State Court Administrative Office

Michigan Trial Courts Remote Jury Trial Standards and Recommendations

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SRA

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Introduction

Remote jury trials have technical, procedural, resource, and due process considerations. Courts must weigh these considerations carefully before proceeding with any aspect of a remote jury trial. The State Court Administrative Office recommends that courts obtain the consent of all parties before any remote jury trial proceedings occur.

Qualifying and Summonsing Jurors for Remote Participation

Standard 1 – Juror Questionnaires

Supply a juror qualification questionnaire[1] and a juror personal history questionnaire[2] to each potential juror drawn or selected for jury service. These questionnaires may be sent in the same mailing as the written summons that is required by MCL 600.1332 (one-step jury process), or may be sent separately before jurors are summonsed for jury duty.

Recommendation 1.1 – Increase the Number of Juror Questionnaires and Summonses Issued

Increase the usual number of questionnaires and summonses issued to offset the anticipated increased excusals and deferrals due to COVID-19 health concerns. This will help ensure that the court has enough qualified jurors available to empanel juries.

Recommendation 1.2 – Provide Jurors Online Questionnaires

There are two options to supply the qualification and personal history questionnaires (MC 321a & MC 321b). Courts can mail potential jurors a communication that gives them a link to complete the questionnaires online, if available. Having potential jurors complete the questionnaires online enables easy sharing of information while parties and court staff work remotely. Alternatively, the court can require jurors to fill out a paper questionnaire and return it to the court. Paper questionnaires can be processed to determine juror qualifications, and then can be scanned/imaged for court retention and to later give attorneys and parties access to the personal history questionnaires.

Recommendation 1.3 – Technology and Quiet Space Questions of Jurors

With the juror qualification questionnaire (MCR 321a), include additional questions to determine if potential jurors have access to the technology and space necessary to participate via remote proceedings, such as:

18. Would you be able to serve as a juror if some or all of the jury trial were held remotely, and you are asked to serve by watching and listening to the proceeding from a remote location?

    18a. Do you have access to a reliable internet connection?

    18b. Do you have a smart phone, tablet, or computer that has a microphone and a video camera?

    18c. Do you have access to a quiet, private space to carry out the functions of

[1] MCL 600.1313

[2] MCR 2.510(B)

a juror?

19. If you answered yes to question 18, but no to question 18a, 18b, and/or 18c, would you be able to serve remotely as a juror if a space is provided for your use that has reliable internet access and a qualifying device?

The court should require remote jurors to use a device with a camera so the court and counsel can observe appearances and ensure that the jurors are present and attentive. If a potential juror does not have the required remote technology, provide an alternate location with adequate technology for the potential juror to join the remote jury trial via Zoom such as discussed in Recommendation 2.3.

In addition, the court can request an email address from potential jurors as part of these additional questions to send electronic notifications about jury service, e.g., the login information for the remote proceedings. The court can request that the potential jurors answer these questions online, by mail, or by phone before the jury service date. Significantly, this gives the court time to plan for jurors who will need to report to the courthouse rather than participate remotely.

Standard 2 – Issuance of Juror Summons

Summon jurors for jury service by a written notice of the juror's first required court appearance (served by ordinary mail or personal service)[3] and provide adequate notice of the Zoom information to ensure they are able to participate remotely or contact the court.

Recommendation 2.1 – Reassure Jurors of Legitimacy of Summons

For the first few months of summonsing jurors after the pandemic restrictions are eased, some jurors may be skeptical about the legitimacy of jury summonses that reference the use of remote technologies. Without additional information, they may ignore the summons or mistakenly believe it to be a scam, especially if they believe that courts are closed or that jury trials have been cancelled due to the pandemic. Therefore, the court should give potential jurors an easy way to contact the court by phone to confirm that their summons is legitimate. Also consider updating the court's website to notify the public that jury trials have resumed and that parts of the trial may be held remotely.

Recommendation 2.2 – Collect Common Voir Dire Information in Advance

In the juror summons packet, include some of the common questions asked of jurors during voir dire, so that answers can be reviewed by the parties without taking up time during voir dire. This will help reduce the time needed for remote voir dire and alleviate some of the difficulty with remote voir dire such as not seeing raised hands, or shaking or nodding heads when questions are asked of the jurors.

Recommendation 2.3 – Provide Alternative Means of Participation for Jurors with Technology Restraints

Review the answers and responses to the remote proceedings questions (Recommendation 1.3) and determine if any jurors do not have access to the internet or

[3] MCL 600.1332; MCR 2.510(D)

an electronic device needed for participation. Negative answers to these questions do not disqualify a potential juror, but may require the court to provide other jury service options. It is important to not automatically exclude these potential jurors from the jury pool, because that can negatively impact the demographic diversity of the jury pool. Any potential jurors with limited access can be brought into the court or some other location, such as libraries, schools, or universities, where the technology/access to participate remotely can be provided by the court. As a last resort, the court can postpone the service of jurors who do not have access to the necessary technology and cannot be provided an alternate method or location for participation until the resumption of in-person jury trials.

Recommendation 2.4 – Provide Zoom Hearing Information and Instructions with the Juror Summons

Give each potential juror instructions and a link to the Zoom hearing on their summons. This can be done in the following ways:

a. The Zoom hearing information can be included separately with the juror summons that is sent out to potential jurors;

b. The court may design a new juror summons that lists the court proceeding, jury trial date, time of appearance, and the Zoom Meeting ID.

Recommendation 2.5 – Direct Prospective Jurors to Test Technology in Advance

Give potential jurors an opportunity to test their technology and ability to log into Zoom prior to reporting for service. This can be done by providing jurors with the Zoom test link www.Zoom.us/test, or by the court offering a separate time, before the first appearance, when jurors can log into Zoom with a jury clerk to verify connectivity. Such a meeting can be used by the court as a tutorial session with potential jurors on some of the Zoom functions, such as hiding all non-video participants, switching from gallery view to speaker view, raising and lowering their hands, asking for the host for help, muting and unmuting, etc. The court can offer these test sessions with a host by setting up some time periods where a Zoom host or co-host would have "office hours" when jurors could log in and be given a live tutorial on Zoom functionality.

Recommendation 2.6 – Provide Jurors Instructions Regarding Virtual Courtroom Decorum

Give potential jurors instructions on proper remote trial etiquette, such as dressing properly, finding a quiet place free of distractions and interruptions, not accessing other electronic devices while participating, not using a virtual background but using a neutral/plain wall behind them (no pictures or windows), making sure lighting is good for video, and renaming their Zoom video screen with their full name or juror numbers (as the court directs). See Tips for Successful Virtual Court Proceedings.

Recommendation 2.7 – Organize Jurors Before Jury Selection

Request that jurors log on to the Zoom meeting an hour before the jury selection, to ensure that all jurors can, in fact, participate remotely, but also provide a phone number

to reach the jury clerk in case they cannot connect. This extra time can be used to provide assistance with the platform functions, to explain what jurors should do if they are disconnected from the platform during the trial, and to address or reinforce issues such as distracting or inappropriate backgrounds, dress, etc. This will also give the jury clerk extra time to check in each juror individually, change their name in Zoom, make sure their technology is working properly, and then conduct a group juror orientation prior to the arrival of the parties, attorneys and the judge. This will also help jurors feel more comfortable with the remote technology.

Recommendation 2.8 – Panel Jurors and Stagger Juror Reporting Times
Place jurors in separate panels and stagger the jurors reporting times by panels. Have the separate panels of jurors log into their assigned trial judge's Zoom meeting early. When they arrive the jury clerk can check-in the jurors and provide an orientation prior to the arrival of the judge and parties. The jury clerk could remain as the host for that trial or turn over the host functions to someone else and leave that meeting to process another panel. This will allow the jury clerk to keep jury panels separate for each judge within their own Zoom meeting, and will allow multiple judges to conduct jury trials on the same day. However, this will require the court to have more trained Zoom hosts or jury clerks, so that each host can stay with their jury trial throughout the entire jury trial process.

Standard 3 – Access to Personal History Questionnaires
The court must give attorneys a reasonable opportunity to examine juror personal history questionnaires before being called on to challenge for cause, according to the court's local administrative order.[4]

Recommendation 3.1 – Provide Attorneys/Parties Electronic Copies of Questionnaires
The court can give attorneys access to the personal history questionnaires electronically through documents generated from the court's jury management software or provide scanned images of the paper questionnaires returned by the potential jurors. These copies can be emailed to the attorneys one or two days prior to jury selection. However, the court may need to modify its LAO for access to juror questionnaires to allow for this type of access.

Zoom Participant Settings

Standard 4 – Juror Communications During Trial
The court may not communicate with the jury or any juror pertaining to the case without notifying the parties, permitting them to be present, and ensuring that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.[5]

[4] Administrative Order 1987-1; MCR 2.510(C)(2)
[5] MCR 2.513(B)

Standard 5 – Juror Communications During Deliberation

The court shall control the proceedings so that sworn jurors do not receive any communications while they are deliberating upon a verdict, except from the trial judge on the record[6] or under a special instruction in writing from the trial judge.[7]

Recommendation 5.1 – Renaming of Trial Participants

Control the renaming of jurors and participants to avoid improper or suggestive names that could be unduly prejudicial. For example, if it will become an issue at the trial as to the identity of the defendant, then the court should not rename the defendant to include the actual term, "defendant" unless and until that occurs in the trial. Also, if the alleged victim is appearing on Zoom meeting, the court must determine how to name or rename them after consultation with the parties or their attorneys.

Recommendation 5.2 – Limit the Chat Function to Prevent Communication Between Participants

Disable the "Chat" function in the Zoom meeting for all participants so that only the host can chat with participants and none of the other participants can chat with the jurors. When chat is enabled, any participant can chat with any other meeting attendee. When the host disables chat, the court should send a standard message to all that chat has been disabled and direct jurors on how to contact host if experiencing technical (sound, video) issues, or need other assistance.

Recommendation 5.3 – Allow Participants to Mute and Unmute Themselves

Set the remote Zoom video settings so participants can mute and unmute themselves. This will allow attorneys to control their own ability to be heard by the court in order to make objections and will allow court reporters to immediately ask a witness or attorneys to repeat themselves or speak louder for the record. As mentioned in Recommendation 12.4, the attorneys should be responsible for managing the muting and unmuting of their own audio during the trial. However, the attorneys may want to stay unmuted during live testimony so they can make timely objections. This is also consistent with the ability of all participants in an actual courtroom to be able to make statements.

Recommendation 5.4 – Make the Jury Clerk the Zoom Host or Co-Host

Make the jury clerk the Zoom host or co-host, so they have all the functionality to manage the meeting during voir dire and the judge can focus on the legal aspects of the trial instead of the technology. This will allow the jury clerk to administer the check-in, take attendance, rename jurors', conduct juror orientation, and share their screen if necessary to show a video or PowerPoint presentation to the jurors.

Recommendation 5.5 – Keep Jurors in the Waiting Room Until Juror Check In

Enable a "waiting room" for the Zoom meeting and keep jurors in the waiting room until the jury clerk is ready to begin the juror's check in. Before the meeting, the court can create a customized message or banner for the waiting room to give jurors information.

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[6] MCR 2.513(N)(2)

[7] MCL 768.16

Recommendation 5.6 – Create Breakout Rooms Before Proceedings Begin
Create several "breakout rooms" before the Zoom meeting begins so there can be separate locations for jurors, judge, attorneys, and parties to be placed during a break or when events need to occur outside the presence of the jury. The following breakout rooms are recommended: Judge's Chambers; Jury Room; Plaintiff Conference Room; and Defendant Conference Room.

Recommendation 5.7 – Enable the Entry and Exit Chime
Enable the "entry and exit chime" once the meeting starts. This will allow the host and co-hosts to be made aware of times when participants are disconnected from the meeting. However, the host or judge must also look for any participant screens that appear frozen. Sometimes a video screen may freeze if a person's connection fails but they video may not disappear.

Recommendation 5.8 – Notify Participants When Breakout Rooms Will End
Warn jurors and other participants each time they will be automatically brought back from a breakout room by the Zoom host or co-host. There are three methods available to notify breakout room participants they will be brought back to the main room. They can be notified through a "broadcast message" to the breakout room, via the host. Alternatively, breakout room participants can be given a countdown for the time they will be returned. Lastly, by having a co-host may go into the breakout room to notify participants that they will be automatically returned and when. This last option is not advisable for the jury room or a parties' conference room.

Remote Check-In and Orientation of Jurors

Standard 6 – Juror Check In Procedures
The court shall record the attendance of potential jurors as they appear for jury duty, so that the number of jurors appearing can be known,[8] they can be paid for their attendance,[9] and they can be recorded as having served.[10]

Recommendation 6.1 – Check In Jurors Prior to Juror Orientation
As the potential jurors arrive in the Zoom waiting room, the jury clerk should bring them into the Zoom meeting one at a time, greet them, note their attendance, and rename their Zoom participant name (See Recommendation 6.2). The jury clerk can either leave checked-in jurors in the main meeting room while they check in other jurors or the checked-in jurors can be placed in the Jury Room breakout room to wait for juror orientation and further instructions. It may be necessary to enter the juror attendance into the court's jury management software, as well.

Recommendation 6.2 – Rename Jurors in Zoom
The jury clerk should rename the potential jurors' Zoom "participant name" so they can be more easily identified during voir dire. Suggestions include renaming Samuel Smith

[8] MCL 600.1336
[9] MCL 600.1344
[10] MCL 600.1309

to Samuel Smith Juror 47, Juror 47, or J 47.

Recommendation 6.3 – Do Not Live stream Juror Check In
Consider not live streaming or recording the juror check-in process when jurors are first brought into the main Zoom meeting, because jurors may log in to Zoom using their phone and their personal phone number might be displayed for people watching the live stream to be able to see. Potential jurors may also raise some sensitive or private issues or concerns with the jury clerk. In non-remote situations, this process is generally done prior to the arrival in the courtroom of and outside the presence of the presiding judge, attorneys, and parties. The jury clerk can check-in the potential jurors one at a time so they can discuss, assess, and address any issues each juror might be having in regards to internet connectivity, video, audio, other technology issues or any issues not related to technology.

Standard 7 – Juror Orientation and Preliminary Information
The court shall provide orientation and preliminary information to persons called for jury service at all three of the following stages: initial contact prior to service; first appearance at the courthouse; and reporting to a courtroom for juror voir dire.[11]

Recommendation 7.1 – Provide a Verbal or Videotaped Juror Orientation
Once all potential jurors have checked in, or sufficient time has elapsed to allow them to arrive, provide an orientation of the jury trial process verbally or by playing an orientation video. If playing a video, the jury clerk (as host or co-host) can share their screen within Zoom for the jurors to view. The Michigan Judicial Institute (MJI) has a six-minute juror orientation video (produced through a grant from the Michigan Commission on Law Enforcement Standards) that is available to all trial courts in Michigan at no charge. In the alternative, the court can videotape and use its own orientation that can be played for potential jurors. The court could also play a tutorial video explaining how to use the Zoom functions that potential jurors might need to utilize.

Remote Jury Selection and Voir Dire

Standard 8 – Potential Jurors' Oath Prior to Voir Dire
The court must give the oath to all the potential jurors that they will truthfully and completely answer all questions about their qualifications to serve as jurors in the case.[12]

Recommendation 8.1 – Unmute Jurors Prior to Giving The Oath
Prior to reading the oath and asking them for an answer, unmute all jurors so their verbal answers of "yes" or "affirm" can be heard. The jurors can then be muted again after their verbal response.

[11] Principle 6, subparts A and B of the American Bar Association, *Principles of Juries and Jury Trials* (Revised 2016).
[12] M Crim JI 1.4

Recommendation 8.2 – Query Jurors Individually Regarding Their Oath
Inquire individually of each juror when they are placed in the box, if they remember the oath they gave earlier, and whether they answered in the affirmative. This can allow the court to preserve the record that the juror agreed with the oath.

Standard 9 – Random Selection of Jurors
The court must select the names or numbers of the prospective jurors to be examined for voir dire by a random process or another fair and impartial method directed by the court or agreed to by the parties.[13] In addition, the court must also replace challenged and removed jurors with another prospective juror from the panel.[14]

Recommendation 9.1 – Use an Approved Method of Random Selection
To choose jurors from the panel, either conduct a blind draw of jurors' names or numbers out of a container, or use a randomized list generated from jury management software, if this method is directed by the court or agreed to by the parties.

Recommendation 9.2 - Add Jury Box Seat Numbers to Group Jurors Sequentially in Zoom
When a potential juror is selected to be seated in the jury box for voir dire, their jury box seat number can be added to the beginning of their Zoom screen name. Doing so will put their participant name toward the top of the participant list in seat number sequence. For example, "1, Juror 47 Samuel Smith", "1, Juror 47" or "1, J 47", etc.

Recommendation 9.3 - Only Seated Jurors Turn on Video and Hide Non-Video Participants
In order to allow the attorneys to observe and view all potential jurors in the pool, it is important for the court to require them to keep their video turned on during the initial voir dire process. This will allow attorney wishing to present a challenge related to the makeup of jury panel to be able to adequately view the panel as a whole in order to assess whether such a challenge should be made. After a reasonable period of time during which counsel can observe and view all the jurors video screens, have all jurors turn off their video prior to drawing names. When a potential juror is selected to sit "in the box" have them turn their video back on. This will allow participants and attorneys to see the seated jurors toward the top of the gallery view if they set their Zoom settings to "hide non-video participants." This will also allow those who are hiding non-video participants to easily see which jurors are currently "seated in the box" for voir dire.

Standard 10 – Juror Examination and Challenges
The court must conduct the voir dire/examination of prospective jurors themselves, or permit the attorneys to do so.[15] The court must rule on each challenge of a juror for cause made by any party[16], and must allow each party to excuse without cause the number of jurors that are

[13] MCR 2.511(A)
[14] MCR 2.511(G)
[15] MCR 2.511(C)
[16] MCR 2.511(D)

allowed as peremptory challenges.[17]

Recommendation 10.1 – Parties' Counsel to Submit Voir Dire Questions in Advance
Consider requiring the parties' counsel to submit their proposed voir dire questions before trial. The trial judge has discretion to determine the role of counsel in conducting voir dire, so the trial judge could ask general questions of the whole group of jurors and then, after jurors are selected and sitting "in the box," the judge could conduct the voir dire by asking the questions attorneys submitted ahead of time.

Recommendation 10.2 – Phrase Juror Questions With Binary Responses
Consider asking the potential jurors questions that allow them to agree or disagree with certain statements. For example, "Please raise your hand in Zoom if you know any of the parties, attorneys, judge, or witnesses we just named" or, "Please raise your hand if you agree with this statement."

Recommendation 10.3 – Designate a Method for Jurors to Answer Questions Privately
If a juror desires to answer a sensitive question privately, then the juror should be allowed to do so, and the judge, juror, and attorneys can go to a "breakout room" to have a private conversation that would be out of the presence of the jurors but still on the record. However, in order to make a record in a breakout room, the court would need to take along a co-host to make a local recording in Zoom or take a court reporter to keep the record separately. A co-host must select the "record" option in the breakout room because they essentially behave as separate zoom meetings. It is not recommended that the primary host leave the main room to join breakout rooms, because it leaves the main meeting without a fully-empowered host to manage the meeting.

Standard 11 – Seated Jurors' Oath to Render a True Verdict
The court must require that the jurors selected and seated give an oath or affirmation to justly decide the questions submitted to them, render a true verdict only on the evidence introduced and in accordance with the instructions of the court.[18]

Recommendation 11.1 – Verbal Responses of Jurors
Prior to reading the oath and asking them for an answer, unmute all jurors so their verbal answers of "yes" or "affirm" can be heard. The jurors can then be muted again after their verbal response.

Remote Jury Trial

Standard 12 – Courts Control Jury Trial Proceedings
The court must control the proceedings during trial, limit evidence and arguments to relevant and proper matters, and take appropriate steps to ensure that the jurors will not be exposed to information or influences that might affect their ability to render an impartial verdict on the

[17] MCR 2.511(E); MCL 768.12; MCL 768.13
[18] MCR 2.511(H); MCL 768.14; MCL 768.15; M Crim JI 2.1

evidence presented in court.[19]

Recommendation 12.1 – Monitor Jurors' Leaving From and Returning to the Courtroom

The judge must be certain they know when all jurors have left for a breakout room and when they have come back. This is necessary to ensure that all discussions that are intended to be out of the presence of the jury are truly out of their presence.

Recommendation 12.2 – Give Jurors Zoom Instructions at each Break

The judge should give the jurors instructions on what to do with their connection to the Zoom meeting each time they take a break or go to deliberate. Instructions should include at what times or circumstances when jurors are allowed to leave their computer or device, when they need to stay logged into the meeting, when they are allowed to log off and then log back in, and when they are allowed to turn off their audio or video, etc. Jurors should also be reminded about the impropriety of doing any internet searches related to the case until after a verdict is reached; about the need to turn off all other electronic devices like cell phones or tablets during trial proceedings; about the need to ensure that jurors are not discussing the case with the other persons in their residence.

Recommendation 12.3 – Direct Participants to Test Technology in Advance

Give attorneys, parties and witnesses an opportunity to test their technology and ability to log into Zoom prior to their appearance for the jury trial. This can be done by providing them with the Zoom test link www.Zoom.us/test, or by the court offering resources or training opportunities. See recommendation 2.5. The resources or trainings should include information on some of the Zoom functions, such as hiding all non-video participants, switching from gallery view to speaker view, raising and lowering their hands, asking for the host help, muting and unmuting, and sharing their screen, etc.

Recommendation 12.4 – Remind Counsel to Unmute for Objections

Remind counsel that their objections during trial should be verbal, and attorneys will be responsible for managing the muting and unmuting of their own audio during the trial. Attorneys may want to stay unmuted during live testimony so they can make timely objections.

Recommendation 12.5 – Use Breakout Rooms for Sidebar Discussion

The court can conduct a brief sidebar discussion with counsel in a Zoom breakout room, and this would allow a private conversation with the attorneys outside the presence of the jury and outside the public recording. However, if any discussion or motions need to be recorded outside the presence of the jury, then it would be more efficient to send the jury to a breakout room. If the court needs to record a discussion in a breakout room, then court would need to take along a co-host to record in Zoom or a court reporter to keep the record. A co-host must select the "record" option in the breakout room because they essentially behave as separate zoom meetings. It is not recommended that the primary host leave the main room to join breakout rooms, because it leaves the main meeting without a fully-empowered host to manage the meeting.

[19] MCR 2.513(B); MCL 768.29

Recommendation 12.6 – Monitor Juror Engagement

Counsel for each party should consider having "second chair" attorney or law clerk continually observing what jurors are doing on their video to ensure they are remaining attentive to the proceedings. This designated person can keep counsel informed so that any objections, admonitions, or motions, can be made as counsel sees fit. Many attorneys may not have the additional resources to monitor remote activity or may pass the additional cost of that monitoring on to parties. Courts should consider these limitations when contemplating remote jury trials.

Standard 13 – Juror Participation Throughout Trial

The court must not allow any seated jurors to be absent from the presentation of evidence or trial proceedings without replacing them with an alternate juror.[20]

Recommendation 13.1 – Listen for Jurors Accidentally Disconnecting

As long as the Zoom settings are such that an audible "chime" will be heard when a participant enters or exits the meeting (consistent with Recommendation 5.7), the host and presiding judge must listen for this chime and, if it occurs, stop all proceedings and attempt to get the juror back. However, as part of monitoring jurors, the host or judge must also look for any juror screens that appear frozen. Sometimes a video screen may freeze if a person's connection fails but they video may not disappear. If a connection cannot be re-established after a reasonable period of time or the trial cannot be adjourned for a period of time, then the judge will need to decide if there are sufficient alternate jurors and whether the trial can proceed without the juror who lost the connection.

Standard 14 – Right to a Public Trial

The court shall satisfy a criminal defendant's right to a public trial[21] by providing the public with an opportunity to view and observe the trial proceedings.

Recommendation 14.1 – Live Stream or Posted Recording of Jury Trial Proceedings

Provide a YouTube channel, or other method for the public to observe the proceedings. Courts can post a link to their channel and a message regarding public availability of court proceedings via live stream or a delayed recording to their website. Courts should consider adding a "Do Not Record" watermark to their channel, so the court can manage these recordings appropriately after live streaming is completed (these recordings should not be considered an official court record). YouTube automatically enables a live chat feature when live streaming, so courts might want to disable this feature. However, in order to prevent jurors or sequestered witnesses to watch portions of the trial they should not observe, the court should post a delayed recording of the jury trial to its YouTube channel instead of a live stream event.

[20] MCL 768.16

[21] US Const, Am VI; Const 1963, art 1, § 20.

Standard 15 – Right to Confront Witnesses

The court shall satisfy a criminal defendant's right to confront witnesses[22] by providing the defendant and their counsel the opportunity to fully cross-exam all witnesses. **Note that allowing two-way, interactive video testimony over a criminal defendant's objection violates the defendant's Confrontation Clause rights.[23]**

Recommendation 15.1 – Ensure Witnesses are Visible

Require all witnesses to position themselves in such a way that there is sufficient view of them and their surroundings to discourage them from being coached or influenced by others while they are testifying. The court should also require the witness to be alone in the room they are testifying from. To the extent that the court determines it is necessary to protect the welfare of a witness or crime victim pursuant to MRE 611(a), the court will need to balance the protection of the victim with the defendant's right to receive a public trial.[24] In addition, courts should require a standard backdrop for all witnesses, or at a minimum for crime victims if they so choose. If a crime victim or witness chooses to utilize such a standard backdrop, no mention should be made to a jury as to why a crime victim or witness is using a virtual backdrop.

Recommendation 15.2 – Sequester Witnesses from Proceedings

If sequestration of witnesses is ordered, then require each witness to wait in a Zoom waiting room until the court is ready for their testimony. The court should also change the public viewing of the jury trial from a live stream event to the posting of a delayed recording, so that witnesses cannot circumvent the sequestration order.

Standard 16 – Right to Due Process and the Presumption of Innocence

The court shall maintain a criminal defendant's right to a due process, a fair trial and the presumption of innocence.[25]

Recommendation 16.1 – Ensure Defendant's Surroundings are Neutral

Eliminate any indication or suggestion that an in-custody defendant is appearing virtually from a jail by providing precautions surrounding a defendant's on-screen image, specifically with respect to lighting, framing, background images, sounds, attire, and shackling.

Standard 17 – Right to Compel Witnesses' Attendance

The court shall satisfy a criminal defendant's right to compulsory process for obtaining witnesses in their favor.[26]

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[22] US Const, Am VI; Const 1963, art 1, § 20.

[23] *People v Jemison*, ___ Mich ___, ___ (2020) (Docket No. 157812). Note that "a child victim may testify against the accused by means of one-way video (or a similar … process) when the trial court finds, consistently with statutory authorization and through a case-specific showing of necessity, that the child needs special protection." *Jemison*, ___ Mich at ___, citing *Maryland v Craig*, 497 US 836, 860 (1990). Absent the specific circumstances that were present in *Craig*, the rule set forth in *Crawford v Washington*, 541 US 36 (2004), applies. *Jemison*, ___ Mich at ___.

[24] MRE 611(a); MCL 600.2163a; *People v Rose*, 289 Mich App 499 (2010).

[25] *In re Winship*, 397 U.S. 358 (1970); See also *Taylor v. Kentucky*, 436 U.S. 478 (1978); M Crim JI 3.2

[26] US Const, Am VI; Const 1963, art 1, § 20.

Recommendation 17.1 – Ensure Witnesses Can Appear

Verify ahead of time that witnesses have access to the necessary technology or internet services to participate in the Zoom hearing by providing them with the Zoom test link www.Zoom.us/test, or by offering the resources or training opportunities that are discussed in Recommendation 12.3. If they do not have the technology, the court should provide another location for witnesses to appear where the technology/access to participate remotely can be provided, similar to what is discussed in Recommendation 2.3 for jurors. In addition, the court should require a standard backdrop for all witnesses, or at a minimum for crime victims if they so choose, and if a crime victim or witness chooses to utilize such a standard backdrop, no mention should be made to a jury as to why a crime victim or witness is using a virtual backdrop.

Standard 18 – Right to Counsel

The court must provide a method to enable confidential communication between a party and the party's counsel, which is also required by a criminal defendant's right to assistance of counsel.[27]

Recommendation 18.1 – Private Means of Communication between Attorneys and Clients

Ensure that attorneys have a means or method of direct and immediate communication with their clients during all phases of the remote jury trial. If Zoom does not provide sufficient access to this, then another means or method must be set up to make sure that the remote process does not impede attorney-client communication, interfere with the attorney client relationship, and jeopardize a defendant's right to participate and assist in his own defense.

Recommendation 18.2 – Allow Attorneys and their Clients Confidential Communication

Allow attorneys to meet with their clients in a breakout room when requested. Breakout rooms are not audio or video recorded unless the host or a co-host comes into the breakout room and begins a recording. The host can set a predetermined amount of time and bring participants back into the Zoom meeting (see Recommendation 5.8). If the host does not want to put a time constraint on the breakout room, the host can send a time warning to the breakout room participants to notify them that they should wrap up. If desired, the court can set Zoom settings for breakout rooms to allow participants to rejoin the hearing when they are done meeting.

Standard 19 – Jurors Asking Witnesses Questions

If the court permits jurors to ask questions, it must employ a procedure that ensures that such questions are addressed to the witnesses by the court itself, that inappropriate questions are not asked, and that the parties have an opportunity outside of the jury to object to the questions. The court shall inform the jurors of the procedures to be followed for submitting questions to witnesses.[28]

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[27] US Const, Am VI; Const 1963, art 1, § 20.

[28] MCR 2.513(I)

Recommendation 19.1 – Receiving and Ruling on Questions from Jurors
Instruct jurors that if they have a question for a particular witnesses they need to use the "raise hand" Zoom function to get the attention of the judge or Zoom host. The judge should then ask the juror if they have a question of this witness (without asking what the question is). If the juror answers in the affirmative, then the jurors must be sent to the jury breakout room so that the court can receive the question from the juror. The jury must be ordered not to discuss the question being posed. The court can have the juror email the jury clerk what their specific question of the witness is, so that the court can provide this to the parties, the parties can object and the court can rule on whether the question will be asked of the witness before bringing the jurors back in to the main room.

Standard 20 – Evidence as Exhibits
Materials that are intended to be used as evidence at or during a trial shall not be filed with the clerk of the court, but shall be submitted to the judge for introduction into evidence as exhibits.[29]

Recommendation 20.1 – Submitting Proposed Exhibits Before Trial
Allow exhibits to be submitted ahead of time via email to the court and parties, so they can be marked and logged before the trial. However, if there is a need to share during the proceeding, it can be done through the Zoom chat feature or other available technologies that allow for sharing documents. If the evidence is a physical object and is not transferrable by file transfer, such as a weapon, and the parties do not agree that a photograph of the evidence suffices, then pursuant to MRE 612 the court may order it made available for inspection at a designated location, day, and time.

Recommendation 20.2 – Displaying Proposed Exhibits to Witnesses
Determine how proposed exhibits will be displayed to witnesses to lay the foundation for admission without allowing the jurors to view the exhibits until they are admitted, since they should not be displayed to the jurors or to the general public on a livestream before the court admits them. One way this may be done is laying the foundation with a witness outside the presence of the jury, and sending the proposed exhibit to the witness via email or private Zoom chat. Physical exhibits (objects other than photos or documents) will require a much different process, and can be done by creating a 360 degree view of the physical exhibits (photo or video) for presentation at trial to witnesses and jurors. When exhibits need to be shared in the trial the attorney or party can do this by a "screen share," but there would need to be advance training on this.

Remote Jury Deliberations

Standard 21 – Election of Jury Foreperson
The court must instruct the jurors that they should choose a foreperson, who will be responsible for making sure their discussions are carried on in a businesslike way, and that everyone has a fair chance to be heard.[30] Additionally, the foreperson will be the one to

[29] MCR 2.518
[30] M Crim JI 3.11

communicate with the court while they are in deliberations.[31]

Recommendation 21.1 – Providing List of Suggested Technology Capacity of Foreperson

Provide the jurors with a list of suggested technology capabilities that their elected jury foreperson should have, such as a device that allows them to share their screen in Zoom, a telephone to communicate with the jury clerk or bailiff if needed, and an email account to send and receive the verdict form and other communications with the court.

Standard 22 – Juror Participation

After the jurors retire to consider their verdict, the court shall not permit the jurors to separate from each other (except temporarily) until they are discharged. If an alternate juror replaces a juror after the jury retires to consider its verdict, then the court must instruct the jury to begin its deliberations anew.[32]

Recommendation 22.1 – Jury Foreperson Monitoring Juror Engagement

Instruct the jury foreperson that he or she will need to make sure the jurors are all connected to the meeting and are able to share their thoughts and opinions. The jurors and the foreperson should watch for participant videos to go out and listen for the Zoom "chime" when a juror enters or exits the deliberation room. However, they must also look for any participant screens that appear frozen. Sometimes a video screen may freeze if a person's connection fails but they video may not disappear. If a juror becomes disconnected, then all discussion must stop, and the foreperson should "ask the host for help" and inform the host so that attempts can be made to get the juror back. If a connection cannot be re-established after a reasonable period of time, the court will need to decide if there is an alternate juror to insert into the deliberations or take some other action.

Standard 23 – Juror Deliberation Materials

The court must permit the jurors, on retiring to deliberate, to take into the jury room their notes (if allowed) and final instructions. The court may permit the jurors to take into the jury room the reference document, if one has been prepared, as well as any exhibits and writings admitted into evidence.[33]

Recommendation 23.1 – Providing Written Jury Instructions & Admitted Exhibits

Make the jury instructions and admitted exhibits available to all jurors for examination during deliberations. These items can be provided to jurors through the Zoom chat feature or other available technologies that allow for sharing documents so the items can be examined during deliberations. A link can be sent to the jurors via email or a chat from the host, and the court should instruct each of the jurors to test their ability to open and view the instructions and admitted exhibits. If one or more jurors are unable to open or view the materials, then the foreperson may need to share their screen so all jurors can see them.

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[31] M Crim JI 3.14

[32] MCL 768.16; MCR 2.511(B); MCR 6.411; MCR 6.620

[33] MCR 2.513(O)

However, jurors must be prevented from downloading and sharing exhibits with anyone outside the deliberation room, or taking screenshots of exhibits on their devices and leaving the deliberations with those exhibits. Therefore, the judge should include clear instructions to jurors about the proper handling of exhibits.

Recommendation 23.2 – Providing Verdict Form

Make a verdict form available to the jury foreperson that can be marked after the jury has reached their verdict. There are several ways in which forms can be completed and returned to the court. Non-fillable forms that are on the court's website or that are sent to the foreperson by email or chat can be printed (if the juror has a home printer). Fillable forms can be placed on the court's website, emailed, or chatted to the jury foreperson for completion. The court may also consider using other available technologies for adding signatures to documents. With signing services, typically the service emails a link to the indicated juror with instructions about how to sign and return the form. Signing services often have to be purchased. Although having the foreperson complete a verdict form is recommended, if necessary, the juror could write a statement and submit it via email.

Standard 24 – Communications to and from Deliberating Jurors

The court must control and limit the communications allowed to be sent to deliberating jurors, as well as monitor communications from deliberating jurors to the court.[34]

Recommendation 24.1 – Provide Means for Communication with the Court

Provide a way for the jury foreperson to send a written communication to the court when they have a question or request of the court, or that they have reached a verdict. There are several ways in which written requests can be made and returned to the court. Non-fillable forms that are on the court's website or that are sent to the foreperson by email or chat can be printed (if the juror has a home printer), completed, photographed, and emailed to the court. Fillable forms can be placed on the court's website or emailed or chatted to the juror, completed, and submitted via email to the jury clerk or bailiff. The court should also provide the jury a phone number for the jury clerk or bailiff if the electronic communication is insufficient or breaks down.

Recommendation 24.2 – Monitor Communications from the Jury

Jury deliberations can be accomplished in breakout room or another Zoom session. The jury clerk or bailiff should monitor communications coming from the "deliberation room," so that the court can receive and address any questions or requests that come from the jury. The jury clerk or bailiff can monitor their email or phone for this purpose, but need to remain in the main Zoom meeting in case the jurors "ask the host for help." If the jury asks the host for help, the jury clerk or bailiff can go to the deliberation room for the limited purpose of determining what assistance is needed.

Standard 25 – Providing any Requested Trial Testimony

If the jury requests to review a portion of testimony or evidence not already provided, the court may make a video or audio recording of witness testimony available to the jury for its

[34] MCL 768.16

consideration. The court may order the jury to deliberate further without the requested review, as long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.[35]

Recommendation 25.1 – Playing a Portion of the Trial Testimony or Evidence
If the request is granted by the court, then (outside the presence of the jury) the court with the attorneys and parties present should determine exactly which portion of the video recording will be played for the jurors when they are brought back into the Zoom courtroom. If there is a timestamp on the video recording, then it should be placed on the record what the beginning and ending timestamp shall be, so there is no confusion on the part of the person doing the playback.

Remote Jury Verdict

Standard 26 - Verdict
The court must have the jury return its verdict in open court, and a party may require a poll to be taken by the court asking each juror if it is his or her verdict.[36]

Recommendation 26.1 – Delivering the Completed Verdict Form to the Court
Provide a way for jury foreperson to deliver the completed verdict form to the court. Non-fillable verdict forms completed by the foreperson can be returned to the court by the foreperson scanning or photographing them and emailing the image to the jury clerk or bailiff. Fillable verdict forms can be completed and emailed back to the jury clerk or bailiff, or the court can consider using other available technologies for adding signatures to documents, but those technologies often have to be purchased. The jury clerk or bailiff should then send the completed verdict form to the judge for review prior to announcement of the verdict.

Recommendation 26.2 – Announcement of Verdict and Polling of Jurors
After the judge has reviewed the verdict form completed by the jury foreperson, the judge should ask the jury foreperson to identify herself or himself and make a verbal announcement of their verdict. All jurors should unmute themselves so the judge can poll the jury at the attorneys' or parties' request.

[35] MCR 2.513(P)
[36] MCR 2.514(B)