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From the Desk of
TIMOTHY A. BAUGHMAN
CHIEF, RESEARCH, TRAINING AND APPEALS

March 20, 2015

Larry Royster
Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2014-09, proposed revision of MCR 7.215.

Dear Mr. Royster:

Below please find my comments concerning the proposed rule revision.

A. The Proposed Changes

The proposed revision to Rule 7.215 reads:

Rule 7.215 Opinions, Orders, Judgments, and Final Process for Court of Appeals

(A) Opinions of Court. An opinion must be written and bear the writer's name or the label "per curiam" or "memorandum" opinion. An opinion of the court that bears the writer's name shall be published by the Supreme Court reporter of decisions. A memorandum opinion shall not be published. A per curiam opinion shall not be published unless one of the judges deciding the case directs the reporter to do so at the time it is filed with the clerk. A copy of an opinion to be published must be delivered to the reporter no later than when it is filed with the clerk. The reporter is responsible for having those opinions published as are opinions of the Supreme Court, but in separate volumes containing opinions of the Court of Appeals only, in a form and under a contract approved by the Supreme Court. An opinion not designated for publication shall be deemed "unpublished."

(B) Standards for Publication. A court opinion must be published if it:

- (1) establishes a new rule of law;

- (2) construes as a matter of first impression a provision of a constitution, statute, regulation, ordinance, or court rule;
- (3) alters, or modifies, or reverses an existing rule of law or extends it to a new factual context;
- (4) reaffirms a principle of law or construction of a constitution, statute, regulation, ordinance, or court rule not applied in a recently reported decision since November 1, 1990;
- (5) involves a legal issue of significant continuing public interest;
- (6) criticizes existing law; or
- (7) ~~creates or resolves a an apparent conflict among unpublished Court of Appeals opinions brought to the Court's attention of authority, whether or not the earlier opinion was reported;~~ or
- (8) [Unchanged.]

(C) Precedent of Opinions.

(1) An unpublished opinion is not precedentially binding under the rule of stare decisis. Citation to such opinions in a party's brief is disfavored unless the unpublished opinion directly relates to the case currently on appeal and published authority is insufficient to address the issue on appeal. A party who cites an unpublished opinion shall explain why existing published authority is insufficient to resolve the issue and must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears.

The proposed revision is designed, 1) on its face, and as the staff comment points out, to decrease citation to unpublished opinions in appellate briefs (they are “disfavored,” and when used, a separate “explanation” why the use is appropriate must be included), and 2) apparently, to further reduce the number of published opinions by the Court of Appeals by narrowing the grounds for publication; for example, a ground for publication in the current rule is that the opinion construes a provision of the constitution (among other things), and under the proposal publication would be limited to where such a construction is one of “first impression.”

I believe that the revisions are unnecessary. If there *is* a problem with over-citation by the bar of unpublished opinions, that is, I believe, because of the extremely grudging application of the *current* publication rule by the Court of Appeals in deciding its cases. If that court published more of its decisions, reliance on unpublished decisions might well be reduced.

B. Current Publication

1. Statistics

Below is a table regarding total opinions issued, opinions published and unpublished, and opinions published in criminal cases, for the months July 2014 through January 2015, or seven months.¹

MONTH	PUBLISHED	UNPUBLISHED	TOTAL	CRIMINAL PUBLISHED
July	26	214	240	2
August	27	217	244	2
September	30	240	270	3
October	47	266	313	6
November	43	211	254	7
December	39	320	359	2
January/2015	25	196	221	3
TOTAL	237	1664	1901	25

In this seven-month period, then, the Court of Appeals published 12.4% of the opinions it issued. Of that 12.4%, 10.5% of the opinions published were opinions in criminal cases, so that the percentage of published opinions in criminal cases out of all opinions issued during the seven-month period was 1.3%. On its face, there is not an “over-publication” problem, certainly not in criminal cases.

Of course, there are three kinds of lies: lies, damned lies, and statistics.² What sort of opinions are *not* being published?

¹ These figures are taken by opinion searching the court’s website for the periods.

² See Mark Twain, “Chapters From My Autobiography,” North American Review DCXVIII, September 7, 1906 (see www.gutenberg.org/files/19987/19987-h/19987-h.htm).

2. General observations

That unpublished opinions have no precedential value has sparked much debate, including an interesting “debate” between the late esteemed Judge Richard S. Arnold³ and Judge Alex Kozinski⁴ as to whether it is within the judicial power to designate opinions as not binding. As Justice Markman noted dissenting in part to the publication of the proposed rule revision here, “that is a matter for another day’s discussion,” but it seems to me likely that Judge Kozinski has the better of the argument that appellate courts have this authority.

