



MICHIGAN TRIAL COURTS: LESSONS LEARNED FROM THE PANDEMIC OF 2020-2021

Findings, Best Practices, and Recommendations

State Court Administrative Office

Lessons Learned Committee

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Committee Members

Hon. T. J. Ackert, Co-Chair
17th Circuit Court, Kent County

Hon. Patricia P. Fresard, Co-Chair
3rd Circuit Court, Wayne County

Ms. Jennifer Grieco
Trial Attorney, Oakland County

Mr. Shaheen Imami
Probate Attorney, Oakland County

Ms. Brandy Robinson
Supervising Attorney,
Neighborhood Defender Service of Detroit

Mr. Matthew Wiese
Prosecuting Attorney, Marquette County

State Court Administrative Office Staff

Mr. Tom Boyd
State Court Administrator

Mr. Paul Paruk
Region 1 Administrator

Ms. Tanya Morrow
Management Analyst, Juvenile

Mr. John Ort
MSC Security and Emergency Management
Director (Retired)

Contributing Members and Stakeholders

The Committee prepared this report based on information compiled from the review of local administrative orders, policies, and information generated from interviews and/or surveys conducted by the Committee, the State Court Administrative Office, and the State Bar of Michigan of:

- Michigan Supreme Court Security & Emergency Management
- American Board of Trial Advocates – Michigan
- Michigan Defense Trial Counsel
- Prosecuting Attorneys Association of Michigan
- Criminal Defense Attorneys of Michigan
- Michigan Sheriffs' Association
- Tribal State Federal Judicial Forum
- Attorneys throughout the state
- Judges, magistrates, referees, court administrators, clerks, registers, friends of the court, probation staff, mediation clerks, prosecutors, and public defenders from a diverse selection of courts from counties, including Berrien, Calhoun, Cass, Cheboygan, Chippewa, Genesee, Gogebic, Iron, Kent, Lapeer, Lenawee, Mason, Marquette, Mecosta, Oakland, Saginaw, St. Clair, Tuscola, Van Buren, and Wayne.

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Introduction

The Michigan Supreme Court (Court) aptly stated, “Michigan has never faced a challenge like COVID-19.”¹ Our judicial system managed the shutdown of court buildings, coordination of essential workers, redistribution of resources to maintain services, and development of virtual courtrooms, while implementing ever-evolving standards to maintain the safety of the public and court staff, and reducing the risk of spreading the virus. While the court system might fairly be perceived as tradition laden, our courts, nonetheless, adapted quickly to the pandemic by incorporating technology and modified procedures that in January 2020 would have been considered impossible. As of April 2021, Michigan trial courts had logged more than 3 million hours of Zoom® hearings and are considered one of the leaders in the country.

The Lessons Learned Committee was formed in May of 2020 and charged with assessing the experiences of our justice system during the pandemic, from implementing emergency procedures following the issuance of the Governor’s Executive Order and the Court’s Administrative Orders, to the efforts undertaken to continue operations for an indefinite period with judges and court staff working remotely, to the modification of hearing procedures to accommodate a virtual courtroom. The Committee considered what court users reported they struggled with throughout the pandemic; what worked and what didn’t work well; and recommendations for the future of the courts based on our shared experience.

Sophocles said, “I have no desire to suffer twice, in reality and then in hindsight.” This report is not intended to inflict more suffering, but to critically assess the work the courts performed during the pandemic, the difficulties experienced during the transition to a remote workforce and virtual courtroom, and what the judicial system should consider to manage our courts more efficiently in the future.

Many counties, and the circuit, district, and probate courts located within those counties, encountered both common and unique experiences. This report does not attempt to recount or quantify every disclosure, but highlights the common experiences that are representative of what shaped our justice system in this pandemic. Every court tried its best, and many courts collaborated with other courts and stakeholders to help direct and lead a path through the challenges. Although many of the issues and struggles that arose during the pandemic overlap different operations of the courts, this report focuses on the following:

- emergency preparedness and response,
- continuity of operations and planning for return to full capacity,
- the virtual courtroom and remote proceedings, and
- a review of criminal procedure issues arising as the courts begin to tackle the backlog of criminal cases.

The COVID-19 Emergency: Preparedness and Response

Judge James Alexander, Oakland County Circuit Court (now retired), best summarized the Michigan trial courts’ level of preparedness for the pandemic and initial shutdown orders: “Anyone who tells you they were prepared for this is either lying or living in Oz!” Of the courts

¹ [Michigan Supreme Court, Return to Full Capacity: COVID-19 Guidelines for Michigan's Judiciary](#)

surveyed, only 24 percent had a documented emergency plan or continuity of operations plan in place prior to the pandemic. Those plans did not anticipate a complete shutdown of services; rather, they prescribed the continuation of operations with reduced level of services either in a different location or by combining all court operations at a central location. The idea of remote operations with nearly all personnel working from home had not previously been considered by any court in the state.

Interestingly, prior to the pandemic some courts had consulted with their local health department regarding the impact of an infectious disease/epidemic outbreak on the justice system and others were experimenting with Zoom® for certain limited hearings.² However, these courts admit their actions were initiated not in anticipation of the shut-down, but as a result of their desire to evaluate and assess all aspects of their court operations. In that regard, they were “lucky” to be in a better position than most courts to quickly pivot into a virtual courtroom environment because of their entrepreneurial approach to solutions.

Of those courts with an emergency plan in place prior to March 2020, 83 percent identified essential workers, and those workers had been fully briefed and informed of the emergency plan. Beyond the identification of essential workers, the preparedness for and implementation of emergency protocols were primarily managed day-to-day to address immediate needs. The more coordinated a court’s operations were among administration, judges, magistrates, referees, clerks, registers, staff, prosecutors, public defenders, city/county operations, sheriffs, jails, friends of the court (FOC), bar associations, Michigan Department of Health and Human Services (MDHHS), local health departments, and other key stakeholders, the more nimble and responsive the court – and the more positive the experience for those using and relying on the courts.

The Difficulties Experienced by Courts Implementing Emergency Protocols

On March 10, 2020, Governor Whitmer declared a state of emergency to address the COVID-19 pandemic.³ On March 15, 2020, the Court authorized trial courts to “implement emergency measures to reduce the risk of transmission of the virus and provide the greatest protection possible to those who work and have business in our courts.”⁴ By April 1, 2020, Michigan had confirmed 9,334 cases of COVID-19 and 337 deaths, with thousands presumed infected but not tested. By May 2020, the confirmed cases within the state rose to 42,356, resulting in 3,866 deaths from the disease.⁵ During this rapid spread of the disease, the metro-Detroit area was the epicenter in Michigan, and rural areas such as Northern Michigan, the Thumb, and the Upper Peninsula had minimal, if any, reported cases. The trial courts were left trying to decipher what

² SCAO had secured Zoom® licenses in May of 2019 and began working with courts to expand the use of virtual proceedings to compliment the Polycom® videoconferencing system or serve as a substitute. SCAO was ahead of the curve in 2019 in moving to expand remote hearing capabilities. The use of Polycom units in several Michigan courts over the past decade played an important role in the transition to remote hearings in many jurisdictions. The majority of the Polycom units were funded by the state (SCAO and MDOC).

³ [Executive Order 2020-4](#).

⁴ [MSC Administrative Order No. 2020-1](#).

⁵ [Executive Order 2020-151](#).

“emergency measures” should be implemented for their location and how to manage personnel, budgets, and the docket.

Trial courts were immediately faced with whether to adjourn matters and for how long, and how to quickly and efficiently communicate adjournments to litigants, attorneys, and jails. Additionally, courts began to assess their capacity to conduct videoconferencing hearings, whether and how that capacity could be expanded, and what employees were necessary to manage the video sessions of the court.

