Public Right to Access Remote Hearings
Legal Analysis

MCR 2.407 (civil proceedings) and MCR 6.006 (criminal proceedings) permit courts to use remote participation technology in a number of circumstances. MCR 2.407(B)(10) specifically requires that courts provide public access to proceedings held using videoconferencing technology "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." MCR 6.006(A)(1) provides that the use of videoconferencing technology in criminal cases is subject to MCR 2.407 unless otherwise provided. The State Court Administrative Office recommends livestreaming remote proceedings to provide public access.[1]

Criminal proceedings. The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to a public trial.[2] Additionally, under the First and Fourteenth Amendments, the public and the press have a right to access criminal court proceedings.[3] The right of public access includes access to jury selection, preliminary hearings, and the trial.[4] "The public-trial right also protects some interests that do not belong to the defendant," specifically, "the right to an open courtroom protects the rights of the public at large, and the press, as well as the rights of the accused."[5] Accordingly, "[t]he parties may not, by their mere agreement, empower a judge to exclude the public and press."[6]

However, the right to public proceedings is not absolute.[7] "A defendant's Sixth Amendment right to a public trial is limited, and there are circumstances that allow the closure of a courtroom during any stage of a criminal proceeding, even over a defendant's objection[.]"[8] "Though these cases should be rare, a judge may deprive a defendant of his right to an open courtroom by making proper factual findings in support of the decision to do so."[9]

The Michigan Supreme Court, quoting the standard set forth first in *Waller v Georgia*, 467 US 39, 48 (1984), explained the necessary findings for limiting public access:

> "[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure."[10]

Similar findings are required to limit the press and public's First and Fourteenth Amendment rights to access criminal proceedings.[11]

The United States Supreme Court has not distinguished between complete and partial closures of proceedings;[12] however, "[n]early all federal courts of appeals . . . have distinguished between the total closure of proceedings and situations in which a courtroom is only partially closed to certain spectators."[13] Similarly, the Michigan Court of Appeals held that "*Waller* addressed total closure of a suppression hearing and does not necessarily govern partial closures."[14] A partial closure does not have the same impact as a total closure; accordingly, "only a substantial, rather than a compelling, reason for the closure is necessary."[15] The determination of whether a closure is partial or total depends on who is excluded for the period in question and not on the duration of the closure itself.[16] "[A] total closure involves excluding all persons from the courtroom for some period while a partial closure involves excluding one or more, but not all, individuals for some period."[17] Accordingly, in the context of a remote proceeding, any termination of the livestream (even temporarily) without an alternative means for the public to view the hearing would constitute a complete closure, and the higher burden would apply.[18]

It is particularly important to make detailed factual findings in support of a decision to limit public access to court proceedings because a Sixth Amendment violation "can occur . . . simply because the trial court omits to make the proper findings before closing the courtroom, even if those findings might have been fully supported by the evidence."[19]

"[T]he denial of a right to a public trial is considered a structural error for which prejudice is presumed," and "[s]tructural errors require automatic reversal, despite the effect of the error on the trial's outcome."[20]

Civil proceedings. Michigan's court rules and statutes require that all court proceedings be open to the public unless otherwise provided by statute or court rule.[21] Further, while the United States Supreme Court has not considered whether the public right of access is constitutionally required in the context of civil trials, its constitutional analysis can be read to support the conclusion that the First and Fourteenth Amendments guarantee the public access to both criminal and civil proceedings.[22] Moreover, the Michigan Court Rules require a similar balancing test before limiting access by the public to *any* court proceeding;[23] specifically: "Except as otherwise provided by statute or court rule, a court may not limit access by the public to a court proceeding unless

> (a) a party has filed a written motion that identifies the specific interest to be protected, or the court *sua sponte* has identified a specific interest to be protected, and the court determines that the interest outweighs the right of access;

> (b) the denial of access is narrowly tailored to accommodate the interest to be protected, and there is no less restrictive means to adequately and effectively protect the interest; and
>
> (c) the court states on the record the specific reasons for the decision to limit access to the proceeding."[24]

MCR 8.116(D)(2) permits motions to set aside an order limiting access to a court proceeding and authorizes applications to appeal that decision. Further, a court entering an order limiting access to a proceeding that otherwise would be public must forward a copy of the order to the State Court Administrative Office.[25]

Note that MCR 8.116(D) acknowledges that there are statutory and court rule exceptions to its general rule requiring public access. Courts should follow any specific authority limiting public access to proceedings, and should apply any specific test for limiting access when one applies to a particular circumstance.[26]

Further, in light of the statutory requirement that sittings of every court be public, "parties may not, by their mere agreement, empower a judge to exclude the public and press."[27] "When a motion for closure is made, the judge should, at a minimum, take testimony at a hearing open to all interested parties, explore the constitutional and statutory validity of any proffered justifications for excluding the public and press from any portion of the trial, and determine whether any alternative and less restrictive mechanisms exist."[28]

Additional information. The State Court Administrative Office's table detailing the authority for the right to access court proceedings and the authority for limiting access to proceedings is available here.

