# TASK FORCE ON OPEN COURTS, MEDIA, AND PRIVACY

## FINAL REPORT

This is the final report of the Michigan Supreme Court Task Force on Open Courts, Media, and Privacy ("the Report"), respectfully submitted December 2021.

### TASK FORCE MISSION

When the COVID-19 pandemic struck in the spring of 2020, public health concerns prevented Michigan judicial proceedings from being conducted in person. The same held true for various administrative proceedings, such as those of the Attorney Grievance Commission and the Judicial Tenure Commission. The Michigan Supreme Court entered a series of administrative orders to address this emergency.[1]

For purposes of this Report, those orders had two critical dimensions. To preserve *access* to our courts, parties and their counsel were generally allowed to participate in proceedings remotely. To preserve the *transparency* of our courts, those proceedings were streamed online using a variety of platforms. We will say more about the distinctions between access and transparency later in this Report.

These emergency measures presented challenges to courts, attorneys, parties, and other participants in the state's justice system. Technical and resource issues made providing remote access challenging. Judges complained that livestreaming contributed to a loss of decorum and that the dignity of judicial proceedings was threatened; some described feeling as if they had "lost control of their courtroom." Furthermore, in certain types of cases the streaming of online proceedings raised concerns about privacy, the rights of criminal defendants, the rights of victims, and the fair administration of justice.

[1] The Administrative Orders entered in response to the pandemic are all available online. As of the writing of this Report, the July 26, 2021 Administrative Order contains the most up-to-date iteration of Court policies: https://www.courts.michigan.gov/covid-19-news-resources/administrative-orders-(covid-19)/

At the same time, these emergency measures brought advantages and opportunities. Access became easier for some participants in the judicial system; remote participation saved time and expense, relieving parties and witnesses from burdens like taking time off work, finding transportation, traveling to the courthouse, and parking. The measures also enhanced transparency, making it easier for members of the media and public who wished to monitor proceedings at distant courthouses or at more than one courthouse to do so.

In sum, the emergency measures adopted by the Court resulted in a massive statewide experiment in remote participation and the streaming of proceedings. Some of the results were worrisome; others were promising. Given the dramatic and sudden nature of the change in the ways in which Michigan's courts did their business, those mixed results are unsurprising.

These developments raise numerous questions, two of which are particularly relevant to the work of this Task Force:

First, in a post-pandemic environment, where in-person proceedings have resumed, should the online streaming of proceedings continue? As we will discuss, conducting proceedings *exclusively* on a remote basis and providing transparency *solely* via streaming would raise significant issues. But using streaming of in-person proceedings as an additional measure to *enhance* transparency poses fewer and, we believe, more manageable challenges.

Second, if online streaming should continue, then what steps should courts take to address privacy concerns and other issues, such as the rights of criminal defendants, victims, and other participants? This is a critically important question as well. In theory, an open proceeding is available for all to observe. But, as a practical matter, there is a difference between (a) conducting a proceeding in open court and (b) projecting that proceeding out into the world for everyone to watch, record, edit, and disseminate as they like. As we will discuss later that difference lies at the heart of Michigan Supreme Court Administrative Order 1989-1, which limits the use of cameras in the courtroom during judicial proceedings—an Order that the Task Force believes has instructional value here.

In the fall of 2020, Michigan Supreme Court Chief Justice Bridget Mary McCormack formed the Task Force on Open Courts, Media, and Privacy to

consider and address these questions.[2] She directed the Task Force to prepare recommendations toward the goal of making Michigan's approach "a model for the nation." This Report responds to the Chief Justice's request.

## MEMBERSHIP AND PROCEEDINGS

Chief Justice McCormack appointed the Hon. Amy Ronayne Krause of the Michigan Court of Appeals and Professor Len Niehoff of the University of Michigan Law School and the Honigman law firm to serve as Co-Chairs of the Task Force. Working with Tom Boyd, State Court Administrator of the Michigan Supreme Court, John Nevin, Communications Director for the Michigan Supreme Court, and Lynn Seaks, former Project Coordinators of the Michigan Supreme Court Public Information Office, the Co-Chairs identified the various constituencies that were most likely to be affected by the Task Force's recommendations. They then identified individuals with the expertise, experience, and position to speak on behalf of those constituencies and to provide their insights. After receiving confirmation of their willingness to serve, Chief Justice McCormack appointed those individuals to the Task Force.

In addition to the Co-Chairs and the previously mentioned Michigan Supreme Court staff, the Task Force includes: the Hon. Freddie Burton, Jr., Chief Judge, Wayne County Probate Court; Brian Dickerson, Editorial Page Editor, Detroit Free Press; Kathy Hagenian, Executive Policy Director, Michigan Coalition to End Domestic and Sexual Violence; Professor Joshua Kay, Clinical Professor of Law, University of Michigan Child Advocacy Law Clinic; David Leyton, Prosecutor, Genesee County Prosecutor's Office; Lisa McGraw, Public Affairs Manager, Michigan Press Association; the Hon. Christopher Ninomiya, Circuit Court Judge, Dickinson County Circuit Court; Karl Numinen, criminal defense attorney, Numinen DeForge & Toutant PC; Lisa Roose-Church, Judicial

[2] Other groups created by the Michigan Supreme Court are considering related questions. The Lessons Learned Committee has been tasked with broadly assessing the successes and failures of remote participation and streaming. In addition, the Supreme Court's Justice for All Commission has been charged with making recommendations for measures to improve access to justice. To some degree, the work of this Task Force overlaps with that of those bodies. But we specifically focus here on (a) the ways in which streaming enhances transparency,(b) the privacy and related concerns that result from the streaming of proceedings, and (c) the importance of maintaining judicial discretion to decide which proceedings are streamed and which are not.

Correspondent, Michigan Information & Research Service; the Hon. Cynthia Ward, District Court Judge, 54-A District Court; and Jeannie Wernet, Prosecuting Attorneys Association of Michigan. In 2021, Ravynne Gilmore replaced Lynn Seaks as Project Coordinator working with the Task Force.

For over a year, from the fall of 2020 through the end of 2021, the Task Force conducted multiple online meetings to discuss the issues within its charge. Attendance and participation at these meetings were excellent. The Task Force reviewed numerous documents, including lengthy legal memoranda, communications received by the Michigan Supreme Court from interested parties, and preliminary versions of findings and recommendations.

