



State Court Administrative Office

Draft Report from the Task Force on Open Courts, Media, and Privacy

July 12, 2021 - DRAFT

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Mission

The arrival of the COVID-19 pandemic in the spring of 2020 forced the vast majority of Michigan judicial proceedings to move online. This presented technical challenges to courts, attorneys, parties, and other participants in the state's justice system. In certain types of cases, the use of online proceedings also raised concerns about privacy, the rights of criminal defendants, the rights of victims, and the fair administration of justice. The affected proceedings included administrative proceedings, such as those of the Attorney Discipline Board and the Judicial Tenure Commission.

At the same time, the advent of online proceedings brought advantages and opportunities. Access became easier for many participants in, and observers of, the judicial system. Online proceedings saved time and expense, relieving participants and observers from burdens like taking time off work, finding transportation, traveling to the courthouse, and parking. It became much simpler for lawyers and members of the media who need to monitor proceedings at more than one courthouse to do so.

These developments raise a number of important questions: How has the online experiment gone? Should courts continue to use online proceedings in the post-pandemic environment? If so, how do courts ensure that access and transparency are maintained and further improved? What measures should courts take to address privacy concerns and the rights of criminal defendants, victims, and other participants? What improvements can be made?

In the fall of 2020, Michigan Supreme Court Chief Justice Bridget Mary McCormack formed the Task Force on Open Courts, Media, and Privacy to consider and address the above questions, specifically in relation to the public's ability to observe judicial proceedings.¹ She directed the Task Force to prepare recommendations toward the goal of making Michigan's approach to online judicial proceedings "a model for the nation." This Report responds to the Chief Justice's request.

Membership and Proceedings

Chief Justice McCormack appointed the Hon. Amy Ronayne Krause of the Michigan Court of Appeals and Professor Len Niehoff of the University of Michigan Law School and the Honigman law firm to serve as co-chairs of the Task Force. Working with Tom Boyd, State Court Administrator; John Nevin, Communications Director for the Michigan Supreme Court; and Lynn Seaks, Project Coordinator of the Michigan Supreme Court Public Information Office, the co-chairs identified the various constituencies that were most likely to be affected by the Task Force's recommendations. They then identified individuals with the expertise, experience, and position to speak on behalf of those constituencies and to provide their insights. After receiving confirmation of their willingness to serve, Chief Justice McCormack appointed those individuals to the Task Force.

¹ Other groups are also considering questions related to the continuation of online proceedings. Specifically, the Michigan Supreme Court Lessons Learned Committee has been tasked with making recommendations on continuing online proceedings after the pandemic. While the issues being considered by the Lessons Learned Committee and this Task Force overlap, the recommendations in this report are limited to the issues of public transparency and access to court proceedings and the potential privacy and related issues that online proceedings raise.

In addition to the co-chairs and the previously mentioned Michigan Supreme Court staff, the Task Force includes:

- Hon. Freddie Burton, Jr., Chief Judge, Wayne County Probate Court
- Brian Dickerson, Editorial Page Editor, Detroit Free Press
- Kathy Hagenian, Executive Policy Director, Michigan Coalition to End Domestic and Sexual Violence
- Professor Joshua Kay, Clinical Professor of Law, University of Michigan Child Advocacy Law Clinic
- David Leyton, Prosecutor, Genesee County Prosecutor's Office
- Lisa McGraw, Public Affairs Manager, Michigan Press Association
- Hon. Christopher Ninomiya, Circuit Court Judge, Dickinson County Circuit Court
- Karl Numinen, criminal defense attorney, Numinen DeForge & Toutant PC
- Lisa Roose-Church, Judicial Correspondent, Michigan Information & Research Service
- Hon. Cynthia Ward, District Court Judge, 54-A District Court
- Jeannie Wernet, Prosecuting Attorneys Association of Michigan.

The Task Force conducted multiple meetings at which attendance and participation were excellent and all of its meetings were held online via Zoom. It reviewed documents that identified issues, proposed preliminary findings, and suggested final recommendations. It studied extensive legal memoranda prepared by Supreme Court Commissioner Molly Hennessey. It considered various communications received by the Supreme Court regarding issues related to online proceedings.

On July 12, 2021, the Task Force approved releasing the draft report for public comment.

