



# MICHIGAN TRIAL COURTS: LESSONS LEARNED FROM THE PANDEMIC OF 2020-2021

Findings, Best Practices, and Recommendations

State Court Administrative Office

Lessons Learned Committee

November 19, 2021

**The Michigan Supreme Court and the State Court Administrative Office would like to thank the Lessons Learned Committee, the various courts, and stakeholders for their invaluable assistance in contributing to the compilation of information and preparing these findings and recommendations.**

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In June of 2021, the Lessons Learned Committee released their preliminary findings in the report, *Michigan Trial Courts: Lessons Learned From the Pandemic of 2020-2021*. That report was released to courts, stakeholders, and the public with a request for comment and feedback. Additionally, pursuant to interim Michigan Court Rule 8.110, court leadership teams convened meetings to discuss the management of court operations during the pandemic and to identify potential permanent changes that might improve court processes. The Committee reviewed 128 responses from various judges, court administrators, court staff, attorneys, associations, and others. Of the responses received, 36 district courts, 17 circuit courts, 9 probate courts, 2 tribal courts, and 1 friend of the court were represented.

The Committee prepared this report and recommendations based on information compiled from the review of comments and feedback, of local administrative orders, policies, and information generated from interviews and/or surveys conducted by the Committee, the State Court Administrative Office, and the State Bar of Michigan of:

- Michigan Supreme Court Security & Emergency Management
- American Board of Trial Advocates – Michigan
- Michigan Defense Trial Counsel
- Prosecuting Attorneys Association of Michigan

- Criminal Defense Attorneys of Michigan
- Michigan Sheriffs' Association
- Tribal State Federal Judicial Forum
- Michigan Indigent Defense Commission
- State Appellate Defender Office
- Attorneys throughout the state
- Judges, magistrates, referees, court administrators, clerks, registers, friends of the court, parole and probation staff, mediation clerks, prosecutors, and public defenders from a diverse selection of courts from counties, including Allegan, Berrien, Calhoun, Cass, Cheboygan, Chippewa, Clare, Dickinson, Genesee, Gogebic, Hillsdale, Ingham, Ionia, Iron, Jackson, Kent, Lake, Lapeer, Lenawee, Livingston, Macomb, Mason, Marquette, Mecosta, Montcalm, Montmorency, Muskegon, Nottawaseppi Huron Band of the Potawatomi Tribal Court, Oakland, Ottawa, Presque Isle, Saginaw, Saginaw Chippewa Tribe, St. Clair, St. Joseph, Tuscola, Van Buren, Washtenaw, Wexford, and Wayne.

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## Executive Summary

In June of 2021, the Lessons Learned Committee released its preliminary findings in the report, *Michigan Trial Courts: Lessons Learned From the Pandemic of 2020-2021*. This report was released to courts, stakeholders, and the public with a request for comment and feedback. Additionally, pursuant to interim Michigan Court Rule 8.110, court leadership teams convened meetings to discuss the management of court operations during the pandemic and to identify potential permanent changes that might improve court processes.

The *Michigan Trial Courts: Lessons Learned From the Pandemic of 2020-2021* report focused on four main areas in which the courts were directly impacted as a result of the pandemic:

- the difficulties experienced by courts implementing emergency protocols;
- continuity of operations and planning for return to full capacity;
- the virtual courtroom and remote proceedings; and
- procedural concerns regarding ZOOM® hearings involving criminal defendants.

Overarching themes as a result of comments and feedback received included the following:

1. Amending court rules to create a presumption for appearing via ZOOM® for certain hearings had little support. Respondents favored allowing judges to maintain discretion over when to utilize a remote platform and for which hearings on a case-by-case basis.
2. Concerns regarding lack of funding for IT and equipment, as well as other unfunded mandates were relatively high among respondents. Respondents favored lobbying for legislative appropriations to assist with implementation of any mandates relating to IT, equipment, software, E-Filing systems, and broadband.
3. A need for reliable broadband and connectivity is imperative before implementation of any requirement of remote proceedings. At the very least, respondents expressed a desire for discretion for in-person proceedings based upon various factors including connectivity issues and lack of reliable equipment.
4. A need for statewide implementation of the E-Filing system MiFILE or an effective electronic workflow process in the interim had a great deal of support from respondents. However, concern was expressed related to funding.
5. Respondents identified a lack of district court representation on the Lessons Learned Committee. This was rectified with the addition of a district court judge to assist with the final version report and recommendations.

Key recommendations resulting from the information gathered as a result of the work of the Lessons Learned Committee are as follows:

1. Amend the court rules to create a presumption that participants will appear remotely for certain types of civil hearings.
2. The Michigan Supreme Court (MSC) should conduct a study over the next 12 months to determine how often courts are utilizing remote platforms versus in person proceedings and for which types of proceedings.
3. Develop a coordinated plan with stakeholders to advocate for the adoption of legislative appropriations to modernize the state's broadband and technology infrastructure. Stakeholders should include judges associations, State Bar of Michigan, Michigan Indigent Defense Commission, victim advocacy groups, and local funding units.

4. Modernize and further develop a unified case management and electronic filing system that is accessible to all courts. Additionally, the State Court Administrative Office (SCAO) should advocate for the adoption of legislative appropriations to assist courts with implementation.

## Introduction

The Michigan Supreme Court (Court) aptly stated, “Michigan has never faced a challenge like COVID-19.”<sup>1</sup> Our judicial system managed the shutdown of court buildings, coordination of essential workers, redistribution of resources to maintain services, and development of virtual courtrooms, while implementing ever-evolving standards to maintain the safety of the public and court staff and reducing the risk of spreading the virus. While the court system might fairly be perceived as tradition laden, our courts, nonetheless, adapted quickly to the pandemic by incorporating technology and modified procedures that in January 2020 would have been considered impossible. As of April 2021, Michigan trial courts had logged more than 3 million hours of Zoom® hearings and are considered one of the leaders in the country.

The Lessons Learned Committee was formed in May of 2020 and charged with assessing the experiences of our justice system during the pandemic, from implementing emergency procedures following the issuance of the Governor’s Executive Order and the Court’s Administrative Orders, to the efforts undertaken to continue operations for an indefinite period with judges and court staff working remotely to the modification of hearing procedures to accommodate a virtual courtroom. The Committee considered what court users reported they struggled with throughout the pandemic; what worked and what didn’t work well; and recommendations for the future of the courts based on our shared experience.

Sophocles said, “I have no desire to suffer twice, in reality and then in hindsight.” This report is not intended to inflict more suffering, but to critically assess the work the courts performed during the pandemic, the difficulties experienced during the transition to a remote workforce and virtual courtroom, and what the judicial system should consider to manage our courts more efficiently in the future.

Many counties, and the circuit, district, and probate courts located within those counties, encountered both common and unique experiences. This report does not attempt to recount or quantify every disclosure but highlights the common experiences that are representative of what shaped our justice system in this pandemic. Every court tried its best, and many courts collaborated with other courts and stakeholders to help direct and lead a path through the challenges. Although many of the issues and struggles that arose during the pandemic overlap different operations of the courts, this report focuses on the following:

- emergency preparedness and response,
- continuity of operations and planning for return to full capacity,
- the virtual courtroom and remote proceedings, and
- a review of criminal procedure issues arising as the courts begin to tackle the backlog of criminal cases.

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<sup>1</sup> [Michigan Supreme Court, Return to Full Capacity: COVID-19 Guidelines for Michigan's Judiciary](#)

## The COVID-19 Emergency: Preparedness and Response

Judge James Alexander, Oakland County Circuit Court (now retired), best summarized the Michigan trial courts' level of preparedness for the pandemic and initial shutdown orders: "Anyone who tells you they were prepared for this is either lying or living in Oz!" Of the courts surveyed, only 24 percent had a documented emergency plan or continuity of operations plan in place prior to the pandemic. Those plans did not anticipate a complete shutdown of services; rather, they prescribed the continuation of operations with reduced level of services either in a different location or by combining all court operations at a central location. The idea of remote operations with nearly all personnel working from home had not previously been considered by any court in the state.

Interestingly, prior to the pandemic some courts had consulted with their local health department regarding the impact of an infectious disease/epidemic outbreak on the justice system and others were experimenting with Zoom® for certain limited hearings.<sup>2</sup> However, these courts admit their actions were initiated not in anticipation of the shut-down, but as a result of their desire to evaluate and assess all aspects of their court operations. In that regard, they were "lucky" to be in a better position than most courts to quickly pivot into a virtual courtroom environment because of their entrepreneurial approach to solutions.

Of those courts with an emergency plan in place prior to March 2020, 83 percent identified essential workers, and those workers had been fully briefed and informed of the emergency plan. Beyond the identification of essential workers, the preparedness for and implementation of emergency protocols were primarily managed day-to-day to address immediate needs. The more coordinated a court's operations were among administration, judges, magistrates, referees, clerks, registers, staff, prosecutors, public defenders, city/county operations, sheriffs, jails, friends of the court (FOC), bar associations, Michigan Department of Health and Human Services (MDHHS), local health departments, and other key stakeholders, the more nimble and responsive the court – and the more positive the experience for those using and relying on the courts.

## The Difficulties Experienced by Courts Implementing Emergency Protocols

On March 10, 2020, Governor Whitmer declared a state of emergency to address the COVID-19 pandemic.<sup>3</sup> On March 15, 2020, the Court authorized trial courts to "implement emergency measures to reduce the risk of transmission of the virus and provide the greatest protection possible to those who work and have business in our courts."<sup>4</sup> By April 1, 2020, Michigan had confirmed 9,334 cases of COVID-19 and 337 deaths, with thousands presumed infected but not tested. By May 2020, the confirmed cases within the state rose to 42,356, resulting in 3,866

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<sup>2</sup> SCAO had secured Zoom® licenses in May of 2019 and began working with courts to expand the use of virtual proceedings to compliment the Polycom® videoconferencing system or serve as a substitute. SCAO was ahead of the curve in 2019 in moving to expand remote hearing capabilities. The use of Polycom units in several Michigan courts over the past decade played an important role in the transition to remote hearings in many jurisdictions. The majority of the Polycom units were funded by the state (SCAO and MDOC).

<sup>3</sup> [Executive Order 2020-4](#).

<sup>4</sup> [MSC Administrative Order No. 2020-1](#).

deaths from the disease.<sup>5</sup> During this rapid spread of the disease, the metro-Detroit area was the epicenter in Michigan, and rural areas such as Northern Michigan, the Thumb, and the Upper Peninsula had minimal, if any, reported cases. The trial courts were left trying to decipher what “emergency measures” should be implemented for their location and how to manage personnel, budgets, and the docket.

Trial courts were immediately faced with whether to adjourn matters and for how long, and how to quickly and efficiently communicate adjournments to litigants, attorneys, and jails. Additionally, courts began to assess their capacity to conduct videoconferencing hearings, whether and how that capacity could be expanded, and what employees were necessary to manage the video sessions of the court.

The Court’s March 15, 2020, administrative order<sup>6</sup> provided trial courts with the authority to:

- Adjourn any civil matters and any criminal matters where the defendant is not in custody; where a criminal defendant is in custody, trial courts should expand the use of videoconferencing when the defendant consents;
- Maximize the use of technology in civil cases to enable and/or require parties to participate remotely and waive any fees currently charged to allow parties to participate in remotely;
- Reduce the number of cases set to be heard at any given time to limit the number of people gathered in entranceways, lobbies, corridors, or courtrooms;
- Maximize the use of technology to facilitate electronic filing and service to reduce the need for in-person filing and service;
- Waive strict adherence to any adjournment rules or policies and administrative and procedural time requirements, wherever possible;
- Coordinate with local probation departments to allow discretion in monitoring probationers’ ability to comply with conditions without the need for amended orders of probation;
- Take any other reasonable measures to avoid exposing participants in court proceedings, court employees, and the general public to the COVID-19 virus;
- Take into careful consideration public health factors arising out of the present state of emergency: a) in making pretrial release decisions, including in determining any conditions of release, b) in determining any conditions of probation; and
- If a chief judge or the court’s funding unit decided to close the court building to the public, then the court must provide the State Court Administrative Office (SCAO) with the court’s plan to continue critical services.<sup>7</sup>

Shortly thereafter, the Court directed trial courts “to the extent possible and consistent with constitutional and statutory rights” to conduct hearings remotely or adjourn all non-emergency or out-of-custody criminal matters to April 3, 2020.<sup>8</sup> Also, the courts were directed to limit access to the courtrooms and other spaces to no more than 10 people, including staff, and to practice social distancing.<sup>9</sup> At that time, it was not clear how long the pandemic would last, but the trial courts faced a prolonged period of uncertainty.

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<sup>5</sup> [Executive Order 2020-151](#).

<sup>6</sup> [MSC Administrative Order No. 2020-1](#), March 15, 2020

<sup>7</sup> Id.

<sup>8</sup> [MSC Administrative Order No. 2020-2](#), March 18, 2020.

<sup>9</sup> [MSC Administrative Order No. 2020-2](#), March 18, 2020.



## Identifying Essential Services AND Essential Workers

The Court's March 18, 2020, administrative order helped courts identify those hearings that were considered essential and those that could be adjourned. The Court continued to update administrative orders and by May 2020, SCAO developed a Remote Court Participation Chart<sup>10</sup>.

Initially, most courts adjourned all hearings except emergency matters (i.e., personal protection orders, criminal proceedings involving people who were incarcerated, certain child protective hearings, domestic relations matters involving ex parte requests, involuntary mental health treatment, emergency matters involving guardians). During this initial period of adjournments, many courts directed "non-essential" workers to remain home pending further instruction while the courts attempted to identify what services were essential, how to provide those services, and the personnel necessary to provide the services.

The courts identified essential hearings that could be conducted remotely and those requiring in-person hearings. The ability to make these decisions quickly and efficiently was dependent upon whether a court had prior capacity to work remotely and to accept pleadings online or by e-mail/fax. If a court had remote capacity, then it was able to use those employees familiar with remote hearings to manage the hearings. Likewise, if a court was able to accept pleadings online through MiFILE or by e-mail filings, it had the option to close most, if not all, in-person filing in the clerk's office, thereby reducing the number of employees needed in the building. Courts that did not have electronic capacity were left to coordinate a filing system based on few employees while limiting the public access to the courts, which slowed the process of filing and managing the docket system. Additionally, clerks' and registers' offices were required to coordinate filings and hearing schedules with the judges' offices, but those offices were – for many – trying to manage remote hearings for the first time; all of which significantly slowed the process.

The courts struggled to identify and coordinate essential workers. As noted, of the small percentage of courts that had an emergency plan in place in March 2020, 83 percent of those identified essential workers. Unfortunately, many courts quickly learned they were neither structured for nor equipped to have employees work remotely. Trial courts faced the immediacy of having to take actions without adequate support staff, technology, and fully vetting the practicality of the procedures to be utilized.

A remote hearing requires not only court staff, judges, magistrates, and referees to be familiar with remote hearing procedures, but also those involved in the hearing, including litigants, prosecutors, public defenders, retained attorneys, probation officers, and witnesses. Self-represented litigants, already unfamiliar with the standard procedures of the court, grappled with the process of remote connection to the court. The courts had to develop protocols and tutorials to educate the users of the court's remote platform; a role the courts had not typically served pre-pandemic. The courts were not initially equipped to do these tasks and improvised "on the fly."<sup>11</sup>

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<sup>10</sup> [Remote Court Participation Chart](#)

<sup>11</sup> In the summer of 2020, SCAO developed a toolkit document entitled [Guidance on Conducting Remote Hearings with Self-Represented Litigants](#). The toolkit included practice tips learned from various courts around the state, along with resources shared from other sources.

Various courts – including those from small to large counties – discovered their IT departments would not support the Zoom® format, notwithstanding that SCAO had secured licenses for the platforms. The difficulties in managing the remote technology are addressed later in this report.

Even though the courts wanted to offer remote hearings, the essential workers were often not equipped with the hardware to connect to the court network remotely, and even if they could connect, their Internet connections were weak, especially in rural areas. In some courts, the judges loaned personal laptops or tablets to employees so that the employees could work from home while they waited for the county funding source to approve acquisition of equipment necessary to support employee remote connectivity to the court system. The district courts, which have a significantly lower technological capacity at present for e-filing than the circuit courts, were practically unable to work remotely to any significant degree.

Even when judges and staff had personal computers at home or in the office, the computers typically were not equipped with microphones and/or cameras. The courts had to secure resources to purchase the equipment necessary to work remotely and conduct remote proceedings. The courts faced budget constraints or reluctance of a funding unit to approve expenditures because the funding unit did not understand the need for remote access. Several courts negotiated discounts with local box stores to purchase 10 or more camera/microphone sets every 10 to 20 days to equip personnel.

At the same time, courts attempted to coordinate emergency planning with stakeholder groups, including prosecutors, public defenders, sheriffs, jails, probation offices, FOC, DHHS, mental health providers, and county boards of commissioners. These efforts were almost immediately hampered for two reasons:

- 1) The stakeholder groups were making the same emergency decisions for themselves and were not readily available; and,
- 2) In those counties where relationships were strained due to lack of communication or other intragovernmental conflicts, the communication lines were not well defined or open.

Courts struggled to prioritize criminal cases for in-person hearings and the amount of staff necessary to manage the hearings. In some counties, hearings were delayed because prosecutors and public defenders could not agree on procedures.

Some courts initially identified one or two “emergency” judges to handle essential cases within the courthouse. However, the plan proved unmanageable in the mid-sized to larger counties because the case volume was too large in both civil and criminal dockets. Judges were required to hear the essential cases to maintain the dockets, and to consider remote virtual hearings by Zoom® or Polycom®. Probate judges remained with their primary docket, focused on essential hearings, and adjourned most hearings until the later part of April or early May 2020.

When courts identified necessary judges and essential hearings, hearings were often delayed because the processing of pleadings was slowed in the county clerk’s office. Courts accepting online filing of pleadings could process the records more quickly than courts that only permitted in-person or mail filings. Also, clerks’ offices were working with reduced staff and limiting the number of persons who could enter the office to file documents; these procedures slowed the typical processing time and made it difficult to coordinate with judicial staff the time required to permit processing of the pleadings before scheduling hearings. These delays, while annoying to standard hearings, resulted in critical delays in emergency hearings such as personal protection orders, child protective hearings, guardianships, and child custody emergencies.

The courts were not immune from the political divisions experienced throughout the country regarding the nature of the pandemic and its health risk. Whether a court shut-down or remained open could, in some measure, depend on where the court was located and whether a funding source directed a shut-down. Courts in much of the Upper Peninsula and some regions of the upper Lower Peninsula continued to operate but limited the number of people who could enter the court to file pleadings, review files, pay fines, or appear in court. Courts in more urban areas initially shut down all operations except for emergency hearings. This status lasted between two to four weeks.

Some courts were directed to shut down by their county funding unit. In these instances, the county identified the essential operations to be maintained within the county and didn't recognize the need for the courts to be open. As the Michigan Supreme Court expected emergency and essential hearings to proceed even if personnel were working from home, courts were required to explain to county boards and managers that courts were the third branch of government and as such were expected to adhere to the direction given by the Michigan Supreme Court.

The need to communicate with the local funding unit regarding designated essential employees slowed the court process. Importantly, many local governmental units had not experienced nor anticipated governmental functions operated from remote locations and could not easily comprehend services continuing without personnel located inside the brick-and-mortar locations commonly identified for governmental services. In some counties, the funding units would not initially approve wages unless the employees were working at the courthouse which led to conversations with courts about the court's authority to oversee court operations.

There were numerous examples across the state where a circuit court was not conducting in-person hearings except when required under the Court's administrative orders, but the district court (or vice versa) would hold in-person hearings for many categories of cases. The courts were not consistent within their county in managing hearings. These discrepancies were primarily caused by a failure to coordinate the needs of all stakeholders within the county and how to effectively address those needs, and this caused confusion for attorneys over which courts were conducting in-person hearings and which were primarily relying on remote virtual hearings.

Those courts with strong and collaborative relationships with their funding unit managed these staffing and resource issues more quickly and efficiently.

Courts coordinated with the jails and prisons to transfer inmates for essential hearings. While this function had relatively few complications pre-pandemic, the transfer to/from and housing of inmates in the courts while waiting for a hearing was complicated by the need for personal protection, social distancing, and quarantines. Additionally, the Sheriffs' Association noted uncertainty with respect to the rules for transporting, quarantining inmates, managing inmates at the courthouses, and whether there would be limited inmates permitted in the court each day. These issues were addressed at the local level.

Inmates were required to have personal protection equipment, and the need to practice social distancing limited the number of inmates that could be transported, which, in turn, limited the number of hearings that could be conducted at a court. The courts and county sheriffs had difficulty in the first few weeks, and in some instances months, coordinating an efficient schedule. In a joint statement released on March 26, 2020,<sup>12</sup> by Michigan Supreme Court Chief Justice Bridget M. McCormack and Michigan Sheriffs' Association Executive Director Sheriff

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<sup>12</sup> [Michigan Courts News Release, March 26, 2020](#)

Matt Saxton, judges and sheriffs across the state were acknowledged for working together to safely reduce jail populations while focusing on keeping the communities safe.

Jails reduced the number of transport guards and staff working each shift and this burdened the system by slowing the process to transport inmates to hearings or return inmates to the jail. The logistics were further complicated by the vast difference of resources and location of jails in each county. Many counties do not have centrally located jails, and travel time to and from the court reduced the number of inmates that could be transported each day while still maintaining safety practices. This reduced the time available for essential hearings in the court.

