

Order

Michigan Supreme Court
Lansing, Michigan

January 8, 2020

Bridget M. McCormack,
Chief Justice

ADM File No. 2018-30

David F. Viviano,
Chief Justice Pro Tem

Amendment of Rule
8.115 of the Michigan
Court Rules

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 8.115 of the Michigan Court Rules is adopted, effective May 1, 2020.

[Additions to the text are indicated in underlining and
deleted text is shown by strikeover.]

Rule 8.115 Courtroom Decorum; Policy Regarding Use of Cell Phones or Other Portable Electronic Communication Devices

(A)-(B) [Unchanged.]

(C) Use of Establishment of a Policy Regarding Portable Electronic Communication Devices in a Courthouse.

- (1) Purpose. This rule specifies the permitted and prohibited uses of portable electronic devices in a courthouse. A court must use reasonable means to advise courthouse visitors of the provisions of this rule. Any allowed use of a portable electronic device under this rule is subject to the authority of a judge to terminate activity that is disruptive or distracting to a court proceeding, or that is otherwise contrary to the administration of justice. This rule does not modify or supersede the guidelines for media coverage of court proceedings set forth in AO No. 1989-1. A facility that contains a courtroom may determine use of electronic equipment in nonjudicial areas of the facility.
- (2) ~~The chief judge may establish a policy regarding the use of cell phones or other portable electronic communication devices within the court, except that no photographs may be taken of any jurors or witnesses, and no photographs may be taken inside any courtroom without permission of the court. The policy regarding the use of cell phones or other portable electronic communication devices shall be posted in a conspicuous location outside and~~

~~inside each courtroom. Failure to comply with this section or with the policy established by the chief judge may result in a fine, including confiscation of the device, incarceration, or both for contempt of court.~~ Definitions. The following definitions apply in this rule:

- (a) “portable electronic device” is a mobile device capable of electronically storing, accessing, or transmitting information. The term encompasses, among other things, a transportable computer of any size, including a tablet, a notebook, and a laptop; a smart phone, a cell phone, or other wireless phone; a camera and other audio or video recording devices; a personal digital assistant (PDA); other devices that provide internet access; and any similar items.
 - (b) A “courthouse” includes all areas within the exterior walls of a court building, or if the court does not occupy the entire building, that portion of the building used for the administration and operation of the court. A “courthouse” also includes areas outside a court building where a judge conducts an event concerning a court case.
 - (c) A “courtroom” includes the portion of a courthouse in which the actual proceedings take place.
- (3) Photography and audio or video recording, broadcasting, or live streaming. Except for requests for film or electronic media coverage of court proceedings as permitted under AO No. 1989-1, the following restrictions apply to photography, audio recording, video recording, broadcasting, or live streaming in a courthouse.
- (a) In a courtroom: 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.
 - (b) Outside a courtroom: In areas of a courthouse other than courtrooms, no one may photograph, record, broadcast, or live stream an individual without that individual’s prior express consent.
 - (c) Jurors: No one may photograph, record, broadcast, or live stream any juror or anyone called to the court for jury service.
 - (d) Local orders: By local administrative order, a court may adopt further reasonable limits on photography and audio or video recording or broadcasting in a courthouse that are not inconsistent with this rule.

- (4) Jurors and witnesses. The following restrictions apply to use of portable electronic devices by jurors, including prospective jurors, and by witnesses.
- (a) Jurors: Jurors must turn off their portable electronic devices while present in a courtroom. A court may order jurors to turn over to the court their portable electronic devices during deliberations. If so, the court must provide jurors with a phone number where they can be reached in case of an emergency during deliberations.
 - (b) Witnesses: A witness must silence any portable electronic device while in a courtroom, and may use a device while testifying only with permission of a judge.
- (5) Attorneys, parties, and members of the public. The following provisions apply to use of portable electronic devices in a courtroom by attorneys, parties, and members of the public.
- (a) Allowed uses: Attorneys, parties, and members of the public may use a portable electronic device in a courtroom to retrieve or to store information (including notetaking), to access the Internet, and to send and receive text messages or information. Attorneys, parties, and members of the public may use a portable electronic device to reproduce public court documents in a clerk's office as long as the device leaves no mark or impression on the document and does not unreasonably interfere with the operation of the clerk's office.
 - (b) Prohibited uses: Attorneys, parties, and members of the public must silence portable electronic devices while in the courtroom. A portable electronic device may not be used, without permission of the court, to make or to receive telephone calls or for any other audible function while court is in session. Portable electronic devices may not be used to communicate in any way with any courtroom participant including, but not limited to, a party, a witness, or juror at any time during any court proceedings. Additional prohibited uses related to photography, recording, and broadcasting are found in 8.115(C)(3) above.
- (6) Use of a portable electronic device outside a courtroom; limitations. Except as provided in paragraphs (3), (4) and (5) of this rule, a person may use a portable electronic device in a courthouse, subject to the authority of judges, Clerks of the Court, or court administrators to limit or terminate activity that is disruptive to court operations or that compromises courthouse security.