Summary of Recommendations

This report respectfully suggests that the Michigan Supreme Court adopt an Administrative Order (the "Proposed Administrative Order") or amend the Michigan Court Rules to provide as follows:

[The summary will be prepared after public comment has been received and the Task Force has approved a final version of its report and recommendations.]

Analysis

I. Transparency and Access

In discourse about courts, the words "transparency" and "access" are sometimes used interchangeably. In this report, however, we distinguish between them. We use "transparency" in connection with the idea that the public should be able to observe and receive information regarding judicial proceedings, including through media coverage. We use "access" in connection with the idea that those who need recourse to judicial proceedings should be able to obtain it. The concepts are associated (for example, it is more difficult to obtain access to a system that is not transparent), but they serve distinct interests and raise distinct concerns.

Transparency

Under the law, a strong presumption exists that the public has a right to be present at and observe judicial proceedings.² The Supreme Court of the United States has recognized this as a right of federal constitutional magnitude. *See, e.g., Richmond Newspapers, Inc v Virginia*, 448 US 555, 576 (1980) (“The First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted”). This robust right also exists as a matter of Michigan constitutional and common law, *see Detroit Free Press, Inc v Recorder’s Court Judge*, 409 Mich 364, 392-393 (1980), Michigan statutory law, *see* MCL 600.1420 (“The sittings of every court within this state shall be public ...”), and Michigan Court Rule, *see* MCR 8.116(D)(1) (“Except as otherwise provided by statute or court rule, a court may not limit access by the public to a court proceeding”). Of course, like all other rights, the right of access is not absolute; but it is clear that the closure of a judicial proceeding is warranted in only rare cases and that courts must exercise special care before taking this extraordinary step. *See, e.g., Waller v Georgia*, 467 US 39, 45 (1984).

In *Richmond Newspapers, supra*, the Supreme Court of the United States listed the numerous important interests that are served by open judicial proceedings. Those include the assurance that the proceedings are being fairly conducted, the discouraging of perjury and other misconduct, the exposure of bias or partiality, and the “significant community therapeutic value” of open justice. *Id* at 570-571. Open judicial proceedings serve a critical educative function and build confidence in our justice system. Quoting Wigmore, the Supreme Court in *Richmond Newspapers* observed that “Not only is respect for the law increased and intelligent acquaintance with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.” *Id.* at 572. “People in an open society do not demand infallibility from their institutions,” the Court noted, “but it is difficult for them to accept what they are prohibited from observing.” *Id.* Of course, the public will sometimes believe that a judicial ruling or jury verdict got things wrong and will express outrage over it; but the public is hardly likely to experience *less* outrage when the perceived injustice was done behind closed doors.

The media play a critical role here. In an earlier time, “attendance at court was a common mode of ‘passing the time.’” *Id.* Today, public understanding of what goes on in our courts is largely achieved through reporting by the media. In this sense, the media serve as the surrogate eyes and ears of the public. As a result, “[w]hile media representative enjoy the same right of access as the public, they are often provided special seating and priority of entry so that they may report what people in attendance have seen and heard.” *Id* at 573. Media coverage of judicial proceedings “contributes to public understanding of the rule of law” and helps foster a greater familiarity with the justice system. *Id.*³

² When this Report refers to “judicial proceedings” it does so in a broad sense, to include not just trials but also proceedings like arraignments, preliminary examinations, motion hearings, etc.

³ In some contexts, it may become important to attempt to discern who does, and does not, qualify as a member of “the media.” Because the media enjoy no greater right of access to judicial proceedings than do members of the general public, that question is not implicated here.

During the pandemic, it became critical to preserve this transparency while moving proceedings to online formats. A variety of measures were recommended and adopted as a result. For example, the Michigan Trial Courts Virtual Courtroom Standards and Guidelines (adopted April 7, 2020, rev'd August 4, 2020) provides as follows in section (C)(1):

Access to proceedings must be provided to the public either during the proceeding or immediately after via video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule ... The court should create a YouTube account (livestreaming channel) and work with its local court website administrator to post a link to the YouTube channel. Information about public availability of court proceedings via livestreaming must be accessible to the public and press. This can be accomplished by posting the information on the court's website. If the court does not have a website, it is the court's responsibility to develop another method to effectively communicate the availability of court proceedings ... A court may also provide access to the public by encouraging members of the press and public to contact the court to receive the Zoom meeting information to watch proceedings.

