

From the Teacher's Manual which accompanies

*Cases and Materials on California Civil Procedure, 3d (American Casebook Series) Thompson West; David I. Levine, William R. Slomanson, Rochelle J. Shapell (2008)*

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SCHMIER v. SUPREME COURT OF CALIFORNIA, p. 8

Schmier focuses on an issue of concern to many practitioners and legal scholars: whether all decisions of the California courts of appeal should be published and available for citation. In Schmier, the Court of Appeal examined various California Rules of Court (CRC) that permit Court of Appeal decisions to be withheld from publication if they do not satisfy the criteria stated in CRC 8.1105(c). An unpublished appellate opinion cannot be cited as precedent except under limited circumstances. CRC 8.1115.

The authority of the Judicial Council of California to enact and enforce the CRC is frequently the subject of controversy because some court rules are perceived to improperly conflict with constitutional or statutory authority. (See *Trans-Action*, *infra*.) Students might wish to explore whether the publication rules in the CRC are inconsistent with the legislative authority given to the California Supreme Court to exercise selective publication discretion.

The publication rules place significant power and discretion in the hands of the California Supreme Court. For example, CRC 8.1105(d)(1) permits the Supreme Court to order nonpublication even if a majority of the Court of Appeal panel rendering the opinion has certified that it meets the standards of CRC 8.1105(c). The rules do not require the Supreme Court to state the reasons for its nonpublication order.

The Schmier court addressed a number of arguments made by the appellant and others in favor of wider publication, but it ultimately concluded that the publication rules are valid. The court believed that the rules serve important purposes by authorizing reliance on only those cases with adequate precedential value and reducing the number of cases with little relevance outside the interests of the parties involved in the case. The court also refuted the appellant's argument that the nonpublication of some appellate decisions creates secrecy; the court asserted that all Court of Appeal decisions are largely available through online and other sources, to be read and digested by anyone who finds them useful.

There are strong feelings on both sides of this issue among attorneys and judges in state and federal courts. Students should be encouraged to explore all perspectives in the debate.

Notes and Questions, p. 12

Note 1. Mr. Schmier advocates for complete publication and citeability of all Court of Appeal decisions, and he opposes the more restrictive approach envisioned by the CRC (and approved of in Schmier).

Note 2. In addition to the articles written by Kenneth and Michael Schmier, Kenneth Schmier has established a website to advocate for changes to the California rules governing publication and citation. It can be found at < [www.NonPublication.com](http://www.NonPublication.com) >.

Note 3. Students should be encouraged to discuss the soundness of the policies underlying the no-publication/no-citation rules, the power given to the California Supreme Court to determine which Court of Appeal decisions will be published, the implications of allowing or prohibiting citation to unpublished cases (some of which might be of great use in a litigant's proceeding), the impact of the wide availability of unpublished cases on the Internet, and the comparison of California's "no-citation" rule to the recently amended federal version (FRAP 32.1) (see Note 5, below).

The April 2007 amendment of Rule 8.1105 removed the previous presumption of non-publication and adopted a presumption of publication. Students should discuss whether this is a distinction without a difference, or whether the presumption of publication might instead serve to increase the number of Court of Appeal opinions that are ultimately certified for publication.

Note 4. Harris states that CRC 8.1115 (formerly CRC 977) does not apply to citation of unpublished federal cases. Lebrilla confirms that unpublished out-of-state opinions "can be cited without regard to their publication status."

Note 5. FRAP 32.1 clears up the ambiguity surrounding whether unpublished federal opinions are citable in the federal courts. But its reach is limited. It is a citation rule. It permits citation of opinions and dispositions issued after January 1, 2007, that have been designated as unpublished or non-precedential. The rule does not address what criteria a court should use in designating an opinion as unpublished or non-precedential, and it does not instruct on how to determine the weight or precedential value to be given to an unpublished opinion. Ninth Circuit Rule 36-3 prohibits citation to the courts of the Ninth Circuit of all unpublished dispositions "of this Court" issued before January 1, 2007. In contrast to FRAP 32.1, which does not address whether unpublished opinions have precedential value, Ninth Circuit Rule 36-3(a) specifically states that unpublished dispositions are not precedent.

In California, if the certification criteria listed in CRC 8.1105(c) apply to an opinion, it becomes citable precedent under CRC 8.1115 by virtue of its certification for publication. "The publication decision should be based solely on the value of an opinion as legal precedent." California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions, Report and Recommendations, Nov. 2006.

Students may wish to debate whether the FRAP or CRC would permit more liberal citation to unpublished opinions. They may also wish to speculate on the impact on the California courts if California adopted a citation rule like FRAP 32.1.

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