
  - d. expungement hearings pursuant to K.S.A. 2013 Supp. 21-6614;
  - e. proceedings pursuant to allegations of violation of conditions of house arrest;
  - f. initial appearances after arrest for violating conditions of probation or community corrections assignments;
  - g. scheduling conferences and hearings; and
  - h. child victim testimony as provided in K.S.A. 22-3434.

## XI. BEST PRACTICES FOR VIDEOCONFERENCES IN CRIMINAL CASES

The following "best practices," or guidelines, are provided to optimize the videoconference experience in criminal proceedings.

### A. GENERAL PRINCIPLES

1. A videoconference proceeding is typically conducted to enhance court security and to promote cost savings. Notwithstanding, a videoconference proceeding in a criminal case should attempt to make the remote participant's appearance by video as similar to an in-person courtroom experience as possible.

2. The dignity and solemnity of a videoconference experience should equate to that of an in-court proceeding. The remote location should be viewed as an extension of the courtroom.
3. Local networks in Kansas differ in size and capacity. Courtrooms and jails in Kansas vary in their physical structure and degree of modernization. Local rules which take into consideration each system's unique characteristics should be promulgated by each jurisdiction utilizing videoconferencing in criminal cases.

## B. PLANNING

1. Judicial officers, court personnel, prosecutors, defense counsel, law enforcement officials, victims, interpreters, court reporters, and elected county officials should be involved in the planning process for any new or remodeled court facility as it relates to the installation of technology for audiovisual court proceedings.
2. Technology for all new, remodeled, or existing court facilities should enable the client and the attorney to hear and see everything in the courtroom, including that portion of the courtroom behind the bar. These fields of vision and hearing may require multiple cameras and microphones.
3. The defendant and counsel at a remote location should be able to see clearly the facial expressions of the judge and all others who are speaking. High definition monitors are preferred over conventional monitors.
4. A videoconferenced proceeding must allow for private, confidential communications between a defendant and defense counsel. A means of confidential communications between a defendant, who is in a jail, and defense counsel, who may be in the courtroom, must be provided and must be available during the video proceeding.
5. Judicial officers and attorneys who regularly appear at videoconferenced proceedings should receive training on video procedures and on how to optimize their use of video equipment. This may include increasing their awareness of what is being shown on the monitors in court and at the remote site; where to stand and how to speak to assure that everyone can be seen and heard; and how to make effective use of non-verbal communications, such as eye contact and gestures.

### C. PRE-PROCEEDING PROCEDURES

1. The judge, court administrator, chief clerk, or his or her designee should conduct a review of any new site which he or she intends to use for a videoconferenced hearing. This review should be done by physically visiting the site and by testing. The purpose of the review is to establish that the lighting, sound, and visual appearance of the remote location do not impede the court from conducting a fair court proceeding.
2. A brief test should be conducted prior to each use of the videoconference system to assure the adequacy of the connection and that there are no technical problems. If the court uses the videoconference network daily and for an extended period of time without difficulties, daily testing may become unnecessary.

### D. PROCEEDINGS

1. The judicial officer conducting a videoconferenced proceeding should retain control over all aspects of the videoconference, and may expand or limit these best practices as may be appropriate in a particular case.
2. Videoconferenced proceedings should not emanate from inmate housing units, such as cells or pods. Rather, the remote proceeding should take place in a room or area dedicated to video proceedings; if no such area is available, then from a room or area which promotes the decorum of the proceeding, and which is free of extraneous activity and sounds. The room or area of the remote proceeding should be furnished with chairs and a table or podium, if appropriate.
3. An interactive audio-visual system used for criminal hearings shall include the ability to electronically transfer documents between the defendant and the court.
4. If defense counsel does not appear in the same location as the defendant, a separate confidential communication line, such as a phone line, shall be provided to allow for private and confidential communication between the defendant and counsel.
5. Parties and counsel at remote locations should be able, upon request, to have the courtroom camera or cameras scan the courtroom so that the remote participants may observe other persons who may be present, as well as activities taking place in the courtroom during the proceedings.
6. The judicial officer should assure that monitors in the courtroom are of sufficient size and placement as to allow spectators in the courtroom

(including the family, victims, the media, and members of the public) to clearly view and hear the remote proceeding.