In the same vein, Administrative Order 2020-6 (adopted April 7, 2020) states that “access to the [online proceedings] must be provided to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule.”

The question of *which* proceedings a court should conduct online lies beyond the scope of the work of this Task Force. This Report focuses on issues of maintaining transparency (while accommodating competing concerns, like privacy) to the extent that courts continue to conduct proceedings online. The pandemic experiment with online proceedings provides important insights.

The media representatives on the Task Force indicated that, in their experience, the move to online proceedings during the pandemic generally did not compromise transparency. To the contrary, online proceedings generally enhanced transparency for at least two reasons. First, they made observing a proceeding more efficient and less time- and resource-intensive. And, second, they made it easier for the media to monitor proceedings in multiple courts.

Nevertheless, based on discussions within the Task Force, it appears that the use of online proceedings does give rise to two risks with respect to transparency.

One risk relates to notice. In the pre-pandemic environment, a member of the public or the media who was following a particular case typically had little difficulty finding out when hearings and trials were scheduled. In at least some state courts, the move to online proceedings occasionally made this more difficult to discern. Transparency without the necessary information to observe is not transparency at all. The issue of adequate notice needs to be addressed.

The other concern relates to closure. As noted above, the right to observe court proceedings is not absolute and in some rare instances closure may be necessary. A comprehensive review of the law concerning court closure lies beyond the scope of this report.

In general, however, the standard for closure is high.⁴ To be clear, MCR 8.116(D) must be followed to close any court proceeding: the requesting party must file a written motion to close the courtroom; the denial of access or the closure must be narrowly tailored; and a copy of any order must be sent to the Supreme Court Administrator's Office.

To take just one example, a court cannot close a portion of a criminal trial unless it makes certain specific determinations. Those include: (a) that the party seeking the closure advances an overriding interest that is likely to be prejudiced; (b) that the closure is no broader than necessary to advance that interest; and (3) that reasonable alternatives to closure do not suffice. The trial court must make particularized on-the-record findings adequate to support the closure. *See, e.g., Waller v Georgia*, 467 US 39, 48 (1984).

In the experience of the media counsel on the Task Force, trial courts are not always aware of the high standards for closure, precisely because closure is so rarely appropriate. It is, therefore, critical that anyone who has an objection to closure have an opportunity to be heard on the issue. When proceedings are conducted in person, the physical clumsiness of closing them helps assure that the correct process is followed and that any challenges are heard. The court must announce the closure to those in attendance and have them ushered from the room. There is an inherent delay as this occurs and the resulting pause provides an opportunity for anyone with an objection to speak up and ask to address the court regarding the closure.

In contrast, it is easier for a court to close an online proceeding. If the proceeding has not yet begun, invitations to participate can be limited to those with passwords. If the proceeding is underway, certain participants can be removed with the click of a few buttons. The opportunity to object to closure may be much more limited, not by design but by the unique characteristics of online proceedings. It is important that courts understand that there are strict standards for closing proceedings and that no closure should occur without affording an adequate opportunity for objections to be voiced and considered.

One additional note is in order. Under certain circumstances, a court may need to close proceedings with respect to a specific person. The sequestering of a witness before she or he testifies provides an example. Some level of sequestration can be achieved in the online environment, for example by moving a witness to a Zoom breakout room. Nevertheless, a court may conclude that it is easier to achieve a complete and reliable sequestration in the context of an in-person proceeding than an online one. These circumstances argue for conducting the proceeding in person, but should not be used to justify the broad closure of an online proceeding.

Access

Access to the courts and to justice is a vast and complex collection of issues, most of which lie beyond the charge of this Task Force and the scope of this report. In January of this year, the Michigan Supreme Court adopted Administrative Order 2021-1, creating the Justice For All Commission, which will work toward the goal of 100 percent access to our civil justice system. Because that Commission is specifically charged with analyzing and making

⁴ For additional information on closure standards, *see* The Michigan Trial Courts Virtual Courtroom Standards and Guidelines at section (C)(1) fn. 9 and the sources cited there.

recommendations with respect to access, this Task Force will offer only a few observations based on our discussions.