Courts worked diligently to reduce workers in the courthouse and limit possible exposure to the virus, but it was quickly discovered that the sheriffs transporting inmates had been working a full shift inside the jail and created risks to the court staff for possible exposure to the virus. The courts and sheriffs worked through the logistics to ensure proper transport and safe operations, but this delayed criminal proceedings.

The courts and jails have long used the Polycom® video conferencing system to conduct criminal arraignments and other appearances that do not require in-person hearings. Polycom® was used as much as possible in the early stages of the shut-down to accommodate more hearings. But the jails had limited space for inmates to connect to Polycom®, and the use of Polycom® extended the length of the hearings because defense counsel – who could not meet with the client in-person before the hearing – required access to the Polycom® system prior to and during the hearing to confidentially confer with the client.

Both the district and probate courts serve a large constituency that do not have ready access to technology necessary to access a website to learn about emergency procedures, or to print, scan, or e-mail pleadings, notices, and documents. The courts recognized early that they needed to provide walk-in service but were hampered by other shared courts within the same courthouse shutting down or significantly reducing public services.

The nature of probate court hearings created issues regarding safety for the litigants. For example, a hearing to appoint a guardian and/or conservator for a developmentally disabled adult requires the adult ward to be present for the hearing. Often, these adults are subject to medical conditions that can increase the risk of the adult contracting a virus. While courts could conduct the hearing by Zoom®, the family and other caregivers were often limited in the use of the technology. The court was left with either adjourning hearings and/or developing training materials to assist the constituents to access the court's remote hearing technology.

Probate courts, like many other courts, that were not prepared for virtual hearings were more liberal in the use of telephone hearings for non-evidentiary hearings, motions, and scheduling conferences. While this permitted essential hearings to proceed in many instances, the judicial officer and staff had to be in court to conduct the telephone hearing. It was difficult to manage the proper staff ratio to maintain operations and safety.

Probate courts were required to coordinate with local hospitals, mental health facilities, DHHS, guardians, sheriffs, and banking institutions. Courts were using Polycom® for mental health hearings and other limited hearings, but it was difficult to expand the users of the Polycom® system without training and training of users was difficult because of limited access. Counties that created tutorial sheets for stakeholders and posted the tutorials to a website experienced fewer delays in coordinating hearing attendance.

## Managing under the Michigan Supreme Court's Administrative Orders

The Michigan Supreme Court and the State Court Administrative Office were tasked with the nearly impossible: guide the trials courts through an immediate shutdown of operations while maintaining access to justice through remote proceedings.

As noted, the initial shut-down orders created uncertainty for the courts. Courts across the state immediately began to address questions and details such as how long the shutdown would last; how long hearings and trials should be adjourned; how the court should handle deadlines previously set in a proceeding but expiring during the shutdown; whether statutory filing deadlines would be extended; and whether court efforts to substantially comply with various mandated procedures under statute or Michigan Court Rules would be considered acceptable to SCAO and the Court as protecting procedural rights of parties during the shut-down.

The Court quickly ordered that in all deadlines applicable to the commencement of all civil and probate case-types, including but not limited to the deadline for the initial filing of a pleading under [MCR 2.110](#) or motions raising a defense or objection to an initial pleading under [MCR 2.116](#), and any statutory prerequisites to the filing of such a pleading or motion, any day that falls during the state of emergency declared by the Governor should not be included for purposes of calculating the time for filing in accordance with such deadlines.<sup>13</sup> Additionally, the Court extended the expiration of summonses and dates to file post-judgment motions filed in trials; allowed for litigants to seek a fee waiver by electronic process; and permitted all service of process under [MCR 2.107\(C\)](#) to be performed using electronic means.<sup>14</sup>

Jury trials in both civil and criminal cases were delayed until June 2020, subject to further order. While some courts have re-opened under a phase of operations that permits jury trials, many courts are not able to conduct jury trials because of the re-opening phase they are caught in due to county infection and hospitalization rates. The courts are keenly aware these delays create significant backlog of the criminal dockets, potentially affecting the rights of criminal defendants, and expand the back-up of the court's docket.<sup>15</sup> Section 5 of this report explores criminal procedure issues.

The district courts, primarily, and other civil courts were provided new case procedures for handling landlord-tenant disputes, including prioritizing of cases. These orders, in part, considered the impact on landlord-tenant responsibilities and payment under the [Coronavirus Aid, Relief, and Economic Security Act \("CARES Act"\), Public Law No.116-136](#), that imposed a moratorium on the filing of summary proceeding actions to recover possession of premises for nonpayment of rent that meet certain parameters. The procedures created questions and docket management issues, but many of the courts worked together to share insights and practices.

The expiration dates for personal protection orders were extended to July 2020. Respondents were permitted to object to the extension by a motion to modify or terminate. Although many courts posted the extension rules on their website under COVID-19 protocols and others mailed notices to respondents if there were valid addresses, the effort to uniformly advise the

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<sup>13</sup> [MSC Administrative Order No. 2020-3](#) , March 23, 2020; amended by [MSC Administrative Order No. 2020-08](#), June 12, 2020 .

<sup>14</sup> *Id.*

<sup>15</sup> This report does not attempt to address the issues regarding conducting remote jury trials. The Supreme Court and SCAO issued a report in July 2020 entitled [Michigan Trial Courts Remote Jury Trial Standards and Recommendations](#).

respondents outside of general news reports was inconsistent.<sup>16</sup> Courts questioned whether they could provide leniency to a respondent who believed a personal protection order had expired, had not received notice of the extension, and contacted the protected party to discuss relationship or family matters – in violation of the extended order – but without threat or violence. With this particular issue not specifically addressed in the administrative orders, courts were left to their discretion, consistent with managing a personal protection hearing prior to COVID-19.

The extension of deadlines created a burden on court staff to manage the deadline schedule to avoid unnecessary notices to dismiss cases for non-service, management of electronic requests for fee waivers and status of summons, and management of files once the executive orders would be lifted. This all done while court staff was reduced and/or working remotely.

Beginning in April 2020, and continuing to present, the Court and SCAO have provided sample order templates and responses to frequently asked questions to assist courts in fashioning local administrative orders or policies to manage the local courts consistent with the Court's administrative orders. Many courts found these helpful and, importantly, they provided guidance to local funding units to understand the need to maintain access to the courts even though court staff and judicial officers were working remotely. Some courts believed the Court's administrative orders were a "one size fits all" approach without engaging sufficient feedback from the various trial courts. Nevertheless, the courts also acknowledge that SCAO regional administrators and staff were extremely helpful in responding to specific questions and needs.

Most courts issued local administrative orders or policies within the first two months following the Governor's Executive Orders and the Michigan Supreme Court's administrative orders in March and early April 2020. The courts that were most successful in informing users of the orders and policies posted them on the court's website, social media, and e-mailed to local bar associations, stakeholder groups and local media. These courts routinely updated the orders/policies after substantive updates from the Court and SCAO; the courts averaged between three to six updated local administrative orders and policies over an eight-month period, when many years a court might issue one, at most. However, many courts did not initially communicate these orders and policies in a proactive manner and did not coordinate with stakeholder groups resulting in confusion and uncertainty.

## Impact of Budget Issues on Trial Courts Responding to COVID-19

The trial courts and their funding units immediately faced the challenging prospect of budgeting for the costs associated with purchasing personal protection equipment (PPE); sanitation materials, and overtime to maintain a clean courthouse during and after business hours; signage for directing traffic safely into and through the courts; plastic shield protection for personnel required to be exposed to the public; and technology and equipment to permit personnel to work remotely and for the court to conduct remote hearings. The Michigan Tribal Courts faced similar budget restraints following tribal decisions to suspend or cut budgets, and courts were closed or limited access to by appointment only to safely operate the courts.

SCAO had to become immediately familiar with laws regarding employee furloughs, the CARES Act, and government loans to assist funding payroll and purchase of personal protection equipment and other technology/equipment to manage remote operations under FEMA and other

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<sup>16</sup> Some courts considered mailing notices of the extensions, but long term this was an additional cost that was not justified given the rising budget constraints caused by other COVID-19 expenses.



government programs. SCAO regional administrators provided courts updates and resources to review to address budget issues and are commended for the break-neck speed of learning, assessing, and developing plans to manage the courts.

The courts could not predict the length of time the Governor’s stay-at-home order would remain in place and when Michigan would “return to normal.” At the beginning of the pandemic, many Michiganders hoped the shut-down would be no longer than one to three months, and some funding units were initially cautious to authorize expenditures for safety and technology, hoping to manage the shut-down on a limited budget. Those courts were caught flat-footed but were quickly brought along by the assistance of SCAO and consultation with surrounding counties when it was clear the pandemic would be for the long haul.

The courts, particularly in small- to medium-sized counties, were required to expend a great deal of time educating their funding units regarding the need for the courts to remain open through remote hearings. The difficulty and delays this process caused the courts was a common refrain.

The greatest budgetary concerns expressed by the courts included costs for technology equipment (laptops, tablets, cameras, microphones, printers, etc.); software applications; personal protection equipment and cleaning supplies; overtime and staff expenses; increased postage and envelopes/paper; and declining revenue. Courts were not always made aware of state and federal funding opportunities available to assist with budgetary concerns during the pandemic. The bureaucracy of traditional funding unit negotiations with courts negates timely access to emergency funds. Emergency funding opportunities directly accessible to courts, prosecutor’s offices, and defender’s offices would allow for immediate action.

The courts must use this pandemic to advocate for their funding units to support the courts’ efforts to adopt an electronic filing system and a more robust paperless system supported by online interaction for users of the court, and to maintain infrastructure and equipment to continue remote hearing access through Zoom®.

## Managing the Filing of Pleadings and Communication to Stakeholders

The commencement of all actions in court and the procedures undertaken during the pendency of the action require a party to file a pleading in the court. The circuit court and district court clerks and the probate court registers manage the filing system. Typically, the pleadings are accepted by mail or in-person filing. In recent years, SCAO and the courts have begun a transition to online or e-mail filing, but only a minority of the courts use the system.

Courts using MiFILE, the E-filing system, could close the clerk’s physical office and accept pleadings filed online. Approximately 95 percent of the court respondents to surveys indicated that court clerks or judges would accept pleadings filed by e-mail provided the original pleadings were mailed to the clerk’s office. However, courts also noted that the practice was not consistent throughout the courthouse and that many judges opted not to accept e-mail pleadings. Many courts utilized a drop-box system outside of the court for those who could not access the Internet. While closing of the clerk’s office limited the number of people in the courthouse and enhanced safety protocols, it also increased delays with the filing system and preparing for remote hearings.

Most courts maintained a skeletal crew in the courthouse. As a result, there were severe delays in processing both in-person and electronic court filings.

The lack of uniformity in how courts accepted filings and the inability of many courts to accept electronic filing created confusion with the users of the court. The attorneys reported that the pandemic accentuated the lack of a reliable and uniform e-filing system like the PACER system used in the federal courts.

Courts in the northern Lower Peninsula and Upper Peninsula were able, for the most part, to keep their clerk and register offices open because of lower rates of the virus. However, the offices maintained social distancing, used personal protective equipment, and reduced the number of employees working in the office to “an essential level.” The courts created work pods or teams of limited numbers that rotated or staggered the workdays in the office; this helped coordination of workflow while maintaining social distancing.

Courts, like many private companies, could not easily secure personal protection equipment at the start of the pandemic. Smaller to mid-size courts were often without internal maintenance staff to post social distance markers and signs directing court visitors; these factors delayed opening the clerk’s office and other public services. If the court did not have the personal protection equipment, it further delayed opening unless staff had secured their own masks.

## Best Practices in Managing the Emergency Response to COVID-19

The courts that best managed the emergency response to COVID-19 had previously developed an emergency plan, identified and trained essential employees regarding the emergency plan, and had a positive working relationship with the court’s funding source, together with a collaborative relationship with court stakeholders that permitted open communication and dialogue.

Courts equipped to use electronic filing or utilized e-mail/fax filing experienced an easier transition to limited in-person court access and remote hearings. Of the courts surveyed, 70 percent accommodated some form of e-mail or fax filing, 20 percent utilized e-filing such as MiFILE, and 90 percent continued to use limited public access for filing, including a drop box, scheduled appointments, or limited hours. Once a court instituted electronic filing, the length of delays declined in managing the schedule for remote hearings.

Courts reported that the top three procedures that increased efficiency and/or were widely applauded by the court’s stakeholders were accommodating electronic or e-mail filing (100 percent of survey responses), availability of drop-boxes outside the court or other public locations accessible to users of the court (90 percent), and creating detailed instructions sent with notices or other court mailings regarding procedures for remote hearings, contact information for each judicial office to address questions, and training for staff to respond to frequently asked questions including Zoom® hearings (64 percent).

Kent and Wayne counties conducted Zoom® bench-bar conferences to review court policies and Zoom® procedures.

The demands of coordinating the shut-down of the courts required cooperation between the courts and the stakeholders. The courts that managed these relationships well undertook the following common steps:

- (1) Immediately scheduled a meeting with stakeholders, including court administrators, chief judges, presiding judges, magistrates, referees, clerks, registers, staff, IT, ADR clerks, prosecutors, public defenders, city/county operations, sheriffs, jails,



FOC, local bar associations, DHHS, local health department representatives, and MIDC Regional Managers.

- (2) Developed an emergency plan or updated the existing emergency plan. Posted on the website the contact information of key personnel to answer questions on the operations of the court.
- (3) Communicated the court's emergency procedures through local administrative order or policy on the court's website and distributed the policies to key users of the court, including prosecutors, public defenders, FOC, sheriff/jails, and local bar associations, including specified practice sections of the bar. Any updates were immediately posted to the website and distributed to the stakeholders. The counties of Kent, Berrien, Cass, Jackson, and Van Buren all have followed some form of this practice.
- (4) Developed training protocols for staff on new emergency procedures.
- (5) Developed a tutorial or guidance for attorneys and parties to access and use the remote hearing procedures. Berrien and Van Buren counties produced a video on how to enter the court, safety protocols, and what to expect inside the court. The video was posted to the court's website and released to news media. These two counties also posted their essential operations plan and guidelines for virtual hearings.
- (6) Maintained consistent and uniform application of the procedures by all judges. The most common complaint by users of the court has been the inconsistency of judges within a county to follow the county's posted policies on remote hearings, e-mail filing, Zoom® procedures, and adjournments.
- (7) Utilized visiting judges or virtual judges.

## Recommendations:

(1) **Emergency Plan Court Rule:**

**Original Recommendation:** The Committee recommends that the Michigan Supreme Court adopt a court rule under Michigan Court Rules, Subchapter 8, and General Administrative Orders, requiring each court to develop an emergency operations and continuity of operations plan within one year of adoption of the rule. The courts should review and update the plan, as necessary, every three years. Each court should be encouraged to work with their stakeholders to develop the plan and conduct the three-year review. The plan would be based, in part, on the lessons learned during the 2020-2021 pandemic.

**Comments and Feedback:**

Comments received regarding this recommendation indicated a majority support for implementing either a court rule, administrative order, or trial court performance standards that would include emergency plans for functions and court-operated services. However, commenters cautioned against requirements for emergency plans that would promote a one size fits all approach. Comments further reflected a request to ensure that that all stakeholders are consulted when developing any

emergency plans and to provide leadership development that addresses ongoing management of courts and crisis management.

Responses indicated a desire for SCAO to create, maintain, and continually update a comprehensive list of materials and resources to assist courts with developing emergency plans and continuity of operations plans with all courts, including local courts, having access to all training materials.

**Final Recommendation:** The Committee recommends amendment of the Chief Judge Rule under MCR 8.110 to require the chief judge to facilitate the development of an emergency operations plan and continuity of operations plan within one year of adoption of the rule. The courts should review and update the plans, as necessary, every three years. Each court should be encouraged to work with their stakeholders to develop the plans and conduct the three-year review. The plans would be based, in part, on the needs and capabilities of each jurisdiction, and on the lessons learned during the 2020-2021 pandemic. The Committee further recommends that SCAO create, maintain, and continually update a comprehensive list of materials and resources to assist courts with developing emergency plans and continuity of operations plans with all courts, including local courts, having access to all training materials.

**(2) Unified Case Management and Electronic Filing System:**

**Original Recommendation:** The Committee recommends that the Michigan judicial system modernize and further develop a unified case management and electronic filing system that is accessible to all courts.

**Comments and Feedback:**

Comments received overwhelmingly supported moving forward with a unified case management and electronic filing system. Many commenters indicated that a unified case management system and electronic filing system was much needed and long overdue. Comments indicated that in order for courts to fully utilize remote work, be efficient, and consistent statewide there must be a unified case management and filing system. It was also confirmed that the report accurately described the inconsistency among courts in providing alternatives to in-person filing and the lack of clear direction given to the public.

Commenters did express concerns that the creation of a statewide unified case management and electronic filing system would be problematic for many courts that have purchased and implemented costly case management systems on their own. Additionally, there were concerns expressed that requiring courts which had not previously purchased and implemented a system to do so would create an unfunded mandate. Commenters requested that funding for a statewide case management system and electronic filing system would come from legislation and not be left to funding units, some of which have already spent large sums for a defunct system.

Concerns were also raised regarding the detrimental and disproportionate impact of establishing technologically based access to the essential services of the Michigan's judicial system to those living below, at, or near the poverty level. Many Michigan

residents live in areas where the technology available is limited, sporadic, or non-existent. Commenters requested consideration of the following in the development of a unified case management and electronic filing system:

- develop avenues to provide access to technology to indigent individuals and those who otherwise do not have reliable access to technology;
- develop avenues to provide equipment to indigent individuals and those who otherwise do not have access to a computer and the internet or a phone;
- develop multiple avenues of access to essential services that do not rely on technology; and
- integrate the rights of victims of crime.

It was suggested that until a unified case management and electronic filing system is created and implemented, a unified approach to filing methods across all Michigan courts should be established. This should include both technological alternatives such as email filings and non-technological alternatives such as a drop box for those lacking adequate internet access that are available immediately. These alternatives should also be well publicized throughout Michigan.

**Final Recommendation:** The Committee recommends that the Michigan judicial system modernize and further develop a unified case management and electronic filing system that is accessible to all courts. The committee further recommends that SCAO advocate for the adoption of legislative appropriations to assist courts with implementation.

**(3) Infrastructure Advocacy:**

**Original Recommendation:** The Committee recommends that SCAO and the judges' associations coordinate a plan to advocate for the adoption of legislative appropriations to modernize the state's broadband and technology infrastructure. The users of the court will expect seamless access to the courts by remote connection, and the experience from the pandemic is that large areas of the state lack strong and stable connectivity. This is a matter of access to justice.

**Comments and Feedback:**

Comments received supported this recommendation as statewide infrastructure enhancement would benefit a broad sector of society with regard to education, healthcare, and employment as well as access to justice. As with the recommendation for a unified case management and electronic filing system, the issue of funding such an endeavor raised many concerns from commenters. Commenters expressed a need for advocating for appropriations sufficient to improve technological access throughout the state, and to provide training to Michigan residents on using the technology to access the essential services of the courts.

**Final Recommendation:** The Committee recommends that SCAO and the judges' associations coordinate a plan to advocate for the adoption of legislative appropriations to modernize the state's broadband and technology infrastructure. The community and users of the court will expect seamless access to the courts by

remote connection, and the experience from the pandemic is that large areas of the state lack strong and stable connectivity. This is a matter of access to justice. The committee further recommends that funding be made available to courts for purposes of implementation.

**(4) SCAO Training to Strengthen and Enhance the Relationship between the Court System and the Funding Unit:**

**Original Recommendation:** The Committee recommends that SCAO and MJI develop a training program that shares the methods and means to develop a strong, mutually collaborative working relationship between the courts and their funding units.

**Comments and Feedback:**

Comments received supported this recommendation. Such training could be beneficial to courts and funding units for years to come as it is often a constant struggle re-developing an understanding with new and ever-changing stakeholders such as mayors, city administrators, council members on the roles and responsibilities of the court, especially as they may differ from that of the local government. Further comments expressed a desire that any training programs regarding a court's relationship with their funding unit be developed in conjunction with the Michigan Association of Counties, Michigan Indigent Defense Commission, and other government agencies.

The Committee also recognized the need to broaden the scope of the training by including all courts and funding units.

**Final Recommendation:** The Committee recommends that SCAO and MJI develop a training a program that shares the methods and means to develop a strong, mutually collaborative working relationship between the courts and their funding units. The Committee also recommends that SCAO develop a protocol to facilitate the notice to and support for immediate access to courts of the availability of, and the access to, state and federal funds to recoup costs incurred as a result of the pandemic including federal and state mandates. SCAO may need to endeavor to strengthening courts negotiating positions as well as allow for independent access to emergency funds.

## Continuity of Operations and Planning for Return to Full Capacity

The Michigan trial courts transitioned from emergency shut-down to managing remote hearings and/or limited in-person hearings over a period of two months. Certainly, the courts did not master or fully adapt pre-pandemic procedures during this period, but they delivered essential services and slowly began to expand the operations of the courts. The magnitude of the changes necessary to remotely manage court operations became clearer in the first two months, but the courts, while at times overwhelmed, remained focused on delivery of services.

During implementation of virtual courtrooms, the courts also maintained safety for essential personnel and the limited public allowed access to the courthouse, accommodated staff childcare needs, managed quarantines, facilitated expansion of online or remote alternative dispute resolution (“ADR”), worked with IT to address technology needs, and continued to manage the docket.