The Task Force prepared a draft report that was circulated for public comment on July 12, 2021. The response was robust, with over sixty comments received, many of which were extensive. A large number of those comments stressed the importance of judges retaining the discretion to determine on a case-by-case basis whether streaming of a particular judicial proceeding was appropriate. On October 27, 2021, the Task Force met to discuss those comments and how the report should be amended to address the issues raised.

On November 8, 2021, the Task Force met and discussed a substantially revised version of the draft report. At that meeting, a consensus emerged that a court rule should be adopted to address issues around the streaming of proceedings. A consensus also emerged that Michigan Supreme Court Administrative Order 1989-1 provided useful insights into what such a rule might say.

Members of the Task Force parted company, however, with respect to the overall tenor and specific contents of the rule. Two distinct approaches emerged.

One approach, which we discuss in this Report as “Alternative One,” closely tracks the structure and language of Administrative Order 1989-1. It does so on the theory that 1989-1 has for more than thirty years served Michigan courts well in addressing issues closely analogous to those raised by the online streaming of proceedings. In addition, it seeks to leave in the hands of trial courts substantial discretion to determine when streaming should and should not be provided.

The chairs of the Task Force favor Alternative One, as do six other members of the Task Force (eight total votes).

Another approach, which we discuss in this Report as "Alternative Two," draws from some components of 1989-1 but departs from it in numerous and substantial ways. Alternative Two places significantly greater restrictions on the streaming of proceedings, on access to court recordings of proceedings, and on the posting of proceedings on online platforms. It does so on the theory that these strictures are necessary to protect competing interests, like the privacy of victims, and that simply leaving such matters to the discretion of trial judges does not suffice.

Five members of the Task Force favor Alternative Two.

Given the complexity of the issues involved, no perfect solution to the challenges presented exists. And it may the case that no member of the Task Force is completely satisfied by either of the proposed alternatives. But these alternatives presented do fairly and generally represent the two competing perspectives that emerged among the Task Force members. We will discuss each in greater detail later in this Report to assist in the Court's consideration of them.

## ANALYSIS AND RECOMMENDATIONS

Before proceeding to a fuller analysis of the issues presented, some clarification of the terms used in this Report and the scope of the Task Force's work may be useful.

### I. TRANSPARENCY AND ACCESS

In discourse about judicial proceedings, the words "transparency" and "access" are sometimes used interchangeably. In this Report, however, we distinguish between them.

We use "transparency" in connection with the idea that the public should be able to observe and receive information regarding judicial proceedings, including through media coverage. We use "access" in connection with the idea that those who need recourse to judicial proceedings should be able to obtain it. The concepts are associated (for example, it is more difficult to obtain access to a system that is not transparent), but they serve distinct interests and raise distinct concerns.

The distinction is important for our purposes, because while the Task Force appreciates the significance of the access issues implicated by allowing remote

participation in judicial proceedings, our charge focuses on transparency and its potential consequences.

*Transparency*

Under the law, a strong presumption exists that the public has a right to be present at and to observe judicial proceedings.[3] The Supreme Court of the United States has recognized this as a right of federal constitutional magnitude. *See*, *e.g.*, *Richmond Newspapers, Inc v Virginia*, 448 US 555, 576 (1980) ("The First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted"). This robust right also exists as a matter of Michigan constitutional and common law, *see Detroit Free Press, Inc v Recorder's Court Judge*, 409 Mich 364, 392-393 (1980), Michigan statutory law, *see* MCL 600.1420 ("The sittings of every court within this state shall be public …"), and Michigan Court Rule, *see* MCR 8.116(D)(1) ("Except as otherwise provided by statute or court rule, a court may not limit access by the public to a court proceeding"). Of course, like all other rights, the right of access is not absolute; but the law clearly holds that the closure of a judicial proceeding is warranted in only rare cases and that courts must exercise special care before taking this extraordinary step. *See*, *e.g.*, *Waller v Georgia*, 467 US 39, 45 (1984).

In *Richmond Newspapers*, *supra*, the Supreme Court of the United States listed the numerous important interests that are served by open judicial proceedings. Those include the assurance that the proceedings are being fairly conducted, the discouraging of perjury and other misconduct, the exposure of bias or partiality, and the "significant community therapeutic value" of open justice. *Id* at 570-571. Open judicial proceedings also serve a critical educative function and build confidence in our justice system. Quoting Wigmore, the Supreme Court in *Richmond Newspapers* observed that "Not only is respect for the law increased and intelligent acquaintance with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy." *Id.* at 572. "People in an open society do not demand infallibility from their institutions," the Court noted, "but it is difficult for them to accept what they are prohibited from observing." *Id.* Of course, the public will sometimes believe that a judicial ruling or jury verdict got things wrong and will express outrage over

[3] When this Report refers to "judicial proceedings" it does so in a broad sense, to include not just trials but also proceedings like arraignments, preliminary examinations, motion hearings, and the like.

it; but the public is hardly likely to experience *less* outrage when the perceived injustice was done behind closed doors.

The media play a critical role here. In an earlier time, "attendance at court was a common mode of 'passing the time.'" *Id.* Today, however, public understanding of what goes on in our courts is largely achieved through reporting by the media. In this sense, the media serve as the surrogate eyes and ears of the public. As a result, "[w]hile media representative enjoy the same right of access as the public, they are often provided special seating and priority of entry so that they may report what people in attendance have seen and heard." *Id* at 573. Media coverage of judicial proceedings thus "contributes to public understanding of the rule of law" and helps foster a greater familiarity with the justice system. *Id.*[4]

In sum, courts have recognized that the transparency of judicial proceedings serves numerous critical values and interests. They have further recognized that—especially today—transparency is achieved not just by having the doors to courtrooms open, but by having those proceedings reported out to the world. This sensibility informs Administrative Order 1989-1 and has direct relevance to the issue of streaming.

During the early stages of the pandemic, when proceedings could not be conducted in person, it became critical to preserve judicial transparency while holding court remotely. In short, our justice system needed to maintain "open courtrooms" even though the proceedings were not taking place in them—or, perhaps more correctly, were taking place in them only virtually. A variety of measures were recommended and adopted as a result.

