Rescission of Administrative Order Nos. 2020-1, 2020-6, 2020-9, 2020-13, 2020-14, 2020-19, and 2020-21 and Amendments of Rules 2.002, 2.107, 2.305, 2.407, 2.506, 2.621, 3.904, 6.006, 6.106, 6.425, 8.110, 9.112, 9.115, and 9.221 of the Michigan Court Rules and Administrative Order No. 2020-17 (Dated July 26, 2021)

On order of the Court, the following administrative orders are rescinded, effective immediately: AO No. 2020-1, AO No. 2020-6, AO No. 2020-9, AO No. 2020-13, AO No. 2020-14, AO No. 2020-19, and AO No. 2020-21.

On further order of the Court, finding that immediate effect is necessary, the following amendments of Rules 2.002, 2.107, 2.305, 2.407, 2.506, 2.621, 3.904, 6.006, 6.106, 6.425, 8.110, 9.112, 9.115, and 9.221 of the Michigan Court Rules and Administrative Order No. 2020-17 are adopted, effective immediately. Concurrently, individuals are invited to comment on the form or the merits of the amendments during the usual comment period. The Court welcomes the views of all. This matter will also be considered at a public hearing. The notices and agendas for public hearing are posted at Administrative Matters & Court Rules page.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Rule 2.002 Waiver of Fees for Indigent Persons

(A)–(K) [Unchanged.]

(L) Notwithstanding any other provision of this rule, until further order of the Court, courts must enable a litigant who seeks a fee waiver to do so by an entirely electronic process.

Rule 2.107 Service and Filing of Pleadings and Other Documents

(A)–(F) [Unchanged.]

(G) Notwithstanding any other provision of this rule, until further order of the Court, all service of process except for case initiation must be performed using electronic means (e-filing where available, email, or fax, where available) to the greatest extent possible. Email transmission does not require agreement by the other party(s) but should otherwise comply as much as possible with the provisions of subsection (C)(4).

Rule 2.305 Discovery Subpoena to a Non-Party

(A)–(E) [Unchanged.]

(F) Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.

Rule 2.407 Videoconferencing

(A)–(F) [Unchanged.]

(G) Notwithstanding any other provision in this rule, until further order of the Court, AO No. 2012-7 is suspended and trial courts are required to use remote participation technology (videoconferencing under this rule or telephone conferencing under MCR 2.406) to the greatest extent possible. In doing so, courts must:

(1) Verify that participants are able to proceed remotely, and provide reasonable notice of the time and format of any such hearings for parties, other participants, and the general public in a manner most likely to be readily obtained by those interested in such proceedings.

(2) Allow some participants to participate remotely even if all participants are not able to do so. Judicial officers who wish to participate from a location other than the judge's courtroom shall do so only with the written permission of the court's chief judge. The chief judge shall grant such permission whenever the circumstances warrant, unless the court does not have and is not able to obtain any equipment or licenses necessary for the court to operate remotely.

(3) Ensure that any such proceedings are consistent with a party's constitutional rights, and allow confidential communication between a party and the party's counsel.

(4) Provide access to the public either during the proceeding or immediately after via access to a video recording of the proceeding, unless the proceeding is closed or access would otherwise be limited by statute or rule.

(5) Ensure that the manner in which the proceeding is conducted produces a recording sufficient to enable a transcript to be produced subsequent to the proceeding.

(6) Ensure that any such remote hearings comply with any standards promulgated by the State Court Administrative Office for conducting these types of proceedings.

(7) Waive any fees currently charged to allow parties to participate remotely.

Courts may collect contact information, including mobile phone number(s) and email address(es) from any party or witness to a case to facilitate scheduling of and participation in remote hearings or to otherwise facilitate case processing. A court may collect the contact information using a SCAO-approved form. The contact information form used under this provision to collect the information shall be confidential. An email address for an attorney must be the same address as the one on file with the State Bar of Michigan.

Rule 2.506 Subpoena; Order to Attend

(A)–(I) [Unchanged.]

(J) Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.

Rule 2.621 Proceedings Supplementary to Judgment

(A)–(B) [Unchanged.]

(C) Subpoenas and Orders. A subpoena or order to enjoin the transfer of assets pursuant to MCL 600.6119 must be served under MCR 2.105. The subpoena must specify the amount claimed

by the judgment creditor. The court shall endorse its approval of the issuance of the subpoena on the original subpoena, which must be filed in the action. The subrule does not apply to subpoenas for ordinary witnesses. Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.

(D)–(H) [Unchanged.]

Rule 3.904 Use of Videoconferencing Technology

(A) Delinquency, Designated, and Personal Protection Violation Proceedings. Court may use videoconferencing technology in delinquency, designated, and personal protection violations proceedings as follows:

(1)–(2) [Unchanged.]

(3) Notwithstanding any other provision of this rule, until further order of the Court, courts may use two-way videoconferencing technology or other remote participation tools where the court orders a more restrictive placement or more restrictive treatment.

(B)–(C) [Unchanged.]

Rule 6.006 Video and Audio Proceedings

(A)–(D) [Unchanged.]