Endnotes

1 See the State Court Administrative Office's *Michigan Trial Courts Virtual Courtroom Standards and Guidelines*, page 4 (accessible here: https://www.courts.michigan.gov/4a28cc/siteassets/covid/covid-19/vcr_stds.pdf).

2 The same right is reflected in Michigan's constitution. Const 1963, art 1, § 20. Public access to court proceedings is also required under the Michigan Court Rules and statutory authority. See MCR 8.116(D)(1); MCL 600.1420.

3 *Globe Newspaper Co v Superior Court for Norfolk Co*, 457 US 596, 603 (1982); *Richmond Newspapers, Inc v Virginia*, 448 US 555, 580 (1980). Similarly, the Michigan Supreme Court held that Michigan's constitution gives the public a right of access to criminal trials, *In re Midland Pub Co, Inc*, 420 Mich 148, 172 (1984), citing Const 1963, art 1, § 5, and the Court of Appeals extended that to preliminary examinations in *Booth Newspapers, Inc v Twelfth Dist Court Judge*, 172 Mich App 688, 692-693 (1988).

4 *Presley v Georgia*, 558 US 209, 213 (2010) (voir dire, Sixth Amendment); *Press-Enterprise Co v Superior Court of Calif*, 478 US 1, 10, 13 (1986) (preliminary hearing, First Amendment); *Press-Enterprise Co v Superior Court of Calif*, 464 US 501, 510-511 (1984) (voir dire, First Amendment); *Waller v Georgia*, 467 US 39, 46 (1984) (suppression hearing, Sixth Amendment); *People v Vaughn*, 491 Mich 642, 650-652 (2012) (jury selection, Sixth Amendment).

5 *Weaver v Massachusetts*, 582 US ___; 137 S Ct 1899, 1910 (2017).

6 *Detroit Free Press, Inc v Macomb Circuit Judge*, 405 Mich 544, 549 (1979).

7 In addition to the constitutional decisions discussed *infra*, note that other procedures allowing the limitation of public access under certain circumstances are set forth in Michigan's court rules and statutes; specific proceedings governed by specific authority should be analyzed under the applicable authority, keeping constitutional requirements in mind. See, e.g., MCL 766.9(1) (regarding closing preliminary examinations under certain circumstances involving specified offenses); MCL 712A.17(7) and MCR 3.925(A)(2) (testimony of child witness or victim). Note that Michigan law has identified particular types of proceedings that are always closed; for example in the criminal context, some proceedings involving youthful trainees, MCL 762.14(4). These examples are not exhaustive. Civil proceedings are discussed *infra*.

8 *Vaughn*, 491 Mich at 653.

9 *Weaver*, 582 US at ___; 137 S Ct at 1909. The Court elaborated, stating that *Waller* and *Presley* "teach that courtroom closure is to be avoided, but that there are some circumstances when it is justified. The problems that may be encountered by trial courts in deciding whether some closures are necessary, or even in deciding which members of the public should be admitted when seats are scarce, are difficult ones. . . . How best to manage these problems is not a topic discussed at length in any decision or commentary the Court has found." *Id.*

10 *Vaughn*, 491 Mich at 653 (quotation marks and citations omitted; alteration in original).

11 The defendant's conviction was reversed where "the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial," there are "various tested alternatives to satisfy the constitutional demands of fairness," and "[t]here was no suggestion that any problems with witnesses could not have been dealt with by their exclusion from the courtroom or their sequestration during the trial. Nor is there anything to indicate that sequestration of the jurors would not have guarded against their being subjected to any improper information. All of the alternatives admittedly present difficulties for trial courts, but none of the factors relied on here was beyond the realm of the manageable. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." *Richmond Newspapers, Inc*, 448 US at 580-581 (citations omitted).

12 The Court did acknowledge the distinction in a roundabout way in *Weaver*, 582 US at ___; 137 S Ct at 1906 (discussing the trial court's findings recognizing a violation of the right to a public trial resulting from closing the courtroom during jury selection in the context of an ineffective assistance of counsel claim and noting that the trial court found "the closure was full rather than partial (meaning that all members of the public, rather than only some of them, had been excluded from the courtroom")).

13 *United States v Simmons*, 797 F3d 409, 413 (CA 6, 2015). Decisions of lower federal courts are not binding on state courts, but may be considered persuasive. *People v Patton*, 325 Mich App 425, 434 n 1 (2018).

14 *People v Kline*, 197 Mich App 165, 169-170 (1992).

