

COVID-19 ISSUE SPOTTING AND RECORD PRESERVATION TRAINING FOR DEFENDERS

May 19, 2020

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MICHIGAN INDIGENT
DEFENSE COMMISSION

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COVID-19

- Executive Order 2020-21 (March 23, 2020)
 - Temporary requirement to suspend activities that are not necessary to sustain or protect life
- Michigan Supreme Court Administrative Order 2020-2 (March 18, 2020)
 - Trial courts must continue to operate to provide essential functions.
 - The Supreme Court's Administrative Order makes clear that “[t]o the extent possible and consistent with MCR 6.006 and a defendant's constitutional and statutory rights” courts should conduct certain hearings remotely using **two-way interactive video technology or other remote participation tools.**
- Michigan Supreme Court Administrative Order 2020-6 (April 7, 2020)
 - Order Expanding Authority for Judicial Officers to Conduct Proceedings Remotely



STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

GRETCHEN WHITMER
GOVERNOR

GARLIN GILCHRIST II
LT. GOVERNOR

EXECUTIVE ORDER

No. 2020-69

Temporary restrictions on the use of places of public accommodation

Rescission of Executive Order 2020-43

The novel coronavirus (COVID-19) is a respiratory disease that can result in serious illness or death. It is caused by a new strain of coronavirus not previously identified in humans and easily spread from person to person. There is currently no approved vaccine or antiviral treatment for this disease.

On March 10, 2020, the Department of Health and Human Services identified the first two presumptive-positive cases of COVID-19 in Michigan. On that same day, I issued Executive Order 2020-4. This order declared a state of emergency across the state of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, 1976 PA 390, as amended, MCL 30.401 et seq., and the Emergency Powers of the Governor Act of 1945, 1945 PA 302, as amended, MCL 10.31 et seq.

Since then, the virus spread across Michigan, bringing deaths in the thousands, confirmed cases in the tens of thousands, and deep disruption to this state's economy, homes, and educational, civic, social, and religious institutions. On April 1, 2020, in response to the widespread and severe health, economic, and social harms posed by the COVID-19 pandemic, I issued Executive Order 2020-33. This order expanded on Executive Order 2020-4 and declared both a state of emergency and a state of disaster across the State of Michigan under section 1 of article 5 of the Michigan Constitution of 1963, the Emergency Management Act, and the Emergency Powers of the Governor Act of 1945. And on April 30, 2020, finding that COVID-19 had created emergency and disaster conditions across the State of Michigan, I issued Executive Order 2020-67 to continue the emergency declaration under the Emergency Powers of the Governor Act, as well as Executive Order 2020-68 to issue new emergency and disaster declarations under the Emergency Management Act.

The Emergency Management Act vests the governor with broad powers and duties to "cop[e] with dangers to this state or the people of this state presented by a disaster or emergency," which the governor may implement through "executive orders, proclamations, and directives having the force and effect of law." MCL 30.403(1)-(2). Similarly, the Emergency Powers of the Governor Act of 1945 provides that, after declaring a state of

Order

April 23, 2020

ADM File No. 2020-08

Administrative Order No. 2020-10

Delay of Jury Trials

Michigan Supreme Court
Lansing, Michigan

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

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

On order of the Court, pursuant to 1963 Const, Art VI, §4, which provides for the Supreme Court's general superintending control over all state courts, all jury trials are delayed for a period of 60 days from the date of this administrative order (until June 22, 2020), or as otherwise provided for by local order, whichever date is later.

Further, the State Court Administrative Office is authorized to initiate pilot projects regarding practices related to how to conduct remote jury trials. The pilot courts will test and evaluate innovative jury procedures to allow for appropriate social distancing while also protecting the parties' Constitutional and statutory rights. After the pilot projects are complete, the State Court Administrative Office shall provide recommendations to assist all courts in providing jury trials that promote public health and safety as well as protect people's rights.

This order shall remain in effect through June 22, 2020, or until further order of the Court.



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

April 23, 2020

Clerk

Order

May 6, 2020

ADM File No. 2020-08

Administrative Order No. 2020-14

Continued Status Quo
Court Operations and
Phased Return to
Full Court Operations

The Michigan Supreme Court, in response to the coronavirus pandemic, court operations have been suspended. As expected, the Court has authorized the greatest extent possible, and several and litigants navigate more efficiently.

Keeping the public and court operations will remain a critical focus of our efforts. Moreover, the spread of the virus and as case counts rise in some areas are

There is some consensus—returning to more normal work practices while also protecting against the risk of various benchmarks based on local conditions in operations. Courts should consider for health and safety practices as determining the capacity of the courts.

