REAL PROPERTY LAW SECTION
Respectfully submits the following position on:

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ADM File No. 2014-09

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The Real Property Law Section is not the State Bar of Michigan itself, but rather a Section which members of the State Bar choose voluntarily to join, based on common professional interest.

The position expressed is that of the Real Property Law Section only and is not the position of the State Bar of Michigan.

The State Bar position on this matter is to take no position on the proposed amendments to MCR 7.215(A) and MCR 7.215(B); to oppose the proposed amendments to MCR 7.215(C) for the reasons stated in Justice Markman's dissent; and to authorize Sections and Committees to transmit non-conflicting positions to the Court.

The total membership of the Real Property Law Section is 3,615.

The position was adopted after discussion and vote at a scheduled meeting. The number of members in the decision-making body is 18. The number who voted in favor to this position was 14. The number who voted opposed to this position was 0.

Report on Public Policy Position

Name of section:
Real Property Law Section

Contact person:
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Proposed Court Rule or Administrative Order Number:
2014-09 - Proposed Amendment of MCR 7.215
The proposed amendments of MCR 7.215(A)-(C) were submitted by the Court of Appeals. Proposed MCR 7.215(A) would clarify the term "unpublished" as used in the rule. The proposed amendment of MCR 7.215(B) would provide more specific guidance for Court of Appeals judges regarding when an opinion should be published. Finally, in response to what the Court of Appeals describes as an increased reliance by parties on unpublished opinions, the proposed revision of MCR 7.215(C) would explicitly note that citation of unpublished opinions is disfavored unless an unpublished decision directly relates to the case currently on appeal and published authority is insufficient to address the issue on appeal.

Date position was adopted:
April 15, 2015

Process used to take the ideological position:
Position adopted after discussion and vote at a scheduled meeting.

Number of members in the decision-making body:
18

Number who voted in favor and opposed to the position:
14 Voted for position
0 Voted against position
0 Abstained from vote
4 Did not vote (absent)

Position:
Oppose

Explanation of the position, including any recommended amendments:
Proposed RPLS Position re Proposed Amendment of Rule 7.215 of the Michigan Court Rules

Under Michigan Supreme Court Order ADM File No. 2014-09 dated February 18, 2015, the Michigan Supreme Court has requested comment on a proposed amendment to Rule 7.215 of the Michigan Court Rules. The

proposed amendment (1) changes the standards for publication of court opinions, paragraph (B), and (2) provides that citation to unpublished opinions 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," and requires a party citing an unpublished opinion to "explain why existing published authority is insufficient to resolve the issue," paragraph (C)(1). The Staff Comment states that the reason for the proposed changes to paragraph (C)(1) is "an increased reliance by parties on unpublished opinions."

RPLS has no objection to the changes to the standards for publication in paragraph (B).

RPLS opposes the changes to paragraph (C)(1). First, the existing court rule already discourages citation to unpublished opinions because such opinions are "not precedentially binding under the rule of stare decisis." Because published opinions are precedentially binding, the existing court rule and common sense dictate that a party cite published opinions whenever available. Further, a party citing an unpublished opinion without citation to available published authority risks losing on the merits because the unpublished opinion can be disregarded by the court. Thus the "disfavored" language added to paragraph (C)(1) is unnecessary.

Second, as Justice Markman noted in his concurrence and dissent in the Order, Michigan Courts have long recognized that while an unpublished opinion is not precedentially binding, unpublished opinions can be instructive or persuasive. The same is true of out-of-state or federal case law where Michigan case law is not instructive. Michigan jurisprudence, and justice for the parties, is best served by giving parties wide latitude to cite court decisions that in their view advance their client's cause, and to give courts the fullest range of case law to consider in deciding a case. Courts (with input from counsel) can then determine the relevance and persuasiveness of the cited opinions.

Third, the requirements that the unpublished opinion must "directly relate[] to the case currently on appeal" and that published authority must be "insufficient to address the issue on appeal" are vague and subjective. Furthermore, the requirement that a litigant "explain why existing published authority is insufficient to resolve the issue" as a condition precedent to citing an unpublished opinion is unnecessarily formalistic. The parties and courts are best served by allowing the parties to distinguish, as appropriate, unpublished decisions from conflicting published authority as a function of effective advocacy. Bench and bar would be benefited by a clear rule that does not restrict citation to unpublished opinions, similar to Federal Rule of Appellate Procedure 32.1 (which provides that a court may not restrict citation to unpublished and non-precedential opinions).

The text of any legislation, court rule, or administrative regulation that is the subject of or referenced in this report.
http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2014-09_2015-02-18_formatted%20order_with%20SJM%20stmt%20with%20RC.pdf