But on the policy side, Judge Kozinski observed that “An unpublished disposition is, more or less, a letter from the court to parties familiar with the facts, announcing the result and the essential rationale of the court's decision.”⁵ With all due respect to how it is done in the federal system, and to the great credit of our Court of Appeals—though I have heard this same “letter to the parties” rationale expressed regarding Michigan unpublished cases—this is *not* the case for the great majority of unpublished opinions, at least on the criminal side, as it is those with which I am familiar. The vast majority contain an extensive summary of the facts and an application of the law that is thorough and detailed, and easy to follow by not only the parties, but the bench and bar. Further, many contain discussions of the law helpful to the bench and bar in resolving future cases, and yet remain unpublished, including opinions with multiple subparts and dissents; a look at almost any Wednesday or Friday release of opinions reveals unpublished opinions of this sort.

3. Small anecdotal set of examples of refusals to publish

Submitting a request for publication of an unpublished opinion is, in the main, a futile endeavor. Below are some examples of unpublished opinions, with publication requests denied.

- *People v Banks*, No. 313887: the opinion says that “*Michigan courts have not yet considered* whether convictions of retaliating against a witness, intimidating a witness, and obstruction of justice, arising out of the same conduct, violate the prohibition against double jeopardy,” concluding that convicting for both intimidating and obstruction charges was improper, but convictions for both retaliating and obstructing were proper. The request to publish, noting that these were holdings of first impression, denied.
- *People v Borom*, No. 313750: after this Court, in lieu of granting leave, remanded to the Court of Appeals to consider several issues never previously

³ See *United States v Anastasoff*, 223 F3d 898 (CA 8, 2000), vacated as moot, 235 F3d 1054 (CA 8, 2000).

⁴ See *Hart v Massanari*, 266 F3d 1155 (CA 9, 2001).

⁵ 266 F3d at 1178.

decided concerning felony-murder, child abuse, and aiding and abetting, see 494 Mich 859, the Court of Appeals issued an unpublished opinion deciding those issues, and denied a publication request.

- People v Lee, No. 306192: in a thorough analysis the panel held that a note identifying the defendant’s license plate number, provided by an unavailable anonymous bystander, was not testimonial under the Confrontation Clause A request for publication was denied.
- People v Gale, No. 292073: the panel held that a tipster who does not leave his or her name is not “anonymous” for Fourth Amendment purposes when he or she gives other information, such as her place of employment, that makes the tipster “identifiable and subject to being located. The panel relied entirely on cases from other jurisdictions so holding, but did not publish, and denied a request to publish.
- People v Naccarato, No. 305222: the court held that under OV 1 a firefighter is a victim where an incendiary device is used, and denied a request for publication.
- People v Holt, No. 302017: after this Court initially reversed based on Florida v Jardines, on the People’s motion for reconsideration the Court remanded to the Court of Appeals to consider the effect of Davis v United States concerning application of the exclusionary rule to police conduct taken that was consistent with then-existing precedent. The Court of Appeals thorough opinion was unpublished, and a request to publish was denied, though this was the first Michigan opinion on the subject.

4. The “classic” unpublished opinion

- Green v Secretary of State, No. 311633: “Thus, it is necessary to determine, looking at MCL 257.322 and MCL 257.319, whether Green was entitled to a hearing after his license was suspended for an additional one-year term under MCL 257.319(8)(i). *Because there is no case law interpreting whether a suspension under MCL 257.319 can be reviewed under MCL 257.322, or which individuals are entitled to a hearing under MCL 257.322, this is an issue of first impression*” (emphasis supplied).

C. Conclusion

This is hardly to say that all opinions should be published, or even a large number of them. But the current publication standard is being applied with undue rigidity by the Court of Appeals; opinions which meet the standard regularly remain unpublished. If that court were to loosen the

reins some in this regard—rather than, as the Court appears to be proposing, tightening them—perhaps fewer unpublished opinions would be cited. And in any event, the Court of Appeals can decide whether a cited unpublished opinion is of value in the same way it views an opinion from another jurisdiction, also not precedential here. Does the Court of Appeals really wish to see all citations to unpublished opinions accompanied by an explanation as to why published authority is insufficient on the point, and to police whether those statements are adequate? If they are not, will the court then strike the pleading?

Again, a look at any Wednesday or Friday’s released opinions will reveal that a very large majority of Court of Appeals unpublished opinions, again to that court’s great credit, contain a thorough recitation of facts and explication of the law, easily understandable by not only the parties but the bench and bar. And a greater number of those opinions would be helpful to the bench and bar as precedent than are currently published. If anything, then, I would recommend that either the publication standard be loosened or the Court of Appeals encouraged by the Court to be less obdurate in application of the current standard, but that no other change be made, certainly not one “disfavoring” citation of unpublished opinions, and requiring a specific explanation of why one is cited when it is. And I certainly approve of the statements of Justice Markman in his concurring/dissenting statement to the publication of the proposal.

I thank the Justices for their attention.

Sincerely,

/s/TIMOTHY A. BAUGHMAN
Chief, Research, Training, and Appeals