15 *Id.* at 170. In *Kline*, "the prosecutor requested closure during the complainant's testimony because of the nature of the testimony, the age and mental disability of the complainant, and the fact that complainant lived in a trauma center after the incident." *Id*. The trial court allowed the complainant's family to remain in the courtroom during her testimony, and noted that no one was present in the courtroom for defendant. *Id.* at 171. The Court of Appeals presumed that if the defendant's family and friends had been present, they would have been permitted to stay and held that because the complainant's family remained in the courtroom during the testimony, the closure was partial. *Id.* The Court then considered whether there was a substantial reason for the partial closure and whether it was narrowly tailored, and ultimately concluded remand was necessary in order for the trial court to "supplement the record with the facts and reasoning upon which the partial closure of the courtroom was based." *Id.* at 171-172. See also *People v Gibbs*, 299 Mich App 473, 481 (2013) and *People v Russell*, 297 Mich App 707, 720 (2012) (both considering whether *partial* closures violated the defendant's right to a public proceeding).

16 *Simmons*, 797 F3d at 41.

17 *Id*.

18 Note that this example involving the livestream is discussed in Background and Legal Standards – Public Right to Access Remote Hearings During COVID-19

Pandemic, Texas (May 2020). See *Simmons*, 797 F3d at 413 (defining partial closure); *Kline*, 197 Mich App at 170-171 (discussing partial closure).

19 *Weaver*, 582 US ___; 137 S Ct at 1909. This case and quote is suggestive that the statement in Background and Legal Standards – Public Right to Access Remote Hearings During COVID-19 Pandemic, Texas (May 2020) that courts have reversed judgments when a single less-restrictive solution existed but was not considered on the record is also applicable to Michigan courts. Similarly, the test requiring that "the closure must be no broader than necessary to protect" the interest identified that requires closure, articulated in numerous binding opinions, but specifically *Waller*, 467 US at 48, can be used to support the applicability of that statement to Michigan proceedings. See also *People v Veach*, ___ Mich ___ (2023) (reversing for a new trial where the trial court failed to "consider any reasonable alternatives to closure on the record," noting that "trial courts are required to consider alternatives to closure even when they are not offered by the parties," and emphasizing that "post-hoc justifications by an appellate court cannot be substituted for the trial court's findings, or lack thereof") (cleaned up).

20 *Simmons*, 797 F3d at 413. See also *Vaughn*, 491 Mich at 666 (characterizing the deprivation of a public trial as structural error). Note that automatic reversal on the basis of the structural error is applicable only on direct review. *Id.* at 664 (holding that forfeiture analysis applies to violation of public trial claims); *Weaver*, 582 US at ___; 137 S Ct at 1908, 1911 (requiring prejudice analysis when defense counsel fails to object to partial closure and defendant later brings an ineffective assistance of counsel claim; noting "a violation of the right to a public trial is structural error"). However, in the context of structural errors, a modified forfeiture analysis applies. *People v Davis*, 509 Mich 52, 74, 75 (2022) (holding "the existence of a forfeited structural error alone satisfies the third prong of the plain-error standard, and a defendant need not also show the occurrence of outcome-determinative prejudice," and "a forfeited structural error creates a formal presumption" that the error seriously affected the fairness, integrity, or public reputation of the proceedings that the prosecutor may rebut).

21 MCR 8.116(D)(1); MCL 600.1420.

22 See *Richmond Newspapers, Inc*, 448 US 555 (discussing the right of public access), and *Brown & Williamson Tobacco Corp v FTC*, 710 F2d 1165, 1178 (1983) (referring the *Richmond Newspapers*, and concluding "[t]he Supreme Court's analysis of the justification for access to the criminal courtroom apply as well to the civil trial"). See also *In re Midland Pub Co, Inc*, 420 Mich 148, 172 n 22 (1984) (noting that "the public's right of access at common law extended to both civil and criminal trials"), citing *Gannett Co, Inc v DePasquale*, 443 US 368, 384-386 (1979).

23 MCR 8.116 applies to "all courts established by the constitution and laws of Michigan, unless a rule otherwise provides." MCR 8.101.

24 MCR 8.116(D)(1). This test mirrors the four-part test articulated in *Waller*, 467 US at 48 and adopted by the Michigan Supreme Court in *Vaughn*, 491 Mich at 653 ("the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure").

25 MCR 8.116(D)(3).

26 For example, in guardianship proceedings the issue of incapacity may be determined at a closed hearing if requested by the individual alleged to be incapacitated or their legal counsel, MCL 700.5304(6); and all hearings held under the Safe Delivery of Newborns Law, MCL 712.1 *et seq.*, are closed to the public, MCL 712.2a(1). These examples are not exhaustive, and there are additional court rules and statutes that provide specific guidance regarding closure of certain proceedings to the public.

27 *Detroit Free Press v Macomb Circuit Judge*, 405 Mich 544, 549 (1979) (construing MCL 600.1420).

28 *Id*.