

MICHIGAN LEGAL HELP

Helping Michigan residents solve their legal problems

August 19, 2019

Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: Comments on ADM File No. 2018-30 – Proposed Amendment of MCR 8.115

Dear Supreme Court Clerk,

I am writing as the Director of the Michigan Legal Help Program to support the proposed rule related to the use of cell phones in courts.

The Michigan Legal Help Program supports the statewide Michigan Legal Help website and affiliated self-help centers which provide critical legal information, DIY tools, and referrals to self-represented litigants (SRLs). About 50% of the litigants appearing in Michigan's courts are self-represented, and the Michigan Legal Help website reaches nearly 45,000 individuals a week. Banning electronic devices for non-lawyers in courts is an issue that disproportionately harms self-represented litigants. As described in more detail below, these litigants are more likely to use a cell phone as their sole means of internet use, and to be caught off-guard and without significant evidence upon learning that they cannot bring the device into court. Self-represented litigants are also more likely to have low income, and therefore less likely to own cars and instead rely on family, friends, and rideshare services to access the courts. Limiting access to cell phones in court is also a safety issue for survivors of domestic violence and other crime, and can have negative consequences for people with disabilities.

There is virtually no change the courts could make that would be all benefit with no cost. There are potential challenges created by allowing electronic devices into courts, but the accessibility and safety benefits they provide far outweigh the costs. Several courts in Michigan and across the country have already made this calculation and reached the same conclusion.

At least nine states have court rules explicitly allowing cell phones in their state courts: Arizona,¹ Connecticut,² Georgia,³ Idaho,⁴ Kansas,⁵ Maryland,⁶ New Hampshire,⁷ New Jersey,⁸ and Vermont.⁹ Utah gives judges the power to limit the use of devices but encourages judges not to impose restrictions.¹⁰

Currently, at least 21 Michigan courthouses allow members of the public to bring their cell phones into the building. This includes courthouses housing multiple courts, so these 21 court buildings house 40 district, circuit, and probate courts. All 12 tribal courts in Michigan allow cell phones, as does the Detroit Immigration Court; the Western District of Michigan currently allows cell phones but requires them to be turned off, and is considering a rule modification which would allow them to remain on.¹¹ Of the 21 state courthouses that allow cell phones, they are not limited to urban or rural, or large or small caseloads. Wayne County, population of 1,753,616 allows cell phones into the Coleman A. Young Municipal building, which houses the circuit and probate court. Iron County, population of 11,124, allows cell phones into its courthouse, which houses a district, circuit, and probate court. Annual caseloads for individual courts that allow cell phones range from 109 (Iron County Probate Court) to 64,939 (Wayne County Circuit Court).¹² These varied courts have weighed the costs and benefits of allowing people to bring their phones to court, decided to allow them, and then continued to conduct business as usual. We urge this Court to change this rule to expand access across the state.

I. Self-Represented Litigants Need Cell Phones

Cell phones have become increasingly central to people's lives. Although it was once merely a convenience to have a computer in your pocket, they have become so common and expected that people rely on them for basic needs like transportation and safety. According to the Pew Research Center, 81% of American adults own a smartphone.¹³ Americans do not just own smartphones, they depend on them. 17% of American adults are smartphone-only internet users, meaning that they own a smartphone but do not have a computer at home with internet service.¹⁴ The proportion of smartphone-only internet users is even higher in groups with low income and lower levels of education.¹⁵ Despite all their other functions, smartphones do still work as telephones. The

¹Ariz Sup Ct R 122.1.

² State of Connecticut Judicial Branch, *The Use and Possession of Electronic Devices in Superior Court Facilities*, https://www.jud.ct.gov/ElectronicDevices_superior.pdf (accessed July 15, 2019).

³ Ga Unif Super Ct 22.

⁴ ICAR Rule 49.

⁵ Kan Sup Ct Rule 1002.

⁶ Md Rule 16-208.

⁷ Supreme Court of New Hampshire Order Concerning Use of Electronic Devices in the Courtroom, issued January 11, 2008, available at <<https://www.courts.state.nh.us/supreme/orders/order011108.pdf>> (accessed July 15, 2019).

⁸ New Jersey Courts, Guidelines on Electronic Devices in the Courtroom, effective February 2, 2015, available at <<https://www.njcourts.gov/public/assets/guidelines.pdf>> (accessed July 15, 2019).

