

Order

Michigan Supreme Court
Lansing, Michigan

September 22, 2021

Bridget M. McCormack,
Chief Justice

ADM File No. 2021-12

Amendments of Rules 2.117,
3.708, 3.951, 6.005, 6.104,
6.445, 6.610, 6.625, 6.905,
6.907, 6.937, and 6.938 of
the Michigan Court Rules

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

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 amendments of Rules 2.117, 3.708, 3.951, 6.005, 6.104, 6.445, 6.610, 6.625, 6.905, 6.907, 6.937, and 6.938 of the Michigan Court Rules are adopted, effective January 1, 2022.

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

Rule 2.117 Appearances

(A) [Unchanged.]

(B) Appearance by Attorney.

(1)-(2) [Unchanged.]

(3) Appearance by Appointing Authority.

(a) In some actions, an appointing authority independent of the judiciary determines the attorney that will represent a party for the entirety of the action. In some actions, an appointing authority independent of the judiciary determines that an attorney will represent a party for a single hearing—like an arraignment.

(b) In actions where an attorney is appointed for the entirety of the action, the appointed attorney shall file an appearance with the court.

(c) In actions where an attorney is appointed for a single hearing, the attorney should orally inform the court of the limited appointment at

the time of the hearing. It is not necessary for the appointing authority to file a notice of appointment or for the attorney to file an appearance.

(~~43~~) [Renumbered but otherwise unchanged.]

(C) Duration of Appearance by Attorney.

(1)-(2) [Unchanged.]

(3) In appointed cases, substitute counsel shall file an appearance with the court after receiving the assignment from the appointing authority.

(~~43~~) [Renumbered but otherwise unchanged.]

(D)-(E) [Unchanged.]

Rule 3.708 Contempt Proceedings for Violation of Personal Protection Orders

(A)-(C) [Unchanged.]

(D) Appearance or Arraignment; Advice to Respondent. At the respondent's first appearance before the circuit court, whether for arraignment under MCL 764.15b, enforcement under MCL 600.2950, 600.2950a, or 600.1701, or otherwise, the court must:

(1)-(2) [Unchanged.]

(3) advise the respondent that he or she is entitled to a lawyer's assistance at the hearing and, if the court determines it might sentence the respondent to jail, that the court, or the local funding unit's appointing authority if the local funding unit has determined that it will provide representation to respondents alleged to have violated a personal protection order, will appoint a lawyer at public expense if the individual wants one and is financially unable to retain one,

(4) if requested and appropriate, appoint a lawyer or refer the matter to the appointing authority,

(5)-(6) [Unchanged.]

(E)-(I) [Unchanged.]

Rule 3.951 Initiating Designated Proceedings

- (A) Prosecutor-Designated Cases. The procedures in this subrule apply if the prosecuting attorney submits a petition designating the case for trial in the same manner as an adult.
- (1) [Unchanged.]
 - (2) Procedure.
 - (a) The court shall determine whether the juvenile's parent, guardian, or legal custodian has been notified and is present. The arraignment may be conducted without a parent, guardian, or legal custodian, provided a guardian ad litem or attorney appears with the juvenile. Attorney appointments, even if just for the arraignment, are to be done by the court's local funding unit's appointing authority.
 - (b) The court shall read the allegations in the petition and advise the juvenile on the record in plain language:
 - (i) of the right to an attorney at all court proceedings, including the arraignment pursuant to MCR 3.915(A)(1);
 - (ii)-(vi) [Unchanged.]
 - (c)-(d) [Unchanged.]
 - (3) [Unchanged.]
- (B) Court-Designated Cases. The procedures in this subrule apply if the prosecuting attorney submits a petition charging an offense other than a specified juvenile violation and requests the court to designate the case for trial in the same manner as an adult.
- (1) [Unchanged.]
 - (2) Procedure.
 - (a) The court shall determine whether the juvenile's parent, guardian, or legal custodian has been notified and is present. The arraignment may be conducted without a parent, guardian, or legal custodian, provided a guardian ad litem or attorney appears with the juvenile. Attorney

appointments, even if just for the arraignment, are to be done by the court's local funding unit's appointing authority.