For example, the Michigan Trial Courts Virtual Courtroom Standards and Guidelines (adopted April 7, 2020, rev'd August 4, 2020) provided as follows in section (C)(1):

> Access to proceedings must be provided to the public either during the proceeding or immediately after via video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule … The court should create a YouTube

[4] In some contexts, it may become important to attempt to discern who does, and does not, qualify as a member of "the media." Because the media enjoy no greater right of access to judicial proceedings than do members of the public, that question is not implicated here.

> account (livestreaming channel) and work with its local court website administrator to post a link to the YouTube channel. Information about public availability of court proceedings via livestreaming must be accessible to the public and press. This can be accomplished by posting the information on the court's website. If the court does not have a website, it is the court's responsibility to develop another method to effectively communicate the availability of court proceedings ... A court may also provide access to the public by encouraging members of the press and public to contact the court to receive the Zoom meeting information to watch proceedings.

In the same vein, Administrative Order 2020-6 (adopted April 7, 2020) stated that "access to the [remotely conducted proceedings] must be provided 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."

In sum, the early stages of the pandemic, when in-person proceedings were suspended, presented a unique challenge. Our courts had to retain the transparency that federal constitutional law and Michigan law require—but in an entirely online environment. The legally mandated "openness" could only be maintained by making those remotely conducted proceedings "open," which required the use of streaming over online platforms. But that approach resulted in myriad dilemmas: for example, how could a court maintain openness in such proceedings while simultaneously sequestering witnesses or prohibiting observers from recording or taking pictures of what was going on in "court?"

The good news is that the media representatives on the Task Force indicated that, in their experience, transparency was generally maintained when proceedings were conducted remotely and streamed. Indeed, they reported that this approach tended to enhance transparency. It made observing a proceeding more efficient and less time- and resource-intensive: a reporter covering a proceeding could watch it from their desk without having to travel to and from the courthouse. In addition, this approach made it easier for a reporter to monitor proceedings in multiple courts.

Discussions within the Task Force did, however, reveal two ways in which the remote conducting and streaming of proceedings threatened to compromise transparency.

One relates to notice. In the pre-pandemic environment, a member of the public or the media who was following a particular case typically had little difficulty finding out when hearings and trials were scheduled. In at least some state courts, the move to exclusively remote proceedings occasionally made this more difficult to discern. This is, of course, worrisome because transparency without the necessary information to observe is not transparency at all. We will return to issues of notice later in this Report.

The other concern relates to the mechanics of closure. In short, a media entity or observer who objects to the closure of a proceeding may have better and more effective opportunities to register those objections when court is being conducted in person than when it is being conducted remotely. A little additional background clarifies why this is so.

As noted above, the right to observe court proceedings is not absolute and in some rare instances closure may be appropriate. As also noted, however, the standard for closure is generally high.[5] For example, as a matter of constitutional law, a court cannot close a portion of a criminal trial unless it makes certain specific determinations. Those include: (a) that the party seeking the closure advances an overriding interest that is likely to be prejudiced; (b) that the closure is no broader than necessary to advance that interest; and (c) that reasonable alternatives to closure do not suffice. In such a case, the trial court must make particularized on-the-record findings adequate to support the closure. *See*, *e.g.*, *Waller v Georgia,* 467 US 39, 48 (1984). The Michigan Court rules also prescribe a specific procedure for closure. Under MCR 8.116(D), the requesting party must file a written motion to close the courtroom (although the judge may also raise the issue *sua sponte*); the denial of access or the closure must be narrowly tailored; and a copy of any order must be sent to the Supreme Court Administrator's Office.[6]

In the experience of the media counsel on the Task Force, trial courts are not always aware of the high standards for closure, precisely because closure is so rarely appropriate. It is therefore critical that anyone who has an objection to

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[5] For additional information on closure standards, *see* The Michigan Trial Courts Virtual Courtroom Standards and Guidelines at section (C)(1) fn. 9 and the sources cited there.

[6] The concern being discussed here arises where a strong presumption against closure exists. For purposes of this discussion, we therefore put aside those proceedings (or portions of proceedings) where a statute or court rule specifically allows for or requires closure.

closure have an opportunity to be heard on the issue. When proceedings are conducted in person, the physical clumsiness of closing them helps assure that the correct process is followed and that any challenges are heard. The court must announce the closure to those in attendance and have them ushered from the room. There is an inherent delay as this process unfolds and the resulting pause provides an opportunity for anyone with an objection to speak up and ask to address the court regarding the closure.

In contrast, it is easier for a court to "close" a proceeding that is not being conducted in person. If the proceeding has not yet begun, invitations to participate can be limited to those with passwords. If the proceeding is underway, certain participants can be removed or the streaming ended with the click of a few buttons. The opportunity to object to closure may be much more limited, not by design but by the unique characteristics of proceedings that are being held only remotely.

In sum, the streaming of proceedings significantly enhances the transparency of our courts well beyond that afforded before the pandemic. That additional transparency may be lost, however, if courts do not provide adequate notice of how they will be doing business or do not provide sufficient opportunity to object to closure. Those risks are most present where a proceeding is being conducted entirely on a remote basis. They are not present, or are at least greatly reduced, where a proceeding is being conducted in person *and* being streamed.

### *Access*

Access to the courts and to justice is a vast and complex collection of issues, most of which lie beyond the charge of this Task Force and the scope of this Report. In January of 2021, the Michigan Supreme Court adopted Administrative Order 2021-1, creating the Justice for All Commission, which will work toward the goal of 100 percent access to our civil justice system. Because that Commission is specifically charged with analyzing and making recommendations with respect to access, this Task Force will offer only a few observations based on discussions that took place during our meetings.

The Task Force includes members who work with populations who sometimes struggle with access to in-person proceedings because of their limited resources. Physically appearing in court places substantial burdens on them. They must take time away from work or arrange for childcare. They have difficulty securing transportation. Travel and parking can be challenging and expensive. For many of these people, remote participation significantly improve access. In

addition, persons with disabilities may have much more difficulty appearing at a courtroom and may enjoy much greater access to justice if allowed to participate remotely.

