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August 28, 2013

Larry Royster
Clerk, Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48090

Re: ADM File No. 2013-18
Proposed Amendments of Rules 3.210, 3.215, and 6.104 of the Michigan Court
Rules and Proposed New Rule 8.124 of the Michigan Court Rules

Dear Mr. Royster:

I write regarding the proposed adoption of videoconferencing standards and procedures in Michigan courts.

Although most of the proposed standards and procedures seem sound, the State Appellate Defender Office strongly opposes permitting a court to *sua sponte* allow videoconferencing without the consent of the parties. First, allowing witnesses at trial to testify via video implicates the Confrontation Clause. Second, allowing pre-trial, post-conviction, or sentencing hearings without a defendant's physical presence violates the defendant's right to be present at critical proceedings. The proposal's result is bad policy and practice that potentially violates the United States and Michigan Constitutions.

Confrontation Clause

Proposed MCR 8.124(B)(1) allows witnesses at a criminal trial to testify via video, even without consent of the parties. Although this is still a developing area of law, there can be little question that such a provision implicates the Confrontation Clause.

In *People v Buie*, 285 Mich App 401, 415 (2009), our Court of Appeals followed "the majority of federal courts that have examined this issue" and held that an important public policy or state interest must justify the violation of the constitutional right to confrontation imposed by two-way interactive video. See *Horn v Quarterman*, 508 F3d 306 (CA 5, 2007); *Harrell v Butterworth*, 251 F3d 926 (CA 11, 2001); *United States v Yates*, 438 F3d 1307 (CA 11 2006); *United States v Bordeaux*, 400 F3d 548 (CA 8, 2005). Although this Court overruled *Buie* on waiver grounds, the Confrontation Clause question is still an open one. See *People v Buie*, 491 Mich 294 (2012). At a minimum, allowing video testimony of witnesses at trial without the consent of a criminal defendant invites a colorable and potentially successful Confrontation Clause challenge.

Right to be present

As written, proposed MCR 8.124(B)(3) requires a defendant to either be physically present or consent to video participation for “evidentiary hearings that occur as part of a trial.” Without any further description of what constitutes “part of a trial,” this section could in theory allow a court to require videoconferencing for sentencing or pre-trial evidentiary hearings, in violation of a defendant’s constitutional and statutory right to be present.

A defendant has a right to be present during the imposition of sentence, and at any stage of trial where substantial rights might be adversely affected. *People v Palmerton* 200 Mich App 302 (1993). Several federal circuits have determined that video participation violates the right to physical presence in the context of federal rules of evidence. See *United States v Williams*, 641 F3d 758 (CA 6 2011); *United States v Navarro*, 169 F3d 228 (CA 5, 1999); *United States v Torres-Palma*, 290 F3d 1244 (CA 10, 2002); *United States v Lawrence*, 248 F 3d 300 (CA 4, 2001); *United States v Salim*, 690 F3d 115 (CA 2, 2012). Without clarification that “evidentiary hearings that occur as part of a trial” include sentencing and any other critical stages, the video proposal violates a defendant’s right to be present.¹

Recommendation

Videoconferencing of witnesses and criminal defendants should be limited to situations in which the parties consent to the procedure. It is reasonable to expect that this would occur in many situations that would produce fiscal savings, without sacrificing constitutional protections: examples include a lab analyst’s testimony at preliminary exams, chain-of-custody witnesses, or out-of-state expert witnesses who do not offer controversial evidence. Parties routinely stipulate to all manner of evidence at criminal trials and pre-trial hearings, and are in the best position to weigh the need for in-person testimony.

This Court is correct to consider a proposal that carefully and responsibly sets up standards and procedures for video court proceedings. The problem with the proposed rule involves the power of a judge to order the procedure *without* the consent of the parties, except for the limited exception of a defendant’s presence at trial and hearings that are part of a trial. SADO believes that court rules allowing videoconferencing should establish uniform and sensible standards while requiring the parties’ consent to the procedure at any trial, sentencing, or pre-trial or post-conviction hearing where evidence is presented.

Thank you for this opportunity to comment and for your consideration.

Sincerely,


Dawn Van Hoek
Director

¹ Prosecuting attorneys may also oppose a rule that could have the consequence of a victim confronting the perpetrator via video at a sentencing hearing rather than in person. See Const 1963, art 1, § 24.