(E) Notwithstanding any other provision in this rule, until further order of the Court, AO No. 2012-7 is suspended and trial courts are required to use remote participation technology (videoconferencing under MCR 2.407 or telephone conferencing under MCR 2.406) to the greatest extent possible. Any such proceedings shall comply with the requirements set forth in MCR 2.407(G).

Rule 6.106 Pretrial Release

(A) In general. At the defendant's arraignment on the complaint and/or warrant, unless an order in accordance with this rule was issued beforehand, the court must order that, pending trial, the defendant be

(1)–(3) [Unchanged.]

(4) Notwithstanding any other provision in this rule, until further order of the Court, in addition to giving consideration to other obligations imposed by law, trial courts are urged to take into careful consideration local public health factors in making pretrial release decisions, including determining any conditions of release, and in determining any conditions of probation.

(B)–(I) [Unchanged.]

Rule 6.425 Sentencing; Appointment of Appellate Counsel

(A)–(G) [Unchanged.]

(H) Notwithstanding any other provision in this rule, until further order of the Court, if the defendant is indigent, a request for the appointment of appellate counsel under MCR 6.425(F)(3) must be granted if it is received by the trial court or the Michigan Appellate Assigned Counsel System (MAACS) within six months after sentencing. This provision applies to all cases in which sentencing took place between March 24, 2020 and June 15, 2021.

Rule 8.110 Chief Judge Rule

(A)–(B) [Unchanged.]

(C) Duties and Powers of Chief Judge.

(1)–(2) [Unchanged.]

(3) As director of the administration of the court, a chief judge shall have administrative superintending power and control over the judges of the court and all court personnel with authority and responsibility to:

(a)–(h) [Unchanged.]

(i) perform any act or duty or enter any order necessarily incidental to carrying out the purposes of this rule. As part of this obligation, the court shall continue to take reasonable measures to avoid exposing participants in court proceedings, court employees, and the general public to COVID-19. Such measures include continuing to providing a method or methods for filers to submit pleadings and other filings other than by personal appearance at the court. In addition, courts may waive strict adherence to any adjournment rules or policies and administrative and procedural time requirements as necessary.

To evaluate the effectiveness of the practices adopted by the Supreme Court as emergency measures during the recent pandemic, and consistent with the advisement under (C)(1) to solicit input from other judges in the jurisdiction, each court's leadership team (including the chief judge(s) and court administrator(s)) shall convene a meeting to discuss the court's ability to manage operations during the pandemic and also identify potential permanent changes that might improve court processes. The State Court Administrative Office will provide guidance regarding the meetings to be held. The meeting shall include (but not be limited to) representatives from the following stakeholders:

(i) court funding unit

(ii) local bar association

(iii) local legal aid organization

(iv) regional administrator

(v) state and local government agencies active in the court (e.g., Michigan Department of Health and Human Services, law enforcement, Friend of the Court, etc.)

(vi) nongovernment agencies with interests in court proceedings, such as crime victim advocacy organizations, nonprofit safety net entities, including the local Housing Assessment Resource Agency, and others as reflective of the local community.

This meeting shall be held by September 17, 2021, and a summary of the discussion and proposed recommendations shall be transmitted to the regional office within two weeks after the meeting. Courts must accept written comments submitted by any of the entities listed above, and include those comments as an appendix to its summary.

(4)–(9) [Unchanged.]

(D) [Unchanged.]

Rule 9.112 Requests for Investigation

(A)–(C) [Unchanged.]

(D) Subpoenas.

(1)–(4) [Unchanged.]

(5) Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.

Rule 9.115 Hearing Panel Procedure

(A)–(H) [Unchanged.]

(I) Hearing; Contempt.

(1)–(3) [Unchanged.]

(4) Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.

(J)–(M) [Unchanged.]

Rule 9.221 Evidence

(A)–(B) [Unchanged.]

(C) Issuance of Subpoenas. The commission may issue subpoenas for the attendance of witnesses to provide statements or produce documents or other tangible evidence exclusively for consideration by the commission and its staff during the investigation. Before the filing of a complaint, the entitlement appearing on the subpoena shall not disclose the name of a respondent under investigation. Notwithstanding any other provision of this rule, until further order of the Court, a subpoena issued under this rule may require a party or witness to appear by telephone, by two-way interactive video technology, or by other remote participation tools.

(D)–(E) [Unchanged.]

Administrative Order No. 2020-17 is amended as follows:

[First five paragraphs: unchanged.]

Therefore, the Court adopts this administrative order under 1963 Const, Art VI, Sec 4, which provides for the Supreme Court's general superintending control over all state courts, directing courts to process landlord/tenant cases following the procedures outlined in this order. ~~Courts are expected to proceed with guidelines referenced in Administrative Order No. 2020-14 (Return to Full Capacity).~~

(A)–(C) [Unchanged.]