The Task Force includes members who work with populations who sometimes struggle with access to in-person proceedings because of their limited resources. Physically appearing in court places substantial burdens on them. They must take time off of work or away from childcare. They have difficulty securing transportation. Travel and parking can be challenging and expensive. For many of these people, online proceedings significantly improve access. For example, persons with disabilities have much more difficulty for a multitude of reasons appearing in person at a courtroom.

Discussions within the Task Force made clear, however, that this experience is not universal. The “digital divide” between those who do and do not have access to technology remains an unfortunate reality. It is estimated that as many as 42 million Americans do not have access to wired or fixed wireless broadband. See Linda Poon, *There Are Far More Americans Without Broadband Access than Previously Thought*, Bloomberg CityLab (February 19, 2020). According to the 2017 census, about 14 percent of Michigan households are not connected to the Internet. See Julie Mack, *14% of Michigan Homes Lack Internet, Census Says* (MLive, September 19, 2019). These issues are especially acute in particular regions and for particular people, including rural areas, in low-income homes, the elderly, and among those who are less educated. See Amelia Benevides-Colón, *Whitmer Order Expands ‘Essential’ High-Speed Internet to Communities Across the State*, The Detroit News (June 2, 2021). In sum, the move to online proceedings may add an additional burden to some people who are already struggling with access to justice.

Members of the Task Force reported instances where parties or witnesses encountered difficulties in participating in proceedings because they did not have ready access to reliable Internet. In some cases this exacerbated an existing problem, for instance where a witness in a criminal case was already hesitant to cooperate and appear. A prosecutor member of the Task Force reported having to make a computer and Internet connection available at their office in order to accommodate a witness who would not otherwise have been able to participate. In sum, while in many instances the use of online proceedings will increase access, it is important to acknowledge that this will not always hold true.

Despite the digital divide, it seems clear that in the majority of cases conducting proceedings online enhances access to the courts. It, therefore, seems advisable for many courts to treat many types of online proceedings as “business as usual.” However courts will need the discretion to conduct in-person proceedings because of access considerations or other issues discussed later in this report, such as the confrontation rights of criminal defendants.

II. Privacy and Related Concerns

Because of the strong presumption in favor of public judicial proceedings, participants in the justice system necessarily surrender some of their personal privacy. Accusers, defendants, and witnesses typically testify in open court. They are subject to cross-examination. Relevant evidence about them can be embarrassing. The experience can be emotionally taxing, if not even traumatizing. Some of these consequences are unavoidable in a system that is adversarial, sets a low bar for relevance, and is open to public scrutiny.

Online judicial proceedings, however, bring with them a unique and additional risk. Specifically, they give rise to the possibility that an observer can make their own video or audio recording of the proceeding and then use it abusively. Such recordings can easily be edited to convey a false or misleading impression. And they can be circulated around the world via social media with the push of a few buttons.

These possibilities raise concerns under a variety of state laws. Those include Article I, § 24 of the Michigan Constitution, which provides crime victims with the right “to be treated with fairness and with respect for their dignity and privacy throughout the criminal justice process.” Unless in conflict with rights conferred under the United States Constitution, the Michigan Crime Victims’ Rights Constitutional provision and the Crime Victims’ Rights Act, MCL 780.751, *et seq.*, must be honored. Of course, those state laws cannot trump rights that are conferred under the United States Constitution (like the right to attend criminal trials or a criminal defendant’s right of confrontation), but in setting policy they must otherwise be followed.

There is substantially less risk of this type of abusive behavior with respect to live judicial proceedings. The taping or photographing of judicial proceedings in Michigan courts is prohibited unless the court grants permission. Michigan Supreme Court Administrative Order 1989-1 states that “[f]ilm or electronic media coverage shall be allowed upon request in all court proceedings,” suggesting that in most cases such a request can and should be granted.⁵ Nevertheless, the Order also makes clear that judges retain the discretion to “terminate, suspend, limit, or exclude” such coverage where “the fair administration of justice requires such action.” *Id.* It also states that the judge has “sole discretion to exclude coverage of certain witnesses, including but not limited to the victims of sex crimes and their families, police informants, undercover agents, and relocated witnesses.” *Id.* In addition, it provides that “film or electronic media coverage of the jurors or of the jury selection process” is not permitted. *Id.*

More broadly, MCR 8.115(C)(3)(a) provides that “In a courtroom, no one may use a portable electronic device to take photographs or for audio or video recording, broadcasting, or live streaming unless that use is specifically allowed by the judge presiding over that courtroom.” This rule appears to apply to anyone in possession of such a device, not just members of the media. The rule does not specify the grounds on which the judge may grant or deny a request to photograph or record, evidently leaving the decision to the judge’s discretion. Violations of the rule are punishable by sanctions “up to and including contempt of court.” MCR 8.115(C)(7).

