

Public Comment
Administrative Order Issued July 26, 2021; ADM 2020-08

The Michigan Coalition to End Domestic & Sexual Violence (MCEDSV) is a nonprofit organization with 73 member agencies that provide comprehensive services to survivors of crime. On a daily basis, MCEDSV, through our Survivor Law Clinic, and our member programs, accompany hundreds of victims through myriad criminal and civil proceedings. Throughout the pandemic, these essential workers have continued to support victims in virtual and in-person proceedings. MCEDSV offers the following comments related to electronic access. We recommend that courts limit livestreaming and establish safeguards if a proceeding is livestreamed or posted online. At minimum, there should be a reasonable take-down period so that videos of court proceedings are not posted indefinitely.

I. Introduction

One in four women and one in nine men experience severe intimate partner physical violence in their lifetime.¹ This means that these crimes have impacted a significant number of the litigants in any type of case. Victims of stalking, sexual assault, human trafficking, and domestic violence often must turn to the courts in their hour of greatest need and vulnerability. MCEDSV member programs work with victims who are navigating proceedings related to public benefits, housing, child welfare, employment, personal safety, divorce and custody, education, consumer protection, immigration, torts, and so much more. The currency of such crimes is power and control. A hallmark of intimate partner perpetrators is that they often will go to great lengths to find, embarrass, and terrorize their target. Online court videos provide abusers more tools and make it easier for them to keep abusing.

There is a growing community of people committed to discrediting all victims, with social media groups across the state dedicated to humiliating, belittling, and often doxing victims. Some of these risks were illustrated when a video went viral of a St. Joseph County defendant appearing virtually from the same location as the victim-witness.² Not only was the survivor subjected to millions of people viewing her ordeal, which included disclosure of her personally identifying information, but she also experienced extensive scrutiny and high-profile victim-blaming. Four months later, the hearing video is still easily accessible in numerous places around the internet. For this survivor and her family, it means that for every future job interview, first date, new friend or colleague, she will live with the knowledge that someone likely found and viewed this video before meeting her.

¹ Special Report, Nonfatal Domestic Violence, BUREAU JUSTICE STATISTICS, April 2014, available at <https://bjs.ojp.gov/content/pub/pdf/ndv0312.pdf>.

² Hannah Knowles, *A Zoom Hearing for Her Domestic Violence Case Went Viral. Now People are Blaming Her, She Says*. WASH. POST, (March 12, 2021) <https://www.washingtonpost.com/dc-md-va/2021/03/12/mary-lindsey-coby-harris-zoomhearing/>.

This is only one example of scores of survivors’ experiences with virtual proceedings. Behind the splashy headlines are the countless cases of ordinary injustice: Many victim service agencies report having observed multiple instances in which virtual proceedings gave rise to witness intimidation, for example, when a perpetrator was able to threaten the survivor in real time while they gave testimony. MCEDSV has also become aware of a sexual assault survivor whose appearance at a preliminary hearing was livestreamed and then re-posted on a news website, then shared and viewed thousands of times on social media. There is also a domestic violence victim whose perpetrator’s plea colloquy remains posted online giving the intimate details of an attack—anyone who knows she is married to the offender would be able to easily infer that this happened to her. A survivor advocacy agency reported that they were working with a victim of stalking who had been able to find safety but was afraid to appear in livestreamed proceedings out of fear that the stalker would see the hearing and find her. Friends and family of perpetrators have found where a victim is working and written false reviews about them on the website or Yelp review. Each week, we continue to learn about different contours of the harm caused by hearings that are livestreamed and posted online.

Beyond these imminent threats, there are significant concerns about both victim and systemic dignity. Livestreaming and subsequent posting often takes the worst day of a litigant or victim’s life and effectively turns it into a court-compelled, unconsented appearance on what has in some cases become similar to “Court TV.” Incidentally, this is also true for defendants and many other litigants. To illustrate, MCEDSV has become aware of many courts throughout Michigan that have left hundreds of hearing videos posted on YouTube for months. Indeed, at least one circuit court has hearings on its YouTube channel from over one year ago. Some of these hearings have over 2,000 views.³ At least one entire Reddit page is dedicated to “Videos of Crazy Zoom Court.”⁴ The implications for survivors simply cannot be overstated.