The Court’s March 15, 2020 administrative order⁶ provided trial courts with the authority to:

- Adjourn any civil matters and any criminal matters where the defendant is not in custody; where a criminal defendant is in custody, trial courts should expand the use of videoconferencing when the defendant consents;
- Maximize the use of technology in civil cases to enable and/or require parties to participate remotely and waive any fees currently charged to allow parties to participate in remotely;
- Reduce the number of cases set to be heard at any given time to limit the number of people gathered in entranceways, lobbies, corridors, or courtrooms;
- Maximize the use of technology to facilitate electronic filing and service to reduce the need for in-person filing and service;
- Waive strict adherence to any adjournment rules or policies and administrative and procedural time requirements, wherever possible;
- Coordinate with local probation departments to allow discretion in monitoring probationers’ ability to comply with conditions without the need for amended orders of probation;
- Take any other reasonable measures to avoid exposing participants in court proceedings, court employees, and the general public to the COVID-19 virus;
- Take into careful consideration public health factors arising out of the present state of emergency: a) in making pretrial release decisions, including in determining any conditions of release, b) in determining any conditions of probation; and
- If a chief judge or the court’s funding unit decided to close the court building to the public, then the court must provide the State Court Administrative Office (SCAO) with the court’s plan to continue critical services.⁷

Shortly thereafter, the Court directed trial courts “to the extent possible and consistent with constitutional and statutory rights” to conduct hearings remotely or adjourn all non-emergency or out-of-custody criminal matters to April 3, 2020.⁸ Also, the courts were directed to limit access to the courtrooms and other spaces to no more than 10 people, including staff, and to practice social distancing.⁹ At that time, it was not clear how long the pandemic would last, but the trial courts faced a prolonged period of uncertainty.

⁶ [MSC Administrative Order No. 2020-1](#), March 15, 2020

⁷ Id.

⁸ [MSC Administrative Order No. 2020-2](#), March 18, 2020.

⁹ [MSC Administrative Order No. 2020-2](#), March 18, 2020.

Identifying Essential Services AND Essential Workers

The Court's March 18, 2020 administrative order helped courts identify those hearings that were considered essential and those that could be adjourned. The Court continued to update administrative orders and by May 2020, SCAO developed a Remote Participation Chart.

Initially, most courts adjourned all hearings except emergency matters (i.e., personal protection orders, in-custody criminal proceedings, certain child protective hearings, domestic relations matters involving ex parte requests, involuntary mental health treatment, emergency matters involving guardians). During this initial period of adjournments, many courts directed “non-essential” workers to remain home pending further instruction while the courts attempted to identify what services were essential, how to provide those services, and the personnel necessary to provide the services.

The courts identified essential hearings that could be conducted remotely and those requiring in-person hearings. The ability to make these decisions quickly and efficiently was dependent upon whether a court had prior capacity to work remotely and to accept pleadings online or by e-mail/fax. If a court had remote capacity, then it was able to use those employees familiar with remote hearings to manage the hearings. Likewise, if a court was able to accept pleadings online through the OnBase program or by e-mail filings, it had the option to close most, if not all, in-person filing in the clerk's office, thereby reducing the number of employees needed in the building. Courts that did not have electronic capacity were left to coordinate a filing system based on few employees while limiting the public access to the courts, which slowed the process of filing and managing the docket system. Additionally, clerks' and registers' offices were required to coordinate filings and hearing schedules with the judges' offices, but those offices were – for many – trying to manage remote hearings for the first time; all of which significantly slowed the process.

The courts struggled to identify and coordinate essential workers. As noted, of the small percentage of courts that had an emergency plan in place in March 2020, 83 percent of those identified essential workers. Unfortunately, many courts quickly learned they were neither structured for nor equipped to have employees work remotely. Trial courts faced the immediacy of having to take actions without adequate support staff, technology, and fully vetting the practicality of the procedures to be utilized.

A remote hearing requires not only court staff, judges, magistrates, and referees to be familiar with remote hearing procedures, but also those involved in the hearing, including litigants, prosecutors, public defenders, retained attorneys, probation officers, and witnesses. Self-represented litigants, already unfamiliar with the standard procedures of the court, grappled with the process of remote connection to the court. The courts had to develop protocols and tutorials to educate the users of the court's remote platform; a role the courts had not typically served pre-pandemic. The courts were not initially equipped to do these tasks and improvised “on the fly.”¹⁰

¹⁰ In the summer of 2020, SCAO developed a toolkit document entitled [Guidance on Conducting Remote Hearings with Self-Represented Litigants](#). The toolkit included practice tips learned from various courts around the state, along with resources shared from other sources.

Various courts – including those from small to large counties – discovered their IT departments would not support the Zoom® format, notwithstanding that SCAO had secured licenses for the platforms. The difficulties in managing the remote technology are addressed later in this report.

Even though the courts wanted to offer remote hearings, the essential workers were often not equipped with the hardware to connect to the court network remotely, and even if they could connect, their Internet connections were weak, especially in rural areas. In some courts, the judges loaned personal laptops or tablets to employees so that the employees could work from home while they waited for the county funding source to approve acquisition of equipment necessary to support employee remote connectivity to the court system.

Even when judges and staff had personal computers at home or in the office, the computers typically were not equipped with microphones and/or cameras. The courts had to secure resources to purchase the equipment necessary to work remotely and conduct remote proceedings. The courts faced budget constraints or reluctance of a funding unit to approve expenditures because the funding unit did not understand the need for remote access. Several courts negotiated discounts with local box stores to purchase 10 or more camera/microphone sets every 10 to 20 days to equip personnel.

At the same time, courts attempted to coordinate emergency planning with stakeholder groups, including prosecutors, public defenders, sheriffs, jails, probation offices, FOC, DHHS, mental health providers, and county boards of commissioners. These efforts were almost immediately hampered for two reasons:

- 1) The stakeholder groups were making the same emergency decisions for themselves and were not readily available; and,
- 2) In those counties where relationships were strained due to lack of communication or other intragovernmental conflicts, the communication lines were not well defined or open.

Courts struggled to prioritize criminal cases for in-person hearings and the amount of staff necessary to manage the hearings. In some counties, hearings were delayed because prosecutors and public defenders could not agree on procedures.

Some courts initially identified one or two “emergency” judges to handle essential cases within the courthouse. However, the plan proved unmanageable in the mid-sized to larger counties because the case volume was too large in both civil and criminal dockets. Judges were required to hear the essential cases to maintain the dockets, and to consider remote virtual hearings by Zoom® or Polycom®. Probate judges remained with their primary docket, focused on essential hearings, and adjourned most hearings until the later part of April or early May 2020.

When courts identified necessary judges and essential hearings, hearings were often delayed because the processing of pleadings was slowed in the county clerk’s office. Courts accepting online filing of pleadings could process the records more quickly than courts that only permitted in-person or mail filings. Also, clerks’ offices were working with reduced staff and limiting the number of persons who could enter the office to file documents; these procedures slowed the typical processing time and made it difficult to coordinate with judicial staff the time required to permit processing of the pleadings before scheduling hearings. These delays, while annoying to standard hearings, resulted in critical delays in emergency hearings such as personal protection orders, child protective hearings, guardianships, and child custody emergencies.

The courts were not immune from the political divisions experienced throughout the country regarding the nature of the pandemic and its health risk. Whether a court shut-down or remained open could, in some measure, depend on where the court was located and whether a funding source directed a shut-down. Courts in much of the Upper Peninsula and some regions of the upper Lower Peninsula continued to operate, but limited the number of people who could enter the court to file pleadings, review files, pay fines, or appear in court. Courts in more urban areas initially shut down all operations except for emergency hearings. This status lasted between two to four weeks.

Some courts were directed to shut down by their county funding source. In these instances, the county identified the essential operations to be maintained within the county and didn't recognize the need for the courts to be open. Courts were required to explain to the county boards or managers that the courts were the third branch of government and that the Michigan Supreme Court expected emergency and essential hearings to proceed even if personnel were working from home.

The need to communicate with and secure approval from the local funding unit to permit operations and approve designated essential employees slowed the court process. Importantly, many local governmental units had not experienced nor anticipated governmental functions operated from remote locations, and could not easily comprehend services continuing without personnel located inside the brick and mortar locations commonly identified for governmental services. In some counties, the funding units would not initially approve wages unless the employees were working at the courthouse.

There were numerous examples across the state where a circuit court was not conducting in-person hearings except when required under the Court's administrative orders, but the district court (or vice versa) would hold in-person hearings for many categories of cases. The courts were not consistent within their county in managing hearings. These discrepancies were primarily caused by a failure to coordinate the needs of all stakeholders within the county and how to effectively address those needs, and this caused confusion for attorneys over which courts were conducting in-person hearings and which were primarily relying on remote virtual hearings.

Those courts with strong and collaborative relationships with their funding unit managed these staffing and resource issues more quickly and efficiently.

Courts coordinated with the jails and prisons to transfer inmates for essential hearings. While this function had relatively few complications pre-pandemic, the transfer to/from and housing of inmates in the courts while waiting for a hearing was complicated by the need for personal protection, social distancing, and quarantines. Additionally, the Sheriffs' Association noted uncertainty with respect to the rules for transporting, quarantining inmates, managing inmates at the courthouses, and whether there would be limited inmates permitted in the court each day. These issues were addressed at the local level.

