May 25, 2016
(Replaces earlier mis-dated letter)

Office of Administrative Counsel
Michigan Supreme Court
P.O. Box 30052
Lansing, Michigan 48909

Re: **ADM File No. 2013-18**, in particular the proposed Amendment to MCR 6.006, new **Subrule (D)**, that would allow the use of videoconferencing in felony sentencing

Dear Administrative Counsel:

I write in opposition to one portion of **ADM File No. 2013-18** (generally allowing expanded use of videoconferencing), namely the addition of **Subrule (D)** to **MCR 6.006** (and to **6.901(C)** to the extent they are connected), proposed to read:

(D) Defendant at a Separate Location – Felony Sentencing. As long as the defendant has waived the right to be present in the courtroom and agrees to participate in the proceeding via two-way interactive video technology, circuit courts may use videoconferencing equipment between a courtroom and a prison, jail, or other location to conduct sentencings for felony offenses.

There are multiple reasons for concerns about the proposed change.

In the most general terms, sentencing is more than just *a* critical stage of the process – it is the ultimate decision. Neither the defendant nor the judge should be insulated from the consequence of that decision. Electronic substitutes effectively insulate participants. Under the guise of efficiency and economy, we should not further depersonalize and mechanize our system of justice for those who too often feel marginalized and disconnected from it already. It is in the better interest of society if the individual convicted of a felony (or felonies) faces the judge imposing the sentence in open court before whatever public chooses to attend. It also reinforces accountability for the judge. Is it easier to impose incarceration if a defendant is not in front of the bench?

Whether the defendant (with or without concurrence of the prosecution or judge) chooses to waive an in-court appearance for felony sentencing is not his or her decision to make. What about the victim (or the statutory substitute)? Under MCL 780.765:
"The victim has the right to appear and make an oral impact statement at the sentencing of the defendant. ..." [See also Mich Const, Art I, Sec. 24(1).]

The proposed Subrule (D) would subvert the oral **victim** impact statement before judge and defendant and the personal dynamic of defendant and **victim** in court at sentencing. The same applies if a substitute addresses the court because the victim is deceased or unable to make the statement. [MCL 780.752(1)(m) or (2); MCL 780.765.] The defendant may not want that experience and would prefer not to be present for the victim's statement. The defendant ought not to have that choice.

On the flip side, what about the personal dynamic where defendant shows genuine contrition toward the victim(s) for his or her conduct? You will not get that through a video screen!

During my 45-year career as staff for the Michigan Legislature, one of the bills I was most proud to have assisted was the original Crime Victim's Rights Act, 1985 PA 87, sponsored and largely drafted by then-Rep. William Van Regenmorter. We spent many late hours going over the bill's provisions. Subrule (D) runs counter to MCL 780.761: "The victim has the right to be present throughout the entire trial of the defendant, unless the victim is going to be called as a witness. ..." See also MCL 780.763(1)(f) and (g) concerning notice to victim to make an impact statement at sentencing and the time and place of sentencing – implying the right to be present, with the assumption at that time (1985) that the defendant would also be present.

The proposed Subrule (D) is **anti-victim** and I would encourage the Michigan Supreme Court to reinforce this state's constitutional and statutory commitment to crime victim's rights by not allowing the defendant to duck out of an in-court sentencing.

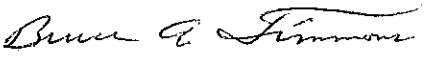
The defense also has valid concerns against Subrule (D). Despite decades of complaints and supposed cures, there are still "imperfections" (to be charitable) as to when presentence investigation (PSI) reports are provided to defense attorneys and whether the defense attorney has a bona fide opportunity to talk with the defendant about the PSI sooner than just before sentencing. Where is the defense attorney when he or she raises objections to the PSI – with the defendant at the jail or prison site, or in court with the judge without confidentiality to consult with his or her client? That is a Hobson's choice, or a lose/lose proposition. The use of videoconferencing for felony sentencing can negatively impact the defense attorney's ability to adequately represent his or her client, including raising objections to the PSI and the scoring of guidelines.

What kind of conundrum does Subrule (D) create for the defense attorney who knows the sentencing judge doesn't want defendant to appear (for whatever reasons)? Subrule (D) can create a not so subtle pressure for defendant to waive his or her appearance at sentencing, with an incentive for the defense attorney to advise the client to accommodate the wishes of the judge or to risk a less favorable result.

I understand and appreciate the Court's and SCAO's ongoing emphasis on efficiency and cost-savings (to government-state and local), but that emphasis must not be the paramount consideration regardless of other consequences or impact on other stakeholders. I also understand that videoconferencing is permitted for sentencing for misdemeanors – notwithstanding the significant consequences (direct and collateral) the sentence may have or whether defendant is represented – and that video-conferencing will likely be extended further in criminal proceedings. But the ultimate conclusion of a felony proceeding – the sentence – should remain before the judge. Yes, it may not be "efficient" or a cost-savings, but it is the right path to take.

For the reasons expressed above, I urge the Supreme Court to drop Subrule 6.006(D) from ADM 2013-18. Thank you for your attention and consideration.

Respectfully,



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