(D) Courts are authorized to proceed with these actions by way of remote participation tools, and encouraged to do so to the greatest extent possible. ~~Administrative Order No. 2020-6 requires that t~~The court scheduling a remote hearing must "verify that all participants are able to proceed in this manner." Therefore, the summons for each case filed under the Summary Proceedings Act must provide the date and time for remote participation in the scheduled hearing, if applicable. In addition, the summons must be accompanied by any written information about the availability of counsel and housing assistance information as provided by legal aid or local funding agencies. If a remote hearing is scheduled for the first proceeding, the defendant received personal service pursuant to MCR 2.105(A), and the defendant fails to appear, a default may enter. If a remote hearing is scheduled for the first proceeding and the defendant fails to appear and has not been served under MCR 2.105(A), the court may not enter a default but must reschedule the hearing and mail notice for that rescheduled hearing as an in-person proceeding. Under these conditions, a notice of rescheduled hearing mailed by the court within 24 hours after the initial hearing date is sufficient notice of the rescheduled hearing, notwithstanding any other court rule. Other parties or participants may proceed remotely.

(E) [Unchanged.]

(F) The court may require remote participation in the second, and any subsequent, proceedings, and the court must verify that participants are able to proceed in that manner ~~under Administrative Order No. 2020-6~~.

(G)–(I) [Unchanged.]

STAFF COMMENT: These amendments largely reflect the substantive provisions of the remaining administrative orders adopted by the Court during the COVID-19 pandemic. Many of the orders have been rescinded or expired by their own terms. In this order, the Court rescinds all remaining active administrative orders entered during the pandemic except for the order regarding procedures specific to landlord/tenant actions (AO No. 2020-17, which is slightly modified as shown above to reflect the rescissions) and the order establishing a wholly online procedure for those taking the Michigan Bar Examination in July 2021 (AO No. 2021-2). Moving the substance of these provisions into a court rule amendment format returns the Court's procedure to the typical court rule revision procedure. The intent of these amendments is to retain the existing practices courts have been operating under for an interim period while inviting public comment. The Court also anticipates comments in response to the reports of two groups of volunteers organized by the State Court Administrative Office (the Lessons Learned Committee and the Task Force on Open Courts, Media, and Privacy). Within the next several months, it is anticipated that the Court will consider further proposals for refinements of these and other new proposals to guide courts going forward.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the secretary of the State Bar and to the state court administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court clerk in writing or electronically by November 1, 2021, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2020-08. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

MCCORMACK, C.J. (*concurring*). Michigan courts and the people they serve have a lot to be proud of in the lessons they have learned and what has been accomplished over the past 16 months. Instead of being paralyzed by the global pandemic, judges and court administrators rose to overcome the challenges that delivering justice required. Judges, magistrates, and referees have presided over more than 3.5 million hours of online court proceedings, which were broadcast so the public had access. The State Court Administrative Office's Virtual Courtroom Directory has been used by the public to access live virtual proceedings more than 325,000 times. Local trial court YouTube channels have nearly 135,000 subscribers and trial court videos have millions of views.

The benefits of these changes are vast and undeniable. First and foremost, they have made people safer during the global pandemic. But the improvements in transparency and access to justice are also staggering; remote access has greatly increased court visibility, allowed more people to get legal representation, and reduced the number of cases defaulted because litigants couldn't make it to court. People who would have missed a court date because they didn't have bus fare or couldn't afford to miss work have been spared the consequences of failing to appear (time in jail and accumulated debt).

Equal access to justice is an ongoing concern for the fair administration of our courts. Pre-pandemic, "[c]ourts were falling short in meeting their mission to provide access to justice for all, and particularly so when it comes to addressing the needs of lower-income and minority communities." Michigan Justice for All Task Force, *Strategic Plan and Inventory Report* (December 2020), p 2, available at <https://courts.michigan.gov/News-Events/Justice-ForAll/Final%20JFA%20Report%20121420.pdf> (accessed July 23, 2021) [https://perma.cc/74UE-V9WN]. Indeed, surveys showed that "nearly nine in ten low-income individuals with a civil legal problem receive little or no legal help" in trying to navigate the justice system. *Id.* Unequal access to justice has worrisome consequences for the public's confidence in our courts, and therefore in the rule of law.

The benefits of remote options for people who have historically been excluded from our justice system is lemonade. Interviews of judges who oversee child welfare courts conducted by the National Center for State Courts found that parents, foster parents, and kinship caregivers appeared more often at virtual proceedings than live, and they attributed that increase in part to not having to travel, find parking, or miss work. See National Center for State Courts, *Study of Virtual Child Welfare Hearings: Impressions From Judicial Interviews* (June 2021), available at <https://www.ncsc.org/__data/assets/pdf_file/0018/65520/Study-of-Virtual-Child-Welfare-Hearings-Judicial-Interviews-Brief.pdf> (accessed July 23, 2021) [https://perma.cc/AVX8-WCNZ]. Other sources have shown that participation in eviction cases skyrocketed after virtual proceedings began, resulting in lower default rates. See Joint Technology Committee, *Judicial Perspectives on ODR and Other Virtual Court Processes* (May 18, 2020), available at <https://www.ncsc.org/__data/assets/pdf_file/0023/34871/2020-05-18-Judicial-Perspectives.pdf> (accessed July 23, 2021) [https://perma.cc/T2MY-6DTZ].