## Coordinating Personnel Schedules and Training

In May 2020, SCAO developed guidelines for return to full capacity.<sup>17</sup> Courts have continued to use these guidelines to manage safety precautions within the court, including sanitation, protective equipment and social distancing, notification, isolation and contact tracing procedures, and coordination with local health department officials and SCAO regional administrators to open safely to the next approved phase of court access. Again, more urban and densely populated areas of the state have struggled to maintain open phases, while rural areas have been able to safely open through various phases of the guidelines.

Before considering return to some measure of full capacity, courts had to develop a plan to provide coordination between essential workers at the court and those non-essential workers working remotely. Most courts allowed workers to work in pods and rotate time between the court and home. When possible, this eased the ability of employees to schedule childcare and virtual school for children, and increased workshare and knowledge of procedures at the court.

## Ability to Manage Court Staff Working Remotely

Courts reported that one of the most difficult aspects during the pandemic, aside from an access to justice viewpoint, was managing staff working remotely. Courts reported that in the early months of the pandemic 38 percent of non-essential workers were not able to work from home. This negatively impacted the courts’ ability to coordinate work distribution, schedules, and training. Issues cited for the difficulty included lack of equipment, poor equipment and/or connectivity at the court and/or the employees' home, inadequate IT support for remote work, inadequate training, and childcare/school obligations.

The courts were more negatively impacted because they had limited personnel to spare and rotate schedules. This created a domino effect, resulting in delays in scheduling and hearing management. Probate and district courts that needed to keep the court open for constituents who could not otherwise communicate online or remotely had a difficult time managing staffing needs. Fortunately, the courts that could be open through each phase did not experience the level of traffic that was common prior to the pandemic; people limited their trips to the courts, and this continued until the fall of 2020. This gave courts more time to work through procedures without significant negative consequences, even when delays were experienced in scheduling hearings and managing the docket.

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<sup>17</sup> [Return to Full Capacity: COVID-19 Guidelines for Michigan Judiciary \(updated May 2021\)](#) issued following MSC Administrative Order No. 2020-08 dated May 6, 2020, expanding the use of remote proceedings. The Return to Full Capacity Guidelines have been consistently updated since being issued.

Three months after the shut-down, 75 percent of the courts reported having sufficient equipment for all employees to work remotely, 58 percent had strong connectivity through the Internet or VPN, and 42 percent had been able to fully train all employees on remote work.

It was not unusual to have employees using their own equipment (laptops, home computers, tablets, and smartphones) to access the court systems before the court provided compatible equipment. Additionally, courts without a paperless system had to rely on file sharing and copying pertinent documents to allow for key work from home. This delayed procedures and communications with parties, lawyers, probation, prosecutors and defenders, agencies, and other third parties.

The more dedicated a court staff was to identifying needs and solutions consistent with the operation plan, the more quickly the obstacles to remote work were resolved. As noted in the section on emergency operation, the more quickly courts identified stakeholder groups to identify needs and plan how best to address those needs, the more efficient was the expansion to remote work.

Some courts had not been using electronic signature software to permit judicial officers to sign orders and other necessary documents prior to the pandemic, but most implemented this software after the shut-down. The courts also provided tablets to judicial officers and staff to allow review electronic documents for signature if they did not otherwise have a laptop. The electronic signature process allowed for swift issuance of orders and notices necessary to maintain the docket.

Courts that struggled in dedicating a plan to expand remote work often reported that the judges within the county were inconsistent in following proposed solutions or, in the early months, conducted very few remote hearings. Lack of consistency by a court in developing and implementing an operation plan remains the most consistent complaint of users and stakeholders of the courts.

## Procedures Established to Maintain Essential Functions and Expand Remote Proceedings

Most courts established procedures to coordinate work for those on site and those working remotely to identify the most important matters to be addressed and prioritize actions to be taken to move the docket. The procedures listed here were generally utilized by the courts in a manner and style best suited for each court.

Courts process mail each day that includes pleadings, reports, recommendations, warrants, notices, and general correspondence. The clerk's and register's office prioritized the most important mail and how to route the mail to ensure further action. The offices worked with various departments within the court system to identify priorities, including court administrators, chief judges, magistrates, referees, mediation clerks, prosecutors, public defenders, probation, and FOC.

Pursuant to [MSC Administrative Order No. 2020-1](#), courts that did not have an electronic filing system were encouraged to use fax or e-mail for electronic filing. Under [MCR 2.406](#), courts had the authority to permit court filings by fax. Courts that established e-mail filing after the shut-down have either established a designated e-mail address within the clerk's or register's office, or individual judges decided whether to accept e-mail filings through a judicial clerk. Most

courts posted the procedure for fax or e-mail filing on their website and through the local bar associations.

Various courts have assigned a dedicated individual from the clerk's office, register's office, or administrator's office, or a judicial law clerk to monitor and report on all new Michigan Supreme Court administrative orders or amendments and SCAO guidelines or communications regarding managing the courts. The court's stakeholder planning team or leadership team would determine what, if any, action was required and how to communicate the update or new action.

Courts utilized docket-run reports to identify cases requiring a "next action date" to begin rescheduling adjournments. Various courts have utilized visiting judges or virtual judges from other counties under assignment from SCAO to relieve docket delays.

Remote access has expanded opportunities for judges, referees, and magistrates to conduct proceedings from locations outside of the courthouse and maintain high standards of public service. Judicial officers have been able to remotely preside over emergency hearings or address critical issues within the courthouse even when on vacation or on leave. Some officers have been able to conduct full-day hearings while at a cottage or visiting family, combining work and vacation. Remote access has been used to provide different options to address time-sensitive issues even when court leadership is not in the courthouse; these options should be explored further by the judiciary to create efficiencies and benefits.

## RECOMMENDATIONS

### (1) **Creation of a Judicial Council Planning Committee:**

**Original Recommendation:** The Committee recommends amendment of the Chief Judge Rule under [MCR 8.110](#) to permit the chief judge to appoint a judicial council planning committee to meet at least one time per year to review court operations, technology, and recommend revised procedures to enhance the efficiency and consistency of court operations. The judicial council would work with designated court stakeholder groups to solicit feedback regarding court operations and proposed improvements.

#### **Comments and Feedback:**

Comments received were mixed regarding this recommendation. There was some indication that this recommendation may overlap with that of establishing an emergency operations and continuity of operation plan and thus not needed. Concern was also expressed that the creation of a judicial council planning committee may not be practical for smaller, local courts.

Comments received further indicated that the identification of stakeholders for the judicial planning committee should include self-represented litigants as well as victim advocacy groups.

**Final Recommendation:** The Committee recommends amendment of the Chief Judge Rule under [MCR 8.110](#) to require the chief judge to appoint a judicial council planning committee to meet at least one time per year to review court operations, technology, and recommend revised procedures to enhance the efficiency and consistency of court operations. The judicial council would work with designated court stakeholder groups including prosecuting attorneys, public defenders,

Managed Assigned Counsel Administrators, appointed attorneys, self-represented litigants, victim advocacy groups, and others to solicit feedback regarding court operations and proposed improvements.

**(2) Best Practices Technology Symposium:**

**Original Recommendation:** The Committee recommends that SCAO and MJI develop a symposium for all county IT departments and court administrators to share best practices regarding court technology, software applications, and operations. The symposium would be held at least once per year and would be coordinated with the Michigan Judicial Council’s proposed strategic plan for technology.

**Comments and Feedback:**

The majority of the comments received regarding this recommendation indicated that best practices symposiums are needed for court technology leadership teams as well as for the remote workforce. However, commenters did identify that a concern that this recommendation presumes that all courts have IT departments and that all jurisdictions are using the same court technology, software applications, and operations. Not every county has an IT department, and some counties have one that is small or has varied responsibilities.

Additional concerns were expressed regarding funding for the implementation of best practices identified and the need for funding if this were to be a state mandate.

**Final Recommendation:** The Committee recommends that SCAO and MJI develop a symposium for all court IT departments and court administrators to share best practices regarding court technology, software applications, and operations. The symposium would be held at least once per year and would be coordinated with the Michigan Judicial Council’s proposed strategic plan for technology.

**(3) Use of Virtual Visiting Judges:**

**Original Recommendation:** The Committee recommends that the Michigan Supreme Court adopt a rule that permits a visiting judge to appear by Zoom®. SCAO is testing the efficacy of allowing a judge experiencing a lighter docket to be assigned to hear cases by Zoom® as a visiting judge for a county experiencing a backlog of specified case matter. Retired judges, even those no longer living in Michigan, would be permitted to serve as a visiting judge by Zoom®. The courts have become proficient with Zoom® and this proficiency should be leveraged to benefit the entire court system.

**Comments and Feedback:**

Comments received reflected both support for and against this recommendation based upon how this would be implemented and the reason for having a visiting judge. Concerns were raised for the need to address any potential constitutional issues that this recommendation may present, i.e., Article VI, Section 11 states in part: “Each circuit judge shall hold court in the county or counties within the circuit



in which he is elected, and in other circuits as may be provided by rules of the Supreme Court.” A concern was raised regarding the interpretation of this language regarding a judge needing to be physically present.

Comments received further expressed concerns regarding allowing visiting judges, especially those living out of state, to sub in on cases over a party’s objection. Many commenters felt that while this might be necessary on an emergency basis, this practice should be limited to specific proceedings that would not be considered a critical stage of the proceedings and only permissible with the parties’ express permission.

Further concerns were raised about this recommendation leading to changes in judges in the middle of family law cases, which could be detrimental to the families involved in these cases. With the success of the “One Family – One Judge” approach, visiting judges may not be the most appropriate in child protection cases, juvenile delinquency cases, family law cases, personal protection order cases, and specific types of criminal law cases.

Additionally, comments received expressed concerns regarding the difficulty with providing judges the documents and/or files if the court does not have an electronic document management system.

There was an acknowledgment by commenters that there are times in which judicial officers should be able to conduct hearings and manage dockets from anywhere when necessary.

Comments received indicated a belief that recommendations should not automatically endorse or require the use of Zoom® and YouTube as the platform for use whenever court proceedings are conducted remotely, and public access is required as other platforms may currently exist or will be developed which would be more efficient in the court setting.

Finally, comments received indicated that any rule or administrative order for virtual visiting judges should include language that provides the option of appearing in person or using a remote platform along with giving the courts discretion to make the determination of when to utilize virtual visiting judges on a case-by-case basis, given the differences in communities and ways courts are structured throughout the state.

**Final Recommendation:** The Committee recommends that the Michigan Supreme Court adopt a rule that permits a visiting judge to appear by a remote platform. The Committee further recommends that MSC conduct a study over the next 12 months to determine which courts and types of hearings would benefit the most from the use of a remote platform.

**(4) Self-Care of Judicial Officers and Court Staff:**

**Original Recommendation:** While this report does not specifically address the issues of stress and self-care in the court system, the Committee recommends that SCAO and MJI commit to a five-year plan to address self-care in the courts. The pandemic has taught us that management of court operations is demanding and generates stress. Moreover, the nature of the work performed by trial courts creates potential for judicial officers and staff to be exposed to secondary trauma. The committee is aware that self-care breakout sessions have been offered in the past but believes a dedicated five-year program to address self-care within the courts would benefit the delivery of justice. The judges' associations could collaborate in formation of the program and share material.

**Comments and Feedback:**

Support for this recommendation was mixed as some commenters viewed this recommendation as just another request to form a committee and develop more court rules and requirements which they felt would not enhance self-care. Comments received in support of this recommendation indicate that training about trauma is a critical aspect of self-care and self-care is critically important for all people involved in the court system.

Commenters did express that the report did not specifically address the issues of stress and self-care in the court system and without addressing the causes of stress it is difficult to put self-care practices in place.

Some comments received indicated that this recommendation was useless and a waste of time.

**Final Recommendation:** The Committee recommends that SCAO and MJI commit to developing a five-year plan to address self-care in the courts through programs offered at state sponsored conferences. The pandemic has taught us that management of court operations is demanding and generates stress. Moreover, the nature of the work performed by trial courts creates potential for judicial officers and staff to be exposed to secondary trauma. The committee is aware that self-care breakout sessions have been offered in the past but believes a dedicated five-year program to address self-care within the courts would benefit the delivery of justice. The judges' associations could collaborate in formation of the program and share material.

**(5) Remote Site Judicial Service:**

**Original Recommendation:** The Committee recommends that the Michigan Supreme Court amend [MSC Administrative Order No. 2012-7](#) (currently suspended by [MSC Administrative Order No. 2020-19](#)) and applicable statutory provisions to permit judicial officers to conduct court hearings and business from a site outside of the courthouse. The judicial officer would be required to manage their regular docket and judicial meetings by Zoom®. Standards and guidelines would be developed to govern remote-site judicial service. The courts have become

proficient with Zoom® and this proficiency should be leveraged to enhance the method and means of public service.

**Comments and Feedback:**

Comments received in support of this recommendation indicated that it may be necessary to provide alternatives for participating remotely in court proceedings, and meetings if the judge resides in areas where the technology available is limited, sporadic, or non-existent. Concerns were also expressed regarding the necessity of including budgetary allocations for all members of the judiciary and court staff to afford the required technology at home and to have laptops sufficient to support the software necessary to engage in court proceedings and meetings.

Comments received were not in favor of permitting judicial officers to conduct hearings and business outside of the normal court hours when working remotely. Additionally, commenters indicated that judges should only be allowed to work from remote locations for a designated period of time and under certain circumstances.

Responses also indicated that the report should not automatically endorse or require the use of Zoom® (and YouTube) as the platforms for use whenever court proceedings are conducted remotely, and public access is required as other, more efficient remote platforms may exist.

**Final Recommendation:** The Committee recommends that prior to any amendment or adoption of court rules, the Michigan Supreme Court conduct a study on permitting judicial officers to conduct hearings and court business from a site outside of the courthouse remotely in order to ensure proper authority for such practices and to determine the best implementation and guidelines. If permitted, the judicial officer would be required to manage their regular docket and judicial meetings utilizing a remote platform approved by the MSC. Standards and guidelines would be developed to govern remote-site judicial service.

- (6) Additional Recommendation Based Upon Comments and Feedback Received:** The Committee recommends that creation of a daily or weekly check-in process for the judiciary to ensure that there are no issues with remote proceedings and remote work that need to be addressed. This would be local courts checking in with key staff to determine that there were no operation issues and reporting the information electronically to SCAO. If issues are identified, they would be assigned for resolution. This process is similar to that used in the medical field (such as hospitals) to ensure that there are no threats to services or dangers to employees.

## The Virtual Courtroom and Remote Proceedings

Michigan Supreme Court Chief Justice Bridget M. McCormack has said the pandemic “is not the disruption courts wanted, but it is the disruption courts needed.” Prior to the pandemic, with few exceptions, anyone involved in a civil or criminal case had to physically “go to court” to be heard. The pandemic required trial courts to embrace technology and improvise to maintain access to justice.

Before the pandemic, a minority of trial courts had initiated use of online formats such as electronic filing, dispute resolution, and video and teleconference hearings. In 2019, SCAO secured licenses to use Zoom® videoconferencing and planned to slowly integrate the technology statewide beginning with trial courts receptive to adopting technology solutions. Neither SCAO nor the most revered fortune teller could have predicted the true value of this fortuitous decision because Zoom® allowed trial courts to continue operations remotely during the pandemic. Trial courts cannot reflexively return to pre-pandemic procedures established prior to the Internet, e-mail, laptops, and videoconferencing, but must use this opportunity to adapt to technology, in the same manner as the marketplace, to create long-term improvements to access to justice.

Interview any trial court judicial officer or staff about their experience conducting Zoom® hearings and you will not want for material. There are countless stories of frustration over technology and connectivity, disbelief regarding the lack of decorum shown by some participants (even lawyers), and humorous anecdotes. But universally, if not begrudgingly by some, the trial courts acknowledge Zoom® provides for efficient and effective access to the courts for most hearings except extended evidentiary hearings and trials. This section will explore the difficulties experienced using Zoom®, best practices to maximize the Zoom® experience, and recommendations for the ongoing use of Zoom®.

## Videconferencing Equipment and Remote Proceedings

Participants in a videoconference must have adequate equipment to transmit and receive audio and video and maintain a stable connection to Wi-Fi/Internet.<sup>18</sup> The most common complaint about Zoom® proceedings, depositions, or mediations is the instability of a participant's connection to the meeting, resulting in frozen screens or garbled sound. In recorded proceedings, these issues can seriously delay or require adjournment of a hearing.

Proceedings experiencing the highest level of interruption involve participants located in rural or urban areas with inadequate broadband and Wi-Fi connection, and participants using a mobile telephone or tablet connected by a mobile device data plan rather than a Wi-Fi link. Trial courts estimated that in the first six months of the pandemic more than 60 percent of remote hearings experienced some connectivity interruption. The connectivity issue has improved as more users of the remote systems have incorporated better equipment or improved Wi-Fi or broadband strength.

Various communities and courts offer free access to high-speed Wi-Fi to allow participants to join Zoom® proceedings. The city of Holland provides access from its civic center parking lot. Although some judges have denied litigants or attorneys to participate in a hearing from their car, often the car provides the quietest environment for the participant; judges should not quickly dismiss a participant from participating while in a car until it is determined the car is sufficiently quiet and without likely disruption like an office or conference room.<sup>19</sup> The Washtenaw County

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<sup>18</sup> This report does not consider the requirements and standards for recording court proceedings. Audio and video recording standards are addressed under [MCR 8.109\(B\)](#) and the operating standards published by SCAO in [Michigan Trial Court Standards for Courtroom Technology \(4/20\)](#).

<sup>19</sup> It need not be said that participants should not participate in a hearing while driving. If a participant is logging into a hearing from a moving vehicle, the judge should consider allowing the participant a brief period to safely park the car or adjourn the hearing. And, yes, the trial courts have reported incidents of attorneys and litigants entering a Zoom® hearing or other remote platform while operating a moving vehicle.

Circuit Court offers a Zoom® hearing room for participants to access a device and hearing. The judicial clerk contacts the participant by e-mail or text and directs the participant to enter the building; this limits the number of persons in the building and provides those without access to Internet or a device the means to participate in the remote hearing.

Inadequate camera and microphone equipment can diminish the quality of the video and audio. While laptops and tablets can provide for mobile access, the cameras and microphones often only meet minimal standards. This can cause video to blur and the volume to decrease if the participant turns their head away from the microphone. Some courts encourage participants, especially lawyers and witnesses involved in lengthy remote evidentiary hearings, to use a headset or a standing microphone that has a higher standard of reception.

## RECOMMENDATIONS

### (1) **Development of Minimum Equipment Standards:**

**Original Recommendation:** The Committee recommends that SCAO consult with Zoom® to develop minimum equipment standards to maximize the connection to Zoom® and performance of the audio and video equipment, including recommended microphone and camera standards. Any standards should be used as guidelines and attorneys should be encouraged to comply. However, many litigants, and in particular self-represented litigants, may not have the means to meet the guidelines. The guidelines should not become a means to deny access to justice.

#### **Comments and Feedback:**

From comments received concerns were raised that this recommendation does little to solve the connectivity issues that exist and is not enforceable. Responses indicated that attention should be given to the technology platforms used for remote hearings and development of public access rules to encourage access to justice. SCAO should develop statewide public access rules that encourage access to justice and better protects sensitive information.

Comments received also expressed concerns over necessary funding for counties for any minimum standards implemented as not every county has an IT department, and some counties have one that is small or has varied responsibilities. To the extent there are statewide requirements, it may be appropriate to consider statewide funding for IT staff and equipment, perhaps as a part of the trial court funding commission work.

**Final Recommendation:** The Committee recommends that SCAO consult with Zoom® or another remote platform to develop minimum equipment standards to maximize the connection to Zoom® or another remote platform and performance of the audio and video equipment, including recommended microphone and camera standards. Any standards should be used as guidelines and attorneys should be encouraged to comply. However, many litigants, and in particular, self-represented litigants, may not have the means to meet the guidelines. The guidelines should not become a means to deny access to justice.

(2) **Modernization of Broadband:**

**Original Recommendation:** The Committee recommends that SCAO, the judges' associations, and the State Bar of Michigan coordinate a plan to advocate for the adoption of legislative appropriations to modernize the state's broadband and technology infrastructure. Users of the court will expect seamless access to the courts by remote connection and the experience from the pandemic is that large areas of the state lack strong and stable connectivity. This is a matter of access to justice.

**Comments and Feedback:**

Comments received overwhelmingly indicated that this truly is an issue of access to justice for all citizens. However, comments also indicated that SCAO should advocate for legislation appropriations for this and to ensure that there is appropriate funding dedicated to helping low-income and pro se litigants have access to broadband technology.

Responses further indicated that before moving forward with any permanent virtual court the broadband issues need to be addressed and corrected. Every court that wants to have a permanent virtual practice should also have connectivity hubs at the courthouse and throughout the community so everyone can connect to Wi-Fi and/or have access to a government owned device.

**Final Recommendation:** The Committee recommends that SCAO, the judges' associations, the State Bar of Michigan, MIDC, and local funding units coordinate a plan to advocate for the adoption of legislative appropriations to modernize the state's broadband and technology infrastructure. Users of the court will expect seamless access to the courts by remote connection and the experience from the pandemic is that large areas of the state lack strong and stable connectivity. This is a matter of access to justice.