Therefore, on order of the Court, provides for the Supreme Court's operations courts must adhere to the phased return established by the State Court Administration not be limited to:

Michigan Supreme Court
Lansing, Michigan

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- Continued use and expansion of remote hearings as practicable and increase of the court's capacity to conduct business online, including increased remote work by employees.
- Continued limited access to courtrooms and other spaces to no more than 10 persons, including staff.
- Imposition of social distancing practices of at least 6 feet for both employees and visitors.
- Limited in-person court activity to essential functions that cannot be conducted remotely.
- In accordance with CDC guidelines,
 - Adoption of policies that ensure appropriate cleaning and sanitation.
 - Adoption of policies that appropriately protect vulnerable individuals.
 - Adoption of policies to safely screen employees and the public for potential cases of illness.
- Courts must maintain their current level of operations until SCAO approves a court's plan to expand in-court proceedings. Courts in each circuit may work together to submit to SCAO at each gating level a single plan wherever possible consistent with the SCAO guidelines for returning to full capacity. Conditions may also require a court to move to a previous access level, depending on local conditions.

These conditions remain in effect until further order of the Court.



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

May 6, 2020

Clerk



RETURN TO FULL CAPACITY

COVID-19 GUIDELINES FOR MICHIGAN'S JUDICIARY

INDEPENDENCE · ACCESSIBILITY · ENGAGEMENT · EFFICIENCY



Remote Court Participation Chart

May 11, 2020

This document is one of a number of Toolkit items designed to help courts in their planning to return to full capacity while continuing to mitigate risk to protect the public and staff. While every effort has been made by SCAO staff to compile as much helpful and accurate guidance as possible, we understand that during the months ahead courts will be responding to their individual situations with creativity and innovation. Moreover, we know that advice from outside authorities continues to change to reflect analysis of additional data. Anticipating occasional updates to these documents as new information becomes available, the SCAO welcomes ongoing input on these documents, and in particular, sharing insights and experiences that can be added so that other courts can benefit from each other's work. Comments can be sent to CourtServices@courts.mi.gov.

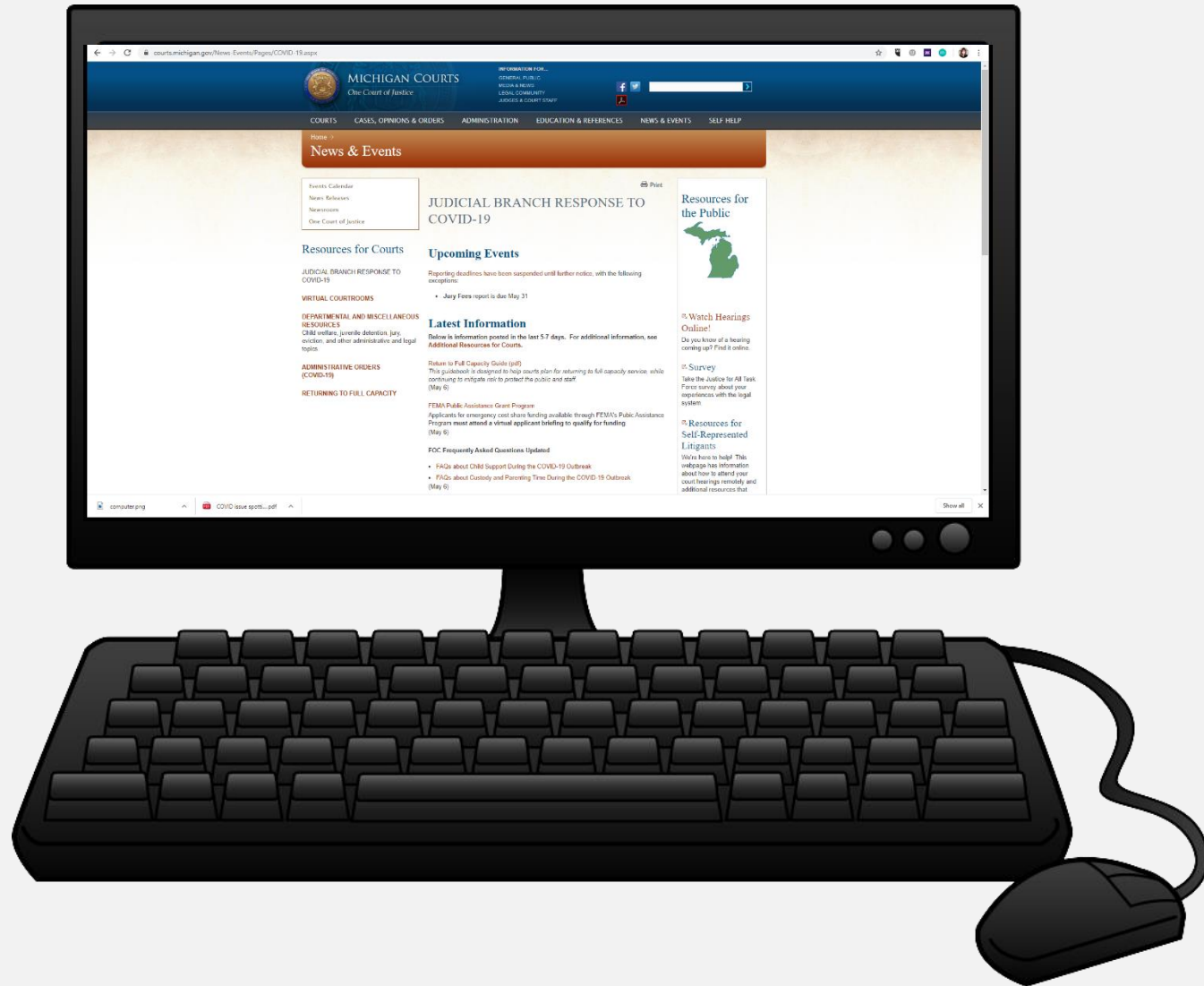
Note: This chart is intended to assist courts with deciding when to hold remote hearings via telephonic and court rule authority for remote hearings, AO 2020-6 authorizes remote court hearings until further ordered by the Michigan Supreme Court.