Virtual proceedings have had enormous efficiency benefits too. By reducing travel time and time spent in the courthouse waiting for hearings to begin, attorneys can appear in courts in multiple counties on the same day. And lawyers benefit too when courts around the state have the same processes for appearing. Having to negotiate vastly different rules from court to court around the state is a cost lawyers and their clients would bear.

Of course there are proceedings that cannot be conducted remotely unless the parties consent. *People v Jemison*, 505 Mich 352 (2020). And there are others that are simply better suited for physical courtrooms. This interim order will allow us to hear from the bench, the bar, and the public about all of this, so that we can take advantage of all the benefits we have gained and make informed decisions about how to best use remote platforms going forward. And in the meantime, we won't lose ground. Our choice is not between smartphones and barristers' wigs.

Justices VIVIANO and BERNSTEIN would disregard all this progress for the people most historically excluded from our justice system in the name of "we should go back to the way we've always done it." That approach would needlessly hurt the many litigants who have gained the most from our new pandemic practices, as well as the many lawyers (and their clients) who have seen efficiencies otherwise not possible. Litigants who might have failed to appear because they will lose their job if they miss work, or who have no access to transportation or no one to care for their children or physical difficulty getting to court, are the ones who would pay the cost if the ability to participate virtually is not an option anymore and instead put off until some future unspecified time when we get around to considering it.[1] Today's interim step avoids asking those least positioned to bear those costs to do so — it continues robust remote access while we take in the lessons we have all learned.

It's time to move forward, not back. We should look at what we have learned from our collective experiences during the pandemic and continue to use practices that have worked while discarding practices that have not. Every other institution and industry is doing exactly that — changing their practices for the better based on lessons learned this past 16 months. The modern workforce will never return to its February 2020 norms. Business travel, education and healthcare will never be the same.

Why should courts be the one institution that doesn't benefit from the lessons learned from the accelerated innovation that COVID-19 brought?[2] More importantly, the public traditionally excluded from those courts should not lose a valuable new tool for access and

transparency. Today's order makes certain they won't, and I am therefore pleased to support it.

ZAHRA, J. (*concurring in part and dissenting in part*).

Faced with the COVID-19 pandemic, this Court used its equitable powers to employ emergency measures we hoped would respond to a health crisis not seen by this state in more than 100 years. We could only surmise whether these procedures would adequately address the emergency we faced, and we exercised our best effort to respond appropriately. Today, it appears that the health crisis we faced is now behind us, and the Court lifts most of its emergency orders. I concur in the portion of today's order that rescinds most of these emergency orders. I, however, dissent from the implementation of these emergency procedures through court rules that are given immediate effect, a process that is imprudent and wholly inconsistent with the traditional process of this Court.

The Court, no doubt, has good intentions in implementing these emergency measures through court rules having immediate effect. But summary implementation of new court rules is rarely employed and occurs only when immediate action is required, such as when an immediate response is needed to address legislative changes in the law or our caselaw renders a rule obsolete. No such circumstances are present here.

A perfect solution is not at hand. Like most matters that end up in this tribunal, there are competing interests at stake, and we should not treat this as an all-or-nothing proposition. Remote hearings provide an opportunity to increase access to justice. This is no small matter. At the same time, remote hearings deny trial courts their full authority to maintain the dignity and proper decorum of the court. The courtroom — with the judge perched on a bench, the call of the court crier to open court and call cases, and the ceremony and ritual of live court proceedings — affords trial courts with authority that is conspicuously absent from video proceedings. It cannot be denied that there is an increased risk that litigants participating remotely will make a mockery of court proceedings, with the court having little to no remedy available to sanction such disruptive conduct. These concerns merit public attention before considering even interim court rules, which, more often than not, load the dice toward their later adoption as permanent court rules.

Video court served its purpose during the state of emergency, but this emergency has, for the most part, passed. It is simply not appropriate for this Court to administer the Michigan court system as though this emergency continues. The better approach, in my view, is to trust our trial courts. The trial courts of this state have the authority to implement video proceedings under our current rules. I would leave it to the discretion of our trial courts to determine when and where best to use these tools. I trust our trial courts to implement these procedures as needed and where such proceedings benefit our judicial process. I would not implement these rules with immediate effect. The Court should instead publish these proposed changes for public comment and conduct a public hearing before imposing on our trial courts a process that was put in place on an emergency basis. In short, we should follow our standard process and promulgate changes to our court rules in due course based on the lessons learned from this crisis, not by imposing procedures that represented our best efforts in responding to it.

VIVIANO and BERNSTEIN, JJ. (*concurring in part and dissenting in part*). We write this joint statement because we strongly believe it is time for this Court to stop administering the state courts by issuing emergency orders and we share a deeply held conviction that our state courts should return to in-person proceedings as much and as quickly as possible. We recognize that there are continued public health challenges due to the COVID-19 pandemic, but we have practiced law and managed courts long enough to know that our chief judges in Michigan are up to the task of managing their own court facilities in a safe, responsible, and efficient manner. We also have great confidence in the ability of our trial judges to manage their dockets and their courtrooms, keeping a keen eye on the safety of their staff, attorneys, litigants, and the public.