## Remote Hearings and Proceedings

The use of videoconference hearings by Zoom® or Polycom® was necessary to continue the operations of the justice system. While Zoom® is practical for the pandemic environment, it is an application the courts should continue long after we "return to normal." Of nearly 1,500 attorneys surveyed, 82 percent stated they want Zoom® hearings to continue after the pandemic. The attorneys ranked, in order of preference, the hearings they believed were best suited for Zoom® as follows: non-evidentiary hearings (status and scheduling conferences, pretrials, motions); traffic violations; civil infractions; summary proceedings; guardianships/conservatorships; criminal pleas and sentencing; and short domestic relations evidentiary hearings including *pro confesso* hearings. Moreover, these attorneys reported their clients appreciated Zoom® for the convenience and time savings from not having to travel to the court, park, and personally attend a hearing. Clients also expressed they were less intimidated by the

process on Zoom® without losing respect for the procedure and decorum. The attorneys were less enthusiastic about evidentiary hearings involving multiple days, witnesses, and exhibits.<sup>20</sup>

The attorneys expressed appreciation for the courts' willingness to use Zoom® for motions, settlement conferences, scheduling conferences, status conferences, and limited evidentiary hearings. Incorporating Zoom® into the court process minimizes travel time, expense, and scheduling conflicts. The attorneys stated their clients anticipate Zoom® will be continued in the court system because it is a cost effective and efficient tool.

Trial courts reported Zoom® preferences similar to the attorneys. Circuit courts considered the following hearings the most beneficial for the Zoom® format: status and scheduling conferences, pretrials, motions, pleas and sentencing (provided the defendant consents to the hearing), PPO hearings (excluding those hearings where the respondent could be sentenced to jail), child protective and juvenile delinquency hearings (excluding removal hearings, parental termination, and juvenile trials), *pro confesso* hearings, and most domestic relations hearings that do not involve multiple days, witnesses, and exhibits.

District courts reported that Zoom® was preferred for pretrial and status conferences, traffic violations, civil infractions, probable cause hearings, landlord-tenant and summary proceedings, and pleas. Probate courts reported a broader acceptance of Zoom® because many hearings can be conducted within a day, such as estate petition and motion hearings, mental health hearings (except jury trials), and guardianship and conservatorship. At least one probate court reported conducting a jury trial by Zoom®.

Friends of the court also reported a general acceptance and efficiency associated with remote hearings and meetings. The majority of FOC offices expressed the convenience for parents to engage in meetings with the FOC investigator by Zoom®, reducing travel time and time from work without reducing the effectiveness of the meetings compared to in-person meetings. FOC has had to prepare instructions for parents to share documents prior to the meeting. FOC reports that parents have generally been supportive of remote meetings and hearings, although acknowledged an initial learning curve. FOC has also utilized Zoom® for mediation and dispute resolution with positive results

An unexpected finding from the use of Zoom® is that minors appearing before the court are more receptive to the hearing and less intimidated or anxious. Family division judges reported that in interviews to determine the reasonable preference of a minor child in a custody matter under [MCL 722.23\(i\)](#) and in juvenile delinquency proceedings, the minor children appeared more relaxed and open in their discussion with the judge or referee. While this finding is anecdotal, a significant number of judges suggested the remote hearing eliminates the intimidation or fear of appearing in court in a predominately adult setting. The video nature of the Zoom® proceedings may provide an experience the minor children are more comfortable with given their familiarity with video games and other digital interactions. SCAO should consider collaborating with a state college or university to study this development.

Understandably, in the initial months following the shut-down order the courts struggled to streamline procedures for communication with parties, attorneys, and other users of the court regarding scheduling remote hearings and procedures relating to those hearings. The courts had not clearly identified how or with whom users were to communicate within a judicial office. The courts were hampered by staff working from home and rotating shifts through the week.

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<sup>20</sup> This Committee did not explore the use of virtual jury trials. SCAO has published the [Michigan Trial Courts Remote Jury Trial Standards and Recommendations](#).



Attorneys reported that, while some courts had provided training to staff regarding frequently asked questions such as on scheduling issues, adjournments, Zoom® protocol, and e-mail filing, other courts were less consistent in their responses to inquiries. The attorneys acknowledged that judicial staff and the clerk's and register's offices were conscientious and trying to resolve questions and provide clarity. Ultimately, over time these communication issues were resolved by most courts.

Whether a motion was heard early in the pandemic differed from court to court. Attorneys reported that some courts adjourned all motion hearings and issued written opinions under [MCR 2.119\(E\)\(3\)](#), while others conducted the hearings by Zoom®. The reason for either choice was not clear and attorneys believed their clients' interests were best served through the Zoom® hearing.

As noted above, the most consistent complaint from court users, including attorneys, has been the inconsistency of the judicial offices within the same county when conducting remote hearings. Of the attorneys surveyed, 66 percent identified the lack of consistency between judicial offices as the second most significant difficulty they experienced in their practice during the pandemic. The most significant difficulty was the effort to remain current with the Court's updated administrative orders and other court directives (67 percent). These responses only underscore how difficult the legal landscape was in the first six months of the pandemic.

Examples of inconsistent management of the docket include:

- (1) Some judges quickly adopted Zoom®, while other judges in the same county were slow to adopt the format and only used Zoom® for limited hearings;
- (2) Some judges accepted pleadings by e-mail provided an original was filed with the clerk and the fee paid in accordance with the administrative orders, while others refused this convenience;
- (3) Some judges used the "cattle call" approach to motion day, while other judges staggered the motion calendar by assigned times or grouped a limited number of motions in a scheduled block; and
- (4) Some judicial offices provided notice of hearings with detailed Zoom® and other offices provided limited information.

Attorneys reported that participating in a "cattle call" Zoom® motion day is a terrible experience for both the attorney and the client. Parties can sit for an hour or more in a waiting room with little to no contact from the court, and attorneys often run into conflicts with other courts while waiting for the appearance. Attorneys and clients prefer a scheduled motion day by set motion times or block times of 60 to 90 minutes, with a limited number of motions assigned to the block. Attorneys reported that judges who follow these scheduling procedures routinely completed the hearings on time with limited waiting.

Settlement conferences conducted by Zoom® provide flexibility for the participants' schedules, elimination of travel, and cost savings. However, the courts must ensure the clients participating and any third-party representatives, such as insurance carriers and trust fiduciaries, have full authority to settle the case in the same manner they would have had had they appeared in person.

Attorneys encouraged the courts to use Zoom® to manage high-conflict cases or for cases that are discovery intensive and suggested that courts can schedule periodic status conferences through Zoom® with limited impact on schedules and travel.



Zoom® hearings will reduce the cost of litigation by reducing the billable hours normally associated with travel, waiting in court for hearings or completing settlement conferences, etc. This cost saving will be a benefit to the public that pays for legal services, as well as to members of the public who otherwise could not afford legal services and would be forced to handle a matter in *pro per*. Moreover, Zoom® hearings (especially when scheduled for a specific time or window of time) have the additional benefit of allowing attorneys to more easily manage their calendar without the potential of being stuck in court all day.

Use of Zoom® in trials and lengthy evidentiary hearings creates greater flexibility to coordinate appearances by experts or other witnesses who would need to travel to court for an in-person hearing. This flexibility may avoid the need for adjournments or rescheduling.

Mediation clerks and FOCs reported that ADR has been successful on Zoom®. Courts should continue the use of ADR on Zoom® similar to court settlement conferences.

## Best Practices for Zoom® Hearings

Best practices for Zoom® hearings include, but are not limited to, the following:

- (1) Notice of the hearing should include Zoom® login information, a contact from the judicial office to answer questions or concerns, and instructions for the participants to login and identify themselves on the screen by name, case name and case number before entering the Zoom® hearing. This allows for court staff to easily identify participants for hearings, especially on motion calls, and allows for easy assignment of the participants into a breakout room, if used. Kent County incorporates these instructions into a SCAO notice form.
- (2) The waiting room can be used as a staging area for motion day if the judicial staff provides e-mail communication with the participants. Oakland County places litigants and attorneys into the breakout room while the prior hearing is pending and the judicial staff can inquire of the participants if there are any agreements reached or issues to resolve and confirm connectivity.
- (3) Courts must make breakout rooms available for attorneys and clients to have confidential communications. This is essential in criminal proceedings, and confidentiality cannot be sacrificed simply because a defendant is appearing by Zoom® from inside a jail or prison.
- (4) When the courts are closed to the public or access is restricted under the phased approach to return to full capacity, the courts must make the hearing available through the YouTube channel unless the proceeding is closed, or access would otherwise be limited by statute or rule.
- (5) Hearings where exhibits shall be introduced should be controlled by a scheduling order created based on a status conference with the attorneys/parties. The status conference should outline the method of disclosing and exchanging exhibits, the schedule for motions *in limine*, and the requirement for parties to agree on the admissibility of exhibits, as possible, prior to the hearing to minimize time spent on foundational procedure. Exhibits shall be provided to the court and witnesses prior to the hearing in a format agreed upon.

- (6) The court may also refer to the SCAO publication, [Michigan Trial Courts Virtual Courtroom Standards and Guidelines \(2020\)](#).
- (7) Both the courts and attorneys have expressed concerns about a witness appearing by Zoom® and the potential risk that someone is communicating with the witness from “the wings” or by text or other digital method. The Zoom® hearing is a court proceeding and the judge controls the courtroom. Judges may request a witness to use the videorecorder to show the court the entire room and inquire about anyone located in the room and whether the witness has access to any documents involving the case. Courts should refer to SCAO’s [Remote Hearing Witness Instructions](#). Courts can supplement the standards and distribute the standards to interested parties and keep them posted on the website.
- (8) Courts must also manage self-represented litigants on Zoom®. A good resource is [SCAO Guidance on Conducting Remote Hearings with Self-Represented Litigants](#).
- (9) Courts should use the Zoom® interpreter tool in all matters requiring an interpreter, except for criminal plea hearings. The interpreter tool allows for the interpreter to speak to the foreign language witness without the interpretation being heard by others on the Zoom® hearing. The tool allows for real-time interpretation as if in open court. However, the recording device cannot record the interpretation, which is required in criminal plea hearings. The [Zoom® tutorial](#) provides instructions on how to schedule a hearing using the interpreter tool.

Zoom® is a tool and not a means to replace in-person litigation. But used effectively, Zoom® can create flexibility for the court docket, increase access to the courts, and minimize legal costs.

## RECOMMENDATIONS

### (1) **Non-Evidentiary Civil and Criminal Hearings:**

**Original Recommendation:** The Committee recommends amending the court rules to create a presumption that attorneys, parties, and participants will appear by Zoom® for non-evidentiary civil and criminal hearings, including warrant requests, arraignments, probable cause conferences, calendar conferences, final conferences, sentencing, probation violation hearings, status conferences, settlement conferences, ADR proceedings, FOC proceedings, and *pro confesso* hearings, unless good cause is shown why Zoom® should not be used, or in a criminal case where the defendant asserts the right to be physically present in the courtroom.

#### **Comments and Feedback:**

Overwhelmingly, there was little support from judges and court administrators for creating a presumption for remote proceedings across the spectrum of non-evidentiary hearings and more limited evidentiary hearings. But the comments indicated the courts were able to adopt the use of virtual hearings and, while there is objection to a mandatory application of virtual hearings, many courts will continue using virtual technology in a wide variety of proceedings based upon local conditions.

Some attorneys and associations were in support of a presumption. Commenters indicated that judges and court administrators should retain discretion over these matters and creating a presumption limits the court's ability to exercise discretion in how to best handle their dockets. Responses indicated a feeling of being disrespected and not trusted to do the job that they were elected to do.

Majority of responses received indicated that the presumption should be in-person hearings and the Court should develop rules to create safeguards for individuals who do not have access to Zoom® or are otherwise unable to effectively participate in remote hearings.

Comments received indicated that if a presumption is to occur, until Michigan can ensure that all court participants can meaningfully participate in remote proceedings through videoconference technology, any rules should set forth a process for a party to request a hearing or request a case be exempt from this presumption and factors courts should considering in deciding such a request.

Concerns were also raised regarding what constitutes *good cause*. Court discretion is important to properly assess all necessary considerations. Commenters indicated that there should be a requirement to demonstrate "good cause" to set a matter for in-person hearing and it should be left up to the discretion of the court regarding appearing via Zoom® with any party being able to request.

However, commenters indicated that courts were continuing to use Zoom® in limited, specified hearings. Many courts have met to identify a list of hearings where Zoom® will continue to be used primarily with scheduling conferences and motions. The circuit courts appear to manage more remote hearings while continuing in-person hearings on evidentiary matters. The probate courts and district courts have more hearings involving testimonial aspects or interactions with self-represented litigants that do not lend themselves as easily to remote proceedings. Accordingly, a broad "presumption" for the use of remote hearings is not as workable as with those specified, limited hearings involving non-testimonial input or interaction.

**Final Recommendation:** The Committee recommends amending the court rules to create a presumption that participants appear on certain types of civil proceedings including pre-trials and motions, as well as in certain limited criminal proceedings. Further, the Committee recommends that the rule be expanded to allow courts, in their discretion, to require participants to appear via remote platform. The rule will also provide for a method to have attorneys provide notice on certain motions for use of remote proceedings. Trials and evidentiary proceedings would be allowed by remote proceedings only upon concurrence of all parties and the court.

The Committee further recommends that MSC conduct a study over the next 12 to 24 months to determine how often courts are utilizing remote platforms versus in person proceedings and for which types of proceedings.

(2) **Proposed Amendment of MCR 2.407:**

**Original Recommendation:** The Committee recommends that [MCR 2.407, Videoconferencing](#) be amended to specify the use of Zoom® and establish a preference for participants to appear by Zoom®. The preference may be overcome by reasonable factors including the nature of the proceeding, the evidence to be presented, and the availability of the participant support. It should remain within the court’s discretion to deny the application to appear by videoconferencing. This would apply to those court rules that permit the use of videoconferencing, including [MCR 3.210\(A\)\(4\)](#), [3.215\(D\)\(3\)](#), [3.705](#), [3.708](#), [3.804](#), [3.904](#), [4.101](#), [4.202](#), [4.303](#), [4.401](#), [5.140](#), [6.006](#), and [6.901](#), subject to any statute or rules that would preclude the use of videoconferencing.

**Comments and Feedback:**

The majority of the responses did not support a presumption for participation by Zoom® for many of the same reasons indicated under Recommendation number one above (Non-Evidentiary Civil and Criminal Hearings). Most comments indicated that this should be left up to the court discretion.

Comments received indicated that the present court rule on remote hearings appeared to adequately address the issue and that judges should have the discretion to allow it or not. Overwhelmingly, the responses indicated a lack of support for specifying the use of Zoom®.

However, commenters indicated that courts were continuing to use Zoom® in limited, specified hearings. Many courts have met to identify a list of hearings where Zoom® will continue to be used primarily with scheduling conferences and motions. The circuit courts appear to manage more remote hearings while continuing in-person hearings on evidentiary matters. The probate courts and district courts have more hearings involving testimonial aspects or interactions with self-represented litigants that do not lend themselves as easily to remote proceedings. Accordingly, a broad “presumption” for the use of remote hearings is not as workable as with those specified, limited hearings involving non-testimonial input or interaction.

**Final Recommendation:** The Committee recommends that [MCR 2.407, Videoconferencing](#) be amended to specify the use of a remote platform and establish a presumption for participants to appear remotely on a limited list of specified hearings subject to determination the hearing is not appropriate for a remote hearing under MCR 2.407(C). Parties who request in-person hearings shall be accommodated. All other hearings shall be in-person, but the courts may require parties to appear in-person, if appropriate. This reflects what the courts are actually doing with remote hearings and allows for courts, in their discretion under the MCR 2.407, to determine their local needs do not support some or all of the limited,

specified remote proceedings. The Committee recommends adoption of the following rule modifications and/or new rules: MCR 2.407, 2.408, and 4.101:

**Proposed Amendments to MCR 2.407 Videoconferencing:**

(A)(1) [Unchanged].

(A)(2) “Videoconferencing” means the use of an interactive technology, including a remote digital platform, 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 codecs, monitors, cameras, audio microphones, and audio speakers.

(B) Application.

(1) Subject to standards published by the State Court Administrative Office and the criteria set forth in subsection (C), a court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any court scheduled civil proceeding.

(2) Subject to the State Court Administrative Office standards, courts may determine the manner and extent of the use of videoconferencing technology and may require participants to attend court proceedings remotely, subject to the requirements of section (C) herein-below.

(3) This rule does not supersede a participant’s ability to participate by telephonic means under MCR 2.402.

(4) Notwithstanding any other provision of this Rule, the use of videoconferencing technology shall be presumed for civil Pre-Trials, Early Scheduling Conferences under MCR 2.401(B), contested motions under MCR 2.119 regarding discovery, adjournments, modifications to scheduling orders, motions *in limine*, post Judgment collection or discovery issues, motions to correct, strike, or amend pleadings, testimonial proofs for *pro confesso* hearings under MCR 3.210(A)(4), and motions pursuant to MCR 2.116 subject to a determination by the Court that the same is inappropriate for a particular case under an analysis as contained in section (C) herein-below.

(5) Notwithstanding any other provision of this Rule, no participant shall be precluded from appearing in court in person should they request same of the Court. In the event there is a request to appear in person, or a participant is found to be unable to adequately use the technology and appear remotely, the presiding judge and any attorney of record for said participant must appear in person with his/her client for said proceeding.

(C)-(F) [Unchanged].

~~(G) Notwithstanding any other provision in this rule, until further order of the Court, AO No. 2012-7 is suspended, and trial courts are required to use remote participation technology (videoconferencing under this rule or telephone~~

conferencing under MCR 2.406) to the greatest extent possible. In doing so, courts must:

- ~~(1) Verify that participants can proceed remotely and provide reasonable notice of the time and format of any such hearings for parties, other participants, and the general public in a manner most likely to be readily obtained by those interested in such proceedings.~~
- ~~(2) Allow some participants to participate remotely even if all participants are not able to do so. Judicial officers who wish to participate from a location other than the judge's courtroom shall do so only with the written permission of the court's chief judge. The chief judge shall grant such permission whenever the circumstances warrant, unless the court does not have and is not able to obtain any equipment or licenses necessary for the court to operate remotely.~~
- ~~(3) Ensure that any such proceedings are consistent with a party's Constitutional rights and allow confidential communication between a party and the party's counsel.~~
- ~~(4) Provide access to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed, or access would otherwise be limited by statute or rule.~~
- ~~(5) Ensure that the manner in which the proceeding is conducted produces a recording sufficient to enable a transcript to be produced subsequent to the proceeding.~~
- ~~(6) Ensure that any such remote hearings comply with any standards promulgated by the State Court Administrative Office for conducting these types of proceedings.~~
- ~~(7) Waive any fees currently charged to allow parties to participate remotely.~~

### **Proposed New MCR 2.408 Use of Remote Proceedings in the District Court:**

#### **(A) Use of Remote Proceedings in Civil Cases.**

- (1) Subject to the standards published by the State Court Administrative Office, a District Court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any court scheduled civil proceeding.
- (2) Courts may determine the manner and extent of the use of videoconferencing technology and may require participants to attend court proceedings remotely, subject to the requirements of section (7) herein-below.

- (3) The use of videoconferencing technology shall be presumed for civil Pre-Trials and Early Scheduling Conferences pursuant to MCR 2.401(B).
- (4) The use of videoconferencing shall be presumed for motions filed pursuant to MCR 2.119 regarding discovery, adjournments, and post Judgment collection matters, and motions to correct, strike, or amend pleadings.
  - (a) The presumption for videoconferencing shall be waived unless the party or attorney acting on behalf of a party, files with the Court Clerk a Notice of Presumed Remote Proceeding on a form approved by the State Court Administrative Office, concomitant with the motion and any briefs, indicating that the filing falls within the category of motions listed in section (A)(4) hereinabove.
- (5) Notwithstanding any other provision of these Rules, the use of videoconferencing technology shall not be used in Bench or Jury Trials, or any civil proceeding wherein the testimony of witnesses or presentation of evidence shall occur, except upon the concurrence of all parties, and in the discretion of the Court.
- (6) Notwithstanding any other provision of these Rules, the Court may determine that a case or case type is not suited for videoconferencing, and may require any hearing, even a proceeding categorized as a presumed remote proceeding, to be conducted in person at the courthouse.
- (7) In determining whether a particular case or proceeding should be conducted by videoconferencing technology the Court shall consider the factors listed in MCR 2.407(C)(1)-(13).
- (8) This rule does not preclude a participant's ability to participate by telephonic means under MCR 2.402 in the discretion of the Court.
- (9) The use of telephonic, voice, videoconferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court.

### **(3) Use of Zoom® for Meetings in Child Protective Proceedings:**

**Original Recommendation:** The Committee recommends that lawyer guardian ad litem in child protective proceedings be permitted, upon written request, to use Zoom® for meetings with clients located outside of the county unless good cause is shown. However, the lawyer guardian ad litem must meet with the out-of-county clients in person prior to adjudication, permanency planning hearings, and termination hearings.

#### **Comments and Feedback:**

From the comments received, there was strong opposition to the use of virtual hearings in for child protection cases due to the following:

- possible conflict with the Indian Child Welfare Act;



- difficulty with being able to see the environment in which the children are living, to determine if the child is being coached, to understand the relationship between parent and child, or to understand the amount of control being imposed by the DHHS worker, all of which could lead to unsafe situations for the child; and
- abuse and neglect cases involve serious constitutional rights for the parents.