Inmates were required to have personal protection, and the need to practice social distancing limited the number of inmates that could be transported, which, in turn, limited the number of hearings that could be conducted at a court. The courts and county sheriffs had difficulty in the first few weeks, and in some instances months, coordinating an efficient schedule. In a joint statement released on March 26, 2020,¹¹ by Michigan Supreme Court Chief Justice Bridget M. McCormack and Michigan Sheriffs' Association Executive Director Sheriff Matt Saxton, judges

¹¹ [Michigan Courts News Release, March 26, 2020](#)

and sheriffs across the state were acknowledged for working together to safely reduce jail populations while focusing on keeping the communities safe.

Jails reduced the number of transport guards and staff working each shift and this burdened the system by slowing the process to transport inmates to hearings or return inmates to the jail. The logistics were further complicated by the vast difference of resources and location of jails in each county. Many counties do not have centrally located jails, and travel time to and from the court reduced the number of inmates that could be transported each day while still maintaining safety practices. This reduced the time available for essential hearings in the court.

Courts worked diligently to reduce workers in the courthouse and limit possible exposure to the virus, but it was quickly discovered that the sheriffs transporting inmates had been working a full shift inside the jail and created risks to the court staff for possible exposure to the virus. The courts and sheriffs worked through the logistics to ensure proper transport and safe operations, but this delayed criminal proceedings.

Wayne County was initially crippled in coordinating criminal hearings because of inflexibility of the jails to work with the court plan. The Wayne County Sheriff and the jails were legitimately concerned about the spread of the virus that was rampant in the Detroit metropolitan area, and acted to protect the sheriffs and inmates. The court and the Sheriff's Association worked to resolve the difficulties and overcome communication impediments, but the process took several months.

The courts and jails have long used the Polycom® video conferencing system to conduct criminal arraignments and other appearances that do not require in-person hearings. Polycom® was used as much as possible in the early stages of the shut-down to accommodate more hearings. But the jails had limited space for inmates to connect to Polycom®, and the use of Polycom® extended the length of the hearings because defense counsel – who could not meet with the client in-person before the hearing – required access to the Polycom® system prior to and during the hearing to confidentially confer with the client.

Both the district and probate courts serve a large constituency that do not have ready access to technology necessary to access a website to learn about emergency procedures, or to print, scan, or e-mail pleadings, notices, and documents. The courts recognized early that they needed to provide walk-in service, but were hampered by other shared courts within the same courthouse shutting down or significantly reducing public services.

The nature of probate court hearings created issues regarding safety for the litigants. For example, a hearing to appoint a guardian and/or conservator for a developmentally disabled adult requires the adult ward to be present for the hearing. Often, these adults are subject to medical conditions that can increase the risk of the adult contracting a virus. While courts could conduct the hearing by Zoom®, the family and other caregivers were often limited in the use of the technology. The court was left with either adjourning hearings and/or developing training materials to assist the constituents to access the court's remote hearing technology.

Probate courts, like many other courts, that were not prepared for virtual hearings were more liberal in the use of telephone hearings for non-evidentiary hearings, motions, and scheduling conferences. While this permitted essential hearings to proceed in many instances, the judicial officer and staff had to be in court to conduct the telephone hearing. It was difficult to manage the proper staff ratio to maintain operations and safety.

Probate courts were required to coordinate with local hospitals, mental health facilities, DHHS, guardians, sheriffs, and banking institutions. Courts were using Polycom® for mental health hearings and other limited hearings, but it was difficult to expand the users of the Polycom® system without training and training of users was difficult because of limited access. Counties that created tutorial sheets for stakeholders and posted the tutorials to a website experienced fewer delays in coordinating hearing attendance.

Managing under the Michigan Supreme Court's Administrative Orders

The Michigan Supreme Court and the State Court Administrative Office were tasked with the nearly impossible: guide the trials courts through an immediate shutdown of operations while maintaining access to justice through remote proceedings.

As noted, the initial shut-down orders created uncertainty for the courts. Courts across the state immediately began to address questions and details such as how long the shutdown would last; how long hearings and trials should be adjourned; how the court should handle deadlines previously set in a proceeding but expiring during the shutdown; whether statutory filing deadlines would be extended; and whether court efforts to substantially comply with various mandated procedures under statute or Michigan Court Rules would be considered acceptable to SCAO and the Court as protecting procedural rights of parties during the shut-down.

The Court quickly ordered that in all deadlines applicable to the commencement of all civil and probate case-types, including but not limited to the deadline for the initial filing of a pleading under [MCR 2.110](#) or motions raising a defense or objection to an initial pleading under [MCR 2.116](#), and any statutory prerequisites to the filing of such a pleading or motion, any day that falls during the state of emergency declared by the Governor should not be included for purposes of calculating the time for filing in accordance with such deadlines.¹² Additionally, the Court extended the expiration of summonses and dates to file post-judgment motions filed in trials; allowed for litigants to seek a fee waiver by electronic process; and permitted all service of process under [MCR 2.107\(C\)](#) to be performed using electronic means.¹³

Jury trials in both civil and criminal cases were delayed until June 2020, subject to further order. While some courts have re-opened under a phase of operations that permits jury trials, many courts are not able to conduct jury trials because of the re-opening phase they are caught in due to county infection and hospitalization rates. The courts are keenly aware these delays create significant backlog of the criminal dockets, potentially affecting the rights of criminal defendants, and expand the back-up of the court's docket.¹⁴ Section 5 of this report explores criminal procedure issues.

The district courts, primarily, and other civil courts were provided new case procedures for handling landlord-tenant disputes, including prioritizing of cases. These orders, in part, considered the impact on landlord-tenant responsibilities and payment under the [Coronavirus Aid, Relief, and Economic Security Act \("CARES Act"\), Public Law No.116-136](#), that imposed

¹² MSC Administrative Order No. 2020-3, March 18, 2020; amended by [MSC Administrative Order No. 2020-08](#), May 1, 2020.

¹³ Id.

¹⁴ This report does not attempt to address the issues regarding conducting remote jury trials. The Supreme Court and SCAO issued a report in July 2020 entitled [Michigan Trial Courts Remote Jury Trial Standards and Recommendations](#).

a moratorium on the filing of summary proceeding actions to recover possession of premises for nonpayment of rent that meet certain parameters. The procedures created questions and docket management issues, but many of the courts worked together to share insights and practices.

The expiration dates for personal protection orders were extended to July 2020. Respondents were permitted to object to the extension by a motion to modify or terminate. Although many courts posted the extension rules on their website under COVID-19 protocols and others mailed notices to respondents if there were valid addresses, the effort to uniformly advise the respondents outside of general news reports was inconsistent.¹⁵ Courts questioned whether they could provide leniency to a respondent who believed a personal protection order had expired, had not received notice of the extension, and contacted the protected party to discuss relationship or family matters – in violation of the extended order – but without threat or violence. With this particular issue not specifically addressed in the administrative orders, courts were left to their discretion, consistent with managing a personal protection hearing prior to COVID-19.

The extension of deadlines created a burden on court staff to manage the deadline schedule to avoid unnecessary notices to dismiss cases for non-service, management of electronic requests for fee waivers and status of summons, and management of files once the executive orders would be lifted. This all done while court staff was reduced and/or working remotely.

Beginning in April 2020, and continuing to present, the Court and SCAO have provided sample order templates and responses to frequently asked questions to assist courts in fashioning local administrative orders or policies to manage the local courts consistent with the Court's administrative orders. Many courts found these helpful and, importantly, they provided guidance to local funding units to understand the need to maintain access to the courts even though court staff and judicial officers were working remotely. Some courts believed the Court's administrative orders were a "one size fits all" approach without engaging sufficient feedback from the various trial courts. Nevertheless, the courts also acknowledge that SCAO regional administrators and staff were extremely helpful in responding to specific questions and needs.

Most courts issued local administrative orders or policies within the first two months following the Governor's Executive Orders and the Michigan Supreme Court's administrative orders in March and early April 2020. The courts that were most successful in informing users of the orders and policies posted them on the court's website, social media, and e-mailed to local bar associations, stakeholder groups and local media. These courts routinely updated the orders/policies after substantive updates from the Court and SCAO; the courts averaged between three to six updated local administrative orders and policies over an eight-month period, when many years a court might issue one, at most. However, many courts did not initially communicate these orders and policies in a proactive manner and did not coordinate with stakeholder groups resulting in confusion and uncertainty.