Participant Type	Court Type	Case Type	Proceeding or Hearing Type	Telephone		Two-Way Interactive Video Technology (IVT)
				Authority	Allowance and Restrictions	
Party ⁱ	All Courts	Civil	Motion hearings, pretrial, scheduling, or status conferences. ⁱⁱ	MCR 2.402(B)	Yes, but some restrictions on use of phones. ⁱ	
			Any court-scheduled civil proceeding, such as motions, pretrials, civil trials, etc.			MCR 2.407 – see criteria
Defendant or Juvenile Charged As Adult	District or Circuit	Misdemeanor or Felony	Arraignments, Pretrials, Plea, Misdemeanor Sentence, Show Cause Hearing, Extradition Waivers/Adjourns, PCC, Referral to Competency Evaluation, PE Waivers/Adjourns, Motion to Amend Restitution			MCR 6.006(A) MCR 6.104(A) MCR 6.430(D) MCR 6.901(C)
			Hearing on Evidence or Competency, [Felony] Sentencing, Probation Revocation or Revoke Sentence not involving adjudication of guilt, such as youthful trainee status.			MCR 6.006(C) (1); MCR 6.901 (C)
			Trials [Criminal – Jury or Bench]			MCR 6.006(C) (2); MCR 6.901 (C)

Remote Court Participation Chart

May 11, 2020

Participant Type	Court Type	Case Type	Proceeding or Hearing Type	Telephone		Two-Way Interactive Video Technology (IVT)					
				Authority	Allowance and Restrictions	Authority	At Court's Own Initiative	At Request of Party	Requires Presence or Waiver of Right	Requires Good Cause Showing	Requires Consent of the Parties
Defendant	District	Felony (Adult or Juvenile Charged as Adult)	Preliminary Exam for <i>Testimony of Expert Witness</i>	MCR 6.006 (B); MCR 6.901(C)	If defendant waives right to be present	MCR 6.006(B) MCR 6.901(C)		X	X		
			Preliminary Exam for <i>Testimony of any person at another location</i>	MCR 6.006 (B); MCR 6.901(C)	If defendant waives right to be present AND good cause shown	MCR 6.006(B)		X	X	X	



<https://courts.michigan.gov/News-Events/Pages/COVID-19.aspx>

MIDC SPECIAL MEETING MARCH 27,
2020

*The **MIDC's standards** for the timing of initial interviews and counsel appearing at arraignment and all critical proceedings **remain in effect**. The MIDC staff will work with funding units to facilitate any necessary modifications to compliance plans and/or budgets to ensure confidential attorney-client meetings take place remotely during the state of emergency and that attorneys appear in court on behalf of in-custody clients through technological means.*

*Watch a recording of the March 27, 2020 meeting online:
<https://youtu.be/2jvLqXv5ZWA>

MIDC STANDARD 2 – INITIAL INTERVIEW

- Confidential setting.
- Meet with in-custody clients within 3 business days from appointment.
- For out of custody clients, the standard requires the attorney to notify clients of the need for a prompt interview.

MIDC STANDARD 4 – COUNSEL AT FIRST APPEARANCE AND ALL CRITICAL STAGES

- Representation includes but is not limited to the arraignment on the complaint and warrant.
- Advocacy about bond determinations is included in the Standard.
- “All persons determined to be eligible for indigent criminal defense services shall also have appointed counsel at pre-trial proceedings, during plea negotiations and at other critical stages, whether in court or out of court.”