(b) The court shall read the allegations in the petition, and advise the juvenile on the record in plain language:

(i) of the right to an attorney at all court proceedings, including the arraignment~~pursuant to MCR 3.915(A)(1);~~

(ii)-(vii) [Unchanged.]

(c)-(d) [Unchanged.]

(3) [Unchanged.]

Rule 6.005 Right to Assistance of Lawyer; Advice; Appointment for Indigents; Waiver; Joint Representation; Grand Jury Proceedings.

(A) Advice of Right. At the arraignment on the warrant or complaint, the court must advise the defendant

(1) of entitlement to a lawyer's assistance at all ~~subsequent~~ court proceedings, and

(2) that the defendant is entitled to~~court will appoint~~ a lawyer at public expense if the defendant wants one and is financially unable to retain one.

The court must ~~ask~~question the defendant ~~to determine~~ whether the defendant wants a lawyer and, if so, whether the defendant is financially unable to retain one.

(B) Questioning Defendant About Indigency. If the defendant requests a lawyer and claims financial inability to retain one, the court must determine whether the defendant is indigent unless the court's local funding unit has designated an appointing authority in its compliance plan with the Michigan Indigent Defense Commission. If there is an appointing authority, the court must refer the defendant to the appointing authority for indigency screening. If there is no appointing authority, or if the defendant seeks judicial review of the appointing authority's determination concerning indigency, tThe court's determination of indigency must be guided by the following factors:

(1)-(3) [Unchanged.]

- (4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned; ~~and~~
- (5) the rebuttable presumptions of indigency listed in the MIDC's indigency standard; and
- (6~~5~~) [Renumbered but otherwise unchanged.]

The ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer. The court reviews an appointing authority's determination of indigency de novo and may consider information not presented to the appointing authority.

- (C) [Unchanged.]
- (D) Appointment or Waiver of a Lawyer. ~~Where~~^{If} the court makes the determination~~determines~~ that ~~the~~ defendant is financially unable to retain a lawyer, it must promptly refer the defendant to the local indigent criminal defense system's appointing authority for appointment of a lawyer~~appoint a lawyer and promptly notify the lawyer of the appointment~~. The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

(1)-(2) [Unchanged.]

The court should encourage any defendant who appears without counsel to be screened for indigency and potential appointment of counsel.

- (E) Advice at Subsequent Proceedings. If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial or sentencing) need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right. Before the court begins such proceedings,
 - (1) [Unchanged.]
 - (2) if the defendant requests a lawyer and is financially unable to retain one, the court must refer the defendant to the local indigent criminal defense system's appointing authority for the appointment of~~appoint~~ one; or

(3) [Unchanged.]

The court may refuse to adjourn a proceeding for the appointment of ~~to appoint~~ counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel.

(F) Multiple Representation. When two or more indigent defendants are jointly charged with an offense or offenses or their cases are otherwise joined, the local indigent criminal defense system ~~court~~ must appoint separate lawyers unassociated in the practice of law for each defendant. Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless:

(1)-(3) [Unchanged.]

(G)-(H) [Unchanged.]

(I) Assistance of Lawyer at Grand Jury Proceedings.

(1) [Unchanged.]

(2) The prosecutor assisting the grand jury is responsible for ensuring that a witness is informed of the right to a lawyer's assistance during examination by written notice accompanying the subpoena to the witness and by personal advice immediately before the examination. The notice must include language informing the witness that if the witness is financially unable to retain a lawyer, the chief judge in the circuit court in which the grand jury is convened will on request refer the witness to the local indigent criminal defense system for appointment of an attorney ~~appoint one for the witness~~ at public expense.