⁹ Vermont Supreme Court Administrative Directive No. 28, issued November 12, 2008, available at <https://www.vermontjudiciary.org/sites/default/files/documents/Administrative_Directive_28.pdf> (accessed July 15, 2019).

¹⁰ Utah R Judicial Admin Rule 4-401.02.

¹¹ Memorandum, *Electronic Communication Devices in Courtroom*, Chief Judge Robert Jonker, issued August 13, 2019.

¹² 2016 caseload numbers come from the *Clerk Services Workgroup Memorandum*, internal SCAO document, available upon request.

¹³ *Mobile Fact Sheet*, Pew Research Center <<https://pewresearch-org-preprod.go-vip.co/pewinternet/fact-sheet/mobile/>> (accessed July 15, 2019).

¹⁴ *Id.*

¹⁵ *Id.*

rise in smartphones has led to a huge decline in the availability of other means of communication. In 1999 there were about 2 million phone booths in the United States, but only about 100,000 remain today.¹⁶

People have become accustomed to using their phones to keep their appointments, to store important information and documents, stay in touch with work and family, and to arrange transportation. While it might have been common in the past to carry paper planners and to bring hard copies of important documents to appointments, smartphones have largely eliminated the need for these things. With only about 25% of Michigan courts listing cell phone policies on their website and many self-represented litigants being inexperienced in court, it is no wonder that in a world where you can send a text message from an airplane people are surprised to learn that they will not be able to bring their device into the building with them.

A. Physical Access to the Courts

Michigan does not have a widely available, robust public transit system. Litigants without access to a car must find public transit if it is available in their area, get a ride from someone they know, or use a cab or rideshare. Barriers to accessing rides disproportionately impact people with low income and people with disabilities.

Given the limitations of public transit, it is not a viable option for many court users, and so some litigants get a ride to court from someone they know. It is usually impossible to know how long a court date could take, and so without a cell phone people have no way to call and tell their ride when they are done. People who do not have experience in court often assume that a 9:00 court date means that they will be called at that time, handle their case, and go home. If their ride returns and the litigant is still inside the courtroom, they might be stuck without a ride and without means to contact a new one. When these litigants arrive to court, many of them will learn that they cannot bring the cell phone they needed to get to court (and will need to get home) into the building. Few courts have a place to store phones and so litigants either need to leave their phones outside the courthouse, or keep their phone and miss court. Some litigants choose to hide their phones in the bushes outside the courthouse, hoping it will still be there when they are finished.¹⁷ Having to choose between possibly losing their lifeline device and accessing the courts is not a choice one should have to make.

Even in places where it is theoretically possible to use public transit to reach the court, buses are infrequent and many people are unfamiliar with using the systems to travel to court. The tool that many people turn to when using unfamiliar and at times unreliable public transit is a smartphone equipped with Google Maps, which gives door to door transit direction. As with court participants who get a ride to court, these court participants arrive at the building with a phone but with no car to safely store it.

Finally, many people use rideshare services, such as Uber or Lyft, to get to court. These are services that wholly rely on smartphones for access. Users have an account with one or both services and use their phone to order and pay for a cab-like service. Litigants are not able to use these ridesharing services if they do not bring their phone to court. When they get dropped off and have nowhere to leave their phone, litigants will need to choose

¹⁶ *In the Matter of Modernization of Payphone Compensation Rules*, FCC Report & Order (FCC-18-21), issued February 22, 2018, available at <<https://www.fcc.gov/document/fcc-eliminates-outdated-payphone-rules-0>> [scroll down to “Files,” click any of the options to download next to “Report and Order”] (accessed July 15, 2019).

¹⁷ See, e.g., Badger and Bui, *In 83 Million Eviction Records, a Sweeping and Intimate new Look at Housing in America*, New York Times (April 7, 2018), available at <<https://www.nytimes.com/interactive/2018/04/07/upshot/millions-of-eviction-records-a-sweeping-new-look-at-housing-in-america.html>> (accessed July 15, 2019).

either to hide their phone somewhere outside of the court, or to go home and miss their court date. There are very similar limitations related to using a cab.