Of course, even with in-person proceedings courts cannot police the use of cameras with complete effectiveness. Cellphones are now allowed in all courtrooms and most cellphones have photographic and video recording capabilities. Surreptitious photography or video recording may therefore occur. But it seems fair to conclude that it is much easier to monitor this risk when a proceeding is being conducted in person than when it is being conducted online.

⁵ The Order is limited to requests by the “media,” but defines media broadly to embrace “any person or organization engaging in news gathering or reporting and includes any newspaper, radio or television station or network, news service, magazine, trade paper, professional journal, or other news reporting or news gathering agency.” It is unclear whether someone who made the request because they “gather news” for their blog or social media account would be viewed as a member of “the media” for these purposes.

In the course of online proceedings, a court can indicate (by introductory statement, caption, or watermark) that no photography or recording should occur without the express permission of the judge. It is the understanding of the Task Force that courts have been using a caption or watermark, although it does not appear that this issue is discussed in the Michigan Trial Courts Virtual Courtroom Standards and Guidelines. During the Task Force discussions, one instance was described where a court displayed such a prohibition during an online proceeding and a reporter asked for permission to record, which the court granted.

Although a court may issue such a directive during online proceedings, special concerns arise in this context. With respect to online proceedings, such a directive may prove difficult or impossible to enforce. A court will usually have no way of knowing whether someone is recording something that they should not. And, if a recording is circulated on the Internet, a court may not be able to ascertain the original source, especially if the recording was made by an individual rather than by the media. Furthermore, a court may be unable to restrain those who did not make the improper recording but who simply re-circulate it. *See Bartnicki v. Vopper*, 532 US 514 (2001) (holding that a media entity could not be punished for broadcasting a recording that its source had unlawfully obtained where the entity itself engaged in no illegal conduct).

In assessing these considerations, a court must consider the safety and privacy concerns of vulnerable victims and witnesses, applying a presumption that proceedings be conducted in person for certain types of cases: those involving domestic assault, sexual assault, child abuse or victimization, gang-related offenses, and cases where a victim or witness expresses a particularized fear that their safety or privacy will be placed in jeopardy by online proceedings. This presumption may be overcome by the victim's or witness's preference to proceed online, for example due to accessibility concerns.

During the pendency of the pandemic environment, when in-person proceedings may be unworkable for health and safety reasons, there may have been no way to address the additional privacy risks that attend online proceedings. Closing proceedings entirely was usually not an option under the federal constitutional law, state law, or court rules discussed above. Where special privacy concerns did exist, a judge could emphatically indicate that recording was prohibited and that violations would be punished by contempt of court. Beyond these steps, however, a court appeared to have few, if any, options and the threat of sanctions may have seemed hollow.

In the post-pandemic environment, however, courts will have an additional alternative: they can simply declare that the relevant proceeding will be conducted in person. This eliminates the special risks of online proceedings. And it allows the judge to apply Administrative Order 1989-1 to any requests for recording that arise.⁶ Courts should consider this alternative when proceedings pose a material risk of the kinds of privacy abuses described above.

⁶ The Task Force recognizes that this approach does not eliminate all risk. Someone might find a way to make surreptitious and improper recordings of a proceeding. Also, an enterprising and well-resourced individual might be able to secure and make abusive use of a court's official recording of a proceeding. Still, those risks existed pre-pandemic and the Task Force has not been made aware of instances where they materialized.

III. The Confrontation Rights of Defendants

The Confrontation Clause of the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him” US Const, Am VI. The Michigan Constitution similarly affords a criminal defendant “[i]n every criminal prosecution,” the right to “be confronted with the witnesses against him,” adopting this language of the federal Confrontation Const 1963, art 1, § 20 (emphasis added). These constitutional provisions are underscored by MCL 763.1, which provides, “On the trial of every indictment or other criminal accusation, the party accused shall be allowed to . . . meet the witnesses who are produced against him face to face.”