Rule 6.104 Arraignment on the Warrant or Complaint

(A) Arraignment Without Unnecessary Delay. Unless released beforehand, an arrested person must be taken without unnecessary delay before a court for arraignment in accordance with the provisions of this rule, or must be arraigned without unnecessary delay by use of two-way interactive video technology in accordance with MCR 6.006(A). The arrested person is entitled to the assistance of an attorney at arraignment unless

- (1) the arrested person makes an informed waiver of counsel or
- (2) the court issues a personal bond and will not accept a plea of guilty or no contest at arraignment.

(B)-(D) [Unchanged.]

(E) Arraignment Procedure; Judicial Responsibilities. The court at the arraignment must

- (1) [Unchanged.]
- (2) if the accused is not represented by a lawyer at the arraignment, advise the accused that
 - (a)-(c) [Unchanged.]
 - (d) if the accused does not have the money to hire a lawyer, the local indigent criminal defense system~~court~~ will appoint a lawyer for the accused;
- (3) advise the accused of the right to a lawyer at all ~~subsequent~~ court proceedings and, if appropriate, appoint a lawyer;

(4)-(6) [Unchanged.]

The court may not question the accused about the alleged offense or request that the accused enter a plea.

(F)-(G) [Unchanged.]

Rule 6.445 Probation Revocation

- (A) [Unchanged.]
- (B) Arraignment on the Charge. At the arraignment on the alleged probation violation, the court must
 - (1) [Unchanged.]
 - (2) advise the probationer that

- (a) [Unchanged.]
- (b) the probationer is entitled to a lawyer's assistance at the hearing and at all ~~subsequent~~ court proceedings, including the arraignment on the violation/bond hearing, and that ~~a lawyer~~the court will be appointed a lawyer—at public expense if the probationer wants one and is financially unable to retain one,
- (3) if requested and appropriate, refer the matter to the local indigent criminal defense system's appointing authority for appointment of a lawyer~~appoint a lawyer,~~

(4)-(5) [Unchanged.]

(C)-(H) [Unchanged.]

Rule 6.610 Criminal Procedure Generally

(A)-(C) [Unchanged.]

(D) Arraignment; District Court Offenses

- (1) Whenever a defendant is arraigned on an offense over which the district court has jurisdiction, the defendant must be informed of

- (a)-(b) [Unchanged.]

- (c) the defendant's right

- (i) to the assistance of an attorney at all court proceedings, including arraignment, and to a trial;

- (ii)-(iii) [Unchanged.]

The information may be given in a writing that is made a part of the file or by the court on the record.

- (2) [Unchanged.]

- (3) The right to the assistance of an attorney, to an appointed attorney, or to a trial by jury is not waived unless the defendant

- (a)-(b) [Unchanged.]

If the defendant has not waived the right to counsel, the court must refer the matter to the appointing authority for the assignment of counsel.

(4) [Unchanged.]

(E)-(F) [Unchanged.]

(G) Sentencing.

(1)-(3) [Unchanged.]

(4) Immediately after imposing a sentence of incarceration, even if suspended, the court must advise the defendant, on the record or in writing, that:

(a) if the defendant wishes to file an appeal and is financially unable to retain a lawyer, the local indigent criminal defense system's appointing authority~~court~~ will appoint a lawyer to represent the defendant on appeal, and

(b) [Unchanged.]

(H)-(I) [Unchanged.]

Rule 6.625 Appeal; Appointment of Appellate Counsel

(A) [Unchanged.]

(B) If the court imposed a sentence of incarceration, even if suspended, and the defendant is indigent, the local indigent criminal defense system's appointing authority~~court~~ must ~~enter an order appointing~~ a lawyer if, within 14 days after sentencing, the defendant files a request for a lawyer or makes a request on the record. If the defendant makes a request on the record, the court shall inform the appointing authority of the request that same day. Unless there is a postjudgment motion pending, the appointing authority~~court~~ must ~~act~~rule on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the appointing authority~~court~~ must ~~act~~rule on the request after the court's disposition of the pending motion and within 14 days after that disposition. If a lawyer is appointed, the 21 days for taking an appeal pursuant to MCR 7.104(A)(3) and MCR 7.105(A)(3) shall commence on the day of the appointment.