ADDITIONAL RESPONSIBILITIES PLACED ON DEFENSE COUNSEL

- Navigating technology
- Access to proceedings for clients
- Physical presence requested/required

PROBABLE CAUSE CONFERENCE

A Zoom meeting grid showing six participants. The top row includes 'michael galbreath' (a man in a police uniform), 'WesleyLibrary' (a person with a yellow neutral face emoji), and 'Jerry Engle' (an older man with glasses). The bottom row includes '12th District Court Rm 222' (a man at a desk with an American flag), 'Audrey Sayles' (a woman), and another yellow neutral face emoji. The Zoom logo is in the bottom right of the grid. Below the grid is a video player with a progress bar at 3:57 / 48:34 and various control icons.

Judge Mazur's Personal Meeting Room

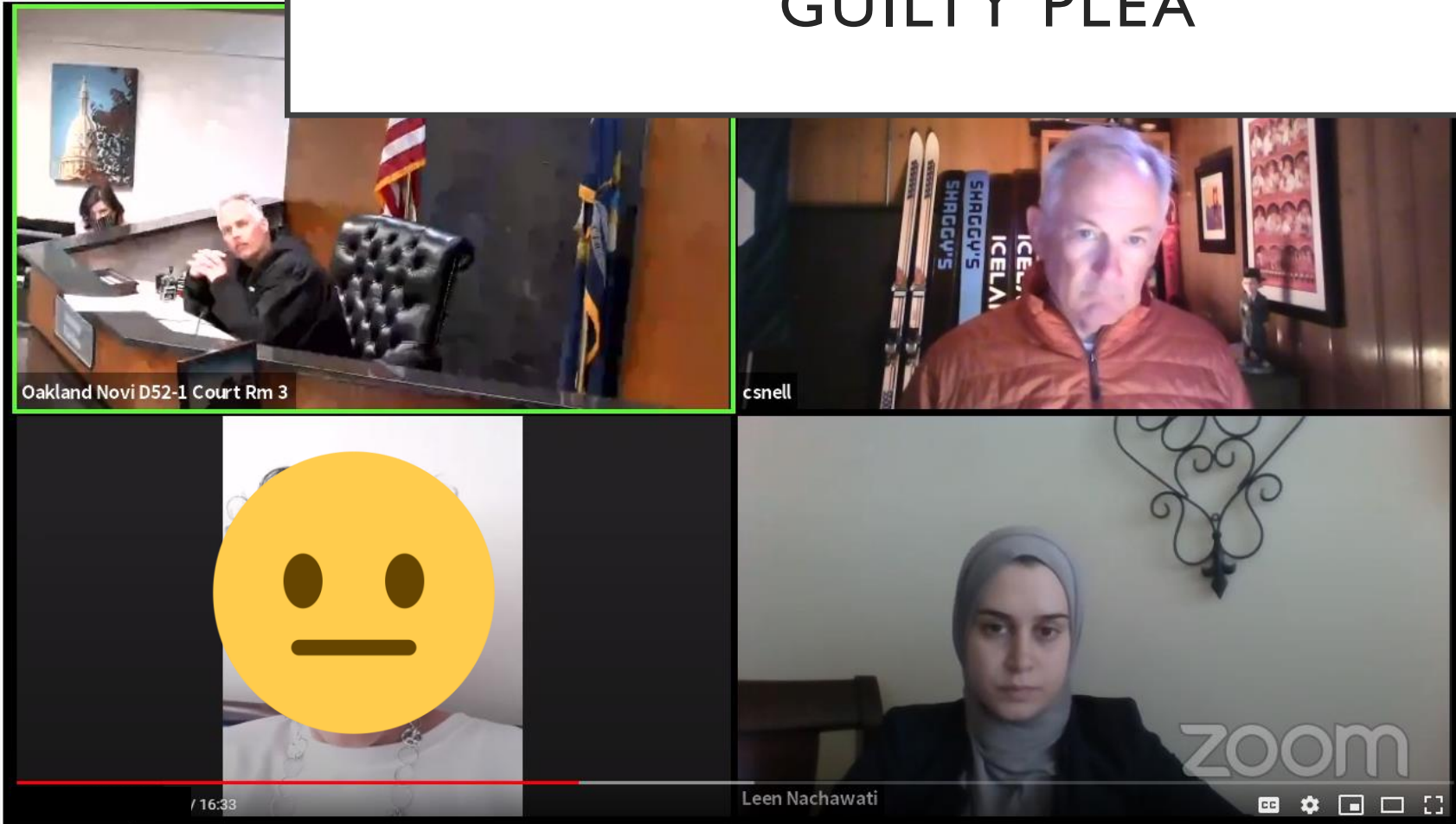
24 views • Streamed live 5 hours ago

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 **Judge Mazur D12**
21 subscribers