In *Crawford v Washington*, 541 US 36 (2004), the Supreme Court of the United States set Confrontation Clause doctrine on a new path. Prior to *Crawford*, the Court had held that the Confrontation Clause created a *substantive* requirement that testimony offered against the defendant be reliable. But *Crawford* found that the Clause guaranteed a specific *process*: that criminal defendants be able to confront their accusers. The Court declared: “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”

In a pre-*Crawford* decision, *Maryland v Craig*, 497 US 836 (1990), the Court had considered whether the Confrontation Clause allows a child victim of abuse to testify at trial over one-way, closed-circuit television while physically located in a room separate from the judge, the jury, and the defendant, who could hear and see the testimony. *Craig* held that the Confrontation Clause did not categorically prohibit this testimony, adopting the following rule: “[A] defendant’s right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured.” *Id.* at 840-841. The Court stated: “[T]hough we reaffirm the importance of face-to-face confrontation with witnesses appearing at trial, we cannot say that such confrontation is an indispensable element of the Sixth Amendment’s guarantee of the right to confront one’s accusers.” *Id.* at 849-850.

The question presented is how broadly to understand *Craig*’s allowance of virtual confrontation in light of *Crawford*’s interpretation of the confrontation right. Some courts have concluded that *Craig* remains controlling law whenever a witness testifies online via video at trial but the defendant is denied physical, face-to-face confrontation. See, e.g., *State v Thomas*, 376 P3d 184, 193-194 (NM, 2016); *United States v Yates*, 438 F3d 1307, 1314 n 4 (CA 11, 2006) (en banc). In a recent decision, however, the Michigan Supreme Court disagreed. In *People v Jemison*, 505 Mich 352, 356 (2020), the Court unanimously held that a forensic analyst’s two-way, interactive video testimony violated the defendant’s Confrontation Clause rights under the state and federal constitutions. The Court in *Jemison* held that it would “apply *Craig* only to the specific facts it decided: a child victim may testify against the accused by means of one-way video (or a similar *Craig*-type process) when the trial court finds, consistently with statutory authorization and through a case-specific showing of necessity, that the child needs special protection.” *Jemison*, 505 Mich at 365. In all other circumstances, “*Crawford* . . . provides the applicable rule.” *Id.*

Jemison limits the ability of courts to satisfy the guarantees of the Confrontation Clause through virtual confrontation in the context of a trial. But it obviously does not entirely eliminate the use of online proceedings in criminal cases. To the contrary, most hearings in a criminal case can be conducted online without violating the Confrontation Clause. Indeed, MCR 6.006 already provides for the use of interactive video technology in a wide array of proceedings. And, of course, the issue does not arise if a defendant waives their confrontation right or if an exception applies, such as where the witness is unavailable and the defendant had a prior opportunity for cross-examination. *See Crawford*, 541 US at 54.

A comprehensive review of the Confrontation Clause jurisprudence, which continues to evolve, lies beyond the scope and charge of this Task Force. It is clear, however, that under certain circumstances the use of online proceedings would violate the defendant's right to confrontation. Courts obviously need to remain mindful of this possibility and must take steps to avoid such violations.⁷

Recommendations

In light of the above, the Task Force concludes as follows:

First, it seems clear that many proceedings can and should continue to be conducted online. In many cases, the use of such proceedings strongly serves the interest of access. And many types of cases do not raise the privacy and other countervailing considerations discussed above.

Second, however, it seems equally clear that in certain circumstances online proceedings may not be possible or workable. In such circumstances, the proceeding must be conducted in-person.⁸ We have identified some categories of cases where we believe a presumption for in-person proceedings should apply, but others may exist.

Regardless of whether the proceeding is conducted in-person or online, the Task Force respectfully suggests that the Proposed Administrative Order and/or court rule⁹ direct as follows:

1. Whether conducted in-person or online, all judicial proceedings must comply with the openness requirements imposed by federal constitutional law, state constitutional law, statutory law, and the Michigan Court Rules. Any closure must comply with the relevant standards and requirements as discussed above. The court must afford an opportunity to be heard by anyone who has an interest in the case and who objects to closure. The court shall preserve a video recording of a closed session so that the

⁷ The Michigan Trial Courts Virtual Courtroom Standards and Guidelines recognizes that “The use of videoconferencing technology must be consistent with a party’s Constitutional rights,” and specifically cites *Jemison* and notes the confrontation concern. In addition, Michigan Supreme Court Administrative Order 2020-08 (April 7, 2020) states that videoconferencing procedures must be consistent with a party’s constitutional rights.