Impact of Budget Issues on Trial Courts Responding to COVID-19

The trial courts and their funding units immediately faced the challenging prospect of budgeting for the costs associated with purchasing personal protection equipment (PPE); sanitation

¹⁵ Some courts considered mailing notices of the extensions, but long term this was an additional cost that was not justified given the rising budget constraints caused by other COVID-19 expenses.

materials, and overtime to maintain a clean courthouse during and after business hours; signage for directing traffic safely into and through the courts; plastic shield protection for personnel required to be exposed to the public; and technology and equipment to permit personnel to work remotely and for the court to conduct remote hearings. The Michigan Tribal Courts faced similar budget restraints following tribal decisions to suspend or cut budgets, and courts were closed or limited access to by appointment only to safely operate the courts.

SCAO had to become immediately familiar with laws regarding employee furloughs, the CARES Act, and government loans to assist funding payroll and purchase of personal protection equipment and other technology/equipment to manage remote operations under FEMA and other government programs. SCAO regional administrators provided courts updates and resources to review to address budget issues, and are commended for the break-neck speed of learning, assessing, and developing plans to manage the courts.

The courts could not predict the length of time the Governor's stay-at-home order would remain in place and when Michigan would "return to normal." At the beginning of the pandemic, many Michiganders hoped the shut-down would be no longer than one to three months, and some funding units were initially cautious to authorize expenditures for safety and technology, hoping to manage the shut-down on a limited budget. Those courts were caught flat-footed, but were quickly brought along by the assistance of SCAO and consultation with surrounding counties when it was clear the pandemic would be for the long haul.

The courts, particularly in small- to medium-sized counties, were required to expend a great deal of time educating their funding units regarding the need for the courts to remain open through remote hearings. The difficulty and delays this process caused the courts was a common refrain.

The greatest budgetary concerns expressed by the courts included costs for technology equipment (laptops, tablets, cameras, microphones, printers, etc.); software applications; personal protection equipment and cleaning supplies; overtime and staff expenses; increased postage and envelopes/paper; and declining revenue.

The courts must use this pandemic to advocate for their funding units to support the courts' efforts to adopt an electronic filing system and a more robust paperless system supported by online interaction for users of the court, and to maintain infrastructure and equipment to continue remote hearing access through Zoom®.

Managing the Filing of Pleadings and Communication to Stakeholders

The commencement of all actions in court and the procedures undertaken during the pendency of the action require a party to file a pleading in the court. The circuit court and district court clerks and the probate court registers manage the filing system. Typically, the pleadings are accepted by mail or in-person filing. In recent years, SCAO and the courts have begun a transition to online or e-mail filing, but only a minority of the courts use the system.

Courts using MiFILE or the OnBase Internet-based filing system could close the clerk's physical office and accept pleadings filed online. Approximately 95 percent of the court respondents to surveys indicated that court clerks or judges would accept pleadings filed by e-mail provided the original pleadings were mailed to the clerk's office. However, courts also noted that the practice was not consistent throughout the courthouse and that many judges opted not to accept e-mail pleadings. Many courts utilized a drop-box system outside of the court for those who could not

access the Internet. While closing of the clerk's office limited the number of people in the courthouse and enhanced safety protocols, it also increased delays with the filing system and preparing for remote hearings.

Most courts maintained a skeletal crew in the courthouse. As a result, there were severe delays in processing both in-person and electronic court filings.

The lack of uniformity in how courts accepted filings and the inability of many courts to accept electronic filing created confusion with the users of the court. The attorneys reported that the pandemic accentuated the lack of a reliable and uniform e-filing system like the PACER system used in the federal courts.

Courts in the northern Lower Peninsula and Upper Peninsula were able, for the most part, to keep their clerk and register offices open because of lower rates of the virus. However, the offices maintained social distancing, used personal protective equipment, and reduced the number of employees working in the office to "an essential level." The courts created work pods or teams of limited numbers that rotated or staggered the work days in the office; this helped coordination of work flow while maintaining social distancing.

Courts, like many private companies, could not easily secure personal protection equipment at the start of the pandemic. Smaller to mid-size courts were often without internal maintenance staff to post social distance markers and signs directing court visitors; these factors delayed opening the clerk's office and other public services. If the court did not have the personal protection equipment, it further delayed opening unless staff had secured their own masks.

Best Practices in Managing the Emergency Response to COVID-19

The courts that best managed the emergency response to COVID-19 had previously developed an emergency plan, identified and trained essential employees regarding the emergency plan, and had a positive working relationship with the court's funding source, together with a collaborative relationship with court stakeholders that permitted open communication and dialogue.

Courts equipped to use electronic filing or utilized e-mail/fax filing experienced an easier transition to limited in-person court access and remote hearings. Of the courts surveyed, 70 percent accommodated some form of e-mail or fax filing, 20 percent utilized e-filing such as OnBase, and 90 percent continued to use limited public access for filing, including a drop box, scheduled appointments, or limited hours. Once a court instituted electronic filing, the length of delays declined in managing the schedule for remote hearings.

Courts reported that the top three procedures that increased efficiency and/or were widely applauded by the court's stakeholders were accommodating electronic or e-mail filing (100 percent of survey responses), availability of drop-boxes outside the court or other public locations accessible to users of the court (90 percent), and creating detailed instructions sent with notices or other court mailings regarding procedures for remote hearings, contact information for each judicial office to address questions, and training for staff to respond to frequently asked questions including Zoom® hearings (64 percent).

Kent and Wayne counties conducted Zoom® bench-bar conferences to review court policies and Zoom® procedures.

The demands of coordinating the shut-down of the courts required cooperation between the courts and the stakeholders. The courts that managed these relationships well undertook the following common steps:

- (1) Immediately scheduled a meeting with stakeholders, including court administrators, chief judges, presiding judges, magistrates, referees, clerks, registers, staff, IT, ADR clerks, prosecutors, public defenders, city/county operations, sheriffs, jails, FOC, local bar associations, DHHS, and local health department representatives.
- (2) Developed an emergency plan or updated the existing emergency plan. Posted on the website the contact information of key personnel to answer questions on the operations of the court.
- (3) Communicated the court's emergency procedures through local administrative order or policy on the court's website and distributed the policies to key users of the court, including prosecutors, public defenders, FOC, sheriff/jails, and local bar associations, including specified practice sections of the bar. Any updates were immediately posted to the website and distributed to the stakeholders. The counties of Kent, Berrien, Cass, Jackson, and Van Buren all have followed some form of this practice.
- (4) Developed training protocols for staff on new emergency procedures.
- (5) Developed a tutorial or guidance for attorneys and parties to access and use the remote hearing procedures. Berrien and Van Buren counties produced a video on how to enter the court, safety protocols, and what to expect inside the court. The video was posted to the court's website and released to news media. These two counties also posted their essential operations plan and guidelines for virtual hearings.
- (6) Maintained consistent and uniform application of the procedures by all judges. The most common complaint by users of the court has been the inconsistency of judges within a county to follow the county's posted policies on remote hearings, e-mail filing, Zoom® procedures, and adjournments.
- (7) Utilized visiting judges or virtual judges.

Recommendations:

- (1) **Emergency Plan Court Rule:** The Committee recommends that the Michigan Supreme Court adopt a court rule under Michigan Court Rules, Subchapter 8, and General Administrative Orders, requiring each court to develop an emergency operations and continuity of operations plan within one year of adoption of the rule. The courts should review and update the plan, as necessary, every three years. Each court should be encouraged to work with their stakeholders to develop the plan and conduct the three-year review. The plan would be based, in part, on the lessons learned during the 2020-2021 pandemic.
- (2) **Unified Case Management and Electronic Filing System:** The Committee recommends that the Michigan judicial system modernize and further develop a unified case management and electronic filing system that is accessible to all courts.

- (3) **Infrastructure Advocacy:** The Committee recommends that SCAO and the judges' associations coordinate a plan to advocate for the adoption of legislative appropriations to modernize the state's broadband and technology infrastructure. The users of the court will expect seamless access to the courts by remote connection, and the experience from the pandemic is that large areas of the state lack strong and stable connectivity. This is a matter of access to justice.
- (4) **SCAO Training to Strengthen and Enhance the Relationship between the County Court System and the County Funding Unit:** The Committee recommends that SCAO and MJI develop a training program that shares the methods and means to develop a strong, mutually collaborative working relationship between the county courts and their funding units.