We agree with the Court's order today to the extent it rescinds many of our COVID-19-related administrative orders, but we dissent to the extent that the Court continues to require expanded use of remote proceedings.[3] The administrative orders that we issued since the start of the COVID-19 pandemic represented our best efforts to address a complex problem that affected numerous facets of our court system. But they, along with the return to full capacity directives issued by the State Court Administrative Office, have prevented large-scale, in-person judicial proceedings across most of the state for the past 18 months. This has contributed to a massive backlog of in-person proceedings that simply cannot be alleviated by the use of more remote proceedings.[4] We believe, however, that the time has come to end these emergency measures and restore normal operating procedures.[5]

Those procedures reflect centuries of tradition that have placed courtrooms and courthouses at the center of the judicial process. There is a reason that our taxpayers have provided each judge in Michigan with a separate courtroom. They represent more than just physical structures.[6] Courthouses hold "symbolic importance" in our society, and their presence "affirm[s] the presence of a community, of a society, by reflecting its values back to itself."[7] The courthouse itself reinforces the importance of what occurs within its walls.[8] Suffice it to say that this symbolism can be lost during remote hearings.[9]

The overemphasis on remote hearings reflected in today's court rule amendments risks — in a very real way — depriving people of their day in court. Even prior to the COVID-19 pandemic, research revealed concerns about the impacts caused by holding proceedings remotely.[10] Remote proceedings may "make it more difficult for the judge to both embody and maintain the authority of the court," and appearance via video may not "adequately convey the authority of the court," which can affect the solemnity of the proceedings.[11] Well-settled caselaw holds that, in the context of criminal trials, in-person testimony can be essential to a defendant's constitutional rights.[12] Even commentators who support expansion of videoconferencing technologies in judicial proceedings advise proceeding with caution before adopting radical changes that risk impinging on litigants' rights and access to justice more broadly.[13] Indeed, the benefits of remote proceedings are often more apparent than their costs,

but there is a risk that judges and judicial policymakers may "face pressure to overemphasize values such as speed, cost savings, and reduced workloads at the cost of fair proceedings."[14]

Michigan trial judges already have the authority and discretion to allow videoconferencing and other means of remote participation when appropriate.[15] We, of course, should carefully consider any lessons learned during the pandemic and whether any new remote participation or other procedures should be formally adopted in the future.[16] However, any changes we might make should be considered through our normal administrative process, after giving notice to the public and an opportunity for all stakeholders to comment on any changes that we are considering. Instead, the Court converts its emergency orders into permanent modifications to the court rules and gives them immediate effect — a process that may result in more confusion, delays, and distrust in the court system.

To have any legitimacy, emergency orders should come to an end once the emergency has subsided. We believe it is imperative for this Court to return to our prepandemic practices and procedures, bearing in mind that any permanent changes to the court rules could and should first be considered through the normal administrative process. Access to the courts is vital, and we believe we should offer an opportunity to hear from anyone who may be affected by sweeping changes to courtroom procedures before making them permanent. It is also important for us to allow our chief judges and other trial court judges the discretion they have always had to manage their facilities, courtrooms, and dockets. They have their work cut out for them in confronting the massive backlog caused by the pandemic. We should get out of their way and let them go to work. We have confidence that our trial judges and their staffers will get the job done. We respectfully dissent.

