

PUBLIC ACCESS TO RECORDINGS OF PUBLIC COURT PROCEEDINGS

Issue

Should the Representative Assembly recommend that the Michigan Court Rules be amended to require courts to make recordings of public court proceedings available for public access?

Proponents

The State Bar of Michigan Civil Procedure & Courts and Access to Justice Policy Committees.

Background

The State Bar of Michigan has a nearly four-decade-long history of supporting efforts to expand public access to recordings of public court proceedings—dating back to the Michigan Supreme Court’s original approval of a pilot project authorizing video recording of such proceedings in 1987. That initial pilot was limited to only 12 courts across the state. In 1990, the Representative Assembly approved a proposal to petition the Supreme Court to extend local courts’ authority to utilize video recording under Administrative Order 1989-2 by removing the twelve-court cap. More recently, in September 2021, the Representative Assembly approved a proposal to amend MCR 8.119(H) to grant access to court recordings to any person that has a special interest warranting access, including a party or representative of a party.¹

In June 2023, the State Bar of Michigan’s Board of Commissioners considered Senate Bill 257, which would amend the Revised Judicature Act, 1961 PA 236, to require courts to make video recordings of public court proceedings available for public access. The Board ultimately voted to oppose the bill on separation of powers grounds but voiced its support for the underlying policy of courtroom transparency. Specifically, the approved motion stated that: “The Board strongly supports courtroom transparency, but believes that this issue is properly addressed by the Court, not the Legislature. SBM stands ready to partner with the Court to develop an appropriate, uniform rule governing access to court recordings.” Based on the Board’s position, the Civil Procedure & Courts and Access to Justice Policy Committees of the State Bar deliberated on the subject of public access to court recordings and proposed the amendment to the Michigan Court Rules set forth in Attachment A.

Currently, there is no consistent rule in Michigan trial courts regarding public access to the recordings that courts make of their public courtroom proceedings. Some courts allow public access, some do not, and some leave it up to judicial discretion with or without governing criteria. The right of public access to judicial records is recognized at common law and under the First Amendment. Recently, the Sixth Circuit opined in dicta that Michigan courts’ failure to make existing recordings of open proceedings presumptively available for public access may be unconstitutional, but did not ultimately decide the issue. *Stevens v. Mich. State Court Admin. Office*, No. 21-1727, 2022 WL 3500193, *6 (6th Cir. Aug. 18, 2022). All other states in the Sixth Circuit—Kentucky, Ohio, and Tennessee—make court recordings generally available for public access.

¹ The Michigan Supreme Court declined to publish the Representative Assembly’s proposed amendment for comment because court recordings are not governed by MCR 8.119(H), as they are not “case records” as defined by MCR 8.119(D). Rather, they are “court records” subject to public access under MCR 8.119(H)(8)(b).

The proposed amendment would address present inconsistency in court practice and the potential constitutional defect identified by the Sixth Circuit by effectively creating a presumption that when courtroom proceedings open to the public are recorded by the court, the recordings will be available to the public as well.

At the same time, just as the law already recognizes that court proceedings are only presumptively open to the public and may be closed when the facts of the case justify doing so, the proposed court rule provides that recordings are not available when, pursuant to court rule or statute, the court has ordered the record sealed or access to the proceeding restricted. Additionally, the proposed court rule does not apply to juvenile proceedings, and existing Michigan law allows victims' faces to be blurred.

Historically, for members of the public who were unable to attend a court proceeding in person, the ability to obtain a transcript was thought by many to provide a record of what took place. However, in an era when most court proceedings are recorded, a transcript is often a poor substitute for a recording of what occurred. It is not uncommon for a transcript to contain errors and flaws, and those can often be definitively proven through review of recordings. Furthermore, non-verbal communication and demeanor are readily apparent in video or audio recordings but are lost or obscured in writing. In some cases, inappropriate judicial conduct has been brought to light through court recordings; indeed, Judicial Tenure Commission proceedings often involve questions about judicial demeanor, which can be helpfully illuminated by recordings. The current system, in which public access to court recordings is haphazard and can be denied without explanation, risks diminishing public confidence in our legal system. The proposed amendment recognizes that transparency, accountability, and public confidence in our institutions necessarily go hand in hand.

