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From the Desk of  
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June 18, 2015

Ms. Anne Boomer  
Administrative Counsel  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

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

Dear Ms. Boomer:

Below please find my additional comments concerning the proposed rule revision, in light of the comments of Judge Christopher Murray.

I have read with great interest Judge Murray's thoughtful—and obviously exasperated!—comments regarding the proposed rule changes, changes that the Court of Appeals submitted to the Supreme Court. His exasperation is understandable. The examples he attaches of citation of unpublished opinions for “very simple and well-established propositions” are, as he says, “simply absurd.”

While my earlier comments of March 20, 2015 were directed almost exclusively to what I see as the lack of publication of opinions that should be published—a view with which I'm sure the Court of Appeals disagrees, given the rejection of publication requests cited anecdotally in my earlier remarks, and a view I maintain, and will comment on a little bit more subsequently—I wonder if the proposed rule concerning unpublished opinion citation is not a bit like using an elephant gun to kill a gnat. Albeit an *extremely* annoying gnat, as Judge Murray's examples demonstrate.

Judge Murray readily demonstrates that there are briefs that cite unpublished opinions “for very simple and well-settled propositions.” But for “very simple and well-settled propositions,” the citation of *anything* is more a matter of protocol and procedure than substance. If a published opinion were cited rather than an unpublished one for a “very simple and well-settled proposition,” would a judge or research attorney need to go read it? I confess that when I refer to requirements of *Miranda*, though I write “*Miranda*,” I use it as a short-hand, and do not cite the “numbers” at all. And I really don't think it necessary to do so. I am not advocating that parties cite *nothing* for “very

simple and well-established propositions," and I agree with Judge Murray that existing published opinions should be cited, but I'm not sure the lack of professional briefing on the matter by some attorneys justifies a rule change, at least not the one proposed. Perhaps some education of the bar, maybe through the Appellate Practice Section, would help convey the inappropriateness of current practice, at least when the citation of the unpublished opinion is for a very simple and well-established proposition. Perhaps the proposal could be revised to say:

An unpublished opinion is not precedentially binding under the rule of stare decisis. Citation to such opinions in a party's brief is discouraged where a published opinion directly relates to the case currently on appeal and is sufficient to address the issue on appeal. A party who cites an unpublished opinion 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.

Perhaps a "discouragement" of use of unpublished opinions when a published opinion will do readily, along with some education, will resolve the matter. It might be worth a try, at least.

But again, I repeat my principal concern, that on some fair number of occasions unpublished opinions may be cited—and even the Court of Appeals, I believe, would agree not inappropriately so—because needed for the argument being made. And I believe that is because a number of these opinions *should* be published. I reiterate that I am not suggesting that *all* opinions should be published. But I think it a great credit to the Court of Appeals that the "unpublished opinions are simply 'letters to the parties' that the bench and bar would not fully understand" rationale often does not apply, as the opinion is thorough, and easily understandable by everyone. I find such opinions in almost every Wednesday and Friday release of opinion.. Look at some recent examples.

In *People v Henry Richard Harper*, No. 319942, Release Date, 6/11/2015, the defendant sexually assaulted two young half-brothers, and the question was whether the sexual abuse of the half-brothers resulted in convictions that "arose from the same transaction" within the meaning of MCL 750.520b(3) so as to allow consecutive sentencing. The majority said that to "decide whether criminal offenses rose from the 'same transaction' within the meaning of MCL 750.520b(3), the sentencing court should determine whether the acts "grew out of a continuous time sequence," and whether the acts "sprang one from the other and had a connective relationship that was more than incidental." The majority noted that the sexual assaults were connected in that the victims were brothers, defendant obtained their mother's permission for them to assist him at his home, and the sexual assaults occurred during time that the boys were supposed to be helping defendant. But the majority found that this did not constitute the "same transaction" for purposes of consecutive sentencing because "the assaults did not grow out of a 'continuous sequence of time.' That is, the boys were not assaulted at the same time and they were not even both present at defendant's house at the time their respective assaults occurred." Judge Murray, coincidentally, dissented, saying that "the majority's interpretation of that case's [*People v Ryan*, 295 Mich.App 388 (2012)] temporary component is overly narrow. . . . immediacy is not the touchstone of whether offenses arise from the

same transaction. Rather, the test is temporal continuity coupled with 'a connective relationship that was more than incidental.' . . . The question then is not exclusively how much time elapsed between related offenses, but whether temporal continuity exists between acts that are unified with a single intent to the same transaction. . . . The simple fact that the plan in this case unfolded over the course of a couple of days rather than a couple of seconds does not mean that the time sequence was not continuous. Rather, it merely shows that defendant's single goal required time to execute." To me, this sounds like something that the Michigan Supreme Court may be called upon to resolve; the difference between the majority and the dissent is something, it seems to me, that calls for a published opinion.

And in *People v Anthony Jerome Beaty*, No. 314935, Release Date: 5/5/2015, the defendant pled, and, pursuant to statute, received a \$20,000 fine, where the statute allowed a maximum fine of \$25,000. Though MCR 6.302 provides only that the defendant must be informed of the "maximum possible prison sentence," the court here held that [at least where a fine is actually imposed] due process requires the defendant to be informed of the maximum possible *fine* under the statute, and since he was not, he was entitled to withdraw his plea. It would seem to me that a holding that due process required advice in taking the plea beyond that required in MCR 6.302 is something that ought to be published. And there are other examples. See e.g. *People v Richard Lee Radcliffe*, No. 319175, Release Date: 6/2/2015; *People v Robert Earl Pratt Jr*, No. 319639, Release Date: 4/23/2015.

I appreciate Judge Murray's exasperation and concern, and have suggested a possible modification to the proposal above. My main concern is that the proposed modifications to MCR 7.215(B), which have not attracted comment, might lead to even *fewer* published opinions (e.g. "construes as a matter of first impression a provision of a constitution, statute, regulation, ordinance, or court rule"; though the "first-out" rule prohibits a subsequent holding contrary to a "first impression" opinion, it does not seem to me that "one and done" regarding published opinions concerning a provision of a constitution, statute, regulation, ordinance, or court rule is really a good idea). My view is that the Court of Appeals should be encouraged to publish more, not fewer, opinions, and that is my main concern (in my initial comments I did not express the view that the proposed changes would limit the ability of parties to use persuasive unpublished case law, though I believe there are attorneys who, with the language of the proposal as it stands, will be inhibited from so doing).

I thank the Justices for their attention.

Sincerely,

/s/TIMOTHY A. BAUGHMAN  
Special Assistant Prosecuting Attorney