Additional comments indicated that permitting LGALs to meet remotely with a child diminishes the ability of the LGAL to establish a meaningful relationship with them, including learning the mannerisms and other body language of the child and whether they are being influenced before or during the remote meetings.

**Final Recommendation:** The Committee does not recommend use of an electronic platform for meeting in child protective proceedings because the feedback did not support this proposal outside of the safety concerns surrounding the pandemic.

#### **(4) Request to Appear via a Remote Platform to Ensure Access to Justice:**

**Original Recommendation:** The Committee recommends that litigants who obtain a waiver of fees under [MCR 2.002](#) be given a preference when requesting to appear by Zoom® to ensure access to justice. The ability to appear through videoconferencing may save costs and provide flexibility to avoid lost time from work. However, if the litigant’s videoconferencing technology and/or equipment is not able to provide proper connectivity and audio and/or video recording, the court may require the litigant to appear in person until a remedy can be found.

#### **Comments and Feedback:**

From comments received, there was strong opposition to using income level as a way to determine remote hearing preferences. The suggestion was made to offer the same preferences to all litigants regardless of income level.

Commenters suggested that rule be tailored so that a judge can only order someone to appear in person if they have had repeated and severe interruptions. Additionally, the suggestion was made to specify that a person can revert to virtual appearances based on their own statement that the connectivity issue has been resolved.

Comments received in support indicated that access to justice is key – whether in person or virtual. Allowing a party as much freedom to determine whether to appear in person or via Zoom could alleviate issues such as transportation, childcare, time loss at job, or internet connectivity.

**Final Recommendation:** The Committee does not recommend appearance through remote hearing based on a prior fee waiver approval because of the strong opposition. Additionally, the committee felt that if this were to be done and that if preference were to be given that it should be given to all and should be up to the individual judge to make the determination on a case-by-case basis. Courts should be sensitive to these requests and make accommodations where appropriate.

**(5) Consistency among Courts within a County Judicial System:**

**Original Recommendation:** The Committee recommends that SCAO empanel a committee to study “best practices” of standard procedures courts should establish to provide fair and efficient justice. The findings of the committee would be submitted to each county to determine how best to implement the procedures. The Committee recognizes that Michigan’s judicial system is not a unified court system. Nevertheless, the clear implication from the opinions expressed by attorneys and other stakeholders of the judicial system is that the lack of consistency among judges within a county judicial system to follow established or recommended procedures undermines confidence in the judicial system.

**Comments and Feedback:**

Comments received indicated that making all courts within a circuit consistent is a good idea overall as consistency amongst courts has always been an issue. The issue of courts not following the court rules in a consistent manner could be addressed by SCAO with regard to courts in general.

From comments received, the suggestion was made to establish minimum statewide requirements that all courts must meet when it comes to providing access to the courts. Commenters indicated that to create mandates, rule changes, presumptions, and preferences without all of the data does not fit within the scope.

**Final Recommendation:** The Committee recommends that SCAO empanel a committee to study “best practices” of standard procedures courts should establish to provide fair and efficient justice. The findings of the committee would be submitted to each county to determine how best to implement the procedures. The Committee recognizes that Michigan’s judicial system is not a unified court system. Nevertheless, the clear implication from the opinions expressed by attorneys and other stakeholders of the judicial system is that the lack of consistency among judges within a county and local judicial system to follow established or recommended procedures undermines confidence in the judicial system.

**Additional Procedural Concerns Regarding Zoom® Hearings Involving Criminal Defendants**

The pandemic has delayed a multitude of criminal jury trials and other proceedings because many courts are not able to conduct trials under the phased re-opening plans. Even in those instances where a criminal defendant may have consented to an adjournment, there are still additional procedural issues that courts must consider for whether to proceed with a Zoom® trial. This report does not offer a solution but raises the questions; the local courts must be the final arbiter based on the facts and circumstances.

## Right to Public Proceedings

The First and Sixth Amendments to the United States Constitution guarantee public proceedings. When courts conduct hearings via videoconferencing technology like Zoom®, steps must be taken to ensure public access, including access to the court’s YouTube channel. To the extent that online proceedings are public, the Committee encourages courts to ensure the equipment used and connections to the Internet meet technical standards to minimize technical problems and access to the technology issues that may impede the public’s ability to view the proceedings.

## Right to be Present

Appearing via video does not satisfy the right to be present absent a valid waiver. And “[v]irtual appearance is not a suitable substitute for physical presence.”<sup>21</sup> Courts must make every reasonable effort to ensure a defendant’s agreement to waive personal appearance and appear remotely – often from jail – is voluntary.

Courts must maintain the primary responsibility for ensuring that out-of-custody defendants have notice of how to participate in upcoming court hearings. Courts may not shift the duty of ensuring a defendant’s Zoom® appearance to defense counsel.

## Right to Confrontation and Compulsory Process

Virtual courts present a danger to the right to confront and cross-examine witnesses under the Sixth Amendment. Virtual confrontation may have an impact on the witness, making it more likely that the witness will give false testimony. It may also impact the ability to cross-examine and the factfinder’s ability to assess the testimony. See, *People v Jemison*, 505 Mich 352, 363-367 (2020) (allowing an expert witness to testify by two-way, interactive video violated the defendant’s Confrontational Clause rights).

Important witnesses may be unavailable because they do not have access to the necessary technology or Internet services. What does compulsory process look like in an online court scenario?

## Right to Counsel

Virtual courts can impede attorney-client communication, interfere with the attorney-client relationship, and jeopardize a defendant’s right to participate and assist in his own defense. As noted earlier, the virtual courtroom must provide access to confidential communications such as the Zoom® breakout room. Moreover, the court must provide ample time for criminal hearings at every stage of the proceedings to allow for confidential communication between attorney and client. If an attorney informs the court that the virtual process is impeding the right to communicate because of inability to exchange documents or evidence during the attorney-client breakout sessions, the court must act to protect the right and seek compliance in a non-virtual setting.

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<sup>21</sup> [People v Heller](#), 316 Mich App 314, 318 (2016).

The right to counsel includes the right to the *effective* assistance of counsel.<sup>22</sup> Virtual courts and the choice to proceed virtually under circumstances where in-person activity is limited raise effective assistance of counsel concerns, including but not limited to, the duty to conduct an independent and adequate investigation and the duty to protect client confidentiality.

Equal Protection and Due Process: As noted above, virtual courts may create wealth-based hurdles – those who lack access to sufficient technology may have different and less meaningful access to justice than people with means.<sup>23</sup> The courts must assure meaningful access to the virtual courtroom, including dedicating a room in the courthouse to safely permit use of videoconferencing technology.

## DUE PROCESS CONSIDERATIONS

Right to Impartial Jury: There is consensus among judges, prosecutors, and defense attorneys that criminal jury trials must take place in person. While this report did not address the issues of a virtual jury process, courts are reminded that in criminal proceedings the use of a virtual courtroom could result in the exclusion of distinctive groups of jurors (fair cross-section or systemic exclusion), violating the Sixth Amendment, as well as rights to due process and equal protection.

Both the United States and the Michigan Constitutions are designed to protect our fundamental freedoms and liberties. One of the most important rights guaranteed by both Constitutions is the right of the accused to a public and speedy trial.<sup>24</sup> This right protects against undue and oppressive incarceration prior to trial and allows a person to defend themselves against the criminal charges before evidence becomes lost or destroyed and witnesses' memories fade.

The right to a Speedy Trial also protects members of the public – especially crime victims – and gives the people a voice in ensuring that leaders are held accountable to the Constitution's promise that justice will not be unduly delayed. Given the constitutional importance of a jury trial to our democracy, courts cannot merely cast the Speedy Trial clause aside. As the U.S. Supreme Court recently affirmed, "...even in a pandemic, the Constitution cannot be put away and forgotten."<sup>25</sup>

Most courts have struggled to balance the Constitutional Speedy Trial guarantee with the realities of navigating through a global and deadly pandemic. As the world remains in a prolonged state of emergency, the burden of that struggle is borne most acutely by people who are incarcerated while awaiting trial, and for the many crime victims who await justice.

This issue presents an enormous challenge for all courts, and it is beyond the scope of this Committee to make a comprehensive recommendation on how courts should address Speedy Trial concerns while also working efficiently to clear the backlog that has arisen in criminal matters.

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<sup>22</sup> [\*Strickland v Washington\*, 466 U.S. 668 \(1984\)](#).

<sup>23</sup> [\*Griffin v Illinois\*, 351 U.S. 12 \(1956\)](#); [\*Ake v Oklahoma\*, 470 U.S. 68 \(1985\)](#).

<sup>24</sup> United States Constitution, Am. VI; Michigan Constitution of 1963, Article I § 20.

<sup>25</sup> [\*Roman Cath. Diocese of Brooklyn v. Cuomo\*](#), 141 S. Ct. 63, 68, 208 L. Ed. 2d 206 (2020)

## RECOMMENDATIONS

### (1) Discourage Practice of Scheduling an Entire Docket at One Time Slot:

**Original Recommendation:** The Committee recommends that SCAO discourage judges from using the practice of scheduling multiple hearings or entire dockets at one time slot in criminal matters and instead rely on a staggered docket by using assigned times or a similar docket management mechanism. As is true in civil cases, parties can sit for several hours, and attorneys often run into conflicts with other courts while waiting to appear on these docket types.

#### **Comments and Feedback:**

The majority of comments received supported this recommendation as a requirement.

**Final Recommendation:** The Committee recommends that SCAO prohibit the scheduling of entire dockets at one time and instead require the use of a staggered docket in which multiple hearings are scheduled in varying time slots.

### (2) Require Prioritizing of Hearings for People Who Are Incarcerated:

**Original Recommendation:** As criminal courts return to full capacity and resume previously adjourned hearings, either virtually or in-person, the Committee recommends that SCAO require courts to prioritize adjudicating defendants who are incarcerated before out-of-custody defendants, and that preference be given to those defendants who have been in custody for the longest amount of time.

#### **Comments and Feedback:**

From comments received, there was concern expressed that this would result in an empty mandate for courts to prioritize hearings for individuals who were incarcerated, and the focus should be on bringing the docket current before any new policies or initiatives.

There was also support for all criminal defendants who are in custody to be given the opportunity to appear on Zoom® for any hearing.

#### **Final Recommendation:**

The Committee recommends that SCAO convene a study that will:

- (1) identify best practices in docket management and court operations that have been implemented in jurisdictions where criminal jury trials have successfully resumed;
- (2) identify funding sources that will enable Michigan courts to reduce or eliminate delays in holding jury trials in criminal cases; and
- (3) make recommendations to the Michigan Supreme Court about how to safely resume jury trials in accordance with constitutional speedy trial mandates.

### (3) Minimum Standards for Equipment and Internet Connection:

**Original Recommendation:** To the extent that online proceedings are public, the Committee recommends that courts ensure the equipment used and connections to

Internet meet technical standards to minimize technical problems and access to the technology issues that may impede the public's ability to view the proceedings.

**Comments and Feedback:**

Comments received indicated a need for improvements to the functionality of the Zoom® waiting room and breakout rooms, if this remote platform is utilized. Additional concerns were expressed regarding issues with cellular or broadband access in rural areas as well issues for those who do not have access to the internet. Concerns were raised regarding the funding implications of this recommendation.

Concern raised that there should be no presumptions for use of Zoom®. The court and litigant should determine how best to engage.

Commenters suggested that to assist parties, attorneys, victims, witnesses, and the general public with accessing court proceedings, the minimum technological requirements should be posted in multiple places.

**Final Recommendation:** The Committee recommends that courts ensure the equipment used and connections to Internet meet technical standards to minimize technical problems and access to the technology issues that may impede the public's ability to view the proceedings.

**(4) Mandate Notices in Criminal Matters:**

**Original Recommendation:** Similar to the best practices for Zoom® hearings in civil cases, SCAO should mandate that in criminal matters, courts provide notice of the date, time, and purpose of the hearing, along with the following details:

- a. Zoom® login information;
- b. Contact information for a staff member to answer questions or concerns;  
and
- c. Instructions for the participants to login and identify themselves on the screen by name, case name, and case number before entering the Zoom® hearing. This allows for court staff to easily identify participants for hearings, especially on motion calls, and allows for easy assignment of the participants into a breakout room, if used. Kent County incorporates these instructions into a SCAO notice form.

**Comments and Feedback:**

Comments received expressed concern that this recommendation would place an undue burden on court staff to designate one contact person for questions.

From comments received, additional suggestions were made to provide the following in writing to advise that:

- All persons entering or observing a court proceeding must enter their legal name on their screen or, if participating by phone, inform the court of their legal name in relation to their phone number;

- That no person may record, take a screen shot of or otherwise “copy” information from the court proceeding;
- That no person shall publish any information from a court proceeding, including by posting on social media; and
- That using information from a court proceeding to harass, intimidate, embarrass, or threaten another person shall be prosecuted to the fullest extent of the law.

Additionally, comments received suggested to also provide a phone number for the court proceeding, along with Meeting ID and Passcode in the notices in case of connectivity issues.

**Final Recommendation:** Similar to the best practices for Zoom® hearings in civil cases, SCAO should mandate that in criminal matters, courts provide notice of the date, time, and purpose of the hearing, along with the following details:

- a. Remote platform login information;
- b. Contact information for a staff member to answer questions or concerns; and
- c. Instructions for the participants to login and identify themselves on the screen by name, case name, and case number before entering the remote platform hearing.

**(5) Provide an In-person Alternative for Defendants Who Are Incarcerated:**

**Original Recommendation:** The Committee recommends that SCAO require courts to provide an in-person alternative for defendants who are in jail and do not agree to participate in the hearing by way of Zoom® technology.

**Comments and Feedback:**

Comments received were supportive of this recommendation as a whole as it was consistent with current practice but notes that arraignments should presumptively be done remotely.

Responses indicated that to the extent that defendants who are incarcerated were required to participate remotely before the pandemic, they shall continue to be required to participate remotely so as to not create any greater chaos in already strained processes.

**Final Recommendation:** The Committee recommends that SCAO require courts to provide an in-person alternative for defendants who are incarcerated and do not agree to participate in the hearing by way of Zoom® technology or other remote platform.

**(6) Annual Remote Platform and YouTube Training for Court Staff:**

**Original Recommendation:** To protect the right to counsel, due process, and public access in criminal cases, the Committee recommends that SCAO require court staff to be trained annually on the best practices for operating by Zoom®, and Zoom® and YouTube technology; also, that there be mandatory compliance with SCAO’s current [Recommendations on Using Zoom & Public Access for](#)



[Court Proceedings](#). This mandate should include a requirement that courts allow out-of-custody defendants or witnesses to participate by telephone or another reasonable alternative where they otherwise lack access to a stable Internet connection.

**Comments and Feedback:**

Comments received indicated support for annual training but also questioned if the training was necessary as it should be part of a new hire's orientation. Additional concerns were also expressed concerned with livestreaming cases regarding the burden it places on court staff in attempting to not publicize personal/sensitive information as well as simply being a safety risk.

**Final Recommendation:** To protect the right to counsel, due process, and public access in criminal cases, the Committee recommends that SCAO and MJI develop a training on the best practices for operating a remote platform and for remote platform and YouTube technology. Court staff should be required to participate in the training annually. The committee further recommends that there be mandatory compliance with SCAO's current [Recommendations on Using Zoom & Public Access for Court Proceedings](#). This mandate should include a requirement that courts allow out-of-custody defendants or witnesses to participate by telephone or another reasonable alternative where they otherwise lack access to a stable Internet connection.

**(7) Amend Court Rules to Create a Presumption that Certain Parties Will Appear Remotely for Certain Hearings:**

**Original Recommendation:** The Committee recommends amending the court rules to create a presumption that, except where the defendant asserts the right to be physically present in the courtroom, attorneys, parties, and participants in criminal cases will appear remotely using two-way interactive video technology or other remote participation tools for non-evidentiary criminal hearings, including warrant requests, arraignments on the information under [MCR 6.113](#) (unless waived), probable cause conferences, emergency motions regarding bond, calendar conferences, final conferences, plea hearings, sentencing, extradition hearings, and probation violation hearings under [MCR 6.445\(B\)](#). With regard to matters involving forensic evaluations of juveniles or adults for competence to stand trial, competence to waive Miranda rights, and criminal responsibility, courts shall permit the use of video technology. The evaluator shall note in the forensic opinion whether the use of video technology impeded an impartial and accurate clinical assessment, and, if so, notify the court that an in-person evaluation must be scheduled.

**Comments and Feedback:**

Some comments received indicated that it would be difficult to apply mandates, presumptions, and preferences to all courts and to do so would be to ignore significant differences between jurisdictions as the judicial system is not a one size fits all system.



Comments received indicated limited support for creating a presumption. The majority of comments received did not support the creation of a presumption rather an expansion of the current types of cases/hearings permitted to be conducted via videoconferencing technology and then allow for the court and parties to determine the best method for each case.

Comments received favored a default for in-person proceedings with the discretion being left to the courts to determine whether to permit Zoom® proceedings.

Concerns raised with cases involving victims and ensuring that their rights are not being violated. The Michigan Constitution confers on all crime victims the “right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.” Const. 1963, art 1, §24.

**Final Recommendation:** Unlike the other recommendations in this report, the Committee was not able to reach a consensus on proposed revisions to court rules addressing criminal proceedings. The Committee considered whether to propose a presumption or preference for use of remote hearings in certain specified and limited proceedings. The commenters were generally opposed to a presumption but many courts also indicated they anticipated continuing to use remote proceedings in various hearings. However, because of the many procedural and constitutional issues involved in criminal proceedings, the Committee was not able to reach a consensus regarding the use of a presumption for remote hearings in general or for specific hearings including arraignments, probable cause conferences, and criminal scheduling conferences. The commenters reflect a preference for remote hearings in arraignments and probable cause conferences but recognize a need to be flexible given the particular circumstances of a case and defendant; in all other proceedings an in-person appearance is presumed.

Additionally, the Committee considered comments and a rule change based on the decision in *People v Jemison*, 505 Mich 352 (2020)<sup>26</sup> and the impact of the right of confrontation when a trial court permits the use of remote proceedings in certain hearings. However, a consensus was not reached and the Committee believes others must address this issue through specific substantive and procedural changes to court rules and/or statutes. Similarly, the Committee believes the use of remote proceedings in criminal proceedings should be studied over the next 12 to 24 months to determine if there is a best practice developing within the courts that may be later reflected in the court rules.

With this background in mind, the Committee recommends (i) that the State Bar of Michigan and the judicial associations consider whether any rules changes should be considered in light of *People v Jemison*; and (ii) that MSC conduct a study over the next 12 to 24 months to determine if there is a best practice developing within the courts regarding the use of remote proceedings and which

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<sup>26</sup> [People v Jemison, 505 Mich 352 \(2020\)](#)

types of proceedings that have proven to be the most beneficial. Further the Committee proposes the following court rule revisions for further consideration:

## **MCR 6.006 Video and Audio Proceedings**

### **(A) Remote Proceedings in Circuit Court.**

~~District and Circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, waivers and adjournments of preliminary examinations, and hearings on postjudgment motions to amend restitution.~~ to conduct any non-evidentiary or trial proceeding. It is presumed that evidentiary hearings of any nature, sentencings, and trials will be conducted in person, except upon specific concurrence of all parties on the record, and subject to the final discretion of the trial court.

### **(B) Preferred Remote Proceedings in Circuit Court.**

~~As long as the defendant is either present in the courtroom or has waived the right to be present, on motion of either party, district courts may use telephonic, voice, or video conferencing, including two-way interactive video technology, to take testimony from an expert witness or, upon a showing of good cause, any person at another location in a preliminary examination. The use of two-way interactive video technology shall be preferred for the following proceedings: initial arraignments on the information, pretrial conferences, motions pursuant to MCR 2.119, and pleas.~~

### **(C) Defendant in the Courtroom – Other Proceedings.**

~~As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use videoconferencing technology to take testimony from a person at another location in the following proceedings:~~

- ~~(1) evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status;~~
- ~~(2) with the consent of the parties, trials. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.~~

(C) In all other proceedings, the in-person appearance of the parties, witnesses, and other participants is presumed.

(D) Notwithstanding any other provisions of these Rules, the use of videoconferencing technology shall not be used in Bench or Jury Trials, or any proceeding wherein the testimony of witnesses or presentation of evidence shall occur, except upon the concurrence of all parties, and in the discretion of the Court.

(E) Nothing herein shall prevent a defendant from demanding to physically appear in court for any scheduled proceeding. The presiding judge and any attorney of record for said participant must appear in person with his/her client for said proceeding.

**(F) Mechanics of Use.** The use of telephonic, voice, video conferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court.

### **MCR 6.609 Use of Remote Proceedings in the District Court**

#### **(A) Use of Remote Proceedings in Criminal Cases**

- (1) Subject to the standards published by the State Court Administrative Office, a District Court may, at the request of any participant, or *sua sponte*, allow the use of videoconferencing technology by any participant in any court scheduled criminal proceeding.
- (2) The use of videoconferencing technology shall be the preferred method for conducting arraignments and Probable Cause Conferences for in custody defendants.
- (3) In all other criminal proceedings, the in-person appearance of parties, witnesses, and other participants is presumed.
- (4) Notwithstanding any other provision of these Rules, the use of videoconferencing technology shall not be used in Preliminary Examinations, Evidentiary Hearings, Bench Trials or Jury Trials, or any criminal proceeding wherein the testimony of witnesses or presentation of evidence shall occur, except upon the concurrence of all parties, and in the discretion of the Court.
- (5) Notwithstanding anything herein to the contrary, as long as the defendant is either present in the courtroom or has waived the right to be present, District Courts may use videoconferencing to take testimony from any witness in a Preliminary Examination.
- (6) In determining whether to utilize videoconferencing technology, the Court shall consider Constitutional requirements, in addition to those factors contained in MCR 2.407(C)(1)-(13).
- (7) In the event there is a determination made by the Court that a participant is found to be unable to adequately use the technology and appear at a scheduled remote proceeding, the presiding judge and any attorney of record for said participant must appear in person with his/her client for said proceeding.
- (8) This rule does not preclude a participant's ability to participate by telephonic means under MCR 2.402 in the discretion of the Court.
- (9) The use of telephonic, voice, videoconferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by

the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court.