7. The judicial officer should assure that any person who is speaking to the court during a videoconferenced proceeding is within camera view and microphone range, so that the person can be seen and heard by other persons at the remote location, as well as by individuals in the courtroom.
8. During proceedings for which interpreters are utilized (including sign language interpreters), the judicial officer should assure and monitor that the interpreter can clearly see and hear those persons who are speaking. The interpreter should be authorized to interrupt the proceeding if language becomes inaudible.
9. In proceedings where court reporters are utilized, the judicial officer should assure that the court reporter can clearly see and hear those persons who are speaking, and that the court reporter has an accessible microphone which permits the reporter to interrupt the proceeding if language becomes inaudible.
10. Documents which are provided to a defendant who personally appears in court should be similarly available for a defendant who appears by video. Documents such as charging documents or plea agreements should be photocopied and provided to a defendant in advance of the video proceeding, or they should be transmitted to the jail by facsimile, online, or by other means during the course of the proceeding, and then furnished to the defendant.
11. The judicial officer conducting the proceeding should have discretion to discontinue any proceeding in which there are technical issues which detract from the fairness of the proceeding, or if there are matters which occur during the proceeding which would warrant conducting the proceeding with the defendant's personal appearance in the courtroom.

## **XII. PROCEDURE FOR THE USE OF VIDEOCONFERENCING IN ORAL ARGUMENTS BEFORE THE APPELLATE COURTS**

Currently, the procedure is in the discretion of the appellate court. The appellate courts should adopt procedures for the voluntary use of videoconferencing by parties at appellate oral argument. By allowing counsel to appear by video rather than travel to distant locations for oral argument, the cost of litigation will decrease. Parties should never be required to appear by video, but should be given the option in approved circumstances.

XIII. CONCLUSIONS AS TO PROPOSED LEGISLATION, SUPREME COURT RULES, AND PIK INSTRUCTIONS

A. The following statutory subsections should be revised by the Legislature as follows:

1. BOND PROCEEDINGS:

- a. K.S.A. 2013 Supp. 22-2802 (14). Proceedings before a magistrate as provided in this section to determine the release conditions of a person charged with a crime including release upon execution of an appearance bond may be conducted by two-way electronic audio-video communication between the defendant and the judge in lieu of personal presence of the defendant or defendant's counsel in the courtroom *unless good cause is shown why videoconferencing should not be utilized.* ~~in the discretion of the court.~~ The defendant may be accompanied by the defendant's counsel. ~~The defendant shall be informed of the defendant's right to be personally present in the courtroom during such proceeding if the defendant so requests. Exercising the right to be present shall in no way prejudice the defendant.~~
- b. K.S.A. 2013 Supp. 12-4213(c) – municipal courts. Any person held in custody pursuant to the provisions of this section, and who has not made bond for such person's appearance, may be held in custody until the earliest practical time for such person's appearance in municipal court upon a warrant being issued by the municipal court in accordance with K.S.A. 12-4209, and amendments thereto. *Such appearance may be in person or by two-way electronic audio-visual communication between the defendant and the judge.*

2. ARRAIGNMENT:

- a. K.S.A. 22-3205(a). Arraignment shall be conducted in open court and shall consist of reading the complaint, information or indictment to the defendant or stating to the defendant the substance of the charge and calling upon the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before the defendant is called upon to plead. Except as provided in subsection (b), if the crime charged is a felony, the defendant must be personally present for arraignment; if a misdemeanor, with the approval of the court, the defendant may appear by counsel. The court may direct any officer who has custody of the defendant to bring the defendant before the court to be arraigned.

(b) Arraignment *at which the defendant stands mute or enters a not guilty plea* may be conducted by two-way electronic audio-video communication between the defendant and the judge in lieu of personal presence of the defendant or the defendant's counsel in the courtroom ~~in the discretion of the court. unless good cause is shown why videoconferencing should not be utilized.~~ The defendant may be accompanied by the defendant's counsel during such arraignment. ~~The defendant shall be informed of the defendant's right to be personally present in the courtroom during arraignment. Exercising the right to be present shall in no way prejudice the defendant.~~

(c) The court shall ensure that the defendant has been processed and fingerprinted pursuant to K.S.A. 21-2501, and 21-2501a and amendments thereto.