Finally, the Committees believe that the successful experience of the Michigan Supreme Court, Court of Appeals, and Court of Claims with public access to video recording is instructive. All of these courts publish recordings of arguments in their courts on their YouTube channels for easy public access. Because of the nature of the cases that reach these courts, the proceedings encompass many of the most high-profile and attention-grabbing cases. Nonetheless, there is no evidence that making these recordings public and easily accessible to the public has resulted in disinformation or other harm. In fact, this innovation has been broadly lauded by both the legal profession and the general public.

What happens in our courtrooms is an essential aspect of our democracy, particularly in jurisdictions such as Michigan where judges and prosecutors are elected. Our democracy, and our judicial system, is strengthened when the people can easily see the bench and bar in operation.

Opposition

No opposition is known.

Prior Action by Representative Assembly

The following is a list of prior actions by the Representative Assembly regarding public access to recordings of public court proceedings:

- September 13, 1990: Adopted a proposal to petition the Michigan Supreme Court to extend Administrative Order 1989-2 permitting the creation of the record of court proceedings by

videotape and authorizing any trial court in the state to apply to the State Court Administrative Office for permission to do so.

- September 18, 2021: Adopted a proposal to amend to MCR 8.119(H) to grant access to court recordings to any person seeking access that has a special interest warranting access and/or receipt of the court record, including a party or representative of the party.

Fiscal and Staffing Impact on State Bar of Michigan

None.

**STATE BAR OF MICHIGAN POSITION
By vote of the Representative Assembly on April 20, 2024**

Should the Representative Assembly recommend that the Michigan Court Rules be amended to require Michigan courts to make recordings of public court proceedings available for public access as provided in Attachment A?

- (a) Yes
- or
- (b) No

ATTACHMENT A

- (1) If a court makes any recording of a public court proceeding in a case in which records are open to the general public, the court shall make the recording available for public access as required by this court rule.
- (2) A recording that is made available for public access under this court rule must be a complete recording of all public portions of the court proceeding and not be edited to remove any portion of the recording that could be seen or heard by an individual who was physically present at the proceeding except as otherwise permitted or required by law.
- (3) A recording to which this court rule applies must be made available for access within 10 days after the date the recording was made and continue to be available as long as the court retains it.
- (4) A recording to which this court rule applies must be made available in one or more of the following ways:

 - (a) Making the recording accessible from a public website.
 - (b) Making the recording accessible from a link provided by electronic mail on request.
 - (c) Providing a physical copy of the recording.
- (5) A court may require a person that requests a recording to which this court rule applies to complete a form approved by the state court administrative office that includes all of the following:

 - (a) The case name and number.
 - (b) The date, time, and location of and the name of the judge who presided over the court proceeding.
 - (c) If less than the entire proceeding is requested, the portion requested.
 - (d) An acknowledgment that the recording is not the official record of the proceeding.
- (6) If a recording to which this court rule applies is provided in physical form, the court may require a person to pay a fee of not more than \$10.00 for each copy of each court proceeding requested.
- (7) A recording made available under this court rule is not the official record of the court proceeding.
- (8) This court rule does not require a court to make or retain a recording of a court proceeding that would not otherwise be made or retained in the normal course of court business.
- (9) This court rule does not apply to a court proceeding or portion of a court proceeding if the court has ordered the record sealed or access to the proceeding restricted as allowed by court rule or statute.
- (10) A recording of a public proceeding made available under this court rule may be deemed a public record for purposes of section 248 of the Michigan penal code, 1931 PA 328, MCL 750.248. This court rule does not limit the ability to prosecute under any other applicable law the false making or alteration of a recording of a public proceeding made available under this court rule.