Discussions within the Task Force (and public comments received by the Task Force) make clear, however, that this experience is not universal. The "digital divide" between those who do and do not have access to technology remains an unfortunate reality. It is estimated that as many as 42 million Americans do not have access to wired or fixed wireless broadband. *See* Linda Poon, *There Are Far More Americans Without Broadband Access than Previously Thought*, Bloomberg CityLab (February 19, 2020). According to the 2017 census, about 14% of Michigan households are not connected to the internet. *See* Julie Mack, *14% of Michigan Homes Lack Internet, Census Says* (MLive, September 19, 2019). These issues are especially acute in particular regions and for particular people, including rural areas, low-income homes, the elderly, and among those who are less educated. See Amelia Benevides-Colón, *Whitmer Order Expands 'Essential' High-Speed Internet to Communities Across the State*, The Detroit News (June 2, 2021). In sum, *requiring* remote participation may in some cases add an additional burden to some people who are already struggling with access to justice.

Members of the Task Force reported instances where parties or witnesses encountered difficulties in participating in proceedings because they did not have ready access to reliable internet. In some cases, these difficulties exacerbated an existing problem, for instance where a witness in a criminal case was already hesitant to cooperate and appear. A prosecutor member of the Task Force reported having to make a computer and internet connection available at their office to accommodate a witness who would not otherwise have been able to participate in a proceeding. In sum, while in many instances remote participation will increase access, it is important to acknowledge that this will not always hold true.

At the same time, observations from Task Force members and in the comments the Task Force received make clear that remote participation often plays a critical role in promoting access to justice. In the view of the Task Force, it is therefore important that judges do not simply revert to the pre-pandemic practice of expecting everyone to be physically present for every proceeding on every occasion. The Task Force encourages the Supreme Court to consider adopting measures that urge or require trial judges to consider carefully in each case whether allowing remote participation in proceedings will enhance access to our courts. We believe that this reasoned approach will increase transparency and build public confidence in our judiciary and that these benefits exceed the costs.

Finally, it should be noted that allowing remote participation in proceedings raises an issue that does not fall neatly into either the transparency or access category: the protection afforded by the Confrontation Clause. Although this issue is not within the specific charge to this Task Force, we discuss it in an attached appendix because of its constitutional magnitude and manifest importance.

With these clarifications, we turn to the focus of our charge: considering how the use of streamed proceedings—although enhancing transparency—may give rise to privacy and other significant concerns.

## II. STREAMED PROCEEDINGS: BALANCING TRANSPARENCY WITH PRIVACY AND RELATED CONCERNS

As discussed above, constitutional and statutory law create a strong presumption in favor of open judicial proceedings. That transparency serves the various values and interests described. Preserving and fostering transparency has been a high priority for the Michigan Supreme Court, as is demonstrated by its practice of livestreaming oral arguments and maintaining recordings of those proceedings on its own YouTube channel. And it should be noted that arguments before the Michigan Supreme Court often touch on sensitive issues, such as the details of a crime, the nature of someone's injury, or a party's financial misfortunes.

As a result of the transparency principle, participants in the justice system necessarily surrender part of their personal privacy. Accusers, defendants, and witnesses typically testify in open court. They are subject to cross-examination. Relevant evidence about them can be embarrassing. The experience can be emotionally taxing, if not even traumatizing. To some extent, those consequences are unavoidable in a system that is adversarial, sets a low bar for relevance, and is open to public scrutiny.

When judicial proceedings are streamed and made available on the internet, however, additional risks arise. The added exposure and potential publicity may chill victims and witnesses from participating in the proceedings. The pervasive dissemination of highly prejudicial information may make it difficult to select an impartial jury and to afford a criminal defendant a fair trial. These concerns were brought to the attention of the Task Force during its deliberations and through public comment.

Indeed, many commenters indicated that the loss of personal privacy and potential risk of trauma is dramatically increased by the livestreaming of proceedings to platforms like YouTube. These commenters distinguish such substantial (and potentially permanent) online exposure from the more limited public exposure that takes place within an ordinary open courtroom. They stressed the need for judicial discretion in such matters and for decisions to be made on a case-by-case basis.

Concerns were also expressed that an observer could secretly record streamed proceedings and then use that recording abusively—for example, by editing it to convey a false or misleading impression. Policing such abuses would be practically impossible. And once such material finds its way onto the internet, it may remain there forever.

These concerns raise issues under a variety of laws. Those include Article I, § 24 of the Michigan Constitution, which provides crime victims with the right "to be treated with fairness and with respect for their dignity and privacy throughout the criminal justice process." Unless in conflict with rights conferred under the United States Constitution, the Michigan Crime Victims' Rights Constitutional provision and the Crime Victims' Rights Act, MCL 780.751, *et seq*., must be adhered to and enforced.

Other laws protect the rights of witnesses generally. For example, MCL 750.122 makes it a felony to discourage or attempt to discourage anyone from serving as a witness in a proceeding by threat or intimidation. And still others protect the rights of criminal defendants. These include the Sixth Amendment to the Constitution, which, among other things, affords the accused the right to a trial before an impartial jury.

It should be noted that at least some of the concerns expressed may exist regardless of whether a judicial proceeding is livestreamed or is conducted entirely in person. For example, many courts across the state video record their proceedings and the resulting tapes are available to anyone who requests a copy. Someone who secures such a recording could put it on the internet and distribute it around the world with the push of a few buttons. An individual with malicious intent could edit the tape to convey a false or misleading impression.

With that said, streaming over the internet clearly exacerbates these concerns. It distributes the proceeding to the world without anyone having to make any special effort or take any additional steps. It renders it much easier for an

observer to make their own recording of the proceeding and to edit it in whatever manner they choose.

Where does all of this leave us?

The Task Force believes it is useful to think about things this way: In the post-pandemic world, a trial court could take either of two possible approaches to the online streaming of a proceeding. First, a court could conduct a proceeding entirely remotely and stream it with *no* in-person participation. Alternatively, a court could conduct a proceeding in person *and* stream it or otherwise post it online. For reasons we will discuss, the Michigan Supreme Court does not need to create new rules to address the former, but it does to address the latter. To explain why, it is helpful to look at these two scenarios more closely.

Consider first the scenario where a court conducts a proceeding entirely remotely and streams it. Where this is the case, the transparency required by the Constitution and Michigan statutory law must be maintained in the online environment because there is no in-person proceeding by which to achieve it. This is effectively the situation that existed in the early stages of the pandemic. The Michigan Supreme Court does not need to adopt any further administrative orders or court rules in such cases, because the controlling principles are already provided by the Constitution, the controlling case law, and Michigan statutes. The trial court must conduct the remote and streamed proceeding in a manner consistent with those principles.

