



# BEST PRACTICES

## Management of Evidence in Remote Pretrial Hearings in Criminal Cases<sup>1</sup>

June 10, 2020

### Introduction

This guide sets forth best practices with respect to the management of evidence during remote pretrial hearings in criminal cases and provides links to other resources generally addressing remote hearings.

### Best Practices for Remote Evidentiary Hearings

Local administrative orders (AOs) should establish procedures for the filing and management of exhibits and the taking of testimony in remote hearings. Issues that a Florida judicial circuit may wish to address include specifying:

1. Procedures that distinguish between requirements for:
  - a. Pro se defendants and those represented by counsel; and
  - b. Physical exhibits, exhibits capable of being provided electronically, and testimony.
2. In cases where reciprocal discovery applies, requirements for the parties to exchange exhibits and confer remotely before the hearing for the purpose of stipulating, as much as practicable, to the authenticity and admissibility of the exhibits. With respect to physical evidence, parties could be directed to exchange pictures of the evidence, when adequate. If, however, the physical evidence itself is necessary, it could be deposited with the clerk of court at least 48 hours before the hearing.
3. Provisions indicating that the presiding judge has the discretion to establish requirements for the parties to file any objection(s) to the exhibit(s) by a specified deadline and procedures for setting pre-evidentiary hearings at which such objections would be heard and ruled upon.

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<sup>1</sup> The Criminal Subgroup notes that these best practices constitute recommendations for the conduct of remote pretrial hearings in criminal cases for the phases in which in-person contact is limited due to Coronavirus Disease 2019 (COVID-19). The subgroup is not suggesting that criminal proceedings should continue to be conducted remotely when COVID-19 no longer presents a significant risk to the public's health and safety, i.e., Phase 4.

4. Requirements for the parties to:
  - a. Exchange, before the hearing, contact information for each witness, unless such information is made confidential under rule of court or law.
  - b. Ensure their witnesses who will lay the predicate for evidence have a copy of the evidence.
  - c. Ensure their witnesses have the necessary technology to participate in the remote hearing and, if not, specify requirements for the provision of an affidavit from the party explaining and attesting to the inability for the witness to access such resources.
  - d. Ensure their witnesses are aware of the witness testimony protocol discussed below.
  - e. Meet specified deadlines for the provision of the witness lists to the court along with the identification of any witness for whom an interpreter or an accommodation under the Americans with Disabilities Act will be required or for whom sequestration is requested.
5. Requirements for the marking and indexing of exhibits, filing methods, e.g., via the clerk or ePortal, email to the presiding judge, or upload to a cloud storage service, and filing deadlines.
  - a. Depending on the filing methods authorized, the local AO may wish to also address, based on consultation with the Court Technology Officer, requirements that will ensure the security of the circuit's network, e.g., that will avoid the transmission of malware via evidence submitted by email.
  - b. With respect to physical evidence, the local AO could direct the parties to contact the presiding judge on a case-by-case basis and to indicate whether there is agreement among the parties as to how the physical evidence will be filed. Options for submission might include filing a picture of the physical evidence or submitting the evidence in a sealed, clear plastic bag.
  - c. Consider advising the parties that documents or other items that the presiding judge must review during the hearing, but which are not being submitted as evidence, e.g., a driver's license to verify identity, do not have to be provided to the judge in advance and may be presented to the judge during the hearing using the camera.
6. Any applicable limits on the time that will be allotted for the hearing.
7. Provisions indicating that:
  - a. Unless suspended or amended by the Florida Supreme Court, rules of court procedure apply in the proceedings as do constitutional and statutory rights and requirements for defendants and victims unless such rights are waived.

