Order

Michigan Supreme Court
Lansing, Michigan

June 9, 2021

Bridget M. McCormack,
Chief Justice

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

ADM File No. 2020-13

Proposed Amendment of
Rule 6.005 of the Michigan
Court Rules

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On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.005 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[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 ~~the prosecutor's interlocutory~~any application for leave to appeal, appellant's brief, or substantive motion; or

(ii) notify the Court of Appeals ~~that the lawyer will not be filing a brief in response to the application~~in writing that the defendant has knowingly elected not to file a response.

(2~~4~~) [Renumbered by otherwise unchanged.]

(3~~5~~) W~~w~~hen 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: The proposed amendment of MCR 6.005 would clarify 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.

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 October 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. 2020-13. 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.

WELCH, J. (*concurring*). I concur in the Court's order publishing for comment proposed changes to MCR 6.005 that are designed to clarify a criminal-defense trial attorney's responsibilities in handling preconviction appeals. I write separately because, while I recognize several longstanding problems linked to defendants being unrepresented before the Court of Appeals during preconviction appeals, I am concerned that the proposed amendments may not get to the root of the problem and may have unintended consequences. Currently, a criminal-defense trial attorney can withdraw from representing his or her client in a preconviction appeal, MCR 6.005(H)(4), or simply "notify the Court of Appeals that the lawyer will not be filing a brief in response to the application." MCR 6.005(H)(3)(ii). While I support a higher level of responsibility than

what is set forth in our current rule, I question whether the proposed amendment may create additional problems. For example:

> (1) Can an attorney, who has only been paid to handle trial court proceedings and whose client is unwilling to pay more for the preconviction appeal (but who is not indigent), withdraw as counsel and notify the Court of Appeals that the lawyer or the defendant will not file a response?
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> (2) What if an attorney petitions the trial court for extra funding to handle an appeal for a retained but poor client and the trial court rejects the request? Is that attorney still required to handle the appeal?
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> (3) Can an attorney (whether court-appointed or retained) make a referral to appellate counsel and opt out of handling the appeal even if the client decides not to hire the recommended appellate counsel? Would this be a basis to notify the Court of Appeals that the defendant has knowingly elected to not file a response?
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> (4) Can an attorney, who prefers to focus on trial-level work only, make it clear in an engagement agreement that the attorney does not handle appeals and will refer such matters out if needed? If so, would such an agreement be enforceable in light of the proposed amendments?

As a final matter, it is not clear to me how the proposed rule would mesh with MRPC 1.1, which states that an attorney has an ethical obligation not to litigate matters he or she is not competent to handle, or with MRPC 1.16, which discusses an attorney's obligation to withdraw in certain circumstances and discretion to withdraw in others (including a client's failure to abide by payment terms in a retention agreement).

I applaud the Court's efforts to help ensure that defendants in criminal cases will have representation during preconviction appeals. While I recognize that in most cases a transition to or partnership with appellate counsel will likely occur, it also seems predictable that there will be situations in which one of the scenarios I have outlined above could arise. I hope that the public comment process will, at a minimum, address and clarify the concerns that I have outlined above.

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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.

June 9, 2021

Clerk