One commenter on this rule shared his experience with these barriers in an e-mail. He explained that he is legally blind and partly paralyzed, and used Uber on his phone to get to court for jury duty. When he arrived at court he found out he could not bring his phone inside and that there was nowhere to store his phone. He left court and missed jury duty because of the restriction on cell phones.¹⁸

B. Smartphones Make Courts Accessible for People with Disabilities

Smartphones have become a reliable way for some people with disabilities to make public areas more accessible. As discussed in the previous section, some disabilities can prevent people from safely driving themselves to court. Ridesharing services accessed via smart phone allow people to get from place to place without needing to drive themselves.

Some people with hearing loss use hearing aids, and hearing aids are increasingly smartphone-assisted devices. Many hearing aids come with an app to control volume and to adjust for varying types and volumes of background noise.¹⁹ While these hearing aids would still work without an app, a user who is accustomed to the automation that comes with a smartphone assisted device may be left fumbling with manual controls in the courtroom. Similarly, some people with diabetes rely on smartphone apps to monitor their blood sugar and alert them when they are low.

A request for a reasonable accommodation may work in some circumstances, but this assumes that people know they can ask for one, and know that they need one before stepping into the building. As a practical matter, court cell phone policies are enforced at the door by security. A person with a disability who needs a phone to enter the building and knows to ask for an accommodation is not likely to be successful if they request the accommodation in person, in line, from a security officer.

C. Cell Phones Store Important Evidence

As smart phones have become ubiquitous, so have electronic transactions. Electronic signatures, electronic documents, e-mail, and communication by text message have all become central to the way people communicate and conduct business. The most common methods of communication are some of the most important pieces of evidence in court cases.

When self-represented litigants come to court asking for a personal protection order or trying to defend an eviction, they prepare by reviewing the evidence they have to support their claims. A person seeking a

¹⁸ Anonymous comment on proposed MCR 8.115, submitted May 16, 2019, available at <https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Comments%20library%204%20recvd%20from%20Sept%202017%20and%20beyond/2018-30_2019-05-16_CommentFromAnonymous.pdf> (accessed July 17, 2019).

¹⁹ See, e.g., Saltzman, *Hearing aids are getting better with Bluetooth and apps just as more Americans need them*, USA Today (July 20, 2018), available at <<https://www.usatoday.com/story/tech/columnist/saltzman/2018/07/20/hearing-aids-getting-better-bluetooth-and-apps/796632002/>> (accessed July 17, 2019); Comment of Barb Byrum, Ingham County Clerk, on proposed MCR 8.115, submitted May 21, 2019, available at <https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Comments%20library%204%20recvd%20from%20Sept%202017%20and%20beyond/2018-30_2019-05-21_CommentFromClerkByrum.pdf> (accessed July 17, 2019).

protection order could have threatening text messages or voicemails from an abusive partner. A tenant might have a copy of their lease store in an e-mail message, a photo of a dangerous condition in their home, or a call history proving that they attempted to ask the landlord to repair damages. While it is possible, in theory, to obtain documentation of this evidence on paper, a person who does not have experience in court and does not know that cell phones are banned would have no reason to go through the trouble of getting paper phone records when they expect to show the judge the information directly from their phone. Even attorneys struggle with the technology needed to get evidence from a phone to paper, but they typically don't need to do it.

Perhaps the most troubling impact of accessing evidence stored on cell phones is that people with and without attorneys have different rules, and different levels of access to evidence. Attorneys are allowed to bring their devices into almost any courthouse. It is not uncommon for attorneys to take and hold their clients' cell phones through security, returning them to their clients in the building.²⁰ Litigants without lawyers are already at a distinct disadvantage compared to people with lawyers, and cell phone policies in courts add to the disparity. This is not just a convenience issue. One commenter on this court rule reports that he has seen courts allow represented parties to present evidence accessed from their electronic devices, while self-represented parties are denied access to this evidence because they are not allowed to bring their devices into court.²¹

D. People Need Phones to e-File and Set Court Dates

The State Court Administrative Office is in the midst of implementing statewide, mandatory e-Filing. As part of this process, litigants presenting to the court clerk to file will be directed to computer workstations, presumably inside the court building, to register for MiFILE and to e-File their documents. Prohibiting cell phones creates barriers to e-Filing access for self-represented litigants. MiFILE requires checking one's personal e-mail to create an account, and notifications from MiFILE are delivered either by e-mail or text message. Many courts have policies in place prohibiting users from checking their e-mail on court computers. Some e-mail platforms require 2-factor authentication via text message when logging in from a new device, which would mean some litigants will not be able create a MiFile account from a court workstation even if the court allows people to check their e-mail from court computers. If users choose to receive MiFILE notifications by text message, they need to respond to a confirmation text message before their account will be setup to allow this.