APPENDIX A

LESSONS LEARNED SUMMARY OF  
COMMENTS AND FEEDBACK

Lessons Learned Committee  
 Summary of Comments and Feedback Received for the Report:  
*Michigan Trial Courts: Lessons Learned From the Pandemic of 2020-2021*

**Overview of Responses Received**

In June of 2021, the Lessons Learned Committee released their preliminary findings in the report, *Michigan Trial Courts: Lessons Learned From the Pandemic of 2020-2021*. That report was released to courts, stakeholders, and the public with a request for comment and feedback. Additionally, pursuant to interim Michigan Court Rule 8.110, court leadership teams convened meetings to discuss the management of court operations during the pandemic and to identify potential permanent changes that might improve court processes.

The Committee received 128 responses from various judges, court administrators, court staff, attorneys, associations, and others. Of the responses received, 36 district courts, 17 circuit courts, 9 probate courts, 2 tribal courts, and 1 friend of the court were represented. A complete breakdown of responses received is illustrated in the table below.

Role	District Court	Circuit Court	Trial Court	Probate Court	Tribal Court	Associations	Other	Total	% of Total Received
<b>Court Administrators</b>	5	2	3	0	0	N/A	N/A	10	7.8%
<b>Court Clerks</b>	3	2	0	0	0	N/A	N/A	5	3.9%
<b>Defense Attorney</b>								10	7.8%
<b>Funding Unit</b>								1	0.78%
<b>IT Personnel</b>								0	0.0%
<b>Judges</b>	41	17	4	7	3	1	1	74	57.81%
<b>Law Enforcement</b>								0	0.0%
<b>LGAL</b>								1	0.78%
<b>Other<sup>27</sup></b>								19	14.84%
<b>Probate and Juvenile Registers</b>								0	0.0%
<b>Probation and Parole</b>	2							2	1.6%
<b>Prosecuting Attorney</b>								3	2.3%

<sup>27</sup> This category encompassed various associations, organizations, and individuals not directly associated with a specific court.

<b>Public</b>								0	0.0%
<b>Referee</b>	1	1					1	3	2.3%
<b>TOTAL</b>								<b>128</b>	

*The Michigan Trial Courts: Lessons Learned From the Pandemic of 2020-2021* report focused on 4 main areas in which the courts were directly impacted as a result of the pandemic:

- the difficulties experienced by courts implementing emergency protocols;
- continuity of operations and planning for return to full capacity;
- the virtual courtroom and remote proceedings; and
- procedural concerns regarding ZOOM® hearings involving criminal defendants.

Overarching themes from the comments and feedback received included, but were not limited to, the following:

- Little to no support for amending court rules to create a presumption for appearing via ZOOM® for certain hearings
- lack of funding for IT and equipment
- concerns over unfunded mandates
- broadband/connectivity issues with ZOOM®
- need for statewide implementation of E-Filing system or an effective electronic workflow process in the interim
- staff time relating to ZOOM®
- varying thoughts on which hearings should be in-person vs. via ZOOM®
- lack of addressing of victim’s rights
- lack of district court representation on the committee

This document provides a summary of the comments and feedback received regarding the Lessons Learned report, *The Michigan Trial Courts: Lessons Learned From the Pandemic of 2020-2021*. All submissions have been shared with the Lessons Learned Committee members and will be reviewed when addressing the final recommendations.

## The Difficulties Experienced by Courts Implementing Emergency Protocols

There were 61 comments that specifically addressed the narrative discussion regarding difficulties experienced by courts implementing emergency protocols. An additional 60 responses provided feedback on the preliminary recommendations. Comments were reviewed and summarized in relation to the corresponding subsections contained in the original report:

- Identifying Essential Services and Essential Workers;
- Managing Under the Michigan Supreme Court’s Administrative Orders;
- Impact of Budget Issues on Trial Courts Responding to COVID-19;
- Managing the Filing of Pleadings and Communications to Stakeholders;
- Best Practices in Managing the Emergency Response to COVID-19;

## Identifying Essential Services AND Essential Workers

According to responses received, identifying essential services and workers was challenging for some courts. Emergency plans did not contemplate remote work and all courts facing a crisis like the COVID-19 pandemic at the same time. As a result, the list of essential services and workers continued to evolve based upon urgency of legal situations and the health and safety of court staff and the public.

During the pandemic, some courts dealt with issues surrounding lack of personnel due to furloughs, COVID-19 exposure, as well as early retirements precipitated by the pandemic. Smaller jurisdictions were challenged more than their larger counterparts due to staff often wearing multiple hats and the effect of personnel issues was felt across several roles. The inability for staff to work remotely contributed to creating the backlog of cases.

The success of transitioning to remote work varied for courts based upon access to equipment and connectivity issues. Some jurisdictions reported that they did not have a dedicated IT department and obtaining the necessary tools and equipment to allow staff to work from home such as laptops, VPNs, monitors, etc. was a challenge. In addition, in the more rural areas a lack of high-speed broadband created connectivity issues which hampered remote capabilities.

Commenters reported a need for courts to have a larger number of staff who are well trained and can operate videoconferencing equipment correctly. Further, commenters expressed that increasing capacity would lead to fewer disruptions of court hearings. Some jurisdictions reported that the transition to virtual proceedings was relatively seamless once the information technology was in place and staff were trained.

## Managing under the Michigan Supreme Court's Administrative Orders

Courts expressed that they felt that the Michigan Supreme Court inundated them with Administrative Orders regarding legislation, moratoriums, reforms, e-filing, and Zoom® use. Some courts reported that the volume of changes due to COVID-19 and/or planned changes in Michigan law pertaining to courts has been overwhelming and infeasible to digest and implement. Courts expressed feeling as though everyone, (State Court Administrative Office (SCAO), the Michigan Supreme Court (MSC), Health Departments, and County Governments) all wanted different things and wanted them immediately. There was significant time devoted to responding to statewide directives when judges could have exercised discretion and fashioned an appropriate response to the crisis.

Commenters reported that each Administrative Order felt inconsistent and like it came with little direction. They also reported that decisions made by heads of different state departments did not appear to be coordinated, there was too much variation from county to county, and there did not seem to be much thought as to how the implementation of all of the changes would be processed and handled amongst those on the ground. Courts indicated that they lacked the ability to lay out long-term plans since they did not have the time to put everything into written policy.

Responses indicated that there appeared to have been a lack of recognition by the courts surveyed for the report and by the Lessons Learned committee of the impact on petitioners of the extension of expiration dates of personal protection orders (PPOs). While the order extending these expiration dates was well intended, the lack of clarity on how this extension would operate



along with some of the requirements of the order, inadvertently put petitioners with existing PPOs at risk (This is one example of an absence of reflection on victims in the report).

## Impact of Budget Issues on Trial Courts Responding to COVID-19

While many responses touched on the budgetary issues facing courts related to the response to COVID-19, only one submission was received from a funding unit leadership role. According to this submission, the financial costs of the mandates associated with the pandemic have been significant, however, CARES Act funding was utilized to assist in covering most of the costs. It was expressed that if there are other expenses from Michigan Supreme Court mandates the hope would be that the state will cover those expenses.

A common theme expressed throughout the comments received was a concern regarding unfunded mandates that may be imposed as a result of any amendments to court rules or possible administrative orders.

## Managing the Filing of Pleadings and Communication to Stakeholders

Responses indicated that before COVID-19, matters would often be noticed for the same time and taken on a first come first serve basis. Often times attorneys would have to find coverage for matters when they were booked in multiple courtrooms, rush across town from one courthouse to another, adjourn matters, or risk having the matter dismissed for failure to appear timely. With the use of Zoom®, e-filing, and email filings, attorneys can file more matters in different courts across town. However, they are now requesting, and sometimes demanding, specific hearing times due to matters going in other courts on the same day. Often dockets are not available far enough in advance to accommodate the time slot that they are requesting without causing conflicts in other cases. This often becomes a juggling act that ultimately results in gaps in the hearing officer's docket and limits the number of matters that can be heard in a morning or afternoon. Some responses indicated that the efficiency gained from lack of travel for attorneys is diminished by the scheduling conflicts, and the courts' overall efficiency is capped.

Responses indicated that the lag in implementing statewide e-filing system adversely impacted remote filing. Courts that had an e-filing system in place were able to continue to conduct court business more seamlessly than those who did not. Those courts without an e-filing system were able to accept filings via a dedicated email address. With the increase in e-mail filing, parties filed more documents as they did not incur a cost and the court had to expend additional resources to handle the increase in filings. Providing detailed individualized notices for regular hearings like motions and conferences continues to be a huge burden on support staff.

While service on parties was difficult in some jurisdictions due to lack of technology or knowledge of pro-per litigants, many responses received indicated that permitting all service of process under MCR 2.107(C) to be performed using electronic means was extremely helpful in continuing to provide valuable services. While many litigants and parties may change their physical mailing location frequently, their email addresses do not tend to change. Allowing for the use of email service of process assisted in keeping the lines of communication open between the parties and the court.

Courts varied in their responses regarding how specifically pleadings and hearings were handled depending on case type. For example, in some courts for civil cases scheduling orders were

mailed out instead of conducting the scheduled pretrial. For pending Driving While License Suspended cases, the prosecutors reviewed the files with court appointed attorneys and pleas by mail were sent out to hundreds of defendants. Some of them were completed and returned in a timely fashion, while others participated in Zoom® proceedings or called in later and the cases were resolved consistent with the original offers. Cases with pending sentencing dates were often moved up and held by Zoom®. Some courts scheduled misdemeanor pretrials in 10-minute intervals via Zoom®. The staggered timing appeared to be more efficient. As staff and attorneys became more proficient in the process, additional hearings were scheduled at the same time.

Responses indicated that bond and probation compliance suffered since programming was either not being offered or it was offered remotely, which was not as effective. Additionally, it was reported that monitoring of probationers suffered as the pandemic provided an easy excuse for noncompliance and face-to-face meetings/appearances were not required. Some courts reported having more no shows for virtual hearings than for in-person hearings.

Another area of difficulty that was reported was meaningful monitoring of juvenile delinquency and child protective proceedings. While monitoring of juvenile probationers appears to have been relatively successful, the monitoring of services was hampered since much of the monitoring was done remotely, which was not very effective, or the desired services were not ordered at all.

## Best Practices in Managing the Emergency Response to COVID-19

Courts reported that they did not have the luxury of a test environment before launching a new business platform to address the pandemic. Pandemic circumstances did not afford them that luxury. SCAO regional administrators and various MJI webinars were helpful.

Some courts developed and/or already had plans in place in which the court and county meet monthly, which aided in communication. Regular meetings between administration and the bench assisted in successful implementation of administrative orders and continuity of operations during the pandemic. Overall, the consensus from the responses received was that communication with all stakeholders was key.

## Summary of Comments Regarding Preliminary Recommendations:

Some responses to the preliminary recommendations expressed concern that the recommendations do not suggest any action(s) that will address the concerns and provide immediate relief. Responses indicated that COVID-19 related issues continue to create an unsustainable burden on courts and staff. Concern was expressed that there appeared to be no apparent funding at the state, county, or local municipal level to implement and support the recommendations and ideas and without the availability of funding many of the recommendations cannot be supported.

**Recommendation #1: Emergency Plan Court Rule:** The Committee recommends that the Michigan Supreme Court adopt a court rule under Michigan Court Rules, Subchapter 8, and General Administrative Orders, requiring each court to develop an emergency operations and continuity of operations plan within one year of adoption of the rule. The courts should review

and update the plan, as necessary, every three years. Each court should be encouraged to work with their stakeholders to develop the plan and conduct the three-year review. The plan would be based, in part, on the lessons learned during the 2020-2021 pandemic.

**Feedback:**

Responses received indicated majority support for implementing either a court rule, administrative order, or trial court performance standards that would include emergency plans for functions and court-operated services. However, commenters caution against requirements for emergency plans that would promote a one size fits all approach.

Responses indicated a desire for SCAO to create, maintain, and continually update a comprehensive list of materials and resources to assist courts with developing emergency plans and continuity of operations plans with all courts, including local courts, having access to all training materials.

Commenters indicated that the development of emergency plans was often difficult when certain stakeholders were not on the same page and/or at the table during discussions. The comments also reflect a request to ensure that that all stakeholders were consulted when developing any emergency plans and to provide Leadership Development that addresses ongoing management of courts and crisis management.

Responses also reflected the failure of the report to address the resources of victims and indigent individuals. Many Michigan residents do not have the financial resources to purchase and maintain technological equipment and/or live in an area where the technology available is limited, sporadic, or non-existent. Commenters requested that any emergency plan court rule include the following to ensure that all Michigan residents have access to essential services of the Michigan’s judicial system:

- develop avenues to provide access and equipment to indigent individuals and those who otherwise do not have access to a computer and reliable internet or a phone;
- develop avenues that do not rely on technology, especially for victims of domestic violence;
- include the specific duty to integrate the rights of victims of crime in the emergency plan court rule.

**Recommendation #2: Unified Case Management and Electronic Filing System:** The Committee recommends that the Michigan judicial system modernize and further develop a unified case management and electronic filing system that is accessible to all courts.

**Feedback:**

Responses received overwhelmingly supported moving forward with a unified case management and electronic filing system. Many responses indicated that this was long overdue and needed. Further responses indicated that in order for courts to fully utilize remote work, be efficient and consistent statewide there must be a unified case management and filing system. It was also confirmed that the report accurately described the inconsistency among courts in providing alternatives to in-person filing and the lack of clear direction given to the public. Commenters did express concerns that the creation of a statewide unified case management and electronic filing system would be problematic for many courts that have purchased and implemented costly case management systems on their own. Additionally, there were concerns that for those

courts that have not previously purchased and implemented a system that requiring them to do so would create an unfunded mandate. Commenters requested that funding for a statewide case management system and electronic filing system would come from legislation and not be left to funding units, some of which have already spent large sums for a defunct system.

Concerns were also raised regarding the detrimental and disproportionate impact of establishing technologically based access to the essential services of the Michigan's judicial system to those living below, at, or near the poverty level. Many Michigan residents live in areas where the technology available is limited, sporadic, or non-existent. Commenters requested consideration of the following in the development of a unified case management and electronic filing system:

- develop avenues to provide access to technology to indigent individuals and those who otherwise do not have reliable access to technology;
- develop avenues to provide equipment to indigent individuals and those who otherwise do not have access to a computer and the internet or a phone;
- develop multiple avenues of access to essential services that do not rely on technology; and
- integrate the rights of victims of crime.

It was suggested that until a unified case management and electronic filing system is created and implemented, a unified approach to filing across all Michigan courts should be established. This should include both technological alternatives such as email filings and non-technological alternatives such as a drop box for those lacking adequate internet access that are available immediately. These alternatives should also be well publicized throughout Michigan.

**Recommendation #3: Infrastructure Advocacy:** The Committee recommends that SCAO and the judges' associations coordinate a plan to advocate for the adoption of legislative appropriations to modernize the state's broadband and technology infrastructure. The users of the court will expect seamless access to the courts by remote connection, and the experience from the pandemic is that large areas of the state lack strong and stable connectivity. This is a matter of access to justice.

**Feedback:**

Responses received support this recommendation. Statewide infrastructure enhancement would benefit a broad sector of society with regard to education, healthcare, and employment as well as access to justice. As with the unified case management and electronic filing system, funding was a large concern.

Commenters requested to also advocate for appropriations sufficient to improve technological access throughout the state, and to provide training to Michigan residents on using the technology to access the essential services of the courts. Additionally, training should be provided to victims of crime, advocates, and service providers to access the essential services of the courts designed to assist victims. Lastly, prioritize and integrate the safety, privacy, and other rights of victims under Michigan and federal law provide victims within all systems created.

It was also suggested that a Court Technology Assessment Tool be created and implemented. This tool would assist with assessing the technology needs of the courts within Michigan, specifically as it relates to courts ability to work remotely.

Responses received suggested that while appropriations to modernize the infrastructure were being sought, courts should be encouraged – to the extent possible – to provide broader access to the internet to the public based on some strategies implemented during the pandemic, such as providing Wi-Fi service in the parking lot or access in a room in the building.

**Recommendation #4: SCAO Training to Strengthen and Enhance the Relationship**

**between the County Court System and the County Funding Unit:** The Committee recommends that SCAO and MJI develop a training program that shares the methods and means to develop a strong, mutually collaborative working relationship between the county courts and their funding units.

**Feedback:**

Responses received indicate support for this recommendation as a whole. Such training could be beneficial to courts and funding units for years to come as it is often a constant struggle re-developing an understanding with new and ever-changing stakeholders such as mayors, city administrators, council members on the roles and responsibilities of the court, especially as they may differ from that of the local government.

Commenters requested that any training programs regarding their relationship with their funding units be developed in conjunction with the Michigan Association of Counties, Michigan Indigent Defense Commission, and other government agencies.

Responses indicated that implementation of this recommendation may provide an opportunity to establish and enhance relationships with partner agencies, service providers, and Native Nations. Stronger partnerships can lead to improvements in access to Michigan’s judicial system, support the wellbeing of children and families, identify local barriers to accessing justice, facilitate a victim-centered approach, enhance culturally honoring services for survivors, facilitate restorative justice, establish prevention efforts, identify local needs, and improve the quality of life for all Michigan residents.

## Continuity of Operations and Planning for Return to Full Capacity

There were 52 comments specifically addressing continuity of operations and planning for return to full capacity and 52 responses providing feedback on the recommendations in this area. The comments were reviewed and summarized in relation to the report’s corresponding subsections, which include:

- Coordinating Personal Schedules and Training;
- Ability to Manage Court Staff Working Remotely;
- Procedures Established to Maintain Essential Functions and Expand Remote Proceedings;

## Coordinating Personnel Schedules and Training

Some comments indicated that not properly equipping court staff to work remotely caused issues as they did not have a court issued laptop to return emails and process paperwork, nor did they have a dedicated telephone number to return calls.

Other comments indicated that due to sparse staffing that had been reduced by years of budget cuts, smaller jurisdictions were able to work safely within the office by thinking outside the box and creating safe workspaces.

### Ability to Manage Court Staff Working Remotely

It was reported that one of the most difficult aspects during the pandemic, aside from an access to justice viewpoint, was managing staff working remotely. Responses received indicated that extra Zoom® licenses for administrators, referees, and staff increased the ability for some courts to provide remote services. However, in some courts, juvenile court staff were unable to work remotely and district courts had limited ability to allow remote work given the lack of technology available.

Difficulties were reported with the ability to contact certain staff and other stakeholders when needed while working remotely. Responses indicated that courts did not coordinate with staff for the transfer of telephone calls to their home and/or cell phones. Additionally, responses indicated that staff did not check their voicemails and/or e-mails regularly which resulted in a failure to respond timely to issues.

Commenters highlighted the report's absence of any recommendations regarding how to monitor and supervise staff working remotely.

### Procedures Established to Maintain Essential Functions and Expand Remote Proceedings

Commenters indicated that prior to any mandate or allowing of remote proceedings, the establishment of guiding principles and procedures that govern this type of work should occur.

Concerns were raised regarding remote work and the lack of confidentiality of court files and other confidential information. Court staff often live with family and/or friends who may have some level of involvement in the court system which raises concerns over court files being taken out of the courthouse and left unsecured in staff's home. Additionally, where court staff access the court's system from their home computers issues of internet security, firewalls, etc. were also raised.

Commenters raised concerns regarding allowing visiting judges, especially those living out of state, to sub in on cases over a party's objection. While this might be necessary on an emergency basis, the suggestion was made that this practice be limited to specific proceedings that would not be considered a critical stage of the proceedings and only permissible with the parties' express permission. A primary issue expressed was that the public cannot meaningfully hold an unelected, visiting judge accountable in the same manner that an elected, sitting judge can be held accountable.

Comments indicated that one court adopted electronic signature software in April of 2021, due to its significant advantages. However, the limitation to this practice is that documents must be created online or scanned into a digital file. The idea that most staff will work remotely presumes that all interested parties will be both willing and able to manipulate documents digitally which has not been the case to date.

Some courts indicated that they are allowing email-filing. However, it was expressed that this practice creates concern with filers failing to provide the original copy via mail as requested. Original documents must be filed with the Court and instead, courts have received emailed pleadings where the “signature” is simply a name in script font. Even though courts accept the emailed scanned copies, filers are required to forward the original via mail. Unfortunately, this does not happen in a significant percentage of cases and in others, the original is received long after the relevant date has passed.

## Summary of Comments Regarding Preliminary Recommendations

**Recommendation #1: Creation of a Judicial Council Planning Committee:** The Committee recommends amendment of the Chief Judge Rule under [MCR 8.110](#) to permit the chief judge to appoint a judicial council planning committee to meet at least one time per year to review court operations, technology, and recommend revised procedures to enhance the efficiency and consistency of court operations. The judicial council would work with designated court stakeholder groups to solicit feedback regarding court operations and proposed improvements.