The analysis differs, however, where a court conducts a proceeding in person *and* streams it or otherwise posts it online. Where this is the case, the streaming does not need to comply with the Constitution or Michigan statutory law because the required openness is achieved by conducting the in-person proceeding in a manner consistent with those principles. It is therefore with respect to this second situation—where streaming is used *in addition to* an in-person proceeding—that trial courts need guidance from the Michigan Supreme Court. They need answers to such questions as: When can a trial court do so? When should it decline to do so? What standards apply?

The Michigan Supreme Court could, of course, address these issues by entering an administrative order that prohibited courts from streaming any proceeding that is also conducted in person. Such an approach would, however, deprive the public of the significant additional transparency afforded by streamed proceedings. During the pandemic, millions of people watched online proceedings

on YouTube, and more than 175,000 individuals subscribed to local trial court video channels. Taking away this window into the people's court system would not go unnoticed and would exacerbate the public perception that the judiciary is disconnected from local communities. In contrast, preserving this window, with precautions that address legitimate concerns, would build engagement between the courts and the public, would enhance public understanding of court procedures, and most importantly, would foster public trust in our justice system.

Furthermore, a draconian measure like entirely banning the streaming of in-person proceedings is unnecessary. As we will discuss, a template for managing the issues that streaming presents as a supplement to in-person proceedings already exists. And it can be found within Administrative Order 1989-1.

### A. A Template for an Approach

For the reasons discussed above, trial courts need guidance from the Michigan Supreme Court when deciding whether to stream proceedings in addition to conducting them in person. It may be tempting to see this as an entirely new collection of issues created by the pandemic and by using online platforms, but this is not the case. To the contrary, a useful model for addressing these issues already exists and the Michigan Supreme Court need not write on a blank slate.

In the view of the Task Force, Michigan Supreme Court Administrative Order 1989-1 (amended by order of December 5, 2012, effective January 1, 2013) addresses similar issues and provides very helpful guidance. That Order addresses the "film or electronic media coverage" of court proceedings that are taking place in person. As with online streaming, media coverage effectively takes whatever happens in an open courtroom and projects it out into the world. Also, media coverage can raise the same sorts of privacy and related concerns that were identified above with respect to streaming.

When the order was adopted in 1989, it was an experiment in enhanced but responsible transparency. The experiment has been a success. The order greatly enhanced the public's opportunity to view Michigan court proceedings. It has now been in place for more than thirty years, has worked well for all concerned, and has provided the public with more information about and insight into the operation of its courts. At the same time, it has given judges the latitude to protect victims, witnesses, defendants, and jurors as necessary and to preserve the fair administration of justice. And it has done so by leaving the judge with considerable discretion to decide when cameras should and should not be allowed.

Administrative Order 1989-1 essentially provides as follows:

- The media may request that a court allow film or electronic coverage of a judicial proceeding.
- Such coverage "shall be allowed," subject to the limitations expressed in the order.
- The parties must be notified of such requests.
- The court may "terminate, suspend, limit, or exclude" such coverage at any time.
- If the court does so, then it must make a finding, articulated on the record, that "the fair administration of justice" requires the termination, suspension, limitation, or exclusion.
- Such judgments are made in the court's exercise of its discretion.
- The judge also has the discretion to exclude coverage of certain witnesses, including but not limited to the victims of sex crimes and their families, police informants, undercover agents, and relocated witnesses.
- Coverage of jurors and the jury selection process is not allowed.

In the view of the Task Force, an analogous approach could be adopted with respect to using streaming to supplement in-person proceedings. Because the circumstances of media coverage and online streaming are similar, but not identical, all Task Force members agree that some revisions are necessary and appropriate. As noted above, however, Task Force members have meaningfully different perspectives on the nature and extent of the revisions necessary to arrive at the right rule. We outline below the two alternative approaches that have emerged from Task Force discussions.

We note one foundational similarity between them: both alternatives suggest that the Court address these issues through a court rule rather than through an additional administrative order. It is the Task Force's understanding that procedures that provide instruction to both the courts and the public are best presented through a rule. Because the proposed measure advises the public about its ability to secure streaming, we think a rule is the appropriate vehicle. The process of rule adoption also provides greater opportunities for public comment, which is particularly important where significant competing interests are at stake.

### B. Alternative 1

Alternative 1 follows Administrative Order 1989-1 relatively closely. It would provide as follows:

[RULE NUMBER] Online Streaming of Judicial Proceedings

The following rule applies to the online streaming of judicial proceedings in Michigan courts, where those proceedings are also being conducted in person:

1. Definitions

"Online streaming" means the sharing via the internet of judicial proceedings in real time.

"Judicial proceedings" means all hearings and other official activities conducted in a courtroom open to the public.

"Judge" means the judge or other judicial officer presiding over the judicial proceeding at issue.

2. Online streaming generally

Where a judicial proceeding is being conducted in a trial court on an in-person basis and the courtroom is open, the judge may direct that the proceeding be streamed online upon request or upon the court's own initiative.

3. Limitations and Procedures

(i) This rule does not apply to any court without the technological capacity to provide online streaming.[7]

(ii) Requests for online streaming of a judicial proceeding may be made by any member of the public, whether an individual or entity.

(iii) Such a request must be made in writing to the clerk of the relevant court at least three business days before the proceeding is scheduled to begin. The judge has the discretion to honor a request that does not comply with the requirements of this subsection.

[7] The Task Force has included this provision because the comments provided to its earlier draft report suggested that some courts may lack the technology or resources to provide streaming services on a regular basis.

(iv) The judge shall make reasonable efforts to notify the parties of the request for online streaming of a proceeding so that the judge may consider their objections, if any. If the request has been granted, then the docket shall state that the in-person proceeding will also be streamed.

(v) The court will make reasonable efforts to provide timely notice to the public that a proceeding will be streamed, including instructions on how to access the proceeding online.

(vi) The judge has the discretion to terminate, suspend, limit, or decline to grant the online streaming of a judicial proceeding at any time upon a finding, made and articulated on the record, that the fair administration of justice requires such action or that rules established under this order or additional rules imposed by the judge have been violated.

(vii) The judge has the discretion to terminate, suspend, or limit online streaming to protect the interests of specific witnesses, including but not limited to the victims of sex crimes and their families, police informants, undercover agents, and relocated witnesses.

(viii) The judge has the discretion to terminate, suspend, or limit online streaming where such streaming would interfere with the sequestration of witnesses.