Continuity of Operations and Planning for Return to Full Capacity

The Michigan trial courts transitioned from emergency shut-down to managing remote hearings and/or limited in-person hearings over a period of two months. Certainly, the courts did not master or fully adapt pre-pandemic procedures during this period, but they delivered essential services and slowly began to expand the operations of the courts. The magnitude of the changes necessary to remotely manage court operations became clearer in the first two months, but the courts, while at times overwhelmed, remained focused on delivery of services.

During implementation of virtual courtrooms, the courts also maintained safety for essential personnel and the limited public allowed access to the courthouse, accommodated staff child care needs, managed quarantines, facilitated expansion of online or remote alternative dispute resolution ("ADR"), worked with IT to address technology needs, and continued to manage the docket.

Coordinating Personnel Schedules and Training

In May 2020, SCAO developed guidelines for return to full capacity.¹⁶ Courts have continued to use these guidelines to manage safety precautions within the court, including sanitation, protective equipment and social distancing, notification, isolation and contact tracing procedures, and coordination with local health department officials and SCAO regional administrators to open safely to the next approved phase of court access. Again, more urban and densely populated areas of the state have struggled to maintain open phases, while rural areas have been able to safely open through various phases of the guidelines.

Before considering return to some measure of full capacity, courts had to develop a plan to provide coordination between essential workers at the court and those non-essential workers working remotely. Most courts allowed workers to work in pods and rotate time between the

¹⁶[Return to Full Capacity: COVID-19 Guidelines for Michigan Judiciary \(updated May 2021\)](#) issued following MSC Administrative Order No. 2020-08 dated May 6, 2020, expanding the use of remote proceedings. The Return to Full Capacity Guidelines have been consistently updated since being issued.

court and home. When possible, this eased the ability of employees to schedule child care and virtual school for children, and increased work-share and knowledge of procedures at the court.

Ability to Manage Court Staff Working Remotely

Courts reported that in the early months of the pandemic 38 percent of non-essential workers were not able to work from home. This negatively impacted the courts' ability to coordinate work distribution, schedules, and training. Issues cited for the difficulty included lack of equipment, poor equipment and/or connectivity at the court and/or the employees home, inadequate IT support for remote work, inadequate training, and childcare/school obligations.

The courts were more negatively impacted because they had limited personnel to spare and rotate schedules. This created a domino effect, resulting in delays in scheduling and hearing management. Probate and district courts that needed to keep the court open for constituents who could not otherwise communicate online or remotely had a difficult time managing staffing needs. Fortunately, the courts that could be open through each phase did not experience the level of traffic that was common prior to the pandemic; people limited their trips to the courts and this continued until the fall of 2020. This gave courts more time to work through procedures without significant negative consequences, even when delays were experienced in scheduling hearings and managing the docket.

Three months after the shut-down, 75 percent of the courts reported having sufficient equipment for all employees to work remotely, 58 percent had strong connectivity through the Internet or VPN, and 42 percent had been able to fully train all employees on remote work.

It was not unusual to have employees using their own equipment (laptops, home computers, tablets, and smartphones) to access the court systems before the court provided compatible equipment. Additionally, courts without a paperless system had to rely on file sharing and copying pertinent documents to allow for key work from home. This delayed procedures and communications with parties, lawyers, probation, prosecutors and defenders, agencies, and other third parties.

The more dedicated a court staff was to identifying needs and solutions consistent with the operation plan, the more quickly the obstacles to remote work were resolved. As noted in the section on emergency operation, the more quickly courts identified stakeholder groups to identify needs and plan how best to address those needs, the more efficient was the expansion to remote work.

Some courts had not been using electronic signature software to permit judicial officers to sign orders and other necessary documents prior to the pandemic, but most implemented this software after the shut-down. The courts also provided tablets to judicial officers and staff to allow review electronic documents for signature if they did not otherwise have a laptop. The electronic signature process allowed for swift issuance of orders and notices necessary to maintain the docket.

Courts that struggled in dedicating a plan to expand remote work often reported that the judges within the county were inconsistent in following proposed solutions or, in the early months, conducted very few remote hearings. Lack of consistency by a court in developing and implementing an operation plan remains the most consistent complaint of users and stakeholders of the courts.

Procedures Established to Maintain Essential Functions and Expand Remote Proceedings

Most courts established procedures to coordinate work for those on site and those working remotely to identify the most important matters to be addressed and prioritize actions to be taken to move the docket. The procedures listed here were generally utilized by the courts in a manner and style best suited for each court.

Courts process mail each day that includes pleadings, reports, recommendations, warrants, notices, and general correspondence. The clerk's and register's office prioritized the most important mail and how to route the mail to ensure further action. The offices worked with various departments within the court system to identify priorities, including court administrators, chief judges, magistrates, referees, mediation clerks, prosecutors, public defenders, probation, and FOC.

Pursuant to [MSC Administrative Order No. 2020-1](#), courts that did not have an electronic filing system were encouraged to use fax or e-mail for electronic filing. Under [MCR 2.406](#), courts had the authority to permit court filings by fax. Courts that established e-mail filing after the shut-down have either established a designated e-mail address within the clerk's or register's office, or individual judges decided whether to accept e-mail filings through a judicial clerk. Most courts posted the procedure for fax or e-mail filing on their website and through the local bar associations.

Various courts have assigned a dedicated individual from the clerk's office, register's office, or administrator's office, or a judicial law clerk to monitor and report on all new Michigan Supreme Court administrative orders or amendments and SCAO guidelines or communications regarding managing the courts. The court's stakeholder planning team or leadership team would determine what, if any, action was required and how to communicate the update or new action.

Courts utilized docket-run reports to identify cases requiring a "next action date" to begin rescheduling adjournments. Various courts have utilized visiting judges or virtual judges from other counties under assignment from SCAO to relieve docket delays.

Remote access has expanded opportunities for judges, referees, and magistrates to conduct proceedings from locations outside of the courthouse and maintain high standards of public service. Judicial officers have been able to remotely preside over emergency hearings or address critical issues within the courthouse even when on vacation or on leave. Some officers have been able to conduct full-day hearings while at a cottage or visiting family, combining work and vacation. Remote access has been used to provide different options to address time-sensitive issues even when court leadership is not in the courthouse; these options should be explored further by the judiciary to create efficiencies and benefits.

RECOMMENDATIONS

- (1) Creation of a Judicial Council Planning Committee:** The Committee recommends amendment of the Chief Judge Rule under [MCR 8.110](#) to permit the chief judge to appoint a judicial council planning committee to meet at least one time per year to review court operations, technology, and recommend revised procedures to enhance the efficiency and consistency of court operations. The

judicial council would work with designated court stakeholder groups to solicit feedback regarding court operations and proposed improvements.

- (2) **Best Practices Technology Symposium:** The Committee recommends that SCAO and MJI develop a symposium for all county IT departments and court administrators to share best practices regarding court technology, software applications, and operations. The symposium would be held at least once per year and would be coordinated with the Michigan Judicial Council’s proposed strategic plan for technology.
- (3) **Use of Virtual Visiting Judges:** The Committee recommends that the Michigan Supreme Court adopt a rule that permits a visiting judge to appear by Zoom®. SCAO is testing the efficacy of allowing a judge experiencing a lighter docket to be assigned to hear cases by Zoom® as a visiting judge for a county experiencing a backlog of specified case matter. Retired judges, even those no longer living in Michigan, would be permitted to serve as a visiting judge by Zoom®. The courts have become proficient with Zoom® and this proficiency should be leveraged to benefit the entire court system.
- (4) **Self-Care of Judicial Officers and Court Staff:** While this report does not specifically address the issues of stress and self-care in the court system, the Committee recommends that SCAO and MJI commit to a five-year plan to address self-care in the courts. The pandemic has taught us that management of court operations is demanding and generates stress. Moreover, the nature of the work performed by trial courts creates potential for judicial officers and staff to be exposed to secondary trauma. The committee is aware that self-care breakout sessions have been offered in the past, but believes a dedicated five-year program to address self-care within the courts would benefit the delivery of justice. The judges’ associations could collaborate in formation of the program and share material.
- (5) **Remote Site Judicial Service:** The Committee recommends that the Michigan Supreme Court amend [MSC Administrative Order 2012-7](#) (currently suspended by [MSC Administrative Order No. 2020-19](#)) and applicable statutory provisions to permit judicial officers to conduct court hearings and business from a site outside of the courthouse. The judicial officer would be required to manage their regular docket and judicial meetings by Zoom®. Standards and guidelines would be developed to govern remote-site judicial service. The courts have become proficient with Zoom® and this proficiency should be leveraged to enhance the method and means of public service.