Banning cell phones from courts creates a significant barrier to registering for e-Filing, and for accessing one's legal file once it is all online. With e-service, litigants will no longer get paper copies of documents, so if they want to refer to their pleadings or pleadings of opposing counsel while in court, they will have to find a way to print (and pay for) copies of court documents before they go to court, or they will be at a serious disadvantage while in court because they have no access to the court record. Courts cannot simultaneously move toward an all-electronic notice and filing system while prohibiting litigants from having access in court to any device from which they can see their court file. This also puts self-represented litigants at an additional disadvantage compared to parties with lawyers. While lawyers will have easy access to an entire case file from the courtroom, self-represented litigants will not have the same access to their records during court proceedings.

²⁰ Comment of Benjamin King on proposed MCR 8.115, submitted July 1, 2019, available at <https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Comments%20library%204%20recvd%20from%20Sept%202017%20and%20beyond/2018-30_2019-07-01_CommentFromAttnyBenjaminKing.pdf> (accessed July 17, 2019).

²¹ *Id.*

Both while filing documents and attending court proceedings, people are also asked to schedule future court dates. As previously mentioned, many people keep their schedules on their phones and if they do not expect to lose access to their phone and do not know they will need to know their availability, may need to schedule an important court date based on their best guess of their availability.

E. Phones Help People to Reach Support and Stay Safe During Traumatic Events

Court can be a traumatic experience. People attending court might find out they are about to lose their home, or custody of their children, or be handed a judgment they cannot pay. Litigants in personal protection cases are sharing intimate details about why they fear for their safety, often as a result of violence from a family member or someone they cared for or trusted. Having a phone to call or text a support person before or after a court proceeding can be extremely important to people dealing with these kinds of life changing difficulties.

Outside of emotional support, cell phones provide people at risk of physical violence with a literal lifeline as they travel to and from court. Victims of violence can change the place where they live, change their phone numbers, or stay in a shelter with a confidential location, but court is the one time and place where an abuser or stalker knows a victim will physically appear. The walk to and from the front door of the court can be a dangerous one, and it is unsafe to ask victims of violence who are seeking the court's protection to do this without any means of calling for help.

II. Addressing Concerns Related to Electronic Devices in Courts

Many of the comments opposing this rule have cited safety concerns as their primary objection. These comments range from actual experiences to hypothetical scenarios. The biggest challenge posed by allowing cell phones into courts is the expanded ability for the public to record, by audio or video, testimony taking place in court. However, we believe the proposed rule addresses these concerns appropriately, and that it is unwise to create public policy limiting access to the court for thousands of people based on possible bad/illegal/intentional actions by a small number of people.

A. Safety Concerns Related to Cell Phone Use in Courts

Some of the comments opposing the rule due to safety concerns focus on witnesses, victims, or undercover officers being recorded in court. Although it is worth considering this possibility in setting up security protocols in courts, it ultimately should not be the deciding factor in rejecting the proposed rule changes. On balance, it is extremely likely to be more harmful to victims of crime to travel to and from court without a cell phone, than to plan around a very sophisticated bad actor who might attempt to use a cell phone to harm someone.

First and most importantly, the court rules already have procedures in place to protect particularly sensitive people and information from public disclosure. MCR 8.116(D) provides that although court proceedings are generally open to the public, the court may restrict access either on motion or sua sponte where an interest to be protected outweighs the right of access to the courts, so long as the restriction is narrowly tailored and there are not less restrictive means to protect the interest. In a case where an undercover officer needs to maintain cover but also needs to appear in court, restricting cell phones will not protect that person's identity if the public can come to the courtroom and watch the testimony. 8.116(D), on the other hand, provides a much better suited

means of protecting an officer's identity by closing the proceeding. The same protections could be used in other sensitive cases that some comments have highlighted, such as gang or militia cases.

Second, the proposed rule allowing electronic devices has contemplated the possibility of recording, and places restrictions on phone use that mitigate the risks of recording. The rule specifically prohibits taking photos, or making audio or video recordings in court. Outside the courtrooms recordings are only allowed with a person's prior express consent. The rule gives discretion to the judge in imposing appropriate sanctions for violators.