(ix) The judge shall not allow online streaming of the jury selection process or of any other part of a proceeding during which a juror is identified by name.

(x) The requesting party may ask that a recording of the streamed proceeding be posted to an online platform, such as YouTube, or the judge may do so *sua sponte*. The judge has the discretion to determine whether such posting should take place and, if so, the length of time for which the recording should remain posted.

(xi) The judge may order that the recording of a streamed proceeding is prohibited and may enforce that order through contempt.

The following observations may help clarify the approach reflected in and the intent behind Alternative 1.

Alternative 1 retains much of the simplicity and structure of Administrative Order 1989-1. It does so on the theory that 1989-1 has served the courts and public well, the trial courts have experience in applying it, and a broad grant of discretion allows the court to tailor its approach as needed. Many of the comments provided to the Task Force underscored the importance of judicial discretion in such matters,

and Alternative 1 follows the lead of 1989-1 in this respect. Like Administrative Order 1989-1, Alternative 1 also reflects an expectation that requests will generally be granted unless there are valid reasons to decline.

Alternative 1 includes limitations that track those included in 1989-1. In this connection, it should be noted that the limitations on media coverage imposed by Order 1989-1 do not create a "closed courtroom" problem because the order assumes that the courtroom is open and proceedings are being conducted in person. The public is free to observe. The question that 1989-1 addresses is whether transparency should be *expanded* by allowing media coverage as well.

The Task Force envisions the same situation and therefore applies the same analysis here. Alternative 1 expressly stipulates that the proceedings are being conducted in person and the courtroom is open. The question is therefore not whether transparency should be allowed, but whether it should be *expanded* by also providing online streaming.

If in-person proceedings were suspended and transparency was available exclusively through the streamed version, then, as noted above, the proposed court rule would not apply. Under those circumstances, the presiding judge would need to adhere to the much stricter constitutional and statutory requirements for open courtrooms. Thus, for example, while a court may have the leeway to prohibit media coverage or online streaming when a crime victim testifies, it may not have the leeway to close the courtroom for that same reason.

Alternative 1 departs from 1989-1 in some ways. For example, it does not limit those who can request streaming to "the media." There is a sound rationale for limiting photographic and electronic coverage to professional news gatherers: they have the technology and expertise to film or photograph the proceedings in a non-disruptive manner. But that rationale does not apply here, because the court's own technology and external platforms are used to stream.

In addition, Alternative 1 assumes that the universe of those with a legitimate interest in having a proceeding streamed is broader than the universe of those with a legitimate interest in "covering" a proceeding for news reporting purposes. Family, friends, non-parties who may be affected by the outcome, educators, and others may have a legitimate interest in being able to observe a proceeding via streaming. Alternative 1 also embodies the idea that a court may, on its own initiative, conclude that streaming a case or a whole segment of its docket

has no apparent downside and serves the public interest and the principle of judicial transparency.[8]

Based on discussions within the Task Force and comments received, Alternative 1 has also modified 1989-1 to account for some additional considerations the court should entertain in deciding a request for streaming. One is whether streaming would make it impossible to police effectively the sequestration of witnesses, which is a matter of some importance in certain cases. Another is whether a recording of the streamed proceeding should be preserved on an online platform, like YouTube, and, if so, for how long.

Alternative 1 also addresses the question of whether observers can make their own recordings of streamed proceedings. In the early stages of the pandemic, when in-person proceedings were suspended and court business was streamed, at least some judges stipulated (orally or via watermark) that recording of the proceedings was prohibited.[9] This measure was an effort to replicate in streamed proceedings the rule that ordinarily applies to in-person proceedings. Specifically, MCR 8.115(C)(3)(a) provides that "In a courtroom, no one may use a portable electronic device to take photographs or for audio or video recording, broadcasting, or live streaming unless that use is specifically allowed by the Judge presiding over that courtroom."

Alternative 1 allows a court to continue this practice with respect to streamed proceedings if it wishes to do so. The Task Force recognizes that a court may decide against this approach, given that such an order may be practically unenforceable against an individual or entity intent on breaking it. But the Task

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[8] We put aside here an additional concern, which is that it has become increasingly difficult to discern who qualifies as a member of "the media." In the context of "coverage," where the technological capabilities and professionalism of the requester matter, an effort to distinguish "the media" from others may serve a valid purpose. In the streaming context, however, such a distinction could result in pointless anomalies, for example allowing one person to request streaming because he is a part-time blogger but disallowing another from doing so because he is not.

[9] It is the understanding of the Task Force that most courts used a caption or watermark, although it does not appear that this issue is discussed in the Michigan Trial Courts Virtual Courtroom Standards and Guidelines. During the Task Force discussions, one instance was described where a court displayed such a prohibition during an online proceeding and a reporter asked for permission to record, which the court granted.

Force assumes that, at a minimum, such an order may have some useful deterrent effect and that some judges may wish to retain the measure.

Multiple members of the Task Force expressed concerns regarding the providing of notice that a proceeding will be streamed. The nature of the concerns varied, however. Some judicial members of the Task Force worried that providing notice to parties on a relatively tight time frame could prove difficult. Alternative 1 addresses this concern by requiring only reasonable efforts to provide such notice.

Some media members of the Task Force worried that it could prove difficult to determine when a proceeding would be streamed. In this connection, they noted the significant variations in how different courts provide notice of what will be heard and when. Alternative 1 addresses this concern by requiring that the docket of the case indicate that a scheduled in-person proceeding will also be streamed. It further stipulates that the judge must make reasonable efforts to provide public notice of how to access the streamed proceeding.

Alternative 1 does not specify the streaming technology to be used. Some comments provided to the Task Force complained about YouTube, and we are aware that some states, like Indiana, are using their own streaming application. Alternative 1 takes no position on this issue but leaves that matter to the sound discretion of the Michigan Supreme Court and the expertise of its administrators.

Finally, it should be noted that Order 1989-1 expressly disallows appeals from a trial court's order regarding photographic or video coverage of a proceeding. The reasons for this prohibition are not stated in 1989-1 and are not obvious to us. Arguments for allowing appeals exist: Appeals would rarely be taken, given that the forgiving abuse of discretion standard would typically apply; and if a judge has abused her or his discretion, then appellate review seems appropriate where such important interests are at stake. Because the Task Force is unclear about the court's reasoning in this part of Order 1989-1, we have not replicated that provision in Alternative 1.

