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October 29, 2021

Justices of the Michigan Supreme Court  
Hall of Justice  
P.O. Box 30052  
Lansing, MI 48909

**ADM File No. 2020-08**

Dear Justices,

Our comments to the proposed rule changes reflect and are in line with SADO's August 13, 2021 comment to the draft report *Michigan Trial Courts: Lessons Learned from the Pandemic of 2020-2021 – Findings, Best Practices, and Recommendations*, which is attached here.

We ask the Court to adopt rule changes that would allow for appropriate remote proceedings to be regularly available post-pandemic, uniformly in every courtroom of every circuit. However, the use of this technology should remain thoughtful and flexible, and it must protect the constitutional rights of people accused or convicted of crimes. In that spirit, SADO offers the following specific comments:

- The proposed changes to MCR 2.407(G) and MCR 6.006 require the use of “remote participation technology . . . to the greatest extent possible.” While SADO understands the doors that have been opened with the use of video technology in our courtrooms, the proposed rule change goes too far. For proceedings that can result in the loss of freedom and other serious consequences, people and their attorneys should be in-person, in-court. Proceedings where people should be in-person include plea hearings, sentencing hearings, probation violation hearings, and of course trials. The rules could be amended to encourage remote technology except in proceedings where the accused or convicted person has a constitutional right to be present (i.e. sentencing hearings or when testimony is taken).
- Proposed MCR 2.407(G)(4) would require that video proceedings be available to the public live or “immediately after” the proceedings. If the hearings are

not posted live for the public and media to view, there could be serious constitutional questions about whether there was an open courtroom.

- Proposed MCR 8.110(C)(3)(i) requires circuit courts to allow for pleadings to be filed other than by appearing in-person at the courthouse. SADO suggests that this Court take this opportunity to require circuit courts to accept pleadings filed by email if the court is not part of the MiFile e-filing system.
- SADO supports the proposed corrected revisions of MCR 6.425(H), permanently extending the time for people to request appellate counsel be appointed.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Zimbelman", written in a cursive style.

Jessica Zimbelman  
Managing Attorney



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August 13, 2021

Honorable T.J. Ackert, Co-Chair  
Honorable Patricia P. Fresard, Co-Chair  
Lessons Learned Committee  
State Court Administrator's Office  
[LessonsLearned@courts.mi.gov](mailto:LessonsLearned@courts.mi.gov)

*Re: Comment to DRAFT REPORT - Michigan Trial Courts: Lessons Learned from the Pandemic of 2020-2021 – Findings, Best Practices, and Recommendations.*

Dear Honorable Co-Chairs and Committee Members:

I appreciate the opportunity to comment on the Committee's draft report on lessons learned from the pandemic. At the State Appellate Defender Office (SADO) and the Michigan Appellate Assigned Counsel System (MAACS), we have the benefit of practicing in courts statewide. SADO staff attorneys and MAACS roster attorneys represent clients on appeal and in post-judgment proceedings in all 56 circuit courts, each district of the Court of Appeals, and the Supreme Court.

SADO wishes to express our gratitude for the dedication of the judges and court staff at adapting to the pandemic emergency to keep our legal system functioning. I am proud that the attorneys and supporting staff of SADO and MAACS similarly adapted and continued to provide quality representation to our clients during this difficult time.

As appellate practitioners, we remain committed to providing the best representation possible to our clients on appeal, and it is this mission that informs our comments.

### **Virtual Courtrooms (Recommendations, pp. 24-25, 27-28)**

Best practices and constitutional considerations will often mean that appellate attorneys should appear in-person in circuit and appellate courts and that their clients should appear in-person in circuit courts. *See People v Jemison*, 505 Mich 352 (2020); *People v Heller*, 316 Mich App 314 (2016).

That said, we fully support the use of the virtual courtroom and remote proceedings for routine scheduling or status hearings, less complex motion hearings, and some oral arguments. SADO public defenders and MAACS appointed counsel saved large amounts of valuable time that would otherwise have been spent traveling to and from court and waiting inside a courthouse. This dynamic means more efficiency, more time to do quality substantive casework to the benefit of our clients, and significant savings for taxpayers.