- b. K.S.A. 12-4404 – municipal courts. Arraignment shall be conducted in open court *or by two-way electronic audio-video communication between the defendant and the judge* by stating to the accused person the substance of the charge and calling upon the accused to plead thereto. Arraignment for purposes of accepting plea of not guilty *also* may be accomplished by telephone, mail or appearance by counsel.

3. PLEADINGS AND MOTIONS:

- a. K.S.A. 22-3208(7). Any *non-evidentiary* hearing conducted by the court to determine the merits of any motion may be conducted by two-way electronic audio-video communication between the defendant and defendant's counsel in lieu of personal presence of the defendant and defendant's counsel in the courtroom ~~in the discretion of the court unless good cause is shown why videoconferencing should not be utilized. The defendant shall be informed of the defendant's right to be personally present in the courtroom during such hearing if the defendant so requests. Exercising the right to be present shall in no way prejudice the defendant.~~

- b. K.S.A. 12-4408 – municipal courts. The Kansas code of criminal procedure shall govern, insofar as applicable, the filing and disposition of motions. Motions may be oral or written. *Any non-evidentiary hearing conducted by the court to determine the merits of any motion may be conducted by two-way electronic audio-video communication between the defendant and defendant's counsel in the courtroom unless good cause is shown why videoconferencing should not be utilized.*

4. PRESENCE OF THE DEFENDANT:

- a. K.S.A.22-3405(1). The defendant in a felony case shall be present at ~~the~~ *any arraignment wherein a no contest or guilty plea is entered*, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by law. In prosecutions for crimes not punishable by death, the defendant's voluntary absence after the trial has been commenced in such person's presence shall not prevent continuing the trial to and including the return of the verdict. A corporation may appear by counsel for all purposes.
- b. K.S.A. 12-4402 – municipal courts. Subject to the provisions of K.S.A. 12-4209, and amendments thereto, the municipal judge may compel the appearance of an accused person. In addition to the procedures provided in K.S.A. 12-4305, and amendments thereto, the municipal judge, ~~upon request~~, may permit appearance, pleas and satisfaction of the judgment and sentence of the court by counsel *by two-way electronic audio-video communication* or by mail.

5. TESTIMONY OF WITNESSES; EVIDENCE:

~~K.S.A. 60-243(a). Form and admissibility. At trial, the witness' testimony must be taken in open court, unless otherwise provided by law. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location. Testimony by contemporaneous transmission from a different location may be allowed whenever any party requests the use of videoconferencing by written notice at least seven days prior to the scheduled hearing or proceeding. Such notice shall include the name and IP address of the witness who will testify by videoconferencing and the date and time the witness will testify.~~

6. SCR 145. USE OF TELEPHONE OR VIDEOCONFERENCING: ~~OTHER ELECTRONIC CONFERENCE~~

~~The court may use a telephone or videoconferencing or other electronic conference to conduct any hearing or conference other than a trial on the merits. For a trial on the merits, K.S.A. 60-243(a) applies. The court may require the parties to reimburse the court for any costs incurred.~~

7. PIK INSTRUCTIONS – CIVIL 102.02:

You must consider and weigh only evidence which was admitted during the trial, including exhibits, admissions, stipulations, and witness testimony either in person, ~~or~~ by deposition, *or by videoconferencing*.

You must consider and weigh deposition testimony by an absent witness *or testimony presented by videoconferencing from a remote location* under oath using the same standards you apply to other testimony.

XIV. TECHNOLOGY STANDARDS FOR VIDEOCONFERENCING PROCEEDINGS

A. BASIC TECHNOLOGY REQUIREMENT:

Videoconferencing technology in a courtroom or hearing room proceeding shall provide a clear audio and clear visual presentation as required by officers of the court and participants in the proceeding. The technology implementation should comply with as many industry standards as feasible while maintaining flexible interoperability through compliance with industry telecommunication standards.

B. RECOMMENDED TECHNOLOGY STANDARDS

1. Recognizing the frequent changes and advances in technology, the following are recommended industry standards for videoconferencing technology implementation:

- H.329 Standard for Video over ISDN;
- H.323 Standard for Video over Internet/IP;
- H.261, H.263, and H.264 Standards for Codecs;
- 30 frames per second for picture quality;
- 720p (1020 by 720) for video clarity; and
- 1080p (1920 by 1080) for video clarity and future needs is desirable.