- b. Nothing in the local AO limits the presiding judge's discretion to:
  - i. Establish other procedures consistent with the AO, provided that such procedures do not violate the rights of the defendant or the victim;<sup>2</sup>
  - ii. Admit or deny evidence in the case or determine other relief appropriate under the circumstances; and
  - iii. Reset the hearing if: (a) technological issues prevent the meaningful review of evidence despite the parties having complied in good faith with the procedures; (b) it becomes apparent that different electronic means might be more appropriate; or (c) it becomes apparent that an in-person hearing is both necessary and authorized pursuant to Florida Supreme Court AO.
- 8. Provisions notifying parties that an individual judge may have established additional procedures for remote hearings and indicating where such procedures may be found, e.g., the judge's web page.
- 9. Provisions notifying parties of the suspension of certain rules, court orders, and opinions by Florida Supreme Court AO, relating to remote hearings and remote administration of oaths.
- 10. Procedures that ensure the public's right of access to court hearings while maintaining any confidentiality that may apply to information in exhibits or witness testimony.<sup>3</sup>
- 11. Sanctions applicable to a party's failure to comply with the requirements of the local AO. Consider including these sanctions in the presiding judge's standing order or order setting the hearing.

For examples of recent local AOs on this topic, see [Eleventh Judicial Circuit Administrative Memoranda](#).

## Best Practices for Witnesses

With respect to witnesses, additional evidentiary issues for which the presiding judge of a remote pretrial hearing may wish to prepare include:

1. Advising witnesses at the beginning of the hearing or before their testimony of the following protocol for their testimony: they must be alone in a quiet room during their

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<sup>2</sup> In all cases, the presiding judge should ensure that any procedure independently established by the judge is equitable and does not result in an advantage to one party over the other.

<sup>3</sup> For a discussion of the strong presumption of openness for all court proceedings and of confidentiality requirements applicable in the judicial branch, see the [Government-In-The-Sunshine-Manual](#), 2020 Edition, by the Office of the Attorney General, at pages 12-13 and 63-68, respectively. Although the public has a right of access, it does not have the right to participate in the proceeding.

testimony, may not use a virtual background, and are ordered, subject to contempt of court, to turn off all electronic devices except for the device enabling participation in the hearing and to refrain from exchanging any electronic messages while testifying.

2. Advising witnesses of: (a) the gravity of a criminal proceeding, whether conducted in person or remotely; (b) the potential consequences of being found in contempt of court; and (c) the statutory maximum for perjury.
3. Establishing procedures to ensure that a criminal defendant may confer privately with his or her counsel during the hearing.
4. If sequestration is necessary, the presiding judge should determine whether there are means to ensure that the witness is unable to become informed of other witness testimony.
5. Confirming that the witness is alone by requiring that he or she use the camera to scan the room before and after testimony and noting this for the record.

### Other Resources Generally Addressing Remote Hearings

The following links are for informational purposes only:<sup>4</sup>

1. Florida:
  - a. [Video of a Remote Mock Trial](#), Seventeenth Judicial Circuit, posted May 1, 2020.
  - b. [Benchguide Checklist for Procedural Safeguards During Hearings for Judges](#), Eleventh Judicial Circuit, May 4, 2020: checklist addressing items that a judge should consider before and during a remote hearing conducted via Zoom.
  - c. [Zoom Script for Judge](#), Eleventh Judicial Circuit, May 4, 2020: script for judges that establishes ground rules for a Zoom hearing.
2. National Center for State Courts
  - a. [Checklist for judges in virtual proceedings](#), April 22, 2020: short checklist indicating issues to be considered by judges when conducting remote hearings.
3. [Michigan's Virtual Court Resources](#): contains a variety of remote hearing resources, including:
  - a. [Trial Courts Virtual Courtroom Standards and Guidelines](#), April 17, 2020: guidance for the Michigan judiciary on the best practices for conducting remote hearings.
  - b. [Remote Proceedings Checklist](#), April 20, 2020: step-by-step guidance for the use of Zoom to set up and conduct a remote hearing.
  - c. [Frequently Asked Questions Regarding Expansion of Remote Proceedings](#), April 30, 2020: helpful, extensive list of questions regarding the expanded use of remote hearings.

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<sup>4</sup> See Footnote 1.

4. [Texas Electronic Hearings with Zoom](#), Texas Judicial Branch: contains a variety of helpful resources for conducting remote hearings using Zoom.