

CRIMINAL LAW SECTION
Respectfully submits the following position on:

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ADM File No. 2013-18 –
Proposed Amendments to MCR 6.006(D)

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The Criminal Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Criminal Law Section only and is not the position of the State Bar of Michigan.

The State Bar's position in this matter is to oppose the proposed changes to MCR 6.006(D).

The total membership of the Criminal Law Section is 2,508.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 24. The number who voted in favor to this position was 14. The number who voted opposed to this position was 3.

Report on Public Policy Position**Name of section:**

Criminal Law Section

Contact person:

Stephanie Farkas

E-Mail:attorneyfarkas@gmail.com**Proposed Court Rule or Administrative Order Number:**

[2013-18 - Proposed Amendments of MCR 2.004, 3.705, 3.708, 3.804, 3.904, 4.101, 4.201, 4.202, 4.304, 4.401, 5.119, 5.140, 5.402, 5.404, 5.738a, 6.006, and 6.901 \(would expand authority to use videoconferencing\)](#)

The proposed amendments of MCR 2.004, 3.705, 3.708, 3.804, 3.904, 4.101, 4.201, 4.202, 4.304, 4.401, 5.119, 5.140, 5.402, 5.404, 5.738a, 6.006, and 6.901 would permit courts to expand the use of videoconferencing technology in many court proceedings.

Date position was adopted:

May 17, 2016

Process used to take the ideological position:

Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:

24

Number who voted in favor and opposed to the position:

14 Voted for position

3 Voted against position

0 Abstained from vote

7 Did not vote (absent)

Position:

Oppose proposed changes to MCR 6.006(D)

Explanation of the position, including any recommended amendments:

The proposed amendment of MCR 6.006 expands the use of two-way interactive video technology in criminal proceedings, deletes the requirement that a party must articulate a reason for objecting to its use and provides a balancing test if the prosecution objects.

MCR 6.006(D) expands the concept of video conferencing to include felony sentencing, where a

defendant waives the right to be physically present, through the use of two-way interactive video technology.

The criminal justice system is inherently coercive and a defendant will always face pressure to accept convenience and efficiency in exchange for leniency. This is an unfortunate reality for lawyers who actually practice criminal defense.

There is a palpable and tangible aura and atmosphere created in courtrooms where human beings are in close physical proximity. Flat digital images of depersonalized defendants and victims, and the electronic video setting itself damages the public's confidence in the integrity and solemnity of a criminal proceeding. This is especially true in sentencing hearings which are more than a critical stage—the sentence is the ultimate decision and the culmination of the criminal proceedings.

It may not be unusual for a defendant and his or her defense counsel to recognize the benefit of conducting a video teleconferenced proceeding, which will eliminate lengthy and sometimes expensive travel or permit the hearings to be conducted much sooner. Moreover, MDOC inmates sometimes prefer videoconferences as it results in less disruption of their rehabilitation. But sentencing procedures in felony cases are far more complex and often involve challenges to inaccurate information in presentence reports, guideline calculations, victim impact statements and allocution.

The cold and two-dimensional pixelization of humanity is a meager substitute for the actual physical presence of both victims and defendants at sentencing hearings, and insulates all parties from the direct consequences of their actions.

There is a real and perceptible presence created when victims are permitted to address the court personally under the Victim's Rights Act and defendants should be physically present in the same courtroom to understand and appreciate the gravity of their offenses.

There is a corresponding allocutory right by a defendant to personally address the court before sentencing and the impersonal and artificial flat screen impairs an accurate assessment of a defendant's physical, emotional, and mental condition.

Any attempt to digitize solemn court proceedings must be conducted with equipment that is adequate for high-quality transmissions and allows defense attorneys confidential communications with their clients. And the court should also consider establishing procedures for ensuring that counsel and the defendant (and even the defendant's immediate family) are provided an ample opportunity to confer in private.

But no matter how far technology advances, there is always the possibility that it will fail, even when transmissions are from adjacent locations. This failure of technology (both audio and video) recently occurred in proceedings involving the highly publicized Kalamazoo Uber shooter case. The infallibility of this technology is not a hypothetical concern or fiction, but rather an actual problem that has already presented itself.

"The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States

via the Fourteenth Amendment, both guarantee to a criminal defendant . . . the right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Tennessee v Lane*, 541 US 509, 523; 124 S Ct 1978; 158 L Ed 2d 820 (2004) (quotation marks omitted). This right applies to the sentencing hearing, as well as the trial itself. *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984); *People v Palmerton*, 200 Mich App 302, 304; 503 NW2d 663 (1993).

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.

http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2013-18_2016-03-23_formatted%20order.pdf