2. Terminology

- H.261 is an ITU standard for videoconferencing. H.261 operates in the 64 kbps to 2 mbps range. All H.323 compliant videoconferencing system are required to support this codec. QCIF and CIF formats are found in H.261. H.261 offers full-pel motion compensation.
- H.263 is an ITU standard for video coding. H.263 offers better compression than H.261, particularly in the low bitrate range. The H.263 standard contains a mechanism to define and use



customized formats. The H.263 standard supports the following standard source formats:

- SQCIF 128x96 @ 29.97 fps
  - 4CIF 704x576 @ 29.97 fps
  - 16CIF 1408x1152 @ 29.97 fps
- H.264 is an ITU standard for video compression. It is based on MPEG-4 and renders roughly equal video quality with H.263, but at half the bit rate (e.g., 256 kbps instead of 512 kbps for an H.263 stream).
  - H.323 includes a series of protocols that together create the H.323 standard. H.323 enables endpoints to establish point to point connections. It requires the centralized intelligence of a gatekeeper to control the communications in a multi-point session. Two of the signaling protocols under the H.323 umbrella are H.225 and H.245.
  - 1080p is an HDTV standard with a display resolution of up to 1080 by 1920 pixels. It is a 16:9 signal using progressive build-up of the signal's lines.
  - 1080i is an HDTV standard with a display resolution of up to 1080 by 1920 pixels. It is a 16:9 signal using interlaced build-up of the signal's lines.
  - 720p is an HDTV standard a display resolution of up to 720 by 1280 pixels. It is a 16:9 signal using progressive build-up of the signal's lines.
  - 480p is an SDTV standard with a display resolution of up to 480 by 720 pixels. It is a 4:3 signal using progressive build-up of the signal's lines.

3. Non-technical recommendations for videoconferencing technology implementation

Systems should have:

- System control that resides with court;
- audio quality requirements and potential integration with room audio system;
- partial and full audio mute capability;
- the ability to create the official record for a proceeding using videoconferencing technology;

- provisions for “read-back and play-back of official record,” if required;
  - requirements for screen viewing from multiple locations and angles;
  - accommodations for confidential discussion off the record, such as attorney-client discussions and bench conferences;
  - confidentiality requirements appropriate to the level of the proceeding; and
  - a method to share materials and evidence if needed for the proceeding.
4. Recommended display technology standards that allows for variance in courtroom and hearing room layout:
- LCD/LED televisions should display a minimum 720p resolution and provide a 30 frames per second refresh rate. LCD/LEDs above 40 inches should display a 1080p resolution and provide a 30 frames per second refresh rate.
  - Projectors should display a minimum 720p resolution and 30 frames per second. If you are projecting to a larger surface, 1080p resolution is recommended.
  - Dependent on room design, the LCD/LED television should have a viewing angle that allows clear viewing from identified viewing locations without dimming or color shifting due to viewing angle. Ideally, a 160 degree viewing angle would be the minimum requirement for a television display.
  - Projector images do not suffer excessively from dimming or color shifting when seen from an acute angle. Projector images are negatively impacted by the ambient light in the room. It is recommended that projectors have 2500 lumens at a minimum for use in the room with low ambient light or with good ambient light controls. Lumens at a minimum of 3000 are recommended for a room with moderate ambient light. A brightly lit room would require a minimum 4500 lumens if lighting controls will not adequately dim the ambient light.