As currently drafted, the court rules do not fully address these implications and put survivors at risk. Beyond the specifics set forth below, MCEDSV would urge understanding and caution as the courts consider next steps. The COVID-19 pandemic forced society to move swiftly in response to a unique set of circumstances. There is no parallel urgency in this moment. This process provides a rare opportunity to regroup and return to the deliberate, thoughtful, and transparent decision-making Michiganders have come to expect from their system of courts. The dire consequences at stake for survivors and victims, as well as all Michigan litigants, merit great care and judicious consideration.

A. Victim and Litigants’ Rights

The court rules do not fully consider the rights implicated for victims. Forcing litigants to participate in a public livestream if they want the crimes against them or their civil claims addressed threatens not only Michigan’s constitutional victim rights, but also victims’ rights under the United States Constitution to “petition the Government for a redress of grievances.” US Const Amend I.

³ Judge Aaron J. Gauthier, YouTube.com, <https://www.youtube.com/channel/UCc0L8vggh4KetwU-D6LokWg/videos> (last accessed July 22, 2021).

⁴ Videos of Crazy Zoom Court, Reddit.com, <https://www.reddit.com/r/ZoomCourt/> (last accessed July 22, 2021).

The final clause of the First Amendment, the right to petition the government for a redress of grievances, is fundamental to “the very idea of a government republican in form.” *United States v Cruikshank*, 92 US 542, 552 (1875); see also *United Mine Workers of Am v Illinois State Bar Ass’n*, 389 US 217, 222 (1967). The Supreme Court has observed that justice is owed to both those accused of a criminal act as well as the accuser, and that the “concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.” *Payne v Tennessee*, 501 US 808, 827(1991) (quoting *Snyder v Massachusetts*, 291 US 97, 122 (1934)). Victims should not be given the impossible choice of either (a) obtaining no justice for the harms against them, or (b) subjecting the intimate details of their suffering to the whims of any person with the time and inclination to troll the Internet.

All Michiganders enjoy rights to privacy. See *Whalen v Roe*, 429 U.S. 589, 599–600 (1977) (recognizing a constitutionally protected “zone of privacy” that encompasses two interests— “[o]ne is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions”); see also, eg, *Michigan Fed’n of Teachers & Sch Related Pers, AFT, AFL-CIO v Univ of Michigan*, 481 Mich. 657, 753 N.W.2d 28 (2008) (exempting university employees’ private contact information from FOIA to guard their privacy). The right to privacy suggests that the courts should take special care of personally identifying information (PII) that they are being entrusted with, just as the Court is prioritizing through other current rule processes specifically dealing with PII in documents filed. By being a witness or litigant, a person should not be asked to relinquish their right to privacy altogether.

Michigan crime victims have rights under the Michigan Constitution to “be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.” Const 1963 art 1, § 24(1). Out of respect for this right, Michigan’s legislature has also made the determination that “certain information about crime victims is exempt from disclosure.” *State News v Michigan State Univ*, 481 Mich 692, 705 n28; 753 NW2d 20, 27 (2008) (making this observation with regard to FOIA disclosure of victim information). As members of the Michigan Supreme Court have observed in an important case involving privacy, “given the scope of the cloak of privacy created by the Legislature, the protection afforded to the privacy of crime victims by our state constitution, Const. 1963, art. 1, § 24, and the fact that we are sailing in constitutionally uncharted waters, a measured response . . . is appropriate.” *People v Stanaway*, 446 Mich 643, 713; 521 NW2d 557, 590–91 (1994) (balancing victims’ right to privacy and confrontation rights, Riley, J. concurring, with Cavanagh, C.J., Griffin, Mallett, and Levin, JJ.)