- (7) Violations of this rule. If these rules are violated, the presiding judge may confiscate the device for the remainder of the day or order that the phone be turned off and put away. Violations of this rule are punishable by appropriate sanctions up to and including contempt of court as determined in the discretion of the court.

Staff comment: The amendment of MCR 8.115, submitted by the Michigan State Planning Body, explicitly allows the use of cellular phones (as well as prohibits certain uses) in a courthouse. The rule makes cell phone and electronic device use policies consistent from one court to another, and broadens the ability of litigants to use their devices in support of their court cases when possible.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

MARKMAN, J. (*dissenting*). A better sense of priority by this Court in exercising its superintending authority over our judiciary would, in my judgment, be to accord less regard for the proposition that all persons attending our courtrooms must be allowed to remain in the possession of “smartphones” and to accord more regard for the proposition that criminal and civil trials taking place in these courtrooms must proceed in a manner ensuring that their participants-- judges, jurors, litigants, witnesses, attorneys, and court staff-- be accommodated as much as reasonably possible in the stressful circumstances under which each carries out responsibilities in the pursuit of justice under law. A further sense of priority would be to accord greater deference in this regard to the judgments of trial judges throughout this state who are principally charged with ensuring that such trials proceed in a fair, efficient, orderly, and serious-minded manner.

Available for this Court’s consideration have been at least the following options: (a) preserving the status quo by allowing local courts to set their own policies concerning phones, (b) requiring that local courts provide lockers or similar storage facilities for phones if their rules did not allow phones in courtrooms, (c) allowing jurors or other persons with specifically defined needs to bring phones into courtrooms, (d) establishing procedures by which persons could request special permission to bring a phone into a courtroom, (e) requiring that self-represented litigants be placed on an equal footing with attorneys in their ability to use phones in courtrooms, and (f) allowing all persons to bring phones into courtrooms. While I could support any of the first five options, I respectfully dissent from the Court’s selection of the final option. Such a rule-- allowing phones in courtrooms, and during virtually all judicial proceedings-- raises at least the following concerns.

First, it is not apparent that a “one-size-fits-all” approach best addresses the diverse role and character of courtrooms, and the distinctive configurations of courthouses, across this state. Allowing phones in a courtroom in a small county courthouse may pose

relatively few problems, as there may only be a small number of attendees during proceedings and many may be known to the presiding judge or court staff. However, courtrooms serving significantly larger populations, which may host busy and crowded motion hearings and have limited security staffs, are likely to face significantly greater challenges in regulating permissible and impermissible uses of phones set forth in the newly amended court rule. Additionally, while allowing phones in courtrooms during a pretrial civil hearing may raise only modest concerns, allowing phones in courtrooms during a criminal trial may raise considerably greater concerns, many of which would outweigh the “convenience benefits” to individual phone users. Given that local judges are obviously most attuned to the needs and circumstances of their communities and courtrooms, and given that it ultimately falls on them to ensure the integrity of proceedings within their courtrooms, local judges should continue to possess the authority and flexibility to regulate phone usage in these venues. The Michigan Probate Judges Association and the Michigan District Judges Association have understandably raised this same point.

Second, courtrooms are home to solemn proceedings demanding the fullest attention of participants in these proceedings. Allowing individuals in courtrooms to casually browse the internet, to text, or to play games, may introduce distractions into these proceedings or compromise the necessarily formal and focused atmosphere of the courtroom. Nor should judges and court staff periodically be required to divert their attention from matters at hand in order to maintain a watchful eye for phone misuse by any one of the many spectators. Even more particularly, jurors and witnesses, who may not be altogether comfortable in their assigned roles, should not have to keep an apprehensive eye out for surreptitious or inappropriate picture-taking or out-of-court communications.

Third, aside from the inevitable and distracting beeps, buzzes, and personalized ringtones coming from unsilenced phones, allowing phones in the courtroom risks undermining the orderliness and propriety of the judicial process, the integrity of which must be of the highest priority. Doubtlessly, this risk will be of a greater or lesser character as the case may be, but in light of the gravity of what is taking place, there should be no such risk at all. Just as a courtroom in which a criminal trial is taking place, for example, is not a place for conversation, for headphones, for political paraphernalia, or for signs or messages or buttons expressing attitudes on issues being litigated, it is also not a “place” or a “time” for all other forms of conduct that might be entirely proper under different circumstances.