**Feedback:**

Responses received regarding this recommendation were mixed. Some responses indicated that this recommendation overlapped with the recommendation to establish an emergency operations plan and did not seem to be necessary. There was also concern that this may not be practical for smaller, local courts. A suggestion was made to combine these two recommendations within one rule as the Chief Judge should convene and oversee both committees. Additionally, any proposed court rule should be expansive and acknowledge there may be ways in addition to the Judicial Council to accomplish the needed task.

In regard to identification of stakeholders for the judicial council planning committees, responses indicated that self-represented litigants should be included as a designated court stakeholder group, either through focus groups, interviews, or surveys that will enable a cross section of the public to share their experiences and ideas to ensure that their input and views are heard. Responses again identified a lack of victim representation and suggested that any committee should recognize victim service providers as stakeholders.

**Recommendation #2: Best Practices Technology Symposium:** The Committee recommends that SCAO and MJI develop a symposium for all county IT departments and court administrators to share best practices regarding court technology, software applications, and operations. The symposium would be held at least once per year and would be coordinated with the Michigan Judicial Council’s proposed strategic plan for technology.

**Feedback:**

The majority of the responses indicated that best practices symposiums are needed for court technology leadership teams as well as for the remote workforce.

Responses received pointed out that this recommendation presumes that all courts have IT departments. Not every county has an IT department, and some counties have one that is small or has varied responsibilities.

Concerns were raised regarding funding for implementing best practices. If there were to be any statewide requirements, it may be appropriate to consider statewide funding for IT staff and equipment, perhaps as a part of the trial court funding commission work.

Further responses indicated that while this is an excellent goal, it should be noted that not all jurisdictions are using the same court technology, software applications, and operations. Any symposium should present on best practices for all systems currently in place.

Commenters indicated that while a yearly symposium would be a very good start, it may also be beneficial to find a way to build and maintain relationships throughout the year as problems or questions arise, and to combat relationships lost due to staff turnover. One suggested option was the creation of a listserv for people who work on court process and technology.

**Recommendation #3: Use of Virtual Visiting Judges:** The Committee recommends that the Michigan Supreme Court adopt a rule that permits a visiting judge to appear by Zoom®. SCAO is testing the efficacy of allowing a judge experiencing a lighter docket to be assigned to hear cases by Zoom® as a visiting judge for a county experiencing a backlog of specified case matter. Retired judges, even those no longer living in Michigan, would be permitted to serve as a visiting judge by Zoom®. The courts have become proficient with Zoom® and this proficiency should be leveraged to benefit the entire court system.

**Feedback:**

Responses received reflected both support for and against this recommendation based upon how this would be implemented and the reason for having a visiting judge. Concerns were raised for the need to address any potential constitutional issues that this recommendation may present, i.e., Article VI, Section 11 states in part: “Each circuit judge shall hold court in the county or counties within the circuit in which he is elected, and in other circuits as may be provided by rules of the Supreme Court.” A concern was raised regarding the interpretation of this language regarding a judge needing to be physically present.

Further concerns were raised about this recommendation leading to changes in judges in the middle of family law cases, which could be detrimental to the families involved in these cases. With the success of the “One Family – One Judge” approach, visiting judges may not be the most appropriate in child protection cases, juvenile delinquency cases, family law cases, personal protection order cases, and specific types of criminal law cases.

Some responses opposed the use of any retired judge living outside of Michigan appearing as virtual visiting judge. The suggestion was made to have SCAO develop a roster of available visiting judges, either retired judges or judges with lighter caseloads, and the court type they are available for. Commenters expressed concerns regarding the difficulty with providing judges the documents and/or files if the court does not have an electronic document management system.

For those in support of the recommendation, there was an acknowledgment that there are times in which judicial officers should be able to conduct hearings and manage dockets from anywhere when necessary. Responses indicated a belief that recommendations



should not automatically endorse or require the use of Zoom® and YouTube as the platform for use whenever court proceedings are conducted remotely, and public access is required since other platforms may exist for use.

Additionally, commenters indicated that any rule or administrative order for virtual visiting judges should include language that provides the option of appearing by Zoom® or in-person. Further support was given for this recommendation so long as courts had discretion to make the determination of when to utilize virtual visiting judges on a case-by-case basis, given the differences in communities and ways courts are structured throughout the state.

**Recommendation #4: Self-Care of Judicial Officers and Court Staff:** While this report does not specifically address the issues of stress and self-care in the court system, the Committee recommends that SCAO and MJI commit to a five-year plan to address self-care in the courts. The pandemic has taught us that management of court operations is demanding and generates stress. Moreover, the nature of the work performed by trial courts creates potential for judicial officers and staff to be exposed to secondary trauma. The committee is aware that self-care breakout sessions have been offered in the past but believes a dedicated five-year program to address self-care within the courts would benefit the delivery of justice. The judges' associations could collaborate in formation of the program and share material.

**Feedback:**

Support for this recommendation was split. Some responses indicated that this recommendation appeared to be just another request for committees, more rules, more reports, and more requirements that will not enhance self-care. Feedback indicated that the report did not specifically address the issues of stress and self-care in the court system and without addressing the causes it is difficult to put self-care practices in place. Other responses indicated that this recommendation was useless and a waste of time. Responses in support of this recommendation indicate that training about trauma is a critical aspect of self-care, in part to understand the responses to direct trauma, understand the responses to historical trauma, and improve interactions with victims, children, advocates, service providers, and others in Michigan's judicial system, including defendants. Self-care is critically important for all people involved in the court system.

**Recommendation #5: Remote Site Judicial Service:** The Committee recommends that the Michigan Supreme Court amend [MSC Administrative Order 2012-7](#) (currently suspended by [MSC Administrative Order No. 2020-19](#)) and applicable statutory provisions to permit judicial officers to conduct court hearings and business from a site outside of the courthouse. The judicial officer would be required to manage their regular docket and judicial meetings by Zoom®. Standards and guidelines would be developed to govern remote-site judicial service. The courts have become proficient with Zoom® and this proficiency should be leveraged to enhance the method and means of public service.

**Feedback:**

Responses received in support of this recommendation indicated that it may be necessary to provide alternatives for participating remotely in court proceedings, meetings, and other remote gatherings required under the duties of their position if they reside in areas where the technology available is limited, sporadic, or non-existent. Further, it may be necessary to include budgetary allocations for all members of the judiciary and court staff

to afford the required technology at home and to have laptops sufficient to support the software necessary to engage in court proceedings, meetings, and other remote gatherings required under the duties of their position.

Responses received were not in favor of permitting judicial officers to conduct hearings and business outside of the normal court hours when working remotely. Additionally, commenters indicated that judges should only be allowed to work from remote locations for a designated period of time and under certain circumstances.

Responses also indicated that the report should not automatically endorse or require the use of Zoom® (and YouTube) as the platforms for use whenever court proceedings are conducted remotely, and public access is required.

Commenters raised concern that there is a significant generational gap that will need to be addressed in that many senior judges want people physically present on site and do not understand or acknowledge that remote work is real work. Commenters indicated that individual judges should be given discretion to work remotely as long as they are managing their dockets well.

**Suggestion for new Recommendation (6):** Create a process for a daily (or weekly) check-in to ensure there are no issues the judiciary needs to address. This could be local courts checking in with key staff to determine that there are no operation issues and reporting it electronically to SCAO. If issues are identified, they can be assigned for resolution. This process is similar to that used in the medical field (such as hospitals) to ensure that there are no threats to services or dangers to employees.

## The Virtual Courtroom and Remote Proceedings

There were a total 147 comments specifically addressing the virtual courtroom and remote proceedings with an additional 153 responses providing feedback on the recommendations.

## Videoconferencing Equipment and Remote Proceedings

There were 70 comments specifically addressing the videoconferencing equipment and remote proceedings with an additional 72 responses providing feedback on the recommendations.

Comments received indicate that the increased and ongoing use of videoconferencing to conduct legal proceedings compels access and equity to be the foremost lenses through which the court examines recommendations. Without question, in many circumstances, the use of videoconferencing by the court will increase efficiency and access for participants and the public. However, the use of videoconferencing also carries the burden of requiring resources that may not be readily available to those most impacted by limited access to the court system. The court must ensure that it is equipped to ensure full accessibility to all litigants for whom remote participation in proceedings may present barriers.

Additionally, commenters reported that transcriptionists have significant difficulty in maintaining accurate transcripts when there is a remote hearing. Inaudible speech, poor

connections, and background noises all make it difficult to create an accurate transcript. This has also made it difficult to find transcriptionists.

Comments received indicated that Zoom® and remote hearings have only weakened the already degraded court system as there is a sense that together with recent statutory changes the courts are no longer a place of laws but of mere suggestions. With the use of Zoom® and remote hearings, guidelines are specific in some areas and vague in others and when clarity is sought court staff are referred to their judges rather than provided additional guidance.

Comments received indicate that in-person meeting options must remain to be an option for people who unable to access video-conferencing technology because they have no internet, no smartphone, or no training on how to use any of these programs/devices.

## Summary of Comments Regarding Preliminary Recommendations

**Recommendation #1: Development of Minimum Equipment Standards:** The Committee recommends that SCAO consult with Zoom® to develop minimum equipment standards to maximize the connection to Zoom® and performance of the audio and video equipment, including recommended microphone and camera standards. Any standards should be used as guidelines and attorneys should be encouraged to comply. However, many litigants, and in particular self-represented litigants, may not have the means to meet the guidelines. The guidelines should not become a means to deny access to justice.

### **Feedback:**

Concerns were raised that this recommendation does little to solve the connectivity issues that exist and is not enforceable.

Responses indicated that attention should be given to the technology platforms used for remote hearings and develop public access rules to encourage access to justice. The current features on Zoom® may not be optimal for remote proceedings. SCAO should develop statewide public access rules that encourage access to justice and better protects sensitive information.

Further responses indicated that SCAO should either look at alternative options or negotiate with Zoom® to change its settings for remote proceedings to allow a virtual experience that more closely mirrors the in-person hearing experience. Zoom® should be consulted to consider changes to its platform. If this is possible, creation of a committee of court personnel representative of statewide personnel would be beneficial to determine all necessary and desired modifications to the Zoom® platform to address all current issues with Zoom® platform. In addition, commenters indicated that SCAO should consult with Zoom to establish minimum standards for access by disabled litigants in compliance with the Americans with Disabilities Act (ADA).

Commenters raised concerns over necessary funding for counties for any minimum standards implemented. Not every county has an IT department, and some counties have one that is small or has varied responsibilities. To the extent there are statewide requirements, it may be appropriate to consider statewide funding for IT staff and equipment, perhaps as a part of the trial court funding commission work.

Concerns were also raised that until there is universal access to modern broadband, there can be no requirement that any court be presumed to use Zoom® in their court hearings - especially in criminal hearings. Commenters indicated that mandated virtual court is not

based in reality until the proper infrastructure is in place and courts are given discretion as to what hearings they allow Zoom® appearances on based upon what works best within their communities.

A suggestion was made that SCAO work with the Justice for All Commission to create a short set of access to justice metrics. This would take the form of a set of baseline best practices for access (including digital access), and a short survey intended to measure which courtrooms are using these best practices. The responses could be collected and posted on the SCAO website.

**Recommendation #2: Modernization of Broadband:** The Committee recommends that SCAO, the judges' associations, and the State Bar of Michigan coordinate a plan to advocate for the adoption of legislative appropriations to modernize the state's broadband and technology infrastructure. Users of the court will expect seamless access to the courts by remote connection and the experience from the pandemic is that large areas of the state lack strong and stable connectivity. This is a matter of access to justice.

**Feedback:**

Responses overwhelmingly indicated that this truly is an issue of access to justice for all citizens. However, the responses received also indicated that SCAO should advocate for legislation appropriations for this and to ensure that there is appropriate funding dedicated to helping low-income and pro se litigants have access to broadband technology.

Responses further indicated that before moving forward with any permanent virtual court the broadband issues need to be addressed and corrected. Every court that wants to have a permanent virtual practice should also have connectivity hubs at the courthouse and throughout the community so everyone can connect to Wi-Fi and/or have access to a government owned device.

Commenters indicated that until technology is provided to rural areas, remote hearings should be used on a limited basis.

## Remote Hearings and Proceedings

There were 77 comments specifically addressing the remote hearings and proceedings as well as best practices for Zoom® with an additional 81 responses providing feedback on the recommendations.

Comments received indicated that the use of the practice of scheduling multiple hearings at the same time should not occur in virtual proceedings and instead a staggered docket would be more efficient. Commenters indicated that courts must ensure that participants in Zoom® hearings feel they are treated with respect, issues were heard, and they understood what occurred in the hearing.

Commenters raised concerns relating to witnesses viewing the proceedings live were not addressed in the report nor was the recording of the proceedings.

Many responses received identified the perception that the use of Zoom® has contributed of the lack of respect for the court and the proceedings in relation to courtroom decorum, courtroom

behavior and language, etc. Many expressed the importance of reestablishing the respect for the courts.

Commenters suggested that if a court rule amendment was to be made that the rule require for all virtual proceedings that a device/volume/connectivity check in occur before beginning the proceeding virtually. If the connectivity is inadequate to ensure a clear transcript, then the court must arrange for an in-person hearing or a different connectivity option.

## Best Practices for Zoom® Hearings

Best practices for Zoom® hearings include, but are not limited to, the following:

- (1) Notice of the hearing should include Zoom® login information, a contact from the judicial office to answer questions or concerns, and instructions for the participants to login and identify themselves on the screen by name, case name and case number before entering the Zoom® hearing. This allows for court staff to easily identify participants for hearings, especially on motion calls, and allows for easy assignment of the participants into a breakout room, if used. Kent County incorporates these instructions into a SCAO notice form.

### **COMMENTS:**

Comments received indicated that creating additional instructions increases time and expense to courts and there is no guarantee that a user will utilize that information. It was suggested that SCAO should create a form for courts to use and distribute specifically for Zoom® notice of hearings.

Additionally, it was suggested that Zoom® links and YouTube links be readily available on each court's website so the information is easy to locate for attorneys, clients, and members of the public. Concern was raised that courts do not have available staff to process calls with comments or concerns from litigants nor can they troubleshoot their issues with Zoom®.

- (2) The waiting room can be used as a staging area for motion day if the judicial staff provides e-mail communication with the participants. Oakland County places litigants and attorneys into the breakout room while the prior hearing is pending, and the judicial staff can inquire of the participants if there are any agreements reached or issues to resolve and confirm connectivity.

### **COMMENTS:**

There is a need for improvements to the functionality of the Zoom® waiting room and breakout rooms. Suggestion made for SCAO should ensure there is a comprehensive and easily accessible user guide with specific instructions for different devices (phones, tablet, computer, etc.).

- (3) Courts must make breakout rooms available for attorneys and clients to have confidential communications. This is essential in criminal proceedings, and confidentiality cannot be sacrificed simply because a defendant is appearing by Zoom® from inside a jail or prison.

**COMMENTS:**

Commenters raised concerns that defendants in custody are monitored and can never have private sessions even in the breakout rooms with their attorney.

- (4) When the courts are closed to the public under the phased approach to return to full capacity, the courts must make the hearing available through the YouTube channel unless the proceeding is closed, or access would otherwise be limited by statute or rule.

**COMMENTS:**

Support for this recommendation was expressed because of the transparency that comes from the public being able to access the Court's hearings. Suggestion was made for SCAO to help educate any court utilizing YouTube regarding when it is appropriate to use and when to pause proceedings.

- (5) Hearings where exhibits shall be introduced should be controlled by a scheduling order created based on a status conference with the attorneys/parties. The status conference should outline the method of disclosing and exchanging exhibits, the schedule for motions *in limine*, and the requirement for parties to agree on the admissibility of exhibits, as possible, prior to the hearing to minimize time spent on foundational procedure. Exhibits shall be provided to the court and witnesses prior to the hearing in a format agreed upon.

**COMMENTS:**

Exhibits are only practical when all parties are represented, and the attorneys have a good grasp on technology.

- (6) The court may also refer to the SCAO publication, [Michigan Trial Courts Virtual Courtroom Standards and Guidelines, 2020](#).

**COMMENTS:**

N/A

- (7) Both the courts and attorneys have expressed concerns about a witness appearing by Zoom® and the potential risk that someone is communicating with the witness from “the wings” or by text or other digital method. The Zoom® hearing is a court proceeding and the judge controls the courtroom. Judges may request a witness to use the videorecorder to show the court the entire room and inquire about anyone located in the room and whether the witness has access to any documents involving the case. Courts should refer to SCAO's [Remote Hearing Witness Instructions](#). Courts can supplement the standards and distribute the standards to interested parties and keep them posted on the website.

**COMMENTS:**

Commenters raised concerns regarding witnesses and remote proceedings. Solutions suggested do not address this issue. The Remote Hearing Witness Instructions document referenced should be mandatory, rather than recommended.

- (8) Courts must also manage self-represented litigants on Zoom®. A good resource is [SCAO Guidance on Conducting Remote Hearings with Self-Represented Litigants](#).



**COMMENTS:**

N/A

- (9) Courts should use the Zoom® interpreter tool in all matters requiring an interpreter, except for criminal plea hearings. The interpreter tool allows for the interpreter to speak to the foreign language witness without the interpretation being heard by others on the Zoom® hearing. The tool allows for real-time interpretation as if in open court. However, the recording device cannot record the interpretation, which is required in criminal plea hearings. The [Zoom® tutorial](#) provides instructions on how to schedule a hearing using the interpreter tool.

**COMMENTS:**

N/A

Zoom® is a tool and not a means to replace in-person litigation. But used effectively, Zoom® can create flexibility for the court docket, increase access to the courts, and minimize legal costs.

## Summary of Comments Regarding Preliminary Recommendations

**Recommendation #1: Non-Evidentiary Civil and Criminal Hearings:** The Committee recommends amending the court rules to create a presumption that attorneys, parties, and participants will appear by Zoom® for non-evidentiary civil and criminal hearings, including warrant requests, arraignments, probable cause conferences, calendar conferences, final conferences, sentencing, probation violation hearings, status conferences, settlement conferences, ADR proceedings, FOC proceedings, and *pro confesso* hearings, unless good cause is shown why Zoom® should not be used, or in a criminal case where the defendant asserts the right to be physically present in the courtroom.

**Feedback:**

Overwhelmingly, there was little support from judges and court administrators for creating a presumption. Some attorneys and associations were in support of a presumption. Commenters indicated that judges and court administrators should retain discretion over these matters and creating a presumption limits the court’s ability to exercise discretion in how to best handle their dockets. Responses indicated a feeling a being disrespected and not trusted to do the job that they were elected to do.

Majority of responses indicated that the presumption should be in-person hearings and the Court should develop rules to create safeguards for individuals who do not have access to Zoom® or are otherwise unable to effectively participate in remote hearings.

If a presumption is to occur, until Michigan can ensure that all court participants can meaningfully participate in remote proceedings through videoconference technology, any rules should set forth a process for a party to request a hearing or request a case be exempt from this presumption and factors courts should considering in deciding such a request. Much like the exemptions to electronic filing set forth in MCR 1.109(G)(3)(g), the court should set forth specific factors for courts to consider in overcoming the videoconferencing presumption.

Concern was raised regarding what constitutes *good cause*. Court discretion is important to properly assess all necessary considerations. Commenters indicated that there should be a requirement to demonstrate “good cause” to set a matter for in-person hearing and it

should be left up to the discretion of the court regarding appearing via Zoom with any party being able to request.

Additional concerns were raised regarding when the victim requests a virtual hearing. It was recommended that proceedings that are offered via livestream in real time should not also be posted after the fact for the safety of the victim. If posting is also agreed to (or for some special circumstance required by the court), then a time frame for removing the posting must also be provided.

Responses received provided varying lists of hearings that should/should not be held virtually. The LL committee will be including the finalized recommendations within their report.

**Recommendation #2: Proposed Amendment of MCR 2.407:** The Committee recommends that [MCR 2.407, Videoconferencing](#) be amended to specify the use of Zoom® and establish a preference for participants to appear by Zoom®. The preference may be overcome by reasonable factors including the nature of the proceeding, the evidence to be presented, and the availability of the participant support. It should remain within the court's discretion to deny the application to appear by videoconferencing. This would apply to those court rules that permit the use of videoconferencing, including [MCR 3.210\(A\)\(4\)](#), [3.215\(D\)\(3\)](#), [3.705](#), [3.708](#), [3.804](#), [3.904](#), [4.101](#), [4.202](#), [4.303](#), [4.401](#), [5.140](#), [6.006](#), and [6.901](#), subject to any statute or rules that would preclude the use of videoconferencing.

**Feedback:**

Some responses received indicated that the present court rule on remote hearings is adequate. The judge should have the discretion to allow it or not. Overwhelmingly, the responses indicated a lack of support for specifying the use of Zoom® and provided a recommendation that describe videoconferencing generally as there may be more remote applications available that courts may want to utilize.

The majority of the responses did not support a presumption for participation by Zoom® for many of the same reasons indicated under Recommendation #1. The majority of responses indicated that it should be left up to the court discretion.

**Recommendation #3: Use of Zoom® for Meetings in NA Cases:** The Committee recommends that lawyer guardian ad litem in an NA case be permitted, upon written request, to use Zoom® for meetings with clients located outside of the county unless good cause is shown. However, the lawyer guardian ad litem must meet with the out-of-county clients in person prior to adjudication, permanency planning hearings, and termination hearings.