SUBSCRIBE

GUILTY PLEA



Travis Reeds' Personal Meeting Room

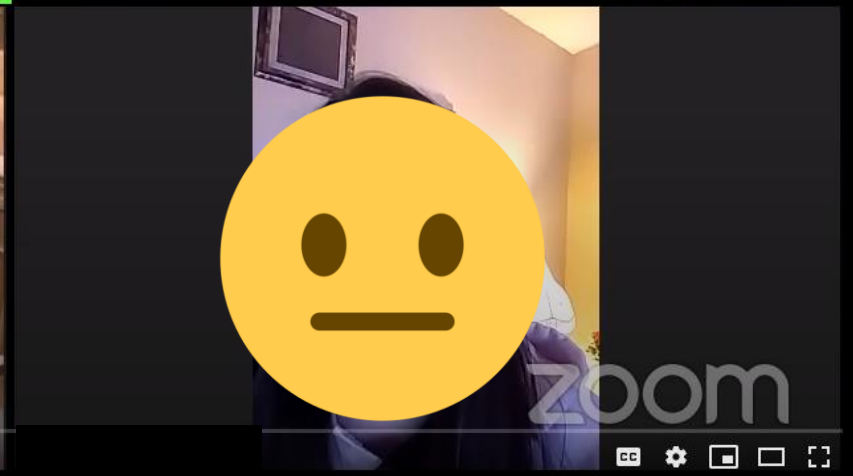
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J Judge Reeds - 52-1 District Court
6 subscribers