The Fundamental Principles of the Michigan Supreme Court also counsel in favor of care as the courts proceed in making decisions about online proceedings. Those Principles suggest that courts “ensure that we are responsive to the needs of those we serve” and “continue to search for new ways to remove barriers to our judicial system.” See Message from Chief Justice Bridget M. McCormack, One Court of Justice, <https://courts.michigan.gov/courts/michigansupremecourt/Pages/default.aspx> (accessed August 9, 2021). To be able to meaningfully access courts, victims and survivors should not have to sacrifice the safety that they have carefully constructed. A tailored approach is needed to ensure that the courts serve the community, including those who are most vulnerable to victimization.

B. The Right of Access to Courts

The right of public access to courts has never meant access in perpetuity, nor has it meant access in the most public forum possible. This right emerged out of the Supreme Court's two-tiered analysis, which considers requests in light of (1) the history of openness, and (2) the role access played in judicial process. *Richmond Newspapers, Inc v Virginia*, 448 US 555, 576; 100 S Ct 2814 (1980). A review of each tier in the context of internet proceedings counsels a more limited approach than the Recommendations takes.

As to the history of openness, the *Richmond* Court concluded that criminal trials “had long been open to the public at time [the First A]mendment was adopted.” *Id.* The Court further noted that the right to access is “[s]ubject to the traditional time, place, and manner restrictions” *Id.* at 578. In applying this analysis, courts have concluded that public access does not always apply outside the context of criminal proceedings. *Eg, Calder v IRS*, 890 F.2d 781, 783 (CA5 1989) (holding that a professor had no First Amendment right to access records of Al Capone’s tax investigation). The task at hand is to apply the Constitution’s broad principle to the current context, but “[a] historical tradition of at least some duration is obviously necessary, ... [or] nothing would separate the judicial task of constitutional interpretation from the political task of enacting laws currently deemed essential.” *Detroit Free Press v Ashcroft*, 303 F3d 681, 701 (CA 6 2002) (allowing media access to deportation case, internal quotation omitted).

An open courtroom at the time the First Amendment was adopted meant that an attendee would have to arrive at the appointed time, wait if necessary, show others in the courtroom that they were present and listening, and adhere to the courtroom standards. None of these characteristics apply when someone merely clicks on a broadcast or a posted video. Instead, a person (or thousands of people) who has made almost no thoughtful decision to be present can view proceedings surreptitiously. The history of openness bears almost no resemblance to this virtual paradigm.

With regard to the second tier, unfettered online viewing undermines the role that access is meant to play in fostering system integrity. The value of openness lies not in how many people are able to view a trial, but “in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known.” *Press-Enter Co v Superior Ct of California, Riverside Cty*, 464 US 501, 508; 104 S. Ct. 819, 823 (1984).

The goal of making trials public was to avoid secret trials. See, *eg, In re Oliver*, 333 US 257, 269; 68 S Ct 499, 506 (1948). Distrust for secret trials has been attributed to the Spanish Inquisition’s notorious use of this practice and similar endeavors that posed a “menace to liberty.” *Id.* (upholding a Michigan conviction where members of the general public were excluded from a portion). To be sure, there is plenty of room for nuance in between a trial that is secret and one posted on the internet.

Indeed, courts have observed that *Richmond* and its progeny “articulate a right to attend trials, not a right to view them on a television screen.” *Westmoreland v Columbia Broad Sys, Inc*, 752 F2d 16, 23 (CA 2 1984); see also *Courtroom Television Network LLC v State*, 8 AD3d 164, 165 (2004) (stating “There is no federal constitutional right to televise court proceedings.”); see also *Wilson v Layne*, 526 US 603, 613; 119 SCt 1692, 1698 (1999) (distinguishing *Richmond Newspapers* and acknowledging that

members of society rely on the press to gain an understanding of government operations, but nonetheless holding that allowing media to accompany officers during the execution of search warrants went too far); see also, *Herald Co v McNeal*, 511 F Supp 269, 273 (ED Mo 1981) (finding that *Richmond* does not require media access to expunged criminal records and stating, “The Constitution is not a ‘Freedom of Information Act’”) (internal quotations omitted).