**Feedback:**

There was opposition to the use of virtual hearings in for child protection cases due to the following:

- this recommendation may conflict with the Indian Child Welfare Act;
- it is difficult to see the environment in which the children are living, to determine if the child is being coached, to understand the relationship between parent and child, or to understand the amount of control being imposed by the DHHS worker, all of which could lead to unsafe situations for the child; and
- abuse and neglect cases involve serious constitutional rights for the parents.



Additional responses indicated that permitting LGALs to meet remotely diminishes the ability of the LGAL to establish a meaningful relationship with clients, including learning the mannerisms and other body language of the client and whether the client is being influenced before or during the remote meetings. Suggestion was made that the recommendation should be changed to a requirement that meetings between the LGAL and client be held in-person unless good cause is shown.

**Recommendation #4: Request to Appear via Zoom® to Ensure Access to Justice:** The Committee recommends that litigants who obtain a waiver of fees under [MCR 2.002](#) be given a preference when requesting to appear by Zoom® to ensure access to justice. The ability to appear through videoconferencing may save costs and provide flexibility to avoid lost time from work. However, if the litigant’s videoconferencing technology and/or equipment is not able to provide proper connectivity and audio and/or video recording, the court may require the litigant to appear in person until a remedy can be found.

**Feedback:**

There was strong opposition to using income level as a way to determine remote hearing preferences. The suggestion was made to offer the same preferences to all litigants regardless of income level. If the courts are not willing to offer this to everyone, then the suggestion would be offering this to all self-represented people, not just people who have gotten a fee waiver.

It was suggested that rule be tailored so that a judge can only order someone to appear in person if they have had repeated and severe interruptions. Additionally, the recommendation was made to specify that a person can revert to virtual appearances based on their own statement that the connectivity issue has been resolved.

Responses in support indicated that access to justice is key – whether in person or virtual. Allowing a party as much freedom to determine whether to appear in person or via Zoom could alleviate issues such as transportation, childcare, time loss at job, or internet connectivity.

Judges raised concerns that there appears to be an effort to take away their ability to be impactful in people’s lives by removing their discretion and almost turning them into robots, which leaves judges feeling very disheartened and unappreciated.

**Recommendation #5: Consistency among Courts within a County Judicial System:** The Committee recommends that SCAO empanel a committee to study “best practices” of standard procedures courts should establish to provide fair and efficient justice. The findings of the committee would be submitted to each county to determine how best to implement the procedures. The Committee recognizes that Michigan’s judicial system is not a unified court system. Nevertheless, the clear implication from the opinions expressed by attorneys and other stakeholders of the judicial system is that the lack of consistency among judges within a county judicial system to follow established or recommended procedures undermines confidence in the judicial system.

**Feedback:**

Responses received indicate that making all courts within a circuit consistent is a good idea overall as consistency amongst courts has always been an issue. The issue of courts

not following the court rules in a consistent manner could be addressed by SCAO with regard to courts in general and not just for this topic.

The suggestion to establish minimum statewide requirements that all courts must meet when it comes to providing access to the courts was made. Evidenced based practices are the rule in today's society, not the exception. Commenters indicated that to create mandates, rule changes, presumptions, and preferences without all of the data does not fit within the scope. Concern was raised that creating "Best Practices" will lead to additional mandatory rules for judges to follow.

Additionally, feedback indicated that it is imperative that there are consistent, transparent, and shared expectations about when and how courts will hold remote proceedings, as well as clear processes for access, managing exhibits, addressing barriers to access, technological difficulties, access to counsel and public access to remote court proceedings. Consistency and clarity are also needed related to remote access to clerks' offices for remote filing via email and E-Filing. The lack of uniformity among courts with respect to the use of videoconferencing processes and access to remote filing has proven confusing and challenging to litigants and attorneys and at times, impacted public access to the courts in individual cases.

## Additional Procedural Concerns Regarding Zoom® Hearings Involving Criminal Defendants

There were 73 comments specifically addressing additional procedural concerns regarding additional procedural concerns regarding Zoom® hearings involving criminal defendants with an additional 60 responses providing feedback on the recommendations.

Responses indicated that Zoom® takes longer than in person due to having to identify parties, connection issues, ensuring consent is given for YouTube streaming, etc.

Concern was raised that Zoom® also lacks any accountability and defendants sentenced to jail via Zoom® often refuse or fail to report.

Responses indicated that Zoom® had been an invaluable tool in continuity of supervision and care during the pandemic and would most likely be utilized in some fashion going forward where appropriate.

Responses indicated that most criminal matters should be presumed to be in person unless a defendant is in custody so that they have adequate in person access to their attorney and by appearing in person before the court, the best possible access to justice.

Responses also noted the lack of victim awareness within the report.

## RECOMMENDATIONS

**Recommendation #1: Discourage Practice of Scheduling Multiple Hearings or Entire Dockets At One Time:** The Committee recommends that SCAO discourage judges from using the practice of scheduling multiple hearings or entire dockets in one time slate in criminal matters and instead rely on a staggered docket by using assigned times or a similar docket management mechanism. As is true in civil cases, parties can sit for several hours, and attorneys often run into conflicts with other courts while waiting to appear on a particular docket.

**Feedback:**

Majority of responses received supported this recommendation. One response indicated that they had used the “cattle call” for years and now realize that it was a mistake and should be prohibited. Further agreement that staggering a docket by using assigned times or similar docket management mechanism is most beneficial.

**Recommendation #2: Require Prioritizing of Hearings for Defendants Who Are Incarcerated:** As criminal courts return to full capacity and resume previously adjourned hearings, either virtually or in-person, the Committee recommends that SCAO require courts to prioritize adjudicating defendants who are incarcerated before out-of-custody defendants, and that preference be given to those defendants who have been in custody for the longest amount of time.

**Feedback:**

There was concern expressed that this would result in an empty mandate for courts to prioritize hearings for individuals who were incarcerated. Focus on bringing the docket current before any new policies or initiatives.

There was also support for all criminal defendants who are in custody to be given the opportunity to appear on Zoom® for any hearing.

There was a suggestion to review preference with Victim Advocates, Victim Service Providers, and Service Providers for basic needs to identify concerns and barriers, along with solutions, before changing this priority.

**Recommendation #3: Minimum Standards for Equipment and Internet Connection:** To the extent that online proceedings are public, the Committee recommends that courts ensure the equipment used and connections to Internet meet technical standards to minimize technical problems and access to the technology issues that may impede the public’s ability to view the proceedings.

**Feedback:**

Responses indicate there is a need for improvements to the functionality of the Zoom® waiting room and breakout rooms. The suggestion was made that SCAO should ensure there is a comprehensive and easily accessible user guide with specific instructions for different devices (phones, tablet, computer, etc.).

Concerns raised regarding funding with this recommendation as well. Additionally, commenters expressed concern regarding issues with cellular or broadband access in rural areas as well issues for those who do not have access to the internet.

Concern raised that there should be no presumptions for use of Zoom®. The court and litigant should determine how best to engage.

Commenters suggested that to assist parties, attorneys, victims, witnesses, and the general public with accessing court proceedings, the minimum technological requirements should be posted in multiple places.

**Recommendation #4: Mandate Notices in Criminal Matters:** Similar to the best practices for Zoom® hearings in civil cases, SCAO should mandate that in criminal matters, courts provide notice of the date, time, and purpose of the hearing, along with the following details:

- a. Zoom® login information;
- b. Contact information for a staff member to answer questions or concerns; and
- c. Instructions for the participants to login and identify themselves on the screen by name, case name, and case number before entering the Zoom® hearing. This allows for court staff to easily identify participants for hearings, especially on motion calls, and allows for easy assignment of the participants into a breakout room, if used. Kent County incorporates these instructions into a SCAO notice form.

**Feedback:**

Commenters expressed concern that this recommendation would place an undue burden on court staff to designate one as contact person for questions.

In addition to the details provided in the recommendation above, feedback received suggested the following be provided in writing to advise that:

- All persons entering or observing a court proceeding must enter their legal name on their screen or, if participating by phone, inform the court of their legal name in relation to their phone number;
- That no person may record, take a screen shot of or otherwise “copy” information from the court proceeding;
- That no person shall publish any information from a court proceeding, including by posting on social media; and
- That using information from a court proceeding to harass, intimidate, embarrass, or threaten another person shall be prosecuted to the fullest extent of the law.

Suggestion was also made to provide a phone number for the court proceeding, along with Meeting ID and Passcode in the notices in case of connectivity issues.

**Recommendation #5: Provide an In-person Alternative for Defendants Who Are Incarcerated:** The Committee recommends that SCAO require courts to provide an in-person alternative for defendants who are in jail and do not agree to participate in the hearing by way of Zoom® technology.

**Feedback:**

Responses were supportive of this recommendation as a whole as it was consistent with current practice but notes that arraignments should presumptively be done remotely.

Responses indicated that to the extent that defendants who are incarcerated were required to participate remotely before the pandemic, they shall continue to be required to participate remotely so as to not create any greater chaos in already strained processes.

Commenters requested that any proposed changes to the requirement that defendants who are incarcerated appear remotely prior to the pandemic should remain the same until discussed with Victim Advocates, Victim Service Providers, and Service Providers of basic necessities.

**Recommendation #6: Annual Zoom® and YouTube Training for Court Staff:** To protect the right to counsel, due process, and public access in criminal cases, the Committee recommends that SCAO require court staff to be trained annually on the best practices for operating by Zoom®, and Zoom® and YouTube technology; also, that there be mandatory compliance with SCAO’s current [Recommendations on Using Zoom® & Public Access for Court Proceedings](#). This mandate should include a requirement that courts allow out-of-custody defendants or witnesses to participate by telephone or another reasonable alternative where they otherwise lack access to a stable Internet connection.

**Feedback:**

Responses indicated support for annual training but also questioned if the training was necessary as it should be part of a new hire's orientation.

Responses also expressed concern with livestreaming cases regarding the burden it places on court staff in attempting to not publicize personal/sensitive information as well as simply being a safety risk.

**Recommendation #7: Amend Court Rules to Create a Presumption that Certain Parties Will Appear Remotely for Certain Hearings:** The Committee recommends amending the court rules to create a presumption that, except where the defendant asserts the right to be physically present in the courtroom, attorneys, parties, and participants in criminal cases will appear remotely using two-way interactive video technology or other remote participation tools for non-evidentiary criminal hearings, including warrant requests, arraignments on the information under [MCR 6.113](#) (unless waived), probable cause conferences, emergency motions regarding bond, calendar conferences, final conferences, plea hearings, sentencing, extradition hearings, and probation violation hearings under [MCR 6.445\(B\)](#). With regard to matters involving forensic evaluations of juveniles or adults for competence to stand trial, competence to waive Miranda rights, and criminal responsibility, courts shall permit the use of video technology. The evaluator shall note in the forensic opinion whether the use of video technology impeded an impartial and accurate clinical assessment, and, if so, notify the court that an in-person evaluation must be scheduled.

**Feedback:**

Some responses indicated that it would be difficult to apply mandates, presumptions, and preferences to all courts and to do so would be to ignore significant differences between jurisdictions as the judicial system is not a one size fits all system.

Limited support received in responses for creating a presumption. Majority of responses did not support the creation of a presumption. Responses indicated that it should be enough to expand the current types of cases/hearings permitted to be conducted via videoconferencing technology and then allow for the court and parties to determine the best method for each case. Default was for in-person proceedings, and it should be left to the discretion of the trial court whether to permit Zoom® proceedings. Commenters indicated there should be very minimal mandates on the use of Zoom, as judges should have discretion to make the decision that is best for that court, community and specific case.

Concerns raised with cases involving victims and ensuring that their rights are not being violated. The Michigan Constitution confers on all crime victims the “right to be treated

with fairness and respect for their dignity and privacy throughout the criminal justice process.” Const. 1963, art 1, §24.

There was support for the recommendation as it allows a defendant to assert his right to participate in-person; however, the suggestion was made that the recommendation should be amended to also allow the government/victim to request that defendant appear in-person.

Responses received did not support forensic evaluations being done remotely.

# APPENDIX B

## PROPOSED COURT RULES REVISION RECOMMENDATIONS

## MCR 2.407 Videoconferencing

(A) (1) [Unchanged].

(2) “Videoconferencing” means the use of an interactive technology, including a remote digital platform, 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 codecs, monitors, cameras, audio microphones, and audio speakers.

### (B) Application.

(1) Subject to standards published by the State Court Administrative Office and the criteria set forth in subsection (C), a court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any court scheduled civil proceeding.

(2) Subject to the State Court Administrative Office standards, courts may determine the manner and extent of the use of videoconferencing technology and may require participants to attend court proceedings remotely, subject to the requirements of section (C) herein-below.

(3) This rule does not supersede a participant’s ability to participate by telephonic means under MCR 2.402.

(4) Notwithstanding any other provision of this Rule, the use of videoconferencing technology shall be presumed for civil Pre-Trials, Early Scheduling Conferences under MCR 2.401(B), contested motions under MCR 2.119 regarding discovery, adjournments, modifications to scheduling orders, motions *in limine*, post Judgment collection or discovery issues, testimonial proofs for *pro confesso* hearings under MCR 3.210(A)(4), and motions to correct, strike, or amend pleadings, motions pursuant to MCR 2.116 subject to a determination by the Court that the same is inappropriate for a particular case under an analysis as contained in section (C) herein-below.

(5) Notwithstanding any other provision of this Rule, no participant shall be precluded from appearing in court in person should they request same of the Court. In the event there is a request to appear in person, or a participant is found to be unable to adequately use the technology and appear remotely, the presiding judge and any attorney of record for said participant must appear in person with his/her client for said proceeding.

(C)-(F) [Unchanged].

~~(G) Notwithstanding any other provision in this rule, until further order of the Court, AO No. 2012-7 is suspended and trial courts are required to use remote participation technology (videoconferencing under this rule or telephone conferencing under MCR 2.406) to the greatest extent possible. In doing so, courts must:~~

~~(1) Verify that participants are able to proceed remotely, and provide reasonable notice of the time and format of any such hearings for parties, other participants, and the general public in a manner most likely to be readily obtained by those interested in such proceedings.~~



~~(2) Allow some participants to participate remotely even if all participants are not able to do so. Judicial officers who wish to participate from a location other than the judge's courtroom shall do so only with the written permission of the court's chief judge. The chief judge shall grant such permission whenever the circumstances warrant, unless the court does not have and is not able to obtain any equipment or licenses necessary for the court to operate remotely.~~

~~(3) Ensure that any such proceedings are consistent with a party's Constitutional rights, and allow confidential communication between a party and the party's counsel.~~

~~(4) Provide access to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule.~~

~~(5) Ensure that the manner in which the proceeding is conducted produces a recording sufficient to enable a transcript to be produced subsequent to the proceeding.~~

~~(6) Ensure that any such remote hearings comply with any standards promulgated by the State Court Administrative Office for conducting these types of proceedings.~~

~~(7) Waive any fees currently charged to allow parties to participate remotely.~~

## **MCR 2.408 Use of Remote Proceedings in the District Court**

### **(A) Use of Remote Proceedings in Civil Cases.**

(1) Subject to the standards published by the State Court Administrative Office, a District Court may, at the request of any participant, or *sua sponte*, allow the use of videoconferencing technology by any participant in any court scheduled civil proceeding.

(2) Courts may determine the manner and extent of the use of videoconferencing technology and may require participants to attend court proceedings remotely, subject to the requirements of section (7) herein-below.

(3) The use of videoconferencing technology shall be presumed for civil Pre-Trials and Early Scheduling Conferences pursuant to MCR 2.401(B).

(4) The use of videoconferencing shall be presumed for motions filed pursuant to MCR 2.119 regarding discovery, adjournments, and post Judgment collection matters, and motions to correct, strike, or amend pleadings.

(a) The presumption for videoconferencing shall be waived unless the party or attorney acting on behalf of a party, files with the Court Clerk a Notice of Presumed Remote Proceeding on a form approved by the State Court Administrative Office, concomitant with the motion and any briefs, indicating that the filing falls within the category of motions listed in section (A)(4) hereinabove.

- (5) Notwithstanding any other provision of these Rules, the use of videoconferencing technology shall not be used in Bench or Jury Trials, or any civil proceeding wherein the testimony of witnesses or presentation of evidence shall occur, except upon the concurrence of all parties, and in the discretion of the Court.
- (6) Notwithstanding any other provision of these Rules, the Court may determine that a case or case type is not suited for videoconferencing, and may require any hearing, even a proceeding categorized as a presumption remote proceeding, to be conducted in person at the courthouse.
- (7) In determining whether a particular case or proceeding should be conducted by videoconferencing technology the Court shall consider the factors listed in MCR 2.407(C)(1)-(13).
- (8) This rule does not preclude a participant's ability to participate by telephonic means under MCR 2.402 in the discretion of the Court.
- (9) The use of telephonic, voice, videoconferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court.

**MCR 4.101 Civil Infractions.**

(A)– (E) [Unchanged].

**(F) Contested Actions; Notice; Defaults.**

(1) – (3) [Unchanged].

(4) For any hearing held under this subchapter, in accordance with MCR 2.407, ~~the court may allow~~ the use of videoconferencing technology ~~by an participant as defined in MCR 2.407(A)(1).~~ to conduct remote proceedings is presumed.

**MCR 6.001 Applicability of Civil Rules; Superseded Rules and Statutes**

(A) [Unchanged].

(B) **Misdemeanor Cases.** MCR 6.001-6.004, 6.005(B) and (C), ~~6.006~~, 6.101, 6.102(D) and (F), 6.103, 6.104(A), 6.106, 6.125, 6.202, 6.425(D)(3), 6.427, 6.430, 6.435, 6.440, 6.445(A)-(G), ~~and~~ the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts, and 6.609.

(C) - (E) [Unchanged].

**MCR 6.006 Video and Audio Proceedings**

**(A) Defendant in the Courtroom or at a Separate Location. Remote Proceedings in Circuit Court.**

~~District and C-Circuit Courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial~~

~~arraignments on the warrant or complaint, probable cause conferences, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, waivers and adjournments of preliminary examinations, and hearings on postjudgment motions to amend restitution. to conduct any non-evidentiary or trial proceeding. It is presumed that evidentiary hearings of any nature, sentencings, and trials will be conducted in person, except upon specific concurrence of all parties on the record, and subject to the final discretion of the trial court.~~

**(B) ~~Defendant in the Courtroom – Preliminary Examinations.~~ Preferred Remote Proceedings in Circuit Court.**

~~As long as the defendant is either present in the courtroom or has waived the right to be present, on motion of either party, district courts may use telephonic, voice, or video conferencing, including two-way interactive video technology, to take testimony from an expert witness or, upon a showing of good cause, any person at another location in a preliminary examination. The use of two-way interactive video technology shall be preferred for the following proceedings: initial arraignments on the information, pretrial conferences, motions pursuant to MCR 2.119, and pleas.~~

**(C) ~~Defendant in the Courtroom – Other Proceedings.~~**

~~As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use videoconferencing technology to take testimony from a person at another location in the following proceedings:~~

- ~~(1) evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status;~~
- ~~(2) with the consent of the parties, trials. A party who does not consent to the use of videoconferencing technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.~~

**(C) In all other proceedings, the in-person appearance of the parties, witnesses, and other participants is presumed.**

**(D) Notwithstanding any other provisions of these Rules, the use of videoconferencing technology shall not be used in Bench or Jury Trials, or any proceeding wherein the testimony of witnesses or presentation of evidence shall occur, except upon the concurrence of all parties, and in the discretion of the Court.**

**(E) Nothing herein shall prevent a defendant from demanding to physically appear in court for any scheduled proceeding. The presiding judge and any attorney of record for said participant must appear in person with his/her client for said proceeding.**

**(F) Mechanics of Use.** The use of telephonic, voice, video conferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court.

## **NEW MCR 6.609 Use of Remote Proceedings in the District Court**

### **(A) Use of Remote Proceedings in Criminal Cases**

- (1) Subject to the standards published by the State Court Administrative Office, a District Court may, at the request of any participant, or *sua sponte*, allow the use of videoconferencing technology by any participant in any court scheduled criminal proceeding.
- (2) The use of videoconferencing technology shall be the preferred method for conducting arraignments and Probable Cause Conferences for in custody defendants.
- (3) In all other criminal proceedings, the in-person appearance of parties, witnesses, and other participants is presumed.
- (4) Notwithstanding any other provision of these Rules, the use of videoconferencing technology shall not be used in Preliminary Examinations, Evidentiary Hearings, Bench Trials or Jury Trials, or any criminal proceeding wherein the testimony of witnesses or presentation of evidence shall occur, except upon the concurrence of all parties, and in the discretion of the Court.
- (5) Notwithstanding anything herein to the contrary, as long as the defendant is either present in the courtroom or has waived the right to be present, District Courts may use videoconferencing to take testimony from any witness in a Preliminary Examination.
- (6) In determining whether to utilize videoconferencing technology, the Court shall consider Constitutional requirements, in addition to those factors contained in MCR 2.407(C)(1)-(13).
- (7) In the event there is a determination made by the Court that a participant is found to be unable to adequately use the technology and appear at a scheduled remote proceeding, the presiding judge and any attorney of record for said participant must appear in person with his/her client for said proceeding.
- (8) This rule does not preclude a participant's ability to participate by telephonic means under MCR 2.402 in the discretion of the Court.
- (9) The use of telephonic, voice, videoconferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court.