SUBSCRIBE

PROBATION VIOLATION HEARING



Julie LaCost's Personal Meeting Room

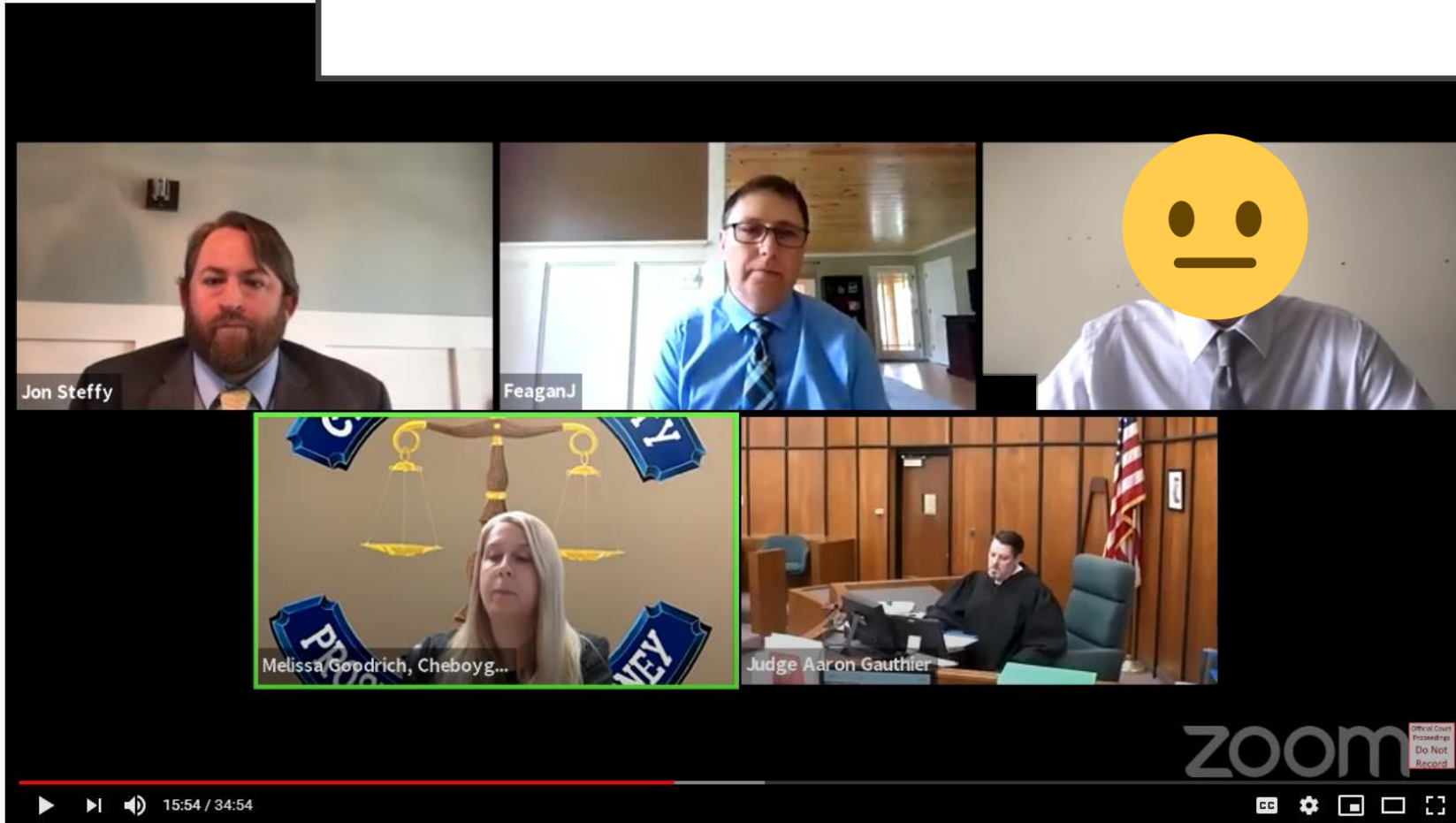
5 views • Streamed live 23 hours ago

👍 0 💬 0 ➦ SHARE 📌 SAVE ⋮

 95B District Court
10 subscribers

SUBSCRIBE

SENTENCING



53rd Circuit Court proceedings, Judge Aaron J. Gauthier presiding

275 views • Streamed live on May 5, 2020

JURY TRIALS?



The image shows a Zoom meeting interface. The main window displays a grid of 17 video thumbnails. The top row includes thumbnails for 'Judge Mark Ste...', 'Defendant Ma...', 'Prosecutor, Ch...', and 'Defense Attor...'. The bottom right corner of the grid features the Zoom logo. Below the grid, the video player title is 'Mock Jury Trial Pilot Stream' by 'Christopher Abraham', with a 'Subscribe' button and '0' subscribers. The viewer count is '99 watching now'. At the bottom, there are icons for '+ Add to', 'Report', and 'More', along with like and share icons.



PRESENTATION
GOALS

The Beginning of the Discussion:
Food for Thought

Con Law for Quarantine

Assert Rights as Needed and in
Accordance With Strategy

Checklist/Cheat Sheet

1ST AND 6TH AMENDMENT RIGHT TO PUBLIC TRIAL

- Suppression hearings. *Waller v Georgia*, 467 US 39 (1984)
- Jury Selection. *Presley v Georgia*, 558 US 209 (2010)
- “Traditionally Open” proceedings:
 - Preliminary Examinations? *Press-Enterprise Co v Cal. Sup.* 478 US 1 (1986)
 - Sentencing
 - Pleas
- 1st Amendment: Press/public have qualified right to attend
- Can be opened over parties’ objections: 6th Amendment “does not guarantee the right to compel a private trial.” *Gannett Co, Inc v DePasquale*, 443 US 368 (1979)

APPLICATION TO APOCALYPSE



Online Proceedings:

Are they public?

Partial or complete closure?

If they do count as closure, does pandemic justify?

Tech Issues: Snafus, lack of access



Social Distancing Measures for Non-Virtual Courts

Space limitations?

Does pandemic justify
closure?

6TH AND 14TH AMENDMENT
RIGHT TO BE PRESENT AND TO CONFRONT
AND PRESENT WITNESSES

“[T]he accused shall enjoy the right to a speedy and public trial ... and to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor.” Sixth Amendment.

- Due Process right “to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.” *Snyder v Massachusetts*, 291 US 97, 105-106 (1934).

IS RIGHT TO BE
PRESENT SATISFIED
BY PRESENCE VIA
VIDEO
CONFERENCE?

‘Why did the Supreme Court omit felony sentencings from MCR 6.006(A)? Presumably because sentencing is a critical stage of a criminal proceeding at which a defendant has a constitutional right to be present.’

‘The courtroom setting provides ‘a dignity essential’ to the process of criminal adjudication.’

People v Heller, 316 Mich App 314 (2016)

What does COMPULSORY PROCESS look like in the virtual world?

IF RIGHT TO
CONFRONTATION
IMPLICATED, IS
VIRTUAL
CONFRONTATION
SUFFICIENT?

Maryland v Craig, 497 US 836 (1990)

- Only where the denial is “**necessary** to further an **important public policy** and only where the **reliability** of the testimony is otherwise assured.”
- Individual, case-by-case determination
- Still good law?



6TH AMENDMENT RIGHT TO COUNSEL

All critical stages

- *Geders v United States*, 425 US 80 (1976) (conferring overnight)
- *Missouri v Frye*, 566 US 134 (2012); *Lafler v Cooper*, 566 US 156 (2012) (plea bargaining)

How might online courts infringe on right to counsel / interfere with the attorney client relationship?

- *Deck v Missouri*, 544 US 622 (2005) (physical restraints “diminishes” right to counsel)

Includes effective assistance – *Strickland v Washington*, 466 US 668 (1984)

EQUAL PROTECTION AND DUE PROCESS

“No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Fourteenth Amendment.

Areas of concern

- Presumption of innocence
 - *Holbrook v Flynn*, 475 US 560, 569 (1986); *Estelle v Williams*, 425 US 501, 503 (1976)
- Wealth and access to “the raw materials integral to the building of an effective defense.”
 - *Ake v Oklahoma*, 105 S Ct 1087 (1985); *Griffin v Illinois*, 351 US 12 (1956)

What procedural safeguards to ask for?