ENDNOTES

1. I am not sure I understand what my colleagues believe regular process should require here — we have given rule changes immediate effect while taking public comment before. And we don't have a regular process for a global pandemic that forced us to quickly change our processes and then serendipitously learn that our new approach boosted access to justice and transparency.
2. Continued remote hearings are part of the solution to backlogs because they increase capacity: visiting judges can conduct remote proceedings for matters that are suited for them, freeing up physical courtrooms for jury trials and other proceedings that are not suited for them.
3. We agree with the Court's rescission of Administrative Order Nos. 2020-1, 2020-6, 2020-9, 2020-13, 2020-14, and 2020-19 and the retention of Administrative Order No. 2021-2. We also agree with imposing the conditions previously found in AO 2020-6 on any remote hearings that are conducted. But, for the reasons discussed in this statement, we strongly disagree with the requirement that courts use remote participation technology "to the greatest extent possible," MCR 2.407(G); MCR 6.006(E); and with the court rule amendment permitting judges to preside over cases from a location other than the judge's courtroom by suspending Administrative Order No. 2012-7.
4. See Brand-Williams, The Detroit News, *Michigan Courts Face Massive Backlog of Felony Cases Awaiting Trial* (July 4, 2021) <https://www.detroitnews.com/story/news/local/michigan/2021/07/04/michigan-courts-face-massive-backlog-felony-cases-awaiting-trial/7787034002/> (accessed July 20, 2021) [https://perma.cc/68GH-VW2Y]. The backlog consists of jury trials, preliminary examinations, and other hearings that must be conducted in person. To answer this docket crisis with a renewed emphasis on remote hearings seems to us at best misguided.
5. In making these court rule changes, the Court again deviates from our general practice of first providing notice and an opportunity to comment, and conducting a public hearing on proposed rule changes prior to adopting them, see MCR 1.201(A) through (C), (E). Although we have the ability to dispense with the notice requirements if "there is a need for immediate action or if the proposed amendment would not significantly affect the delivery of justice," MCR 1.201(D), neither of these conditions is met here. Nor are these changes of the sort that would typically be placed in permanent court rules, since the language is vague and aspirational.
6. We emphasize the importance of the courthouse and courtroom to acknowledge the authority and significance that these spaces have persistently held in our society. Despite that, we continue to acknowledge that courthouses may present accessibility concerns for certain populations. See Pant, McAnnany, and Belluscio, New York Lawyers for the Public Interest, *Accessible Justice: Ensuring Equal Access to Courthouses for People with Disabilities* (March 2015) <https://www.nylpi.org/wp-content/uploads/2015/03/Accessible-Justice-NYLPI-3-23-15.pdf> (accessed July 20, 2021) [https://perma.cc/8H4F-7DJX].
7. Rowden & Wallace, *Remote Judging: The Impact of Video Links on the Image and the Role of the Judge*, 14 Int'l J L Context 504, 518 (2018).
8. See Haldar, *In and Out of Court: On Topographies of Law and the Architecture of Court Buildings*, 7 Int'l J for Semiotics L 185, 189 (June 1994) ("Architecture marks off and signifies that authority-to-judge which can only be found inside a court of law and nowhere else[;] it assigns legal discourse to a proper place.").
9. See Wolfson, Louisville Courier Journal, *Think a Court Cat Filter Is Weird? Try Virtual Court with Beer, Bikinis and Clients in Bed* (December 18, 2020) <https://www.courier-journal.com/story/news/2020/12/18/amid-covid-19-pandemic-remote-court-hearings-bare-naked-truth/3932436001/> (accessed July 20, 2021) [https://perma.cc/X8GJ-F62G] (providing examples of parties and attorneys taking remote court appearances less seriously than warranted).
10. "Video hearings are now a common feature in immigration court, and have been used regularly since the 1990s. The use of videoconferencing, even without the petitioner's consent, is specifically authorized by statute." Bannon & Adelstein, Brennan Center for Justice, *The Impact of Video Proceedings on Fairness and Access to Justice in Court* (September 10, 2020) <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>, p 4 (accessed July 17, 2021) [https://perma.cc/68JE-5TPV]. The American Bar Association has previously recommended that the use of video hearings "be limited to procedural (as opposed to substantive) hearings and that respondents should be entitled to knowing and voluntary consent to proceeding" via video, given the due process concerns that were raised by the use of such technology. American Bar Association Commission on Immigration, *2019 Update Report: Reforming the Immigration System* (March 2019) <https://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/2019_reforming_the_immigration_system_volume_1.pdf>, p 18 (accessed July 21, 2021) [https://perma.cc/W3TW-RRL3]. See also Eagly, *Remote Adjudication in Immigration*, 109 Nw U L Rev 933, 941 (2015) ("Detainees and their attorneys are frequently discouraged by the numerous logistical and technical difficulties associated with litigating televideo cases, such as unpredictable interruptions in the video feed, challenges in communicating with interpreters not physically present in the same room, and the impossibility of confidential attorney-client communication over a public courtroom screen. Detainees removed from the courtroom by the video procedure may be less likely to understand their rights in the removal process, less likely to request a court continuance to find a lawyer, and, especially for those who cannot find or afford an attorney, less equipped to assert their claims and file the required paperwork.").
11. *Remote Judging*, 14 Int'l J L Context at 515–516.
12. The Sixth Amendment of the United States Constitution states, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" See also Const 1963, art 1, § 20. In *People v Jemison*, 505 Mich 352, 356 (2020), we unanimously adopted the Supreme Court's position in *Crawford v Washington*, 541 US 36, 68 (2004), that the Confrontation Clause requires face-to-face in-person cross-examination of witnesses providing testimonial evidence in criminal matters unless a witness is unavailable and the defendant had a prior opportunity for cross-examination.

    "The Sixth Amendment's guarantee of face-to-face encounter between witness and accused serves ends related both to appearances and to reality. This opinion is embellished with references to and quotations from antiquity in part to convey that

there is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.' *Pointer v. Texas*, 380 U.S. 400, 404 (1965)." *Coy v Iowa*, 487 US 1012, 1017 (1988). Noting the differences between face-to-face testimony versus even two-way video testimony, the Ninth Circuit has held that "the use of a remote video procedure must be reserved for rare cases in which it is 'necessary.'" *United States v Carter*, 907 F3d 1199, 1206 (2018), quoting *Maryland v Craig*, 497 US 836, 850 (1990).