### C. Alternative 2

The second alternative rule is also informed by Administrative Order 1989-1. In many respects it resembles Alternative 1 and some of the comments offered above apply to Alternative 2 with equal force. Alternative 2 differs significantly, however, in its overall thrust and details.

Alternative 2 would provide as follows:

**[RULE NUMBER]**

(A) Scope. This court rule shall apply to the online streaming of court proceedings and the sharing and or posting online of recorded court proceedings.

(B) Definitions

(1) "Livestream" means to transmit or share video and or audio of court proceedings in real time;

(2) "Court proceeding" means all hearings and other official activities conducted in a courtroom open to the public.

(C) In fulfilling its obligations pursuant to MCR 2.407(G)(4), a court must:

(1) Ensure that a video recording of the proceeding, maintained by the court, can only be viewed or accessed at the court clerk's office.

(2) Ensure that a video recording of the proceeding, maintained by the court, not have any advertising or chat feature associated with the recording.

(3) Prohibit copies of the video recording of the court proceeding, unless by order of the court.

(4) This rule does not affect or alter an administrative order adopted pursuant to MCR 8.119(H)(2).

(D) A video recording of the court proceeding must not be posted online unless requested by a party, and ordered by the court, or pursuant to the guidelines of AO No. 1989-1. The request must state the reason posting a video recording of the court proceeding is necessary.

(1) A party requesting online posting of a video recording of a court proceeding must give the other party(ies) and the court notice of the request no less than 3 days prior to a court permitting online posting of the video recording;

(2) A video recording of a court proceeding must not be posted online for viewing unless all parties and the court affirmatively consent either in writing or on the record. If a party does not consent, the court may not order online posting of the court proceeding

(3) If a video recording of a court proceeding is posted online for viewing, it shall not be posted online for more time than is necessary to achieve the purpose stated in the request for posting, and in any event the video recording shall not be posted for online viewing for more than 48 hours;

(4) A video recording of the proceeding must not have any advertising, chat, or comment features associated with the recording;
(5) Copies of the video recording are prohibited unless ordered by the court.

(E) Courts permitting public access by livestreaming technology must:
(1) Give notice to all parties and the public, not less than 3 days prior to a court proceeding, of an intent to have a court proceeding shared via livestreaming. The notice shall include instructions on how to access the court proceeding online;
(2) Ensure that any chat or commenting features are disabled;
(3) Ensure there is no advertising associated with the livestream;
(4) Prohibit any recording, posting, or sharing of the livestreamed proceeding;
(5) Allow a crime victim in a criminal court proceeding the choice of whether to have their testimony, victim impact statement, or any other statement to the court shared via livestream. If the victim chooses to not have their testimony, victim impact statement, or any other statement to the court shared via live-stream, the court shall make a transcript of the victim's testimony or statement to the court available after the conclusion of the proceedings, upon request. Such a circumstance does not require an order under MCR 8.116(D)(3);
(6) If a party to a court proceeding objects to having a court proceeding shared via livestream, or if the parties agree to share the court proceeding via livestream and the court does not agree, subject to the guidelines of AO No. 1989-1, the court must determine whether the fair administration of justice requires that the court proceeding be shared or not shared via livestream. In making this determination, the court must consider the following list of relevant factors:
(a) Whether a crime victim's constitutional or statutory rights are implicated;
(b) The court's technical capabilities and resources;
(c) The nature of the court proceeding;
(d) The potential for unnecessary deprivation of privacy of a party or a participant to the court proceeding;
(e) The reason that the court or a party is affirmatively seeking livestreaming of the court proceeding;
(f) The age, maturity, or other particular circumstances of participants in the court proceeding;
(g) Concerns about sequestration of participants in the court proceeding;

(h) Whether a livestream of the court proceeding would serve as a distraction, or otherwise negatively impact the proper decorum of the court proceeding;
(i) Whether a livestream of the court proceeding may cause a chilling effect on the court proceeding, in terms of either actual participation or appropriately in-depth participation;[10]
(j) Whether a court participant's safety may be impacted, including but not limited to law enforcement informants, law enforcement undercover agents, relocated witnesses;
(k) Other relevant and applicable factors which the court states on the record.

(7) If a court proceeding is being shared via livestream, it is within the court's discretion to discontinue the livestream at any time. If the livestream is discontinued, the court must state the reasons on the record or in a court order;

(8) Online streaming of the jurors or the jury selection process shall not be permitted.

The following observations may help clarify the approach reflected in and the intent behind Alternative 2.

In general terms, Alternative 2 reflects the view that Alternative 1 does not adequately account for values and interests that compete with transparency, such as concerns about the protection of victims and witnesses. Alternative 2 therefore places greater and more specific strictures on when a judge can allow streaming and posting. For example, Alternative 2 gives every party "veto power" on the posting of a proceeding, regardless of whether the judge agrees with the expressed concerns.

Alternative 2 specifically requires the elimination of the chat feature for live streaming or posting of a recorded court proceeding.[11] It does so on the basis that the chat feature is not necessary to maintain open courts and out of concern that

[10] This section addresses the concern that the conduct of a judge, an advocate, or a witness may be affected by the presence of livestreaming. For example, there may be reason to believe that a participant in the proceeding will "play to the livestream audience" or will be deterred from delving into certain facts because the proceeding is being livestreamed.

[11] This chat feature exists on some streaming and video hosting platforms, such as YouTube.

online chats may treat victims in unfair and undignified ways, effectively re-traumatizing them and potentially chilling them from further participation in the proceedings.[12]

Alternative 2 also expressly requires that no advertising appear in connection with any livestream or subsequent posting of the court proceedings. This objection primarily relates to the use of YouTube as a streaming service. YouTube's main source of revenue is advertising and Alternative 2 holds that, by posting content on YouTube, the courts are subsidizing a privately held for-profit company. Alternative 2 also reflects the view that it is simply inappropriate for court proceedings to appear on a platform where advertising is or may be present.

In addition, Alternative 2 reflects more general concerns about posting proceedings on any online platform. Those who favor Alternative 1 see value in at least some proceedings remaining online for the public to view at its convenience (absent a reason not to do so). But Alternative 2 takes the approach that such postings lend themselves to abuse: clips can be shared, edited, re-distributed, converted into memes, and so on. Alternative 2 treats livestreaming via Zoom as a better mechanism to allow public access, because it occurs in real time with no recordings being posted.