SPEEDY TRIAL

U.S. CONST., AM. VI;
CONST. 1963, ART, § 20
BARKER V WINGO, 407 US 514
(1972)

Length

Reasons

Did D assert?

Prejudice

- ≥ 18 months, prejudice presumed
- Must normally be trial prejudice (loss of evidence/witness)
- Custody status considered

JURY ISSUES

Fair Cross Section:

- *Duren v Missouri*, 439 US 357 (1979) (applies to entire jury pool)
- Distinctive group excluded
- Representation not “fair and reasonable” compared to population in community
- Systemic exclusion
- Need not be intentional under 6th Am.

Systemic Exclusion:

- Inherent in the jury selection process utilized, or a generally recurring problem
- Not merely occasional occurrence

PRESERVING AND CONSTITUTIONALIZING



**Clear Issue Framed for
Appeal**



**Better Standard of Review:
De Novo vs. Plain Error**



**Easier to Overcome
Harmless Error**



**Ramifications for
Collateral Review:
Procedural default**

WAIVER VS FORFEITURE

Waiver:
Intentional
relinquishment
of known right

- Extinguishes error
- Party invites error or agrees to procedure
- Party expresses satisfaction or even says “no objection”
- Unconditional plea

Forfeiture:
Failure to
timely and
properly assert
right

- Can still appeal but plain error (including for structural error)
- Remaining silent
- Failing to object on proper grounds or untimely
- Failure to get final/definitive ruling

MAKING THE RECORD



Timely



Final Ruling



Memorialize off-record discussions— side bars, in-chambers, breakout rooms



Watch for Inadvertent Waiver



State Federal and Legal Grounds



Eye and Ears of Appellate Court: Make Note of Glitches



Motion Practice

SPECIAL CIRCUMSTANCES

- Pro se clients and standby counsel
 - *McKaskle v Wiggins*, 465 US 168 (1984)
 - Counsel assists the *pro se* defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony,
 - Counsel helps to ensure the defendant's compliance with basic rules of courtroom protocol and procedure.
 - **Practical issues: have a clear process for communication between defendant, court, and indigent defense system (if applicable) ahead of proceedings.**

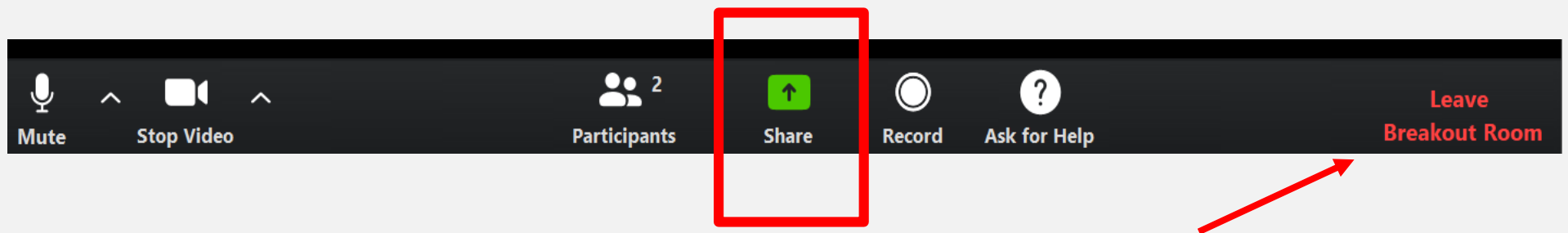
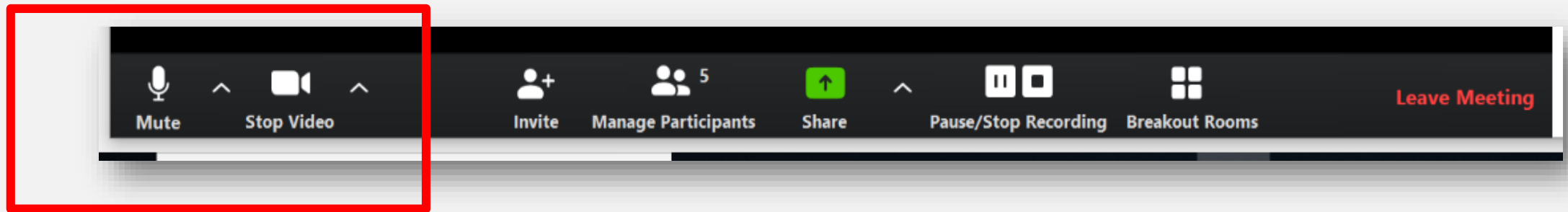
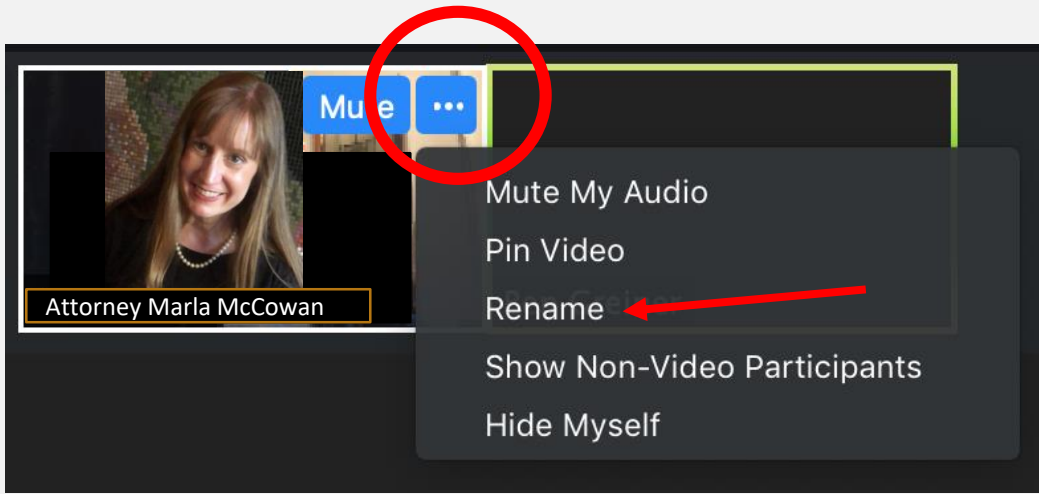
SPECIAL CIRCUMSTANCES