13. *Impact of Video Proceedings*, p 2 (noting that the expanded use of remote technology "raises critical questions about how litigants' rights and their access to justice may be impacted").
14. Bannon & Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond*, 115 Nw U L Rev 1875, 1909 (2021).
15. See, e.g., MCR 2.004; MCR 2.407; MCR 3.904; MCR 6.006.
16. In 2001, the Florida Supreme Court repealed a rule that had been adopted on an interim basis in 1999, which allowed for juvenile detention hearings to be conducted by video. *Amendment to Florida Rule of Juvenile Procedure 8.100(A)*, 796 So 2d 470 (2001). In lieu of adopting a permanent rule change, a pilot program had been initiated and later adopted on an interim basis. *Id.* at 472. More studies were conducted, and the Florida Supreme Court revisited the proposed amendment upon the expiration of a 90-day period. *Id.* at 473. The Florida Supreme Court found that, although the proposed amendment allowed for the exercise of judicial discretion, "[i]n practical operation, the electronic proceeding became mandatory, and not merely an option to be implemented as appropriate." *Id.* at 472. The Florida Supreme Court highlighted the concerns raised by the Florida Public Defender Association: "Specifically, many observed that there was no proper opportunity for meaningful, private communications between the child and the parents or guardians, between the parents or guardians and the public defender at the detention center, and between a public defender at the detention center and a public defender in the courtroom." *Id.* at 473. Although the Florida Supreme Court noted that the proposed amendment had some benefits, "our youth must never take a second position to institutional convenience and economy." *Id.* at 474. We find it particularly noteworthy both that the Florida Supreme Court utilized a process that allowed it to collect data and input from key stakeholders *before* committing to a permanent rule change and that, upon further reflection, the Florida Supreme Court decided *against* adopting a rule change expanding the use of video for these hearings.

Addition of Rule 3.906 of the Michigan Court Rules
(Dated July 28, 2021)

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following addition of Rule 3.906 of the Michigan Court Rules is adopted, effective September 1, 2021.

[NEW] Rule 3.906 Use of Restraints on a Juvenile

(A) Instruments of restraint, such as handcuffs, chains, irons, or straitjackets, cloth and leather restraints, and other similar items, may not be used on a juvenile during a court proceeding unless the court finds that the use of restraints is necessary due to one of the following factors:
  (1) Instruments of restraint are necessary to prevent physical harm to the juvenile or another person.
  (2) The juvenile has a history of disruptive courtroom behavior that has placed others in potentially harmful situations or presents a substantial risk of inflicting physical harm on himself or herself or others as evidenced by recent behavior.
  (3) There is a founded belief that the juvenile presents a substantial risk of flight from the courtroom.

(B) The court's determination that restraints are necessary must be made prior to the juvenile being brought into the courtroom and appearing before the court. The court shall provide the juvenile's attorney an opportunity to be heard before the court orders the use of restraints. If restraints are ordered, the court shall state on the record or in writing its findings of fact in support of the order.

(C) Any restraints used on a juvenile in the courtroom shall allow the juvenile limited movement of the hands to read and handle documents and writings necessary to the hearing. Under no circumstances should a juvenile be restrained using fixed restraints to a wall, floor, or furniture.

STAFF COMMENT: The addition of MCR 3.906 establishes a procedure regarding the use of restraints on a juvenile in court proceedings.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

CAVANAGH, J. (*concurring*). I support the majority's order — and I am not alone; a majority of the public comments received likewise support the adoption of this rule.[1] And Michigan now joins 31 other states (plus the District of Columbia) that have established a procedure regarding the use of restraints on a juvenile in court proceedings.[2] That there is overwhelming support for this court rule, and others like it across the country, should not be misconstrued as suggesting that the majority does not appreciate the complexity of the problem and the available solutions, or that the majority does not value or prioritize the safety and security of our local courtrooms. To the contrary, this Court, like every other court in this state, is often called upon to weigh competing interests in difficult situations and make the best decision it can. That is, in fact, the very essence of our job. Here, in my view, those potentially competing interests include giving trial judges the flexibility, discretion, and autonomy they need to control the procedures and security in their courtrooms and ensuring that juveniles who interact with Michigan's justice system are not subjected to physical, mental, and emotional trauma or judicial bias as a result of being shackled. There is no serious debate that these interests are important and deserving of careful consideration, and I find it unfair to suggest, as my dissenting colleague does, that the court rule is "underdeveloped" or adopted without careful consideration.

Our careful consideration of these competing interests has revealed that the indiscriminate shackling of juveniles is a practice to be avoided when it does not jeopardize the safety of the courtroom. Social science shows that the use of restraints on a juvenile has the potential to cause bias or prejudice on the part of the judge or jury in a courtroom setting, thereby possibly impinging on a juvenile's rights to due process and the presumption of innocence. It has also been shown that shackling causes unnecessary stress and is harmful to juveniles and their families because it causes shame and humiliation. Children with disabilities are at risk of exacerbated harm from shackling, and the use of restraints can create difficulties for the attorney-client relationship. While no one seriously disputes that courtroom safety is important, studies show that shackling youth has little effect on courtroom safety[3] and is inconsistent with the

rehabilitative goals of the juvenile justice system, which are not punitive in nature. In fact, minimizing restraints has been shown to improve engagement and communication in the courtroom and between a juvenile and her attorney.[4]

My dissenting colleague argues that trial judges should have flexibility to exercise their discretion to manage the security of the courtrooms. I agree. This rule simply requires exercise of that discretion before a young person is shackled in the courtroom. I also agree that the factors identified by my dissenting colleague as relevant to the safety and security of our local courtrooms are valid concerns for a trial court to consider in evaluating whether a juvenile should be shackled while in the courtroom. But I disagree that the new court rule does not give trial courts the ability to consider these factors in making that decision. For example, nothing in this court rule prohibits a trial court from considering a juvenile's mental condition, character, or reputation for dangerousness when considering whether "[i]nstruments of restraint are necessary to prevent physical harm to the juvenile or another person" as provided in MCR 3.906(A)(1). The rule does, however, prohibit a trial judge from *indiscriminately* shackling young people appearing in the courtroom without considering these factors. But why would a trial judge want to shackle a young person when it is not necessary for safety reasons?

