

Proposed Amendment of Rules 1.0, 1.2, 4.2 and 4.3 of the Michigan Rules of Professional Conduct and Rules 2.107, 2.117, and 6.001 of the Michigan Court Rules

To read ADM File No. 2016-41, dated April 5, 2017, visit <http://courts.michigan.gov/courts/michigansupremecourt> and click “Administrative Matters & Court Rules” and “Proposed & Recently Adopted Orders on Admin Matters.”

Proposed Amendment of Rule 6.425 of the Michigan Court Rules

On order of the Court, dated April 5, 2017, this is to advise that the Court is considering an amendment of Rule 6.425 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 6.425 Sentencing; Appointment of Appellate Counsel

(A)–(F) [Unchanged.]

(G) Appointment of Lawyer; Trial Court Responsibilities in Connection with Appeal; Motion to Withdraw.

(1)–(2) [Unchanged.]

(3) Motions to Withdraw in Guilty Plea or No Contest Cases. A court-appointed appellate attorney for an indigent appellant may file a motion to withdraw if the attorney determines, after a conscientious and thorough review of the trial court record, that the appeal is wholly frivolous.

(a) A motion to withdraw is made by filing:

- (i) A motion that identifies any points the appellant seeks to assert and any other matters that the attorney has considered as a basis for appeal;
- (ii) A brief that refers to anything in the record that might arguably support the appeal, contains relevant record references, and cites and deals with those authorities which appear to bear on the points in question;
- (iii) proof that copies of the motion, brief in support, and notice that the motion may result in the conviction or trial court judgment being affirmed were served on the appellant by certified mail; and

(iv) proof that a copy of the motion only and not the brief was served on the appellee.

(b) Timing.

(i) A motion to withdraw shall be filed within 56 days after the transcript is filed.

(ii) Within 21 days after the motion to withdraw is filed and served, the appellant may file with the court an answer and brief in which he or she may make any comments and raise any points that he or she chooses concerning the appeal and the attorney's motion. The appellant must file proof that a copy of the answer was served on his or her attorney.

(iii) The court shall decide the motion within 14 days after the answer is filed and served (or could have been filed and served).

(c) If the court finds that the appeal is wholly frivolous, it may grant the motion and affirm the conviction or trial court judgment. If the court grants the motion to withdraw, the appellant's attorney shall mail to the appellant a copy of the transcript within 14 days after the order affirming is certified and file proof of that service. If the court finds any legal point arguable on its merits, it will deny the motion and the court appointed attorney must proceed in support of the appeal.

(3) [Renumbered (4) but otherwise unchanged.]

STAFF COMMENT: The proposed amendments of MCR 6.425 would expressly provide for a procedure under which appointed counsel may withdraw in light of a frivolous appeal in a way that protects a plea-convicted criminal defendant's right to due process. This amendment would ensure that a plea-convicted defendant could obtain the type of protections expressed in *Anders v California*, 386 US 738 (1967), even if the defendant's appeal proceeds by application and not by right. In such a case, a motion to withdraw may be filed in the trial court, which does not currently have a rule establishing the procedure like that in the Court of Appeals at MCR 7.211(C)(5). The timing of the procedure is intended to ensure that if an attorney's motion to withdraw is granted, the defendant would have sufficient time to file an application for leave to appeal under MCR 7.205(G).

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or 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 August 1, 2017, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-15. 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.

Amendment of Rule 1.5 of the Michigan Rules of Professional Conduct

On order of the Court, dated April 5, 2017, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendment of MRPC 1.5 is adopted, effective May 1, 2017.

[The present language is amended as indicated below by underlining for new text and strikeover for text that has been deleted.]

Rule 1.5 Fees

(a)–(c) [Unchanged.]

(d) A lawyer shall not enter into an arrangement for, charge, or collect: ~~a contingent fee in a domestic relations matter or in a criminal matter.~~

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof, the lawyer's success, results obtained, value added, or any factor to be applied that leaves the client unable to discern the basis or rate of the fee or the method by which the fee is to be determined, or

(2) a contingent fee for representing a defendant in a criminal case.

(e) [Unchanged.]

[The following paragraph is to be added in the Comment following Rule 1.5, after the comment on "Basis or Rate of Fee."]

Prohibited Contingent Fees

Paragraph (d) prohibits a lawyer from charging a fee in a domestic relations matter when payment is contingent upon the securing of a divorce, or upon the amount of alimony or support or property settlement to be obtained. The amount of alimony, support or property awarded to a client shall not be used by a lawyer as a basis for enhancing the fee. This provision does not preclude a contract for a contingent fee for legal representation in connection with the recovery of postjudgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

STAFF COMMENT: At the invitation of the Supreme Court, the Attorney Grievance Commission, the Family Law Council of the State Bar of Michigan, and the Bar's Committee on Professional Ethics submitted individual proposals to revise MRPC 1.5(d) related to the ability of an attorney to charge "results obtained" or "value-added fees" in a domestic relations case. Proposals by the AGC and Committee on Professional Ethics were combined for purposes of publication, and that proposal was published along with the Family Law Council's proposal for comment. The Court adopted the AGC-proposed language that clarifies that a lawyer is prohibited from charging a contingent fee in a domestic relations action based on the "results obtained" or "value added."

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

Bernstein, J., would adopt the alternative published proposal that would allow an attorney and client to agree in writing to an enhanced fee.

Appointment of Chief Judge of the 27th Circuit Court, the 78th District Court, and the Newaygo and Oceana County Probate Courts (Dated April 5, 2017)

On order of the Court, effective immediately, the Honorable H. Kevin Drake is appointed chief judge of the 27th Circuit Court, the 78th District Court, and the Newaygo and Oceana County probate courts for the remainder of a term ending December 31, 2017.

Supreme Court Appointments to the Court Reporting and Recording Board of Review (Dated April 5, 2017)

On order of the Court, pursuant to MCR 8.108(G)(2)(a), the following appointments are made to the Court Reporting and Recording Board of Review, effective immediately:

The Honorable Pamela L. Lightvoet (circuit court judge) is re-appointed for a second full term that will expire on March 31, 2021.

Denise M. Kizy (freelance certified stenographic reporter) is re-appointed for a second full term that will expire on March 31, 2021.

Bonnie L. Rozema (freelance certified electronic recorder) is re-appointed for a second full term that will expire on March 31, 2021.