### C. TECHNOLOGY OPTIONS BASED ON TYPE OF HEARING

1. **Choosing the right technology for the proceeding.** Following are issues to examine when identifying the appropriate videoconferencing technology standard for use in a specific proceeding:
- Confidentiality;
  - The quality level required for audio;
  - The quality level required for video;
  - The number of participants and size and layout of facility;

- The official record requirement and official record creation technology and staff; and
  - the impact of a smooth uninterrupted audio and video.
2. **Basic Standard: Court proceeding session where audio and video quality is not paramount to the outcome of the proceeding.** The base for this recommendation, as part of the Basic Standard, includes the frequent use of non-industry standard transmission and encoding methods. These Basic Standard systems often include encryption that lacks external verification and video that may pass through a vendor system rather than direct point to point communications.
- a. **Description:** This applies to a courtroom proceeding session where audio and video quality level and potential interruptions in the signals would not affect the outcome. Potential examples include expert testimony where video detail and the ability to perceive fine facial expressions, for example, would not affect the value or perception of the testimony. Another example would be the testimony of a party who is verifying facts.
- b. **Recommended Technology:** Skype, Facetime, laptop cameras, IP camera based systems, etc., are all examples that fit this lower quality requirement for a court proceeding. (Please note that vendor and product names are provided only as examples of products available at the time of this report which would meet the standards cited. They do not constitute endorsements of these products, nor do they constitute an attempt to exclude other vendors or products. As with all technology, these vendors and products are subject to change with advancements in technology.)
3. **Enhanced Standard: Court proceeding session where audio quality and video quality are paramount to outcome of a courtroom proceeding.** The base for this recommendation, as part of the Enhanced Standard, includes compliance with industry standard transmission and encoding methods. These systems often include encryption using externally verified standards and video that is transmitted point-to-point. System interoperability is key to any permanent equipment acquisition.
- a. **Description:** This applies to a proceeding where audio and video quality are paramount to the courtroom proceedings outcome. Interruptions could affect the outcome of the courtroom proceedings. Potential examples include testimony where video detail and the ability to perceive fine facial expressions, for example, would affect the value or perception of the testimony. This is a courtroom proceeding where the continuous flow of

interaction through the video system is required to meet the court's needs.

- b. **Recommended Technology:** Polycom, CISCO, Tandberg (part of CISCO), and LifeSize, etc., are all examples that fit this Enhanced Standard quality and interoperability requirement for a court proceeding. (Please note that vendor and product names are provided only as examples of products available at the time of this report which would meet the standards cited. They do not constitute endorsements of these products, nor do they constitute an attempt to exclude other vendors or products. As with all technology, these vendors and products are subject to change with advancements in technology.)

4. **Multipoint Standard: Court proceeding session where two or more parties, external to the courtroom proceeding room, would like to participate through videoconferencing.**

- a. **Description:** A multipoint video courtroom proceeding adds two concerns to the Basic Standard and Enhanced Standard requirements.

The initial concern is to ensure that confidentiality requirements, if any, continue to be met. The additional confidentiality concern results from many multipoint videoconferencing systems of the Basic Standard requiring that all signals, video and audio, pass through the vendors' systems to accomplish the multipoint video conferencing.

The Enhanced Standard offers an option for the court to control the multipoint system to avoid vendor control of the video and audio. This will offer the highest level of confidentiality. The Enhanced Standard vendors offer an option to install the multiplexing system in the local court or in a central court or statewide location controlled by the court or state. Such an implementation would offer the highest level of verifiable confidentiality.

The second concern with a multipoint videoconference is the complexity of implementing and maintaining a system if it is locally controlled and located. Staff and technical skills will be required for testing prior to the proceeding, initiation, and monitoring the multipoint videoconference.

## Minority Report

A minority of the committee members note that, while they concur with a majority of the conclusions and recommendations of the committee, they have some concerns regarding the use of videoconferencing in criminal proceedings. The majority of committee members recommend the use of videoconferencing in the early stages of criminal proceedings, including bond hearings pursuant to K.S.A. 2013 Supp. 22-2802 and motion hearings pursuant to K.S.A. 2013 Supp. 22-3208. While videoconferencing may be appropriate under some circumstances, it should be kept in mind that, under other circumstances, it could be important for the defendant to appear in person before the judge. For example, the defendant might be impaired in some manner that might not be apparent or perceptible through videoconferencing, or that it might be important for the judge or the public to be able to see the defendant in person to ensure that the defendant has not been injured or mistreated in some manner. While defense counsel could request that these hearings be held in person for good cause shown, these committee members cannot agree with placing the burden of arguing good cause on the defendant.

As a society, we have a well-deserved confidence in the court system. The ability to view court proceedings in person is a part of that confidence. The thrust of the videoconferencing rules should be not only increasing efficiency, but also increasing public access to and confidence in the courts.