

APPELLATE

CITING UNPUBLISHED OPINIONS

by Phillip J. DeRosier¹

It's well-understood that unpublished decisions don't have precedential value under the doctrine of stare decisis. The Michigan Court of Appeals has even cautioned against citing them, warning that "[c]onsideration of unpublished cases is disfavored."² But practitioners also know that there isn't always a controlling published decision. Indeed, one of the topics of discussion at the 2019 Michigan Appellate Bench Bar Conference was whether the Court of Appeals should be publishing more of its decisions.³

And, of course, there are times when an unpublished opinion contains a particularly helpful discussion of an issue—especially one that is fact-specific. In that situation, it may well be appropriate to cite the unpublished opinion. After all, it has long been recognized that unpublished decisions, while nonbinding, "may be persuasive or instructive."⁴

In all cases, citing an unpublished opinion requires attention to the rules followed by the court you're in. For Michigan practitioners, those rules differs depending on whether you're in the Michigan Supreme Court or Court of Appeals, or in the Sixth Circuit.

Sixth Circuit

The Sixth Circuit "permits citation of any unpublished opinion, order, judgment, or other written disposition."⁵ But if such a decision is "not available in a publicly accessible electronic database, the party must file and serve a copy as an addendum to the brief or other paper in which it is cited."⁶

Michigan Supreme Court and Court of Appeals

The rule governing the citation of unpublished opinions in the Michigan Supreme Court and Court of Appeals is more restrictive. As an initial matter, MCR 7.215(C) cautions that "[u]npublished opinions should not be cited for propositions of law for which there is published authority."⁷ If a party does cite an unpublished opinion, "the party shall explain the reason for citing it and how it is relevant to the issues presented."⁸ In addition, "[a] party who cites an unpublished opinion must provide a copy of the opinion to the court and to opposing parties with the brief or other paper in which the citation appears."⁹

"(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, modifies, or reverses an existing rule of law; (4) reaffirms a principle of law or construction of a constitution, statute, regulation, ordinance, or court rule not applied in a reported decision since November 1, 1990; (5) involves a legal issue of significant public interest; (6) criticizes existing law; or [sic] (7) resolves a conflict among unpublished Court of Appeals opinions brought to the Court's attention; or (8) decides an appeal from a lower court order ruling that a provision of the Michigan Constitution, a Michigan Statute, a rule or regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid."

⁴ *Kern v Kern-Koskela*, 320 Mich App 212, 241; 905 NW2d 453 (2017).

⁵ 6th Cir R 32.1(a).

⁶ 6th Cir R 32.1(a).

⁷ MCR 7.215(C)(1).

⁹ *Id.*

¹⁰ *Id.*

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² *Shinn v Michigan Assigned Claims Facility*, 314 Mich App 765, 773; 887 NW2d 635 (2016).

³ MCR 7.215(B) provides that an opinion "must be published" if it: