



# BEST PRACTICES

## Management of Evidence in Remote Hearings in Civil and Family Cases

May 5, 2020

### Introduction

This guide sets forth best practices with respect to the management of evidence during remote hearings in civil and family cases, provides an overview of the requirements for the conduct of in-person and remote hearings specified in [Florida Supreme Court Administrative Order 20-23, Amendment 1](#), 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 witness testimony in remote hearings. Issues that a Florida judicial circuit may wish to address include specifying:

1. Procedures that distinguish between requirements for:
  - a. Parties represented by counsel and self-represented parties, if appropriate; and
  - b. Physical exhibits, exhibits capable of being provided electronically, and witness testimony.
2. 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.
3. Requirements for the parties to file with the court any objections to exhibits by a specified deadline and procedures for the setting of hearings to resolve all such objections before the evidentiary hearing.
4. Requirements for the parties to:
  - a. Exchange witness lists that include the witnesses' names, email addresses, and cell and landline phone numbers before the hearing;
  - 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 they request sequestration. The name of the interpreter should be included in the witness list.
- 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. 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.
  - b. Consider advising 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. Discovery, evidence, and other rules of procedure still apply, unless suspended or amended by the Florida Supreme Court, as does the right to due process in all court proceedings; however, the courts and parties are encouraged to use flexibility during the public health emergency for the equitable resolution of cases.
  - b. As such, nothing in the local AO limits the presiding judge's discretion to:
    - i. Establish other procedures consistent with the AO;<sup>1</sup>
    - ii. Admit or deny evidence in the case or determine other relief appropriate under the circumstances; and
    - iii. Reset the hearing if technological issues prevent the meaningful review of evidence, where the parties have complied in good faith with the procedures, to use more appropriate electronic means or, if authorized

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<sup>1</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.

under Florida Supreme Court AOSC 20-23, Amendment 1, for an in-person hearing.<sup>2</sup>

8. Provisions notifying parties that they should contact the presiding judge's office to determine whether the judge has established additional procedures for a remote hearing.
9. Provisions notifying parties of the suspension of certain rules, court orders, and opinions by Florida Supreme Court AOSC 20-23, Amendment 1, 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. Responsibilities of the parties for providing for the transcription of the record and indicating that court reporters may remotely participate in the hearing.
12. Post-hearing procedures for the filing of exhibits not filed before the hearing, for a corrected index of exhibits introduced in evidence, and for the parties to retain copies of evidence admitted or denied admission by the presiding judge until the resolution of the case and exhaustion of any appeal.
13. 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 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 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> Under AOSC 20-23, Amendment 1, in-person hearings may be conducted only for essential proceedings. Additionally, under the AO, non-essential proceedings must be conducted remotely unless one of the two exceptions discussed in Footnote 4, below, apply.

<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 during their testimony.

2. Requiring witnesses to remain in a Zoom waiting room until they are called to testify and removing them from the hearing following their testimony. To enable this function, the presiding judge or clerk must host the Zoom hearing. This functionality is critical in the event that a witness must remain in a waiting room because he or she is sequestered. If sequestration is necessary, one of the following options will be needed:
  - a. The posting of a video of the proceeding after the hearing, rather than the live streaming the proceeding; or
  - b. Determination of some other mechanism that ensures the witness is unable to view the live-streamed proceeding.
3. Confirming that the witness is alone by requiring him or her to use his or her camera to scan the room before and after testimony and noting this for the record.

#### Florida Supreme Court Administrative Order 20-23, Amendment 1

Florida Supreme Court Administrative Order 20-23, Amendment 1 requires the trial courts to conduct:

- Essential and critical proceedings in a manner that employs all methods feasible to minimize risk of COVID-19 exposure to all; and
- Non-essential and non-critical court proceedings using electronic means unless a judge determines that remote conduct of the proceeding is subject to an exception.<sup>4</sup>

Included within the categories of proceedings above are requirements for the conduct of certain proceedings in civil and family cases:

<b>Civil and Family Essential Proceedings - <i>must be conducted remotely or in-person</i></b>	<b>Civil and Family Non-Essential Proceedings – <i>must be conducted remotely</i></b>
Juvenile dependency shelter hearings	Alternative dispute resolution proceedings
Juvenile delinquency detention hearings	Status, case management, and pretrial conferences
Hearings on petitions for injunctions relating to safety of an individual	Non-evidentiary and evidentiary motion hearings
Hearings on petitions for risk protection orders	Hearings in juvenile delinquency cases

<sup>4</sup> The exceptions are that the remote conduct of the proceeding would be: (a) inconsistent with the United States or Florida Constitution, a statute, or a rule of court that has not been suspended by administrative order; or (b) infeasible because the court, the clerk, or other participant in a proceeding lacks the technological resources necessary to conduct the proceeding or, for reasons directly related to the state of emergency or the public health emergency, lacks the staff resources necessary to conduct the proceeding.

Hearings on petitions for the appointment of an emergency temporary guardian	Hearings in noncriminal traffic infraction cases
Hearings to determine whether an individual should be involuntarily committed under the Baker Act or the Marchman Act	Problem-solving court staffings, hearings, and wellness checks
Hearings on petitions for extraordinary writs as necessary to protect constitutional rights	Non-jury trials, except for juvenile delinquency and termination of parental rights petitions in dependency cases unless the parties in those cases agree to remote conduct

To facilitate the remote conduct of proceedings, the AO:

- Authorizes chief judges to establish temporary procedures for the use, to the maximum extent feasible, of communication equipment for the conduct of remote proceedings.
- Authorizes the remote administration of oaths by audio-video communication technology for witnesses.
- Suspends all rules of procedure, court orders, and opinions applicable to:
  - Court proceedings that limit or prohibit the use of communication equipment for conducting proceedings by remote electronic means; and
  - Remote testimony, depositions, and other legal testimony that limit or prohibit the use of audio-video communications equipment to administer oaths remotely or to witness the attestation of family law forms.

### Other Resources Generally Addressing Remote Hearings

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