(C) If indigency was not previously determined or there is a request for a redetermination of indigency, the court shall make an indigency determination

unless the court's local funding unit has designated this duty to its appointing authority in its compliance plan with the Michigan Indigent Defense Commission. The determination of indigency and, if indigency is found, the appointment of counsel must occur with 14 days of the request unless a postjudgment motion is pending. If there is a postjudgment motion pending, the appointing authority must act on the request after the court's disposition of the pending motion and within 14 days after that disposition.

- (D) If a lawyer is appointed, the 21 days for taking an appeal pursuant to MCR 7.104(A)(3) and MCR 7.105(A)(3) shall commence on the day the notice of appointment is filed with the court.

Rule 6.905 Assistance of Attorney

- (A) [Unchanged.]
- (B) ~~Court~~-Appointed Attorney. Unless the juvenile has a retained attorney, or has waived the right to an attorney, the magistrate or the court must refer the matter to the local indigent criminal defense system's appointing authority for appointment of~~appoint~~ an attorney to represent the juvenile.

(C)-(D) [Unchanged.]

Rule 6.907 Arraignment on Complaint and Warrant

- (A)-(B) [Unchanged.]
- (C) Procedure. At the arraignment on the complaint and warrant:
- (1) The magistrate shall determine whether a parent, guardian, or an adult relative of the juvenile is present. Arraignment may be conducted without the presence of a parent, guardian, or adult relative provided the local funding unit's appointment authority~~magistrate~~ appoints an attorney to appear at arraignment with the juvenile or provided an attorney has been retained and appears with the juvenile.

(2) [Unchanged.]

Rule 6.937 Commitment Review Hearing

- (A) Required Hearing Before Age 19 for Court-Committed Juveniles. The court shall schedule and hold, unless adjourned for good cause, a commitment review hearing as nearly as possible to, but before, the juvenile's 19th birthday.

- (1) [Unchanged.]
- (2) Appointment of an Attorney. The local funding unit's appointing authority~~court~~ must appoint an attorney to represent the juvenile at the hearing unless an attorney has been retained or is waived pursuant to MCR 6.905(C).
- (3)-(4) [Unchanged.]
- (B) Other Commitment Review Hearings. The court, on motion of the institution, agency, or facility to which the juvenile is committed, may release a juvenile at any time upon a showing by a preponderance of evidence that the juvenile has been rehabilitated and is not a risk to public safety. The notice provision in subrule (A), other than the requirement that the court clearly indicate that it may extend jurisdiction over the juvenile until the age of 21, and the criteria in subrule (A) shall apply. The rules of evidence shall not apply. The local funding unit's appointing authority~~court~~ must appoint an attorney to represent the juvenile at the hearing unless an attorney has been retained or the right to counsel waived. The court, upon notice and opportunity to be heard as provided in this rule, may also move the juvenile to a more restrictive placement or treatment program.

Rule 6.938 Final Review Hearings

- (A)-(B) [Unchanged.]
- (C) Appointment of Counsel. If an attorney has not been retained or appointed to represent the juvenile, the local funding unit's appointing authority~~court~~ must appoint an attorney and the court may assess the cost of providing an attorney as costs against the juvenile or those responsible for the juvenile's support, or both, if the persons to be assessed are financially able to comply.
- (D)-(E) [Unchanged.]

Staff comment: The amendments shift the responsibility for appointment of counsel for an indigent defendant in a criminal proceeding to the local funding unit's appointing authority. The proposal was submitted by the Michigan Indigent Defense Commission, and intended to implement recently-approved Standard Five of the MIDC Standards.

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.



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 22, 2021

A handwritten signature in black ink, appearing to read "Larry S. Royster", written over a horizontal line.

Clerk