I am, admittedly, less concerned than my dissenting colleague about our trial courts' ability to establish the actual procedures necessary to effectuate the requirements of MCR 3.906. With virtually every other court rule established by this Court, we have successfully relied on our trial courts to exercise their discretion and experience to ensure — at the granular level — that both the spirit and the letter of the court rule are complied with. I have complete confidence that this rule does not present a challenge our trial courts cannot meet with the same level of competence they continue to exhibit with respect to all other court rules, especially with the discretion afforded to trial courts to use remote or virtual hearings when necessary.

Viviano, J. (*dissenting*). I dissent from the majority's order because I think the new rule it adopts is underdeveloped and confusing, and, as a result, has the potential to jeopardize the safety and security of judges, court staff, litigants, and members of the public who attend court hearings. Although I do not necessarily object to a rule governing the procedure for determining whether restraints should be used on juvenile defendants during court hearings, we should allow considerable flexibility for trial judges to manage their own courtrooms, including making determinations regarding the level of security that is necessary to protect the safety and security of all involved. That concern was universally expressed by every law enforcement agency and judicial association that submitted public comments concerning this proposed rule change.

My primary concern with this new rule is that it limits the safety factors that a trial court may consider and apparently does not allow trial courts to consider other factors that they have always considered in making pretrial release decisions. Thus, for example, a trial court apparently cannot consider a juvenile's "mental condition, including character and reputation for dangerousness." MCR 6.106(F)(1)(d). Also excluded from the list are "the seriousness of the offense charged, the presence or absence of threats, and the probability of conviction and likely sentence," MCR 6.106(F)(1)(e), and the juvenile's "prior criminal record, including juvenile offenses," MCR 6.106(F)(1)(a).[5] I can think of no justification for limiting trial courts from full consideration of all factors bearing on the safety and security of court proceedings.

In addition, although the new procedure appears to allow for a determination regarding the use of restraints to be made before a juvenile enters the courtroom (in contrast to the proposed rule, which appeared to require the restraints to be removed even before the trial court had an opportunity to address the issue), it remains unclear how such a determination will be initiated (i.e., by the court on its own initiative or at the request of the prosecutor or law enforcement officer?). What we do know is even more problematic: the court's determination regarding the use of restraints will be made out of the presence of the juvenile, since the trial court's "determination…must be made prior to the juvenile being brought into the courtroom and appearing before the court." MCR 3.906(B). This may raise questions regarding a defendant's constitutional right to be present during "stage[s] of trial where [their] substantial rights might be adversely affected." *People v Mallory*, 421 Mich 229, 247 (1984). And, as if to emphasize the Court's indifference to the safety concerns that have been raised, the new rule omits any express reference to a procedure whereby the prosecutor or a law enforcement official can raise the issue of restraints, but instead requires that only one party to the proceeding — "the juvenile's attorney" — be given "an opportunity to be heard before the court orders the use of restraints." MCR 3.906(B). Does this mean that the prosecutor does not have a right to be heard on this topic?

Court security lapses can have tragic consequences. Because I think this new rule is confusing and has the potential to jeopardize the safety of court proceedings, I respectfully dissent.

Zahra, J., joins the statement of Viviano, J.

ENDNOTES

1. The Court received 15 comments during the public comment period. Nearly all commenters expressed support for the concept of the proposal or the actual published version.
2. See National Juvenile Defender Center, *Campaign Against Indiscriminate Juvenile Shackling*, available at <https://njdc.info/campaign-against-indiscriminate-juvenile-shackling/> (accessed July 18, 2021) [https://perma.cc/ZPE4-FZN6].
3. See National Juvenile Defender Center, *Campaign Against Indiscriminate Juvenile Shackling: Toolkit*, available at <https://njdc.info/wp-content/uploads/2016/01/Toolkit-Final-011916.pdf> p 5 (accessed July 18, 2021) [https://perma.cc/KX79-99LW].
4. See National Juvenile Defender Center, *Campaign Against Indiscriminate Juvenile Shackling: Issue Brief*, available at <https://njdc.info/wp-content/uploads/2016/01/NJDC_CAIJS_Issue-Brief.pdf> pp 2–3 (accessed July 18, 2021) [https://perma.cc/YCK6-WFJD].
5. It is also unclear what is meant by "*a founded belief* that the juvenile presents a substantial risk of flight from the courtroom." MCR 3.906(A)(3) (emphasis added). Is that as opposed to an *unfounded* belief?