

Order

**Michigan Supreme Court
Lansing, Michigan**

March 29, 2023

Elizabeth T. Clement,
Chief Justice

ADM File No. 2023-06

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

Amendments of Rules 6.001
and 8.119, and Addition of
Rule 6.451 of the Michigan
Court Rules

On order of the Court, the following amendments of Rules 6.001 and 8.119 and addition of Rule 6.451 of the Michigan Court Rules are adopted, effective April 11, 2023. Concurrently, individuals are invited to comment on the form or the merits of the amendments and addition during the usual comment period. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for each public hearing are posted on the [Public Administrative Hearings](#) page.

Immediate adoption of this proposal does not necessarily mean that the Court will retain the amendments in their present form following the public comment period.

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

Rule 6.001 Scope; Applicability of Civil Rules; Superseded Rules and Statutes

(A) [Unchanged.]

(B) Misdemeanor Cases. MCR 6.001-6.004, 6.005(B) and (C), 6.006(A) and (C)-(E), 6.101-6.103, 6.104(A), 6.105-6.106, 6.125, 6.202, 6.425(D)(3), 6.427, 6.430, 6.435, 6.440, 6.441, 6.445, 6.450, 6.451, and the rules in subchapter 6.600 govern matters of procedure in criminal cases cognizable in the district courts.

(C)-(E) [Unchanged.]

Rule 8.119 Court Records and Reports; Duties of Clerks

(A)-(G) [Unchanged.]

(H) Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules.

(1)-(8) [Unchanged.]

- (9) Set Aside Convictions. Information on set aside convictions is nonpublic and access is limited to a court of competent jurisdiction, an agency of the judicial branch of state government, the department of corrections, a law enforcement agency, a prosecuting attorney, the attorney general, and the governor upon request and only for the purposes identified in MCL 780.623. Access may also be provided to the individual whose conviction was set aside, that individual's attorney, and the victim(s) as defined in MCL 780.623. The court must redact all information related to the set aside conviction or convictions before making the case record available to the public in any format.

(I)-(L) [Unchanged.]

[NEW] Rule 6.451 Reinstatement of Convictions Set Aside Without Application

A conviction that was automatically set aside by operation of law under MCL 780.621g must be reinstated by the court as provided in MCL 780.621h. The court must:

- (A) provide notice and an opportunity to be heard before reinstating a conviction for failure to make a good faith effort to pay restitution under MCL 780.621h(3),
- (B) order the reinstatement on a form approved by the State Court Administrative Office,
- (C) serve any order entered under this rule on the prosecuting authority and the individual whose conviction was automatically set aside.

An order for reinstatement of a conviction that was improperly or erroneously set aside as provided in MCL 780.621h(2) must advise the individual whose conviction is being reinstated that he or she may object to the reinstatement by requesting a hearing. The request must be filed with the court on a form approved by the State Court Administrative Office.

Staff Comment (ADM File No. 2023-06): The amendment of MCR 8.119 requires courts to restrict access to case records involving set aside convictions similar to how MCL 780.623 restricts access to records maintained by the Michigan State Police. The amendment further requires the court to redact information regarding any conviction that has been set aside before that record is made available. The addition of MCR 6.451 requires the court to provide notice and an opportunity to be heard before reinstating a conviction for failure to make a good faith effort to pay restitution under MCL 780.621h(3) and to order the reinstatement on an SCAO-approved form. The amendment of MCR 6.001 clarifies that MCR 6.451 applies to cases cognizable in the district courts.

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 submitted by July 1, 2023 by clicking on the “Comment on this Proposal” link under this proposal on the [Court’s Proposed & Adopted Orders on Administrative Matters](#) page. You may also submit a comment in writing at P.O. Box 30052, Lansing, MI 48909 or via email at ADMcomment@courts.mi.gov. When submitting a comment, please refer to ADM File No. 2023-06. Your comments and the comments of others will be posted under the chapter affected by this proposal.

VIVIANO, J. (*concurring*).

I concur with the adoption of these revisions and giving them effect prior to the close of public comments and consideration at a public hearing. I write to express my concerns about certain aspects of the revisions that this Court must consider when this matter returns to us to decide whether to retain the amendments we have adopted today. First, we must consider what obligations the new expungement statutory amendments impose on courts. MCL 780.623 does not directly address court records at all. Rather, it pertains to records that the Department of State Police must retain.¹ MCL 780.623(5) makes it a crime for a person other than the defendant whose conviction was set aside or the victim to divulge, use, or publish information concerning a set-aside conviction. But

¹ As a matter of practice, courts have treated records relating to set-aside convictions as nonpublic. The State Court Administrative Office has published guidelines for courts addressing nonpublic and limited-access court records, indicating that the existence of records governed by MCL 780.621 and MCL 780.623 cannot be acknowledged. SCAO, *Nonpublic and Limited-Access Court Records* (Revised Jan 2023) <https://www.courts.michigan.gov/siteassets/court-administration/standardsguidelines/casefile/cf_chart.pdf> (accessed March 24, 2023) [<https://perma.cc/G62C-Z4B8>].

it is not clear to me that this provision applies to court clerks.² Second, if MCL 780.623(5) does pertain to court records and court staff, the constitutionality of the statute must be considered. Is the issue of nonpublic court records one of substantive law, such that it is within the province of the Legislature, or one of practice and procedure, such that it falls within our constitutional authority to determine such rules? See generally *McDougall v Schanz*, 461 Mich 15, 26-36 (1999). Third, we should consider what constitutional authority, if any, we have to broadly restrict a class of court records. See *In re Leopold*, 448 US App DC 77, 79 (2020) (“The public’s right of access to judicial records is a fundamental element of the rule of law.”). These are important and difficult questions that should have been fully addressed prior to any changes to the court rules taking effect.³ It is incumbent on this Court to ensure they are adequately addressed when this matter returns to us at the close of the public comment period and after public hearing.

² MCL 780.623(5) broadly prohibits any person, other than the defendant and victim from divulging, using, or publishing information concerning a set-aside conviction and makes it a misdemeanor to do so. I also question whether such a broad prohibition, which appears to criminalize any reference to an expunged conviction unless it is made by the defendant or the victim, runs afoul of the First Amendment. See Volokh, *The Volokh Conspiracy, Mass. Trial Court Rejects Right to Be Forgotten* <<https://reason.com/volokh/2021/04/13/mass-trial-court-rejects-right-to-be-forgotten/>> (posted April 13, 2021) (accessed March 24, 2023) [<https://perma.cc/GF5P-LAG4>].

³ I am once again dismayed by the timing of the proposed amendments. The legislation prompting them, 2020 PA 193, was signed into law in October 2020, over two years ago, but the proposed amendments were not provided to us until a few weeks ago. This is not the first time we have been asked to impose significant changes to how our courts operate with little advance notice to judges and court staff and no opportunity for public comment prior to at least some of the changes becoming effective. The delay in this matter is especially concerning given the estimate that 1,250,000 convictions will be automatically set aside on April 11, 2023. These changes will have a very significant and immediate effect on how our courts manage their files and provide public access. The public, judges, court staff, defense attorneys, prosecutors, and victim advocate groups need guidance but should have been given an opportunity to provide public comment prior to these changes taking effect.



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.

March 29, 2023

Clerk