It should be noted that comments received in response to the earlier draft of the report touched on related themes. They observed that the primary and original reason for livestreaming proceedings—the pandemic and the inability to conduct proceedings in person—had passed. And they expressed concern that continuing to livestream proceedings (particularly if doing so resulted in an online recording)

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[12] In a case earlier this year in Michigan, a domestic violence victim was testifying in a livestreamed hearing when an assistant prosecutor asked the judge to pause the proceedings, fearing that the defendant might be in the residence with the victim. Law enforcement responded and did in fact locate the defendant with the victim. The video recording of the proceeding was then posted online and viewed more than a million times. “A Zoom hearing for her domestic violence case went viral. Now people are blaming her, she says.” The Washington Post, March 12, 2021 (https://www.washingtonpost.com/dc-md-va/2021/03/12/mary-lindsey-coby-harris-zoom-hearing/) (last accessed on 11.18.21) “I know everybody thinks I’m an idiot for staying in the relationship,” said Lindsey, 31, tearful and struggling to speak at times in a Wednesday interview after her night shift as a waitress. She said she had looked through the comments on news articles: “A lot of people are saying, well, it’s her fault.” *Id*.

threatened to compromise the privacy interests of participants, to give undue publicity to sensitive matters and temporary lapses in judgment, to expose participants to ridicule and embarrassment, and to chill victims and other witnesses from participation. Some comments pointed out that even supposedly routine matters can raise such concerns, as participants in them may not view them as "routine" and may worry about the exposure they will receive if preserved online. While Alternative 1 broadly leaves these considerations to the judge's discretion, Alternative 2 imposes more specific strictures.

## CONCLUSION

As noted above, the online streaming of proceedings serves the goal of maximum judicial transparency, but also gives rise to legitimate concerns about intrusiveness and abuse. No perfect solution exists. As one commenter noted: "The key, as always, is to preserve what is essential while exploring the boundaries of what is possible."

In the view of the Task Force, a court rule that in some manner tracks the sensibility of Order 1989-1 strikes that proper balance between the essential and the possible, encourages the thoughtful and deliberate consideration of requests for streaming, and gives individual judges the latitude to limit or decline streaming where competing concerns indicate it would be inappropriate. The two alternatives presented reflect differing approaches: Alternative 1 largely leaves the matter to the discretion of the trial court judge, Alternative 2 includes some more particularized guidance and limitations. The Task Force respectfully leaves it to the sound judgment of this Court to settle on the best and most workable approach.

## APPENDIX: THE CONFRONTATION CLAUSE

The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him . . . ." US Const, Am VI. The Michigan Constitution similarly affords a criminal defendant "[i]n every criminal prosecution," the right to "be confronted with the witnesses against him," adopting this language of the federal Confrontation Const 1963, art 1, § 20 (emphasis added). These constitutional provisions are underscored by MCL 763.1, which provides, "On the trial of every indictment or other criminal accusation, the party accused shall be allowed to . . . meet the witnesses who are produced against him face to face."

In *Crawford v Washington*, 541 US 36 (2004), the Supreme Court of the United States set Confrontation Clause doctrine on a new path. Prior to *Crawford*, the Court had held that the Confrontation Clause created a *substantive* requirement that testimony offered against the defendant be reliable. But *Crawford* found that the Clause guaranteed a specific *process*: that criminal defendants be able to confront their accusers. The Court declared: "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation."

In a pre-*Crawford* decision, *Maryland v Craig*, 497 US 836 (1990), the Court had considered whether the Confrontation Clause allows a child victim of abuse to testify at trial over one-way, closed-circuit television while physically located in a room separate from the judge, the jury, and the defendant, who could hear and see the testimony. *Craig* held that the Confrontation Clause did not categorically prohibit this testimony, adopting the following rule: "[A] defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured." *Id*. at 840-841. The Court stated: "[T]hough we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment's guarantee of the right to confront one's accusers." *Id*. at 849-850.

The question presented is how broadly to understand *Craig*'s allowance of virtual confrontation in light of *Crawford*'s interpretation of the confrontation right. Some courts have concluded that *Craig* remains controlling law whenever a witness testifies online via video at trial but the defendant is denied physical, face-

to-face confrontation. See, e.g., *State v Thomas*, 376 P3d 184, 193-194 (NM, 2016); *United States v Yates*, 438 F3d 1307, 1314 n 4 (CA 11, 2006) (en banc). In a recent decision, however, the Michigan Supreme Court disagreed. In *People v Jemison*, 505 Mich 352, 356 (2020), the Court unanimously held that a forensic analyst's two-way, interactive video testimony violated the defendant's Confrontation Clause rights under the state and federal constitutions. The Court in *Jemison* held that it would "apply *Craig* only to the specific facts it decided: a child victim may testify against the accused by means of one-way video (or a similar *Craig*-type process) when the trial court finds, consistently with statutory authorization and through a case-specific showing of necessity, that the child needs special protection." *Jemison*, 505 Mich at 365. In all other circumstances, "*Crawford* . . . provides the applicable rule." *Id.*

*Jemison* limits the ability of courts to satisfy the guarantees of the Confrontation Clause through "virtual confrontation" in the context of a trial. But it obviously does not entirely eliminate the use of online proceedings in criminal cases. To the contrary, most hearings in a criminal case can be conducted using remote participation without violating the Confrontation Clause. Indeed, MCR 6.006 already provides for the use of interactive video technology in a wide array of proceedings. And, of course, the issue does not arise if a defendant waives their confrontation right or if an exception applies, such as where the witness is unavailable and the defendant had a prior opportunity for cross-examination. *See Crawford*, 541 US at 54.

A comprehensive review of the Confrontation Clause jurisprudence, which continues to evolve, lies well beyond the scope and charge of this Task Force. It is clear, however, that under certain circumstances allowing the remote participation of a witness would violate the defendant's right to confrontation. Courts obviously need to remain mindful of this possibility and must take steps to avoid such violations.[13]

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[13] The Michigan Trial Courts Virtual Courtroom Standards and Guidelines recognizes that "The use of videoconferencing technology must be consistent with a party's Constitutional rights," and specifically cites *Jemison* and notes the confrontation concern. In addition, Michigan Supreme Court Administrative Order 2020-08 (April 7, 2020) states that videoconferencing procedures must be consistent with a party's constitutional rights.