It bears mentioning that the *Richmond* Court and nearly every pertinent decision on this topic deals with the media’s right to access, not the general public—and certainly not the global internet community. One federal court in Michigan has held that the right to access does not allow the general public to record court proceedings. *McKay v Federspeil*, 22 F Supp 3d 731, 736 (ED Mich 2014) (explaining, “Although the Supreme Court’s decision in *Richmond Newspapers* speaks to the intrinsic value of open trials, the Court will not tortuously construe *Richmond Newspapers* as granting a presumptive constitutional right to allow electronic devices into the courtroom.”). Providing nearly every person on earth an opportunity to stumble upon, watch, rewind, and voyeuristically observe hearings does not advance the principles that access rights intended to promote.⁵ As the comments section of any video that goes viral will demonstrate, there are those who take an indecent interest in watching others suffer and making it worse. While there are journalistic ethical standards that guide the media’s behavior, that is not true of private individuals inside and outside the state or country that may decide to observe and share proceedings in which they have no legitimate interest.

In the context of online proceedings, the analysis of *Richmond* and its progeny teach that access should be consistent with the judiciary’s historical commitment to openness and the goals underpinning that tradition. There are better ways to further both *Richmond* tiers than adopting a presumption that proceedings will be virtual and livestreamed. The recommendations below strike the appropriate balance.

II. Recommendations on Remote Participation, Livestreaming, and Posting

MCEDSV recommends a thoughtful revision of interim MCR 2.407(G)(4). To frame this discussion, it is helpful to remember there are three discrete questions implicated in the Recommendations. First, should litigants, witnesses, judges, and staff be able to engage remotely in proceedings taking place in a courtroom? Second, under what conditions should court proceedings be livestreamed (i.e., made publicly available on the internet while they are transpiring)? Finally, when, if ever, should a proceeding that already happened be posted for the public to view? And if so, for how long? MCEDSV will address each question.

B. If possible, in-person proceedings should be prioritized for most trial-level actions.

All proceedings should be offered to the public in person, even if litigants and judicial officers are participating remotely. Because public access goals are satisfied with an opportunity to attend in person, there is no need to livestream proceedings offered for in person viewing. In-person hearings will allow courts to more effectively prevent witness intimidation and allow victims to

⁵ The California Supreme Court explained over a century ago that the public trial requirement “is fairly observed, if, without partiality or favoritism, a reasonable portion of the public is suffered to attend, notwithstanding that those persons whose presence would be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether.” *People v Swafford*, 3 P 809 (1884).

participate and seek redress safely. An in-person default for public access will also prevent participants' identifying information from being broadcast or subsequently posted. Limiting access to in-person is especially important for trial-level proceedings (both civil and criminal), where unproven allegations and foundation evidence containing identifying details are common. In-person access for the public should be the default even if adjudicators or litigants participate remotely.

B. If a proceeding must be livestreamed, it should only be available "live."

If a livestream is necessary to achieve public access because the court cannot offer in-person access (e.g., during a pandemic), then proceedings that are livestreamed in real time should not also be posted after the fact. Offering a livestream to achieve public access, but taking it down afterward would be consistent with at least one other Midwestern state's approach.⁶ When the physical courtroom must be closed, offering livestream during proceedings is more consistent with the Supreme Court's analysis in *Richmond* and its progeny. In offering a livestream during the live event, a person would have to show sufficient interest in the individual case to click on the livestream at the appropriate time. This allows public access that will enhance the integrity of proceedings while preventing exploitation.

Where public access is given via livestreaming, there should be a process in which members of the public are directed to a court webpage to obtain a passcode in order to access the livestream of most trial-level proceedings. This would require a member of the public to express some level of intentionality if they would like to watch a particular proceeding and keep some record of who has watched it. This would provide a reasonable comparator to in-person practice, as members of the public who want to be in courtroom proceeding occurring in-person must express the intentionality of learning when and where the proceeding will occur, and showing themselves in the courtroom so the public knows who is watching. Requiring a passcode, at least for some proceedings, will limit the voyeurism that currently puts survivors at risk.