We ask this Committee to recommend that appropriate virtual court/remote proceedings continue to be regularly available post-pandemic, uniformly in every courtroom across all judges of every circuit. However, the use of this technology should remain thoughtful and flexible, and it must protect the constitutional rights of people accused or convicted of crimes:

- Courts must ensure that people do not feel pressured into waiving their in-person presence where they or their defense counsel have a sincere belief that in-person appearance is necessary. There cannot be an unspoken penalty for decreasing efficiency by exercising constitutional rights to confrontation or the right to be present at sentencing.
- We have serious concerns about creating a “presumption” for Zoom hearings, especially for bond hearings, pleas, sentencings, and probation violation proceedings. These proceedings can result in the loss of freedom and in far-reaching consequences beyond incarceration, such as placement on the Sex Offender Registry, lifetime electronic monitoring, deportation, and significant financial penalties.
- We strongly believe there should be a presumption *against* Zoom hearings for any sentencing where there is not already an agreement and where there is any possibility of incarceration. A person convicted of a crime should not be sentenced to years of incarceration by a judge who only saw them on a television or computer screen. As our Court of Appeals has observed:

Undoubtedly, two-way interactive video technology saves courts money and time, and dramatically lessens security concerns. But in the felony sentencing context, it is simply inconsistent with the intensely personal nature of the process...Sentencing by video dehumanizes the defendant who participates from a jail location...” *Heller*, 316 Mich App at 319.

SADO attorneys have had to object at hearings where our clients were presented on video restrained in small cages with the doors closed. With a presumption for video sentencing, judges will literally sentence people in cages on a screen. It has already happened during the pandemic and even after courts have opened to the public.

- We were pleased to see that the *Draft Report from the Task Force on Open Courts, Media, and Privacy* included a presumption for in-person proceedings for vulnerable victims. The same presumption must be present for proceedings that could result in the loss of liberty for people accused or convicted of crimes.
- We also have concerns about the ability of court reporters to accurately transcribe Zoom hearings. We are starting to see transcripts of proceedings held on Zoom that contain multiple areas with notes from the court reporter stating that they could not make out what was being said at the remote hearing. If crucial portions of the record are unavailable for adequate appellate review, this alone could result in the vacating of a guilty plea or a probation violation or result in resentencing.
- Some post-judgment evidentiary hearings may be difficult to conduct in virtual court settings, if for instance there are numerous exhibits or if there are lay witnesses whose credibility must be judged.
- Further, some clients are not well served if they are in a different location than their attorney, even with the availability of private Zoom break-out rooms. Clients may have intellectual, sensory, or communication deficits that can only be mitigated by in-person communication with their attorneys.

Ultimately, attorneys, in consultation with their clients, must be free to decide whether a particular hearing should be held in-person or remotely so that they can deliver the effective assistance of counsel.

### **Transparent Proceedings (Recommendations, pp. 24-25)**

We are in favor of continuing use of the courts' YouTube channels broadcasting live or at least the posting of recordings for later public viewing, *regardless* of whether the hearing is in-person or by remote technology. We believe this transparency and access is largely in the best interest of our clients and their families, the victims and their families, the press, and the public.

In addition, it allows SADO and MAACS to better supervise attorneys for quality and to provide training and continuing legal education. The Supreme Court has been broadcasting oral arguments for many years, initially on the Michigan Government TV network via local cable channels and now via live-streaming on the internet.

### **Scheduling, Filing, and Service (Recommendations, pp. 14-15, 27-28)**

We strongly support hearings accurately scheduled for a specific designated time or at least on staggered schedules. Most of our clients are incarcerated in the Department of Corrections. Prisons each have only a limited amount of Polycom equipment that can be used to join in a Zoom hearing, so placing these hearings on a set casecall docket is largely unworkable. The Polycom equipment is also used for

attorney-client visits, parole interviews, and sometimes medical appointments. We have found that most courts have been willing to set specific times or a small window

for our hearings to start on Zoom so that the prison (and other courts) can stay on schedule for use of the Polycom equipment.

We ask this Committee to recommend that all courts accept pleadings for filing by e-mail until a statewide unified e-filing system, or at least a local e-filing system, is implemented. We were very pleased that courts adopted some form of filing by e-mail, whether to a central e-mail address or to a particular staff member, or by fax. We found filing and service by e-mail to be reliable and trustworthy. We have been disappointed to see certain circuit courts remove this option and revert to filing in-person or by mail.

We also ask this Committee to recommend that service by e-mail to an attorney's e-mail address listed with the State Bar be required. Just about every MAACS roster attorney and SADO attorney has experienced the frustration of having a local county prosecutor send by regular mail their answer to a client's post-judgment motion, and to have it arrive just before or even after a hearing. At this point, the use of e-mail by attorneys should be universal.

Thank you for allowing me the opportunity to comment on the draft report and offer suggestions. At SADO and MAACS we are confident that courts can strike the proper balance between increased remote hearings and necessary in-person proceedings. Please feel free to contact me if the Committee has any questions or if the Committee wishes to interview any SADO attorneys or MAACS roster attorneys.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan Sacks', with a stylized flourish at the end.

Jonathan Sacks  
Director