The Virtual Courtroom and Remote Proceedings

Michigan Supreme Court Chief Justice Bridget M. McCormack has said the pandemic “is not the disruption courts wanted, but it is the disruption courts needed.” Prior to the pandemic, with few exceptions, anyone involved in a civil or criminal case had to physically “go to court” to be

heard. The pandemic required trial courts to embrace technology and improvise to maintain access to justice.

Before the pandemic, a minority of trial courts had initiated use of online formats such as electronic filing, dispute resolution, and video and teleconference hearings. In 2019, SCAO secured licenses to use Zoom® videoconferencing and planned to slowly integrate the technology statewide beginning with trial courts receptive to adopting technology solutions. Neither SCAO nor the most revered fortune teller could have predicted the true value of this fortuitous decision because Zoom® allowed trial courts to continue operations remotely during the pandemic. Trial courts cannot reflexively return to pre-pandemic procedures established prior to the Internet, e-mail, laptops, and videoconferencing, but must use this opportunity to adapt to technology, in the same manner as the marketplace, to create long-term improvements to access to justice.

Interview any trial court judicial officer or staff about their experience conducting Zoom® hearings and you will not want for material. There are countless stories of frustration over technology and connectivity, disbelief regarding the lack of decorum shown by some participants (even lawyers), and humorous anecdotes. But universally, if not begrudgingly by some, the trial courts acknowledge Zoom® provides for efficient and effective access to the courts for most hearings except extended evidentiary hearings and trials. This section will explore the difficulties experienced using Zoom®, best practices to maximize the Zoom® experience, and recommendations for the ongoing use of Zoom®.

Videoconferencing Equipment and Remote Proceedings

Participants in a videoconference must have adequate equipment to transmit and receive audio and video, and maintain a stable connection to Wi-Fi/Internet.¹⁷ The most common complaint about Zoom® proceedings, depositions, or mediations is the instability of a participant's connection to the meeting, resulting in frozen screens or garbled sound. In recorded proceedings, these issues can seriously delay or require adjournment of a hearing.

Proceedings experiencing the highest level of interruption involve participants located in rural or urban areas with inadequate broadband and Wi-Fi connection, and participants using a mobile telephone or tablet connected by a mobile device data plan rather than a Wi-Fi link. Trial courts estimated that in the first six months of the pandemic more than 60 percent of remote hearings experienced some connectivity interruption. The connectivity issue has improved as more users of the remote systems have incorporated better equipment or improved Wi-Fi or broadband strength.

Various communities and courts offer free access to high-speed Wi-Fi to allow participants to join Zoom® proceedings. The city of Holland provides access from its civic center parking lot. Although some judges have denied litigants or attorneys to participate in a hearing from their car, often the car provides the quietest environment for the participant; judges should not quickly dismiss a participant from participating while in a car until it is determined the car is sufficiently

¹⁷ This report does not consider the requirements and standards for recording court proceedings. Audio and video recording standards are addressed under [MCR 8.109\(B\)](#) and the operating standards published by SCAO in [Michigan Trial Court Standards for Courtroom Technology \(4/20\)](#).

quiet and without likely disruption like an office or conference room.¹⁸ The Washtenaw County Circuit Court offers a Zoom® hearing room for participants to access a device and hearing. The judicial clerk contacts the participant by e-mail or text and directs the participant to enter the building; this limits the number of persons in the building and provides those without access to Internet or a device the means to participate in the remote hearing.

Inadequate camera and microphone equipment can diminish the quality of the video and audio. While laptops and tablets can provide for mobile access, the cameras and microphones often only meet minimal standards. This can cause video to blur and the volume to decrease if the participant turns their head away from the microphone. Some courts encourage participants, especially lawyers and witnesses involved in lengthy remote evidentiary hearings, to use a headset or a standing microphone that has a higher standard of reception.

RECOMMENDATIONS

- (1) **Development of Minimum Equipment Standards:** The Committee recommends that SCAO consult with Zoom® to develop minimum equipment standards to maximize the connection to Zoom® and performance of the audio and video equipment, including recommended microphone and camera standards. Any standards should be used as guidelines and attorneys should be encouraged to comply. However, many litigants, and in particular self-represented litigants, may not have the means to meet the guidelines. The guidelines should not become a means to deny access to justice.
- (2) **Modernization of Broadband:** The Committee recommends that SCAO, the judges' associations, and the State Bar of Michigan coordinate a plan to advocate for the adoption of legislative appropriations to modernize the state's broadband and technology infrastructure. Users of the court will expect seamless access to the courts by remote connection and the experience from the pandemic is that large areas of the state lack strong and stable connectivity. This is a matter of access to justice.

Remote Hearings and Proceedings

The use of videoconference hearings by Zoom® or Polycom® was necessary to continue the operations of the justice system. While Zoom® is practical for the pandemic environment, it is an application the courts should continue long after we “return to normal.” Of nearly 1,500 attorneys surveyed, 82 percent stated they want Zoom® hearings to continue after the pandemic. The attorneys ranked, in order of preference, the hearings they believed were best suited for Zoom® as follows: non-evidentiary hearings (status and scheduling conferences, pretrials, motions); traffic violations; civil infractions; summary proceedings; guardianships/conservatorships; criminal pleas and sentencing; and, short domestic relations evidentiary

¹⁸ It need not be said that participants should not participate in a hearing while driving. If a participant is logging into a hearing from a moving vehicle, the judge should consider allowing the participant a brief period to safely park the car or adjourn the hearing. And, yes, the trial courts have reported incidents of attorneys and litigants entering a Zoom® hearing while operating a moving vehicle.

hearings including *pro confesso* hearings. Moreover, these attorneys reported their clients appreciated Zoom® for the convenience and time savings from not having to travel to the court, park, and personally attend a hearing. Clients also expressed they were less intimidated by the process on Zoom® without losing respect for the procedure and decorum. The attorneys were less enthusiastic about evidentiary hearings involving multiple days, witnesses, and exhibits.¹⁹

The attorneys expressed appreciation for the courts' willingness to use Zoom® for motions, settlement conferences, scheduling conferences, status conferences, and limited evidentiary hearings. Incorporating Zoom® into the court process minimizes travel time, expense, and scheduling conflicts. The attorneys stated their clients anticipate Zoom® will be continued in the court system because it is a cost effective and efficient tool.

Trial courts reported Zoom® preferences similar to the attorneys. Circuit courts considered the following hearings the most beneficial for the Zoom® format: status and scheduling conferences, pretrials, motions, pleas and sentencing (provided the defendant consents to the hearing), PPO hearings (excluding those hearings where the respondent could be sentenced to jail), child protective and juvenile delinquency hearings (excluding removal hearings, parental termination, and juvenile trials), *pro confesso* hearings, and most domestic relations hearings that do not involve multiple days, witnesses, and exhibits.

District courts reported that Zoom® was preferred for pretrial and status conferences, traffic violations, civil infractions, probable cause hearings, landlord-tenant and summary proceedings, and pleas. Probate courts reported a broader acceptance of Zoom® because many hearings can be conducted within a day, such as estate petition and motion hearings, mental health hearings (except jury trials), and guardianship and conservatorship. At least one probate court reported conducting a jury trial by Zoom®.

Friends of the court also reported a general acceptance and efficiency associated with remote hearings and meetings. The majority of FOC offices expressed the convenience for parents to engage in meetings with the FOC investigator by Zoom®, reducing travel time and time from work without reducing the effectiveness of the meetings compared to in-person meetings. FOC has had to prepare instructions for parents to share documents prior to the meeting. FOC reports that parents have generally been supportive of remote meetings and hearings, although acknowledged an initial learning curve. FOC has also utilized Zoom® for mediation and dispute resolution with positive results.

An unexpected finding from the use of Zoom® is that minors appearing before the court are more receptive to the hearing and less intimidated or anxious. Family division judges reported that in interviews to determine the reasonable preference of a minor child in a custody matter under [MCL 722.23\(i\)](#) and in juvenile delinquency proceedings, the minor children appeared more relaxed and open in their discussion with the judge or referee. While this finding is anecdotal, a significant number of judges suggested the remote hearing eliminates the intimidation or fear of appearing in court in a predominately adult setting. The video nature of the Zoom® proceedings may provide an experience the minor children are more comfortable with given their familiarity with video games and other digital interactions. SCAO should consider collaborating with a state college or university to study this development.

¹⁹ This Committee did not explore the use of virtual jury trials. SCAO has published the [Michigan Trial Courts Remote Jury Trial Standards and Recommendations](#).

