

Order

Michigan Supreme Court
Lansing, Michigan

November 2, 2022

Bridget M. McCormack,
Chief Justice

ADM File No. 2020-13

Amendment of Rule
6.005 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 amendment of Rule 6.005 of the Michigan Court Rules is adopted, effective January 1, 2023.

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

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

(A)-(G) [Unchanged.]

(H) Scope of Trial Lawyer's Responsibilities.

- (1) The responsibilities of the trial lawyer who represents the defendant include
 - (a~~1~~) representing the defendant in all trial court proceedings through initial sentencing,
 - (b~~2~~) filing of interlocutory appeals the lawyer deems appropriate, and
 - (c~~3~~) responding to any preconviction appeals by the prosecutor. Unless an appellate lawyer has been appointed or retained, t~~The defendant's trial lawyer must either:~~
 - (i) file a ~~substantive brief in response to any~~the prosecutor's interlocutory application for leave to appeal, appellant's brief, or substantive motion; or
 - (ii) notify the Court of Appeals in writing that the defendant has knowingly elected not to file a response~~that the lawyer will not be filing a brief in response to the application.~~

(24) [Renumbered but otherwise unchanged.]

(35) When an appellate lawyer has been appointed or retained, the trial lawyer is responsible for promptly making the defendant's file, including all discovery material obtained and exhibits in the trial lawyer's possession, reasonably available for copying upon request of the appellate that lawyer. The trial lawyer must retain the materials in the defendant's file for at least five years after the case is disposed in the trial court.

(I) [Unchanged.]

Staff comment (ADM File No. 2020-13): The amendment of MCR 6.005 clarifies the duties of attorneys in preconviction appeals.

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.

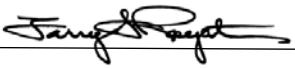
WELCH, J. (*concurring*). I fully support the Court's efforts to clarify a criminal defense trial attorney's responsibilities regarding preconviction appeals. The importance of representation for defendants at the early stage of criminal proceedings cannot be understated. However, many of the concerns that I previously raised when this rule was published for comment remain. See Proposed Amendment of MCR 6.005, 507 Mich ___, ___ (2021) (WELCH, J., *concurring*). Under the amended rule, unless separate appellate counsel has been retained or appointed, a trial attorney is required to respond to any preconviction appeal filings submitted by a prosecutor, MCR 6.005(H)(1)(c)(i), or "notify the Court of Appeals in writing that defendant has knowingly elected not to file a response," MCR 6.005(H)(1)(c)(ii). These options are likely sufficient in most circumstances. But what if no competent appellate attorney is willing to take the case and the trial attorney does not believe they are sufficiently competent in appellate practice or believes that their busy trial schedule will make it unreasonably difficult to provide effective representation in the Court of Appeals? In such circumstances, MRPC 1.1 might require the attorney to consider asking to withdraw as counsel for the accused. Courts generally have broad discretion to decide whether to allow counsel to withdraw. See, e.g., *People v Williams*, 386 Mich 565 (1972); *People v Echavarria*, 233 Mich App 356 (1999). If the trial court grants a request to withdraw, then the attorney's ethical conundrum is solved, but the accused will need a new attorney. If the trial court denies a request to withdraw, then that could increase the likelihood of ineffective-assistance-of-counsel concerns before the Court of Appeals. Additionally, if a client is unable or unwilling to pay any additional fee that a retained trial attorney charges for a preconviction appeal, is the retained attorney now required to work for free? If so, what effect would that have on the attorney-client relationship? While attorney ethics rules have been modified to allow for unbundled representation in civil litigation, similar modifications have not been made in the criminal context. Thus, I question whether criminal defense trial attorneys can solve the challenges

I have raised by entering into limited-scope representation agreements with their clients. See MCR 6.005(H)(1) (scope of trial lawyer's responsibilities); MCR 2.117 (effect of appearance by attorney in an action); MRPC 1.1 (duty to provide competent representation); and MRPC 1.2 (scope of representation). Although in most cases a transition to or partnership with appellate counsel will likely occur, it also seems predictable that there will be situations where one of the scenarios I have outlined could arise. My concerns cause me to believe that we should state explicitly in this rule that trial attorneys are permitted to withdraw if they reasonably believe that they are unable to represent the accused competently and ethically before the Court of Appeals. In summary, while the adopted amendments are an important improvement, I remain concerned that lingering ambiguity in the court rule will lead to situations that we may be required to address in the future.



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.

November 2, 2022


Clerk