- Resources for indigent defendants to use experts and investigators
 - MIDC Standard 3
 - Court can make a finding of indigence at any time
 - Indigent defense system has funding for experts, investigators and policy in place for using funds
 - “MIDC rates” can be found on the <https://michiganidc.gov/standards/>

Standard 3 - Expenses for investigators will be considered at hourly rates not to exceed \$75. Expenses for expert witnesses will follow a tiered level of compensation based on education level and type of expert,* not to exceed these amounts:

High School or Equivalent	\$30/hr
Associate’s Degree	\$50/hr
Bachelor’s Degree	\$70/hr
Master’s Degree	\$85/hr
Crime Scene and Related Experts	\$100/hr
CPA/Financial Expert	\$100/hr
Pharmacy/PharmD	\$125/hr
Information Technology Experts	\$150/hr
Ph.D./Licensed Doctor	\$200/hr

BEST PRACTICES



CHECKLISTS

ACCESS FOR CLIENTS

- ✓ Present
- ✓ Identification verified
- ✓ Able to hear, see, communicate
- ✓ Understands how to get counsel's attention

Checklist of things to remember in video court:

Please note that each individual case may require a different course of action. This checklist is intended to provide a general guide but it is not prescriptive.

- ✓ Do I have a **reliable internet connection**?
- ✓ Am I **visible**?
- ✓ Is my **full name** displayed? (i.e. Attorney Jane Smith)
- ✓ Can I be **heard**?
- ✓ Is my client **present**?
 - If my client is in jail, and the jail does not have internet access, and it is necessary that they be at the hearing, have I **objected to my client's absence**?
 - If my client is not present because he/she **does not have access to the internet**, have I objected?
- ✓ If my client is appearing **only by telephone**, have I noted the potential bias that may affect the hearing?
 - Have I verified that the person on the phone is my client?
- ✓ If my client is not with me, but they are present virtually does he/she have a **reliable internet connection**?
 - If no, have I documented that fact to the court so that they may understand delays in transmission?
- ✓ Is my client's face **fully visible**?
- ✓ Is my client's **name** displayed?
- ✓ Can my client be **heard**?
- ✓ Can my client **hear the proceedings**?
 - Have I taken steps to ensure my client can **understand** the proceedings, especially if unable to hear or read?

- If my client needs an **interpreter**, am I sure that my client has been given access to one?
- ✓ Is my client's image (and video background) portrayed in a way that **does not prejudice him/her** (i.e., person in custody)?
 - If not, have I objected on the record the **problems with my client's image**?
- ✓ Have I coached my client on how to **speak up and engage** on videoconference where appropriate?
 - Have I coached my client on how to get my attention so that I can stop the hearing and have a breakout room/private session to answer his/her questions?
 - Have I communicated this process to the court?
- ✓ Have I established a **secure, private form of communication** with my client?
 - If possible, is that communication **contemporaneous with the hearing**?
 - If not, have I **established that the judge will stop the hearing** so I can meet with my client confidentially?
- ✓ Given the issues with mediated communication over video conference, does my client have access to **visual aids** that assist in understanding the hearing?
- ✓ Have I asked if I can record the hearing or if a **copy of the online proceeding** will be kept?
- ✓ Have I checked to ensure that any livestream has been **deleted from the Internet** after the hearing is over?
- ✓ Have I **reported any issues** to my office/system/other appropriate contact? (if applicable)

QUESTIONS?