Understandably, in the initial months following the shut-down order the courts struggled to streamline procedures for communication with parties, attorneys, and other users of the court regarding scheduling remote hearings and procedures relating to those hearings. The courts had not clearly identified how or with whom users were to communicate within a judicial office. The courts were hampered by staff working from home and rotating shifts through the week.

Attorneys reported that, while some courts had provided training to staff regarding frequently asked questions such as on scheduling issues, adjournments, Zoom® protocol, and e-mail filing, other courts were less consistent in their responses to inquiries. The attorneys acknowledged that judicial staff and the clerk's and register's offices were conscientious, and trying to resolve questions and provide clarity. Ultimately, over time these communication issues were resolved by most courts.

Whether a motion was heard early in the pandemic differed from court to court. Attorneys reported that some courts adjourned all motion hearings and issued written opinions under [MCR 2.119\(E\)\(3\)](#), while others conducted the hearings by Zoom®. The reason for either choice was not clear and attorneys believed their clients' interests were best served through the Zoom® hearing.

As noted above, the most consistent complaint from court users, including attorneys, has been the inconsistency of the judicial offices within the same county when conducting remote hearings. Of the attorneys surveyed, 66 percent identified the lack of consistency between judicial offices as the second most significant difficulty they experienced in their practice during the pandemic. The most significant difficulty was the effort to remain current with the Court's updated administrative orders and other court directives (67 percent). These responses only underscore how difficult the legal landscape was in the first six months of the pandemic.

Examples of inconsistent management of the docket include:

- (1) Some judges quickly adopted Zoom®, while other judges in the same county were slow to adopt the format and only used Zoom® for limited hearings;
- (2) Some judges accepted pleadings by e-mail provided an original was filed with the clerk and the fee paid in accordance with the administrative orders, while others refused this convenience;
- (3) Some judges used the “cattle call” approach to motion day, while other judges staggered the motion calendar by assigned times or grouped a limited number of motions in a scheduled block; and
- (4) Some judicial offices provided notice of hearings with detailed Zoom® and other offices provided limited information.

Attorneys reported that participating in a “cattle call” Zoom® motion day is a terrible experience for both the attorney and the client. Parties can sit for an hour or more in a waiting room with little to no contact from the court, and attorneys often run into conflicts with other courts while waiting for the appearance. Attorneys and clients prefer a scheduled motion day by set motion times or block times of 60 to 90 minutes, with a limited number of motions assigned to the block. Attorneys reported that judges who follow these scheduling procedures routinely completed the hearings on time with limited waiting.

Settlement conferences conducted by Zoom® provide flexibility for the participants' schedules, elimination of travel, and cost savings. However, the courts must ensure the clients participating

and any third-party representatives, such as insurance carriers and trust fiduciaries, have full authority to settle the case in the same manner they would have had had they appeared in person.

Attorneys encouraged the courts to use Zoom® to manage high-conflict cases or for cases that are discovery intensive and suggested that courts can schedule periodic status conferences through Zoom® with limited impact on schedules and travel.

Zoom® hearings will reduce the cost of litigation by reducing the billable hours normally associated with travel, waiting in court for hearings or completing settlement conferences, etc. This cost saving will be a benefit to the public that pays for legal services, as well as to members of the public who otherwise could not afford legal services and would be forced to handle a matter in *pro per*. Moreover, Zoom® hearings (especially when scheduled for a specific time or window of time) have the additional benefit of allowing attorneys to more easily manage their calendar without the potential of being stuck in court all day.

Use of Zoom® in trials and lengthy evidentiary hearings creates greater flexibility to coordinate appearances by experts or other witnesses who would need to travel to court for an in-person hearing. This flexibility may avoid the need for adjournments or rescheduling.

Mediation clerks and FOCs reported that ADR has been successful on Zoom®. Courts should continue the use of ADR on Zoom® similar to court settlement conferences.

Best Practices for Zoom® Hearings

Best practices for Zoom® hearings include, but are not limited to, the following:

- (1) Notice of the hearing should include Zoom® login information, a contact from the judicial office to answer questions or concerns, and instructions for the participants to login and identify themselves on the screen by name, case name and case number before entering the Zoom® hearing. This allows for court staff to easily identify participants for hearings, especially on motion calls, and allows for easy assignment of the participants into a breakout room, if used. Kent County incorporates these instructions into a SCAO notice form.
- (2) The waiting room can be used as a staging area for motion day if the judicial staff provides e-mail communication with the participants. Oakland County places litigants and attorneys into the breakout room while the prior hearing is pending and the judicial staff can inquire of the participants if there are any agreements reached or issues to resolve, and confirm connectivity.
- (3) Courts must make breakout rooms available for attorneys and clients to have confidential communications. This is essential in criminal proceedings, and confidentiality cannot be sacrificed simply because a defendant is appearing by Zoom® from inside a jail or prison.
- (4) When the courts are closed to the public under the phased approach to return to full capacity, the courts must make the hearing available through the YouTube channel unless the proceeding is closed or access would otherwise be limited by statute or rule.
- (5) Hearings where exhibits shall be introduced should be controlled by a scheduling order created based on a status conference with the attorneys/parties. The status

conference should outline the method of disclosing and exchanging exhibits, the schedule for motions *in limine*, and the requirement for parties to agree on the admissibility of exhibits, as possible, prior to the hearing to minimize time spent on foundational procedure. Exhibits shall be provided to the court and witnesses prior to the hearing in a format agreed upon.

- (6) The court may also refer to the SCAO publication, [Michigan Trial Courts Virtual Courtroom Standards and Guidelines, 2020](#).
- (7) Both the courts and attorneys have expressed concerns about a witness appearing by Zoom® and the potential risk that someone is communicating with the witness from “the wings” or by text or other digital method. The Zoom® hearing is a court proceeding and the judge controls the courtroom. Judges may request a witness to use the videorecorder to show the court the entire room, and inquire about anyone located in the room and whether the witness has access to any documents involving the case. Courts should refer to SCAO’s [Remote Hearing Witness Instructions](#). Courts can supplement the standards and distribute the standards to interested parties and keep them posted on the website.
- (8) Courts must also manage self-represented litigants on Zoom®. A good resource is [SCAO Guidance on Conducting Remote Hearings with Self-Represented Litigants](#).
- (9) Courts should use the Zoom® interpreter tool in all matters requiring an interpreter, except for criminal plea hearings. The interpreter tool allows for the interpreter to speak to the foreign language witness without the interpretation being heard by others on the Zoom® hearing. The tool allows for real-time interpretation as if in open court. However, the recording device cannot record the interpretation, which is required in criminal plea hearings. The [Zoom® tutorial](#) provides instructions on how to schedule a hearing using the interpreter tool.

Zoom® is a tool and not a means to replace in-person litigation. But used effectively, Zoom® can create flexibility for the court docket, increase access to the courts, and minimize legal costs.

RECOMMENDATIONS

- (1) **Non-Evidentiary Civil and Criminal Hearings:** The Committee recommends amending the court rules to create a presumption that attorneys, parties, and participants will appear by Zoom® for non-evidentiary civil and criminal hearings, including warrant requests, arraignments, probable cause conferences, calendar conferences, final conferences, sentencings, probation violation hearings, status conferences, settlement conferences, ADR proceedings, FOC proceedings, and *pro confesso* hearings, unless good cause is shown why Zoom® should not be used, or in a criminal case where the defendant asserts the right to be physically present in the courtroom.
- (2) **Proposed Amendment of MCR 2.407:** The Committee recommends that [MCR 2.407, Videoconferencing](#) be amended to specify the use of Zoom® and establish a preference for participants to appear by Zoom®. The preference may be overcome by reasonable factors including the nature of the proceeding, the evidence to be presented, and the availability of the participant support. It should remain within

the court’s discretion to deny the application to appear by videoconferencing. This would apply to those court rules that permit the use of videoconferencing, including [MCR 3.210\(A\)\(4\)](#), [3.215\(D\)\(3\)](#), [3.705](#), [3.708](#), [3.804](#), [3.904](#), [4.101](#), [4.202](#), [4.303](#), [4.401](#), [5.140](#), [6.006](#), and [6.901](#), subject to any statute or rules that would preclude the use of videoconferencing.