⁸ As noted above, recommendations for deciding whether to proceed online or in-person are outside of the scope of this Task Force.

⁹ Whether the Supreme Court decides to adopt an administrative order, court rule, or both, the Task Force expects that the Court will utilize the normal deliberative process of publication, public comment, and public hearing.

- public and press may access the hearing should a court later determine that the hearing should not have been closed.
2. Because livestreamed proceedings generally enhance public transparency and access to justice, in the post-pandemic environment Michigan courts should continue to provide the public and the media access to court proceedings via livestream. The presumption that court proceedings will be available via livestream may be overcome where the proceeding is closed or access is otherwise be limited by statute or rule, or in the circumstances detailed below.
 3. There is a counter-presumption that the following proceedings will not be livestreamed.
 - a) Hearings where a witness is testifying in cases involving allegations of:
 - i. Domestic violence as defined in the domestic violence prevention and treatment act, MCL 400.1501, *et seq.*,¹⁰
 - ii. Criminal sexual conduct as defined in Chapter 76 of the Penal Code, MCL 750.520a, *et seq.*,¹¹
 - iii. Human trafficking as defined in Chapter 67 of the Penal Code, MCL 750.462a, *et seq.*,¹²
 - iv. Stalking as defined in MCL 750.411h(d),¹³ or
 - v. Crimes of indecency or immorality as defined in Chapter 68 of the Penal Code, MCL 750.335 *et seq.*¹⁴
 - b) Family law hearings where testimony or documentary evidence is presented containing sensitive information, including but not limited to the parties' financial assets, the parties' medical or psychological records, or the children's medical, psychological, or school records.

¹⁰ MCL 400.1501(d) defines domestic violence as “the occurrence of any of the following acts by a person that is not an act of self-defense:”

- (i) Causing or attempting to cause physical or mental harm to a family or household member.
- (ii) Placing a family or household member in fear of physical or mental harm.
- (iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
- (iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

A “family or household member” may include a spouse, former spouse, present or former dating or sexual partner, present or former “individual” coresident, present or former relative by marriage, other parent of the individual's child, or minor child of any of the above. MCL 400.1501(e).

¹¹ Chapter 76 defines the crimes of criminal sexual conduct in all degrees, MCL 750.520(b)-(e), and assault with intent to commit criminal sexual conduct, MCL 750.520(g).

¹² Chapter 67 prohibits forced labor or services, debt bondage, and commercial sexual activity, as those terms as defined in MCL 750.462a.

¹³ MCL 750.411h(d) defines “stalking” as “a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested.”

¹⁴ Chapter 68 defines the crimes of indecent exposure, MCL 750.335a, and gross indecency, MCL 750.338, MCL 750.338a, and MCL 750.338b.

4. Every court must have in place a consistent and reliable method for conveying to the public when hearings are scheduled, whether they will be conducted in person or online, and how an interested person can obtain access to the proceeding via livestream. Alternatively, if in accordance with the above the proceeding will not be livestreamed, the court must provide this notice and make clear that an interested party must observe the proceeding in-person.
5. The court must keep the recording of a livestreamed proceeding for 48 hours on YouTube or other platform.¹⁵ The court may remove the recording sooner if the hearing was improperly livestreamed contrary to the above.
6. Every court should indicate by introductory statement, caption, or watermark that photography and recording of the proceeding is prohibited without the express permission of the court. Notice of the possible penalty for violation of this prohibition (i.e., contempt of court under MCR 8.115(C)(7)) should be provided. Additional penalties for the improper recording and dissemination of court proceedings should be considered by the Supreme Court and/or Legislature.

Conclusion

[The conclusion will be prepared after public comment has been received and the Task Force has approved a final version of its report and recommendations.]

¹⁵ The use of Zoom with a livestream to YouTube appears to have worked best for remote proceedings during the pandemic and still appears to be the best available option. However, the Task Force recognizes the limitations of these platforms, specifically with respect to advertisements, chat functions, and the inability to prohibit improper recordings. The Task Force encourages the Court to work with Zoom and other providers of virtual meeting platforms to develop functions that meet the specific needs of courts.