

## Using Unpublished Opinions In Calif. High Court Petitions

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The rules in Title 8, Division 5, of the California Rules of Court govern the publication and citation of California case authority. Recently, the publication aspect of these rules has received significant attention from the legal community as the California Supreme Court considers a proposal to amend rule 8.1105(e)(1), to eliminate the automatic depublication of Court of Appeal opinions when the Supreme Court grants review in a case. While the court's attention is focused on the publication and citation rules, it might be the right time to reconsider aspects of another rule that has generated considerable commentary through the years — California's "no citation" rule.

Under Rule 8.1115(a), unpublished California opinions are generally not citable. Rule 8.1115(b), however, provides that an unpublished opinion may be cited or relied on when (1) it "is relevant under the doctrines of law of the case, res judicata, or collateral estoppel" or (2) it "is relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action."

There is an additional, unstated exception. When petitioning for review to the California Supreme Court, litigants often cite unpublished lower court opinions to demonstrate that lower courts are divided about a legal issue or that there is a recurring, unsettled issue that warrants review. Use of unpublished opinions in this manner does not violate the spirit of rule 8.1115 because the opinions are not being relied on for their precedential value, but rather to establish that review is "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).)

Practitioners have discussed and approved of this unstated exception. The California Criminal Appellate Practice Manual explains that "[i]n addition to the exceptions specifically enumerated in [rule 8.1115(b)] counsel have occasionally discussed unpublished cases — without protest from the court — when the use of the cases is consistent with the rationale underlying the general no-citation rule. A petition for review, for example, may point to unpublished cases to show conflicts among the courts on a particular issue, the frequency with which an issue arises, or the importance of an issue to litigants and society as a whole."

Plaintiff Magazine also notes that when petitioning the court for review, counsel "can show the need to 'secure uniformity' by citing conflicting published decisions and unpublished decisions. Citing unpublished decisions to show the issue is unsettled does not violate [rule 8.1115(a)] because the petitioner is not relying on the unpublished decision as precedent that should be followed." Daniel U. Smith & Valerie T. McGinty, *Obtaining California Supreme Court Review*, Plaintiff Magazine (Dec. 2012).

The Supreme Court is even apparently amenable to the limited use in merits briefs of unpublished opinions. Recently in *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 113, the court itself noted — without criticism— that the plaintiff “references an unpublished case” simply to demonstrate that “costs may in some FEHA cases be considerable.”

The use of unpublished opinions in this manner also creates a level of uncertainty for counsel and courts about where exactly to draw the line between simply “referencing” an unpublished opinion and impermissibly relying on it as precedent in violation of rule 8.1115. Several cases demonstrate that appellate courts themselves are cautious of this fine line distinction. For example, the Court of Appeal in *Robinson v. SSW, Inc.* (2012) 147 Cal.Rptr.3d 230, 235 & fn. 7, took judicial notice of an unpublished opinion and explained that “[w]e are aware of the legal rule barring citation to or reliance upon a depublished California case. ... We nonetheless mention this recently depublished decision in order to accurately describe the current state of law with respect to the scope of [Corporations Code] section 2010.” In *In re Luke L.* (1996) 44 Cal.App.4th 670, 674, fn. 3, the court made sure to note that some discussion in the opinion “derives from our opinion” in an unpublished case “of which we take judicial notice.”

Even the Supreme Court is careful to note that when it references unpublished opinions it is not relying on those opinions. In *People v. Hill* (1998) 17 Cal.4th 800, 847, fn. 9, the court took judicial notice of an unpublished opinion and explained that “[b]ecause we do not cite or rely on that opinion, the judicial notice does not in this circumstance run afoul of [rule 8.1115(a)].”

Because litigants may be wary of crossing the line between relying on an unpublished case as authority and simply citing it for other reasons, it may be helpful for the Supreme Court to clarify rule 8.1115(a). For example, the court could amend the rule to explicitly state that unpublished California opinions must not be “cited or relied on as binding or persuasive authority.” This clarification would emphasize the purpose behind the “no citation” rule — unpublished opinions do not have precedential value — while still allowing litigants and courts to utilize these opinions for other purposes that have been tacitly accepted by the court.

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