C. If video of a proceeding is posted, it must be taken down within a reasonable time.

There is no reasonable argument that leaving a recording of court proceedings posted online for months or years is at all consistent with Supreme Court case law on public access. Accordingly, the Report must include a maximum amount of time that recorded proceedings may remain online. Recordings should be taken down within 24 hours. This time limit should apply to hearings that have been posted previously and have remained posted for extended time periods already.

Ending the long-term posting of videos would put a stop to ongoing, wide-ranging, and compounded system-inflicted trauma. Survivors are forced not only to endure the ordinary challenges of navigating the legal system, but must live with the knowledge that the details of their experience could be viewed by anyone with a point and click. There is no comparison between the knowledge that someone may be able to attend a hearing and watch it and knowing that a

⁶ "The provision in this Court's April 22, 2020 order authorizing the courts to live stream court proceedings (except hearings that are confidential by law) on a public platform, including but not limited to YouTube or any other publicly accessible manner, to accommodate the public's access to court proceedings shall remain in place for the duration of this order. Such a livestream shall be viewable only during the proceeding and shall not be made available for later playback; and no confidential proceedings shall be broadcast on any public platform." Matter of Admin. Rule 17 Emergency Relief for Indiana Trial Courts Relating to 2019 Novel Coronavirus, 144 N.E.3d 197, 198 (Ind. 2020).

frightening and upsetting experience is “out there” for anyone to see as long as the court leaves it up. Intimate partner violence survivors frequently report being concerned that their assailant, whom they still care about and who may be the parent of their children, will be harmed by having the details of their crimes available online in perpetuity. This may translate to fewer job opportunities for the perpetrator, and ultimately, fewer opportunities for the children who have already suffered enough.

A take-down period is an easy and just solution. The Recommendations should address this oversight. Twenty-four hours is more than enough time to create public access consistent with Supreme Court case law.

D. Protections can enhance the safety of participants where a livestream is necessary.

When proceedings are livestreamed or posted, specific protections should be adopted. These recommendations are consistent with principles of notice and opportunity to object that are rooted in our judicial traditions:

1. If there will be a livestream, all participants (and especially crime victims) should be made aware in advance that the proceeding will be livestreamed. Litigants and victims should be given specific instructions on how they may request that the court limit access to sensitive information.
2. The court rule should direct the court to make a finding on the record that virtual proceedings and livestream are consistent with all parties’ and crime victims’ rights.
3. Comment sections must always be disabled from any video or livestream of a court proceeding.
4. Any livestream should be equipped with a clear and prominent display that notifies any person viewing the videoconference or telephone conference that recording of proceedings is prohibited.
5. When a hearing convenes and before livestream begins, the court should ask the parties whether any PII, sensitive, or confidential evidence might be introduced. If PII or sensitive information is expected, the court should offer the victim an opportunity to express any interest they have in limiting access. This will ensure that unrepresented litigants are aware of their rights and have an opportunity to protect themselves.
6. The court rules should ensure there is a mechanism to safeguard exhibits and documents with sensitive information from being shared with the public via livestream.

III. Electronic Mail should be safeguarded.

With regard to interim MCR 2.107(G), MCEDSV welcomes service of process achieved through electronic means and the positive impact this will have on access to justice for survivors who struggle to achieve service of process in a cost-effective manner. In the interest of access to justice, the Court may also want to consider allowing email service for initiating proceedings where it would enhance the safety of individual. When revising the court rules, the Court should give special consideration to how email addresses will be safeguarded and how litigants may be provided with additional means to learn of case proceedings, given the increased sophistication of technologically-facilitated abuse.

IV. Conclusion and request for collaboration.

As currently drafted, the rules fail to seriously address the rights of victims and the safety implications and puts survivors at risk. The dire consequences at stake for survivors and victims, as well as all Michigan litigants, merit great care and judicious consideration. MCEDSV respectfully requests that the Court adopt the changes recommended here to the final rule.

MCEDSV would be pleased to answer any questions related to these comments.

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