- (3) **Use of Zoom® for Meetings in NA Cases:** The Committee recommends that a lawyer guardian ad litem in an NA case be permitted, upon written request, to use Zoom® for meetings with clients located outside of the county unless good cause is shown. However, the lawyer guardian ad litem must meet with the out-of-county clients in person prior to adjudication, permanency planning hearings, and termination hearings.
- (4) **Request to Appear via Zoom® to Ensure Access to Justice:** The Committee recommends that litigants who obtain a waiver of fees under [MCR 2.002](#) be given a preference when requesting to appear by Zoom® to ensure access to justice. The ability to appear through videoconferencing may save costs and provide flexibility to avoid lost time from work. However, if the litigant’s videoconferencing technology and/or equipment is not able to provide proper connectivity and audio and/or video recording, the court may require the litigant to appear in person until a remedy can be found.
- (5) **Consistency among Courts within a County Judicial System:** The Committee recommends that SCAO empanel a committee to study “best practices” of standard procedures courts should establish to provide fair and efficient justice. The findings of the committee would be submitted to each county to determine how best to implement the procedures. The Committee recognizes that Michigan’s judicial system is not a unified court system. Nevertheless, the clear implication from the opinions expressed by attorneys and other stakeholders of the judicial system is that the lack of consistency among judges within a county judicial system to follow established or recommended procedures undermines confidence in the judicial system.

Additional Procedural Concerns Regarding Zoom® Hearings Involving Criminal Defendants

The pandemic has delayed a multitude of criminal jury trials and other proceedings because many courts are not able to conduct trials under the phased re-opening plans. Criminal defendants may have consented to adjournments, but there remain additional procedural issues that courts must consider for whether to proceed with a Zoom® trial. This report does not offer a solution, but raises the questions; the local courts must be the final arbiter based on the facts and circumstances.

Right to Public Proceedings

The First and Sixth Amendments to the United States Constitution guarantee public proceedings. When courts conduct hearings via videoconferencing technology like Zoom®, steps must be taken to ensure public access, including access to the court’s YouTube channel. To the extent

that online proceedings are public, the Committee encourages courts to ensure the equipment used and connections to the Internet meet technical standards to minimize technical problems and access to the technology issues that may impede the public’s ability to view the proceedings.

Right to be Present

Appearing via video does not satisfy the right to be present absent a valid waiver. And “[v]irtual appearance is not a suitable substitute for physical presence.”²⁰ Courts must make every reasonable effort to ensure a defendant’s agreement to waive personal appearance and appear remotely – often from jail – is voluntary.

Courts must maintain the primary responsibility for ensuring that out-of-custody defendants have notice of how to participate in upcoming court hearings. Courts may not shift the duty of ensuring a defendant’s Zoom® appearance to defense counsel.

Right to Confrontation and Compulsory Process

Virtual courts present a danger to the right to confront and cross-examine witnesses under the Sixth Amendment. Virtual confrontation may have an impact on the witness, making it more likely that the witness will give false testimony. It may also impact the ability to cross-examine and the factfinder’s ability to assess the testimony. See, *People v Jemison*, 505 Mich 352, 363-367 (2020) (allowing an expert witness to testify by two-way, interactive video violated the defendant’s Confrontational Clause rights).

Important witnesses may be unavailable because they do not have access to the necessary technology or Internet services. What does compulsory process look like in an online court scenario?

Right to Counsel

Virtual courts can impede attorney-client communication, interfere with the attorney-client relationship, and jeopardize a defendant’s right to participate and assist in his own defense. As noted earlier, the virtual courtroom must provide access to confidential communications such as the Zoom® breakout room. Moreover, the court must provide ample time for criminal hearings at every stage of the proceedings to allow for confidential communication between attorney and client. If an attorney informs the court that the virtual process is impeding the right to communicate because of inability to exchange documents or evidence during the attorney-client breakout sessions, the court must act to protect the right and seek compliance in a non-virtual setting.

The right to counsel includes the right to the *effective* assistance of counsel.²¹ Virtual courts and the choice to proceed virtually under circumstances where in-person activity is limited raise

²⁰ *People v Heller*, 316 Mich App 314, 318 (2016).

²¹ *Strickland v Washington*, 466 U.S. 668 (1984).

effective assistance of counsel concerns, including but not limited to, the duty to conduct an independent and adequate investigation and the duty to protect client confidentiality.

Equal Protection and Due Process: As noted above, virtual courts may create wealth-based hurdles – those who lack access to sufficient technology may have different and less meaningful access to justice than people with means.²² The courts must assure meaningful access to the virtual courtroom, including dedicating a room in the courthouse to safely permit use of videoconferencing technology.

DUE PROCESS CONSIDERATIONS

Right to Impartial Jury: There is consensus among judges, prosecutors, and defense attorneys that criminal jury trials must take place in person. While this report did not address the issues of a virtual jury process, courts are reminded that in criminal proceedings the use of a virtual courtroom could result in the exclusion of distinctive groups of jurors (fair cross-section or systemic exclusion), violating the Sixth Amendment, as well as rights to due process and equal protection.

Right to Speedy Trial: There is tension between the Sixth Amendment right to speedy trial and other Constitutional rights implicated by online courts. Defendants should not be forced to waive guaranteed Constitutional rights to ensure a speedy trial. Moreover, as trial courts commence previously adjourned hearings, either virtually or in-person, courts must continue to prioritize adjudicating in-custody defendants before out-of-custody defendants. Both the courts and attorneys surveyed reported that 85 percent of the courts implemented plans to prioritize in-custody proceedings.

RECOMMENDATIONS

- (1) **Discourage Practice of “Cattle Call” Appearances:** The Committee recommends that SCAO discourage judges from using the cattle call approach in criminal matters and instead rely on a staggered docket by using assigned times or a similar docket management mechanism. As is true in civil cases, parties can sit for several hours and attorneys often run into conflicts with other courts while waiting for a “cattle call” appearance on a particular docket.
- (2) **Require Prioritizing of Hearings for In-Custody Defendants:** As criminal courts return to full capacity and resume previously adjourned hearings, either virtually or in-person, the Committee recommends that SCAO require courts to prioritize adjudicating in-custody defendants before out-of-custody defendants, and that preference be given to those defendants who have been in custody for the longest amount of time.
- (3) **Minimum Standards for Equipment and Internet Connection:** To the extent that online proceedings are public, the Committee recommends that courts ensure the equipment used and connections to Internet meet technical standards to minimize technical problems and access to the technology issues that may impede the public’s ability to view the proceedings.

²²*Griffin v Illinois*, 351 U.S. 12 (1956); *Ake v Oklahoma*, 470 U.S. 68 (1985).

- (4) **Mandate Notices in Criminal Matters:** Similar to the best practices for Zoom® hearings in civil cases, SCAO should mandate that in criminal matters, courts provide notice of the date, time, and purpose of the hearing, along with the following details:
- a. Zoom® login information;
 - b. Contact information for a staff member to answer questions or concerns; and
 - c. Instructions for the participants to login and identify themselves on the screen by name, case name, and case number before entering the Zoom® hearing. This allows for court staff to easily identify participants for hearings, especially on motion calls, and allows for easy assignment of the participants into a breakout room, if used. Kent County incorporates these instructions into a SCAO notice form.
- (5) **Provide an In-person Alternative for Jailed Defendants:** The Committee recommends that SCAO require courts to provide an in-person alternative for defendants who are in jail and do not agree to participate in the hearing by way of Zoom® technology.
- (6) **Annual Zoom® and YouTube Training for Court Staff:** To protect the right to counsel, due process, and public access in criminal cases, the Committee recommends that SCAO require court staff to be trained annually on the best practices for operating by Zoom®, and Zoom® and YouTube technology; also that there be mandatory compliance with SCAO's current [Recommendations on Using Zoom® & Public Access for Court Proceedings](#). This mandate should include a requirement that courts allow out-of-custody defendants or witnesses to participate by telephone or another reasonable alternative where they otherwise lack access to a stable Internet connection.
- (7) **Amend Court Rules to Create a Presumption the Certain Parties Will Appear Remotely for Certain Hearings:** The Committee recommends amending the court rules to create a presumption that, except where the defendant asserts the right to be physically present in the courtroom, attorneys, parties, and participants in criminal cases will appear remotely using two-way interactive video technology or other remote participation tools for non-evidentiary criminal hearings, including warrant requests, arraignments on the information under [MCR 6.113](#) (unless waived), probable cause conferences, emergency motions regarding bond, calendar conferences, final conferences, plea hearings, sentencing, extradition hearings, and probation violation hearings under [MCR 6.445\(B\)](#). With regard to matters involving forensic evaluations of juveniles or adults for competence to stand trial, competence to waive Miranda rights, and criminal responsibility, courts shall permit the use of video technology. The evaluator shall note in the forensic opinion whether the use of video technology impeded an impartial and accurate clinical assessment, and, if so, notify the court that an in-person evaluation must be scheduled.