Proceedings are open to the public and transcripts (audio and/or video) can easily be ordered. People making recordings would be putting themselves at risk of sanction by the court to obtain material that is already publically available, or that anyone from the public would have been able to come into the courtroom and see in person. While this should be prevented as much as possible and punished as a serious violation of the court rules, the potential risk of harm from this act is far less than the risk that is already imposed on victims of crime going to and from court without a way to call for help. This is not to mention the victims of violence who struggle to prove claims because their evidence is stored on a device that is not allowed inside the building. The potential for harm from a recording needs to be balanced against the risks of harm that survivors of domestic violence and other crime are already facing in Michigan courts every day by having their devices prohibited.

One comment suggests that electronic devices had been banned from courthouses because they were used as "explosive devices and other types of weapons," and also cites the possibility of guns that look like cell phones.²² Both the 'cell phone gun' and the 'cell phone explosive device' comments are raised without any scientific backing or examples of where this problem has occurred. In theory, a criminal who is intelligent enough and committed enough could shape almost any household object to serve as a weapon—e.g. a shoe,²³ purse,²⁴ or newspaper.²⁵ Virtually every court has security and all security personnel should be trained to recognize the latest developments in hidden weapons, including training on how to spot the differences between a cell phone and a gun that is shaped like a cell phone. But we should not frustrate full access to the court system for thousands of court users based on those fears.

In summary, we believe that current court security systems and the rules authorizing them—plus the additional safeguards in the proposed rule—provide sufficient tools for courts to remain safe. We believe that court security systems must be holistic and reflect the relative risks related to different types of proceedings. We think a blanket ban on cell phones adds almost nothing to court security but imposes a very significant cost on the court system and court users by limiting access to the courts.

B. Using Phones to Photograph Court Documents

²² Comment of Katrina Gibbs, 67-5 District Court, on proposed MCR 8.115, submitted May 20, 2019, available at <https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Comments%20library%204%20recvd%20from%20Sept%202017%20and%20beyond/2018-30_2019-05-20_CommentFromKatriniaGibbs.pdf> (accessed August 5, 2019).

²³ *Coin Purse That Doubles as a Self-Defense Weapon*, Odditymall <<https://odditymall.com/coin-purse-self-defense-weapon>> (accessed August 5, 2019).

²⁴ See, e.g., Harrison, *High heels used in hundreds of violent attacks across the UK*, The Telegraph (March 20, 2016), available at <<https://www.telegraph.co.uk/news/12199681/High-heels-used-in-hundreds-of-violent-attacks-across-the-UK.html>> (accessed August 5, 2019)

²⁵ *Millwall brick*, Wikipedia, < https://en.wikipedia.org/wiki/Millwall_brick> (accessed August 5, 2019).

A number of comments on the court rules disagree with the portion of the rule that allows people to copy court documents by using their phone to take photos of documents.²⁶ The commenters are concerned that this will cut into revenue. Michigan Legal Help recognizes that clerks perform a valuable service to everyone using the courts, and are a particularly vital resource to self-represented litigants who often get help from clerks when they come to court to ask for procedural guidance.

Under the current court rules, clerks are not allowed to charge fees to retrieve or inspect case documents.²⁷ They may charge fees for reproductions, but only for the actual cost of labor, supplies, and use of the system.²⁸ If the amount of labor used for record retrieval is significant, MLH supports a rule that leaves to a court's discretion, or removes, the portion of proposed 8.115(C)(5)(a) that says "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."

III. The Benefits of Cell Phones in Courts Outweigh the Theoretical Harms

The status quo in most Michigan courts is to ban cell phones for everyone except attorneys, but we do not want to see inertia prevent a change that would ultimately result in increased safety and access to justice for litigants. As we have addressed, new challenges will certainly arise when cell phones come into courts. Nevertheless, we encourage the Court not to ignore the significant challenges and inequities that are already imposed on litigants who are barred from entering court buildings with electronic devices.

Respectfully submitted,

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Director, Michigan Legal Help

²⁶ See, e.g., Comment of Barb Byrum, Ingham County Clerk, on proposed MCR 8.115, submitted May 21, 2019, available at <https://courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Comments%20library%20%20recvd%20from%20Sept%202017%20and%20beyond/2018-30_2019-05-21_CommentFromClerkByrum.pdf> (accessed July 17, 2019).

²⁷ MCR 8.119(J)(1).

²⁸ MCR 8.119(J)(4).