And for this Court in the exercise of its superintending authority, the maintenance and preservation of the sanctity of the courtroom, and the process occurring therein, ought to be of paramount consideration, not the facilitation of access to what is a mere individual *convenience* that, in instances in which convenience rises to necessity, can be specifically and reasonably accommodated by the trial court. Simply put, however, when persons in the courtroom may use phones in the full range of their contemporary functions, there is

simply no practical means by which photographs can be prevented from being taken, especially photographs unnecessarily imposing upon the privacy or security interests of witnesses and jurors. See, e.g., State of Illinois, Circuit Court of Cook County, *Cell Phone & Electronic Communication Device Ban*, <<http://www.cookcountycourt.org/HOME/CellPhoneElectronicDeviceBan.aspx>> (select “Why is a ban necessary?”) (accessed January 2, 2020), quoting Cook Circuit Court Chief Judge Timothy C. Evans (“ ‘Of course the judges and I understand the ban presents an inconvenience for the public. I wish it were possible to just say to the people coming to court, “Please turn off your phones and devices.” The simple fact is we have tried that, and it does not work. People either ignore or refuse to comply with the judges’ directions; and the Sheriff’s staff has confirmed that their deputies cannot prevent the misuse of these devices in the courtrooms.’ ”) [<https://perma.cc/9XSU-SNM7>]. These photographs may then be used to gain information about witnesses and jurors in order to intimidate, compromise, or embarrass these persons, undermining in the process an entire justice system that is so dependent upon the cooperation and compliance of countless numbers of persons who would just as soon be elsewhere than in the courtroom. Indeed, the misuse of phones specifically contributed to the country’s second most-populated county-- Cook County, Illinois, home to Chicago-- restoring a ban on phones in courthouses where criminal matters are heard. Brobst, *The Modern Penny Dreadful: Public Prosecution and the Need for Litigation Privacy in a Digital Age*, 96 Neb L Rev 281, 304-305 (2017).

Moreover, members of the public simply cannot as a practical matter be entirely precluded from surreptitiously *recording* judicial proceedings, and one need look no further than the public comments to recognize that some proponents specifically *intend* this result, the recording of judicial proceedings of personal concern or interest. While some of these recordings may well shed useful light upon the judicial process, they are also susceptible to distortion and manipulation, a concern also raised by the Michigan District Judges Association.

Allowing texting from within the courtroom also risks the potential compromise of trial testimony itself as reflected by the incidence of persons in courtrooms who have texted information about evidence to witnesses sequestered outside the courtroom. See *id.*; see also Sellers, *The Circus Comes to Town: The Media and High-Profile Trials*, 71 Law & Contemp Probs 181, 192 (Autumn 2008) (recounting an instance in Detroit where sequestered witness in murder trial received texts from persons in the courtroom concerning the testimony of other witnesses). In short, the sanctity and security of our courtrooms have been preserved over the years in a variety of ways, while ensuring the fullest access by the media and the public to these places. There are good and legitimate reasons for why restrictions on even “nonsmartphones” have persisted in American, as well as for why jurors and witnesses and others should not be discomfited or made uneasy by

even the risk that abuse of a phone will occur in the courtroom. To restate, it is *this* concern-- ensuring the integrity and single-minded focus and orderliness of the judicial process-- that ought to be understood by this Court as its dominant consideration in reflecting upon the availability of phones in the courtroom. See, e.g., *Cell Phone & Electronic Communication Device Ban*, quoting Cook Circuit Chief Judge Evans (“ ‘It always must be remembered that a criminal case is a serious, solemn proceeding. A defendant’s liberty, or even life, is at stake. Often victims of crimes are in court. There should be no interruption of testimony by ringing phones and no texting of testimony to witnesses waiting to testify. Most important, no juror or witness should ever be afraid because a defendant’s supporters are taking their pictures.’ ”). Not until we are assured that the changes we adopt can proceed without eroding our present process, and without interfering with prerogatives best belonging to trial courts, should we engage as we so casually do today with the instant experiment.

In adopting a rule that allows phones in the courtroom, this Court gives greater regard to a modest increase in personal convenience than to the traditional sanctity of the courtroom and the security of jurors and witnesses. In pursuing this course, we also give inadequate consideration and deference to the opinions and concerns of the judges of this state who will be on the front lines of confronting the problems associated with these phones and who will be held responsible for enforcing what many of them recognize to be a practically unenforceable rule. I dissent and would adopt a considerably more measured rule.



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

January 8, 2020

A handwritten signature in black ink, appearing to read "Larry S. Royster", is written over a horizontal line.

Clerk