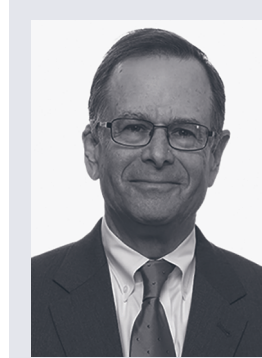


Revisiting California's No-Citation Rule

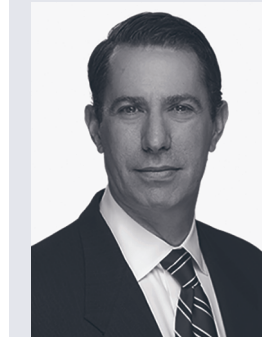
By David S. Ettinger and Dean A. Bochner

In 1974, the California Supreme Court adopted a rule addressing the limited circumstances in which unpublished appellate opinions may be cited in California courts. Now contained in rule 8.1115(a) of the California Rules of Court, the rule provides that an unpublished opinion of a California Court of Appeal or superior court appellate division “must not be cited or relied on by a court or a party in any other action.” Rule 8.1115(b) creates two exceptions to that rule: an unpublished opinion may be cited or relied on when (1) “the opinion is relevant under the doctrines of law of the case, *res judicata*, or collateral estoppel;” or (2) “the opinion 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.” This article examines whether and to what extent rule 8.1115(a) should be revised to reflect the apparent spirit of the rule and current practice among courts and attorneys in California.

One of the primary rationales underlying no-citation rules like rule 8.1115 is to prevent litigants and courts from citing unpublished opinions *as precedent* on the merits of a legal issue. (See *Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 706 [“An opinion that is not certified for publication cannot



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subsequently be cited *as legal authority or precedent*” (italics added)]; see also *Los Angeles Police Protective League v. City of Los Angeles* (2002) 102 Cal.App.4th 85, 91 [noting that an “unpublished opinion . . . may not be cited *as precedent*” (italics added)].) As one court explained, writing a precedential opinion “is an exacting and extremely time-consuming task” and “few, if any, appellate courts have the resources to write precedential opinions in every case that comes before them.” (*Hart v. Massanari* (9th Cir. 2001) 266 F.3d 1155, 1177.) Therefore, appellate courts “select a manageable number of cases in which to publish precedential opinions” and decide the rest in unpublished opinions, which are not citable as precedent. (*Ibid.*)

But rule 8.1115 does not merely bar the citation of unpublished opinions as precedent. The rule goes much further: it prohibits courts and attorneys from citing unpublished opinions *for any purpose* other than the two

narrow exceptions set forth in rule 8.1115(b). Yet despite the text of the rule, courts and attorneys regularly cite unpublished opinions for purposes other than those expressly authorized by rule 8.1115(b). This practice is often consistent with the apparent spirit of the rule — i.e., to prevent citation of unpublished opinions *as binding or persuasive precedent* — but not the letter of the rule.

For example, attorneys sometimes cite unpublished opinions *in petitions for review*, not for their precedential value but to establish the most common grounds for seeking review in the California Supreme Court—i.e., to demonstrate the existence of a conflict among Court of Appeal decisions or an important or recurring legal issue that requires Supreme Court resolution. (See Cal. Rules of Court, rule 8.500(b)(1); Smith & McGinty, *Obtaining California Supreme Court Review* (Dec. 2012) Plaintiff Magazine, p. 1 <<https://bit.ly/33cUReH>> [as of July 29, 2021] [“The petition [for review] can show the need to ‘secure uniformity’ by citing conflicting published decisions and unpublished decisions”].)

Courts also cite unpublished decisions for similar reasons—to identify a recurring legal issue that warrants Supreme Court resolution. (See *Mangini v. J.G. Durand International* (1994) 31 Cal.App.4th 214, 219-220 [citing two depublished opinions to illustrate that the question under consideration is a recurring issue that requires resolution]; see also *People v. De Jesus Valencia* (Dec. 11, 2019, S258038) 2019 WL 6869128, at p. *7 (dis. opn. of Liu, J.) [citing unpublished opinions to demonstrate that the issue presented in a petition for review is a frequently recurring one].)

A manual on California criminal appellate practice observes that attorneys occasionally cite “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.” (Appellate Defenders, Inc., Cal. Criminal Appellate Practice Manual (Jan. 2013) § 7.11, pp. 9-10 <<https://bit.ly/2F2K3YF>> [as of July 19, 2021], fn. omitted.) The manual goes on to explain that this practice is “consistent with the general no-citation rule because [it is] referring to the unpublished cases, not as *authority* or *precedent* to persuade the court on the merits of an issue, but as *evidence* of some external fact.” (*Id.* at p. 10; but see *Hernandez v. Restoration Hardware, Inc.* (2018) 4 Cal.5th 260, 269, fn. 2; Ettinger, *Questions about the Supreme Court declining to look at some unpublished opinions* (Jan. 30, 2018) At the Lectern: Practicing Before the California Supreme Court <<https://bit.ly/33KKGiC>> [as of July 29, 2021].)

Courts and attorneys also cite unpublished opinions to identify noteworthy facts that do not appear in the appellate record. In *People v. Hill* (1998) 17 Cal.4th 800, 818-839, 844-848, for example, the Supreme Court reversed a criminal conviction in part because the prosecutor had committed prejudicial misconduct. In discussing the misconduct, the Supreme Court took judicial notice of an unpublished Court of Appeal opinion that described misconduct by the same prosecutor and identified two other appellate decisions that also concluded she had engaged in misconduct. (*Id.* at pp. 847-848 & fns. 9, 10.) In *Williams v. Chino Valley Independent Fire District* (2015) 61 Cal.4th 97, 99, 109-115, the Court considered whether a defendant who prevails in a case brought under the Fair Employment and Housing Act (FEHA) must

establish that the action is frivolous to recover costs and fees. While analyzing that issue, the Court noted, without any criticism, that the plaintiff had cited an unpublished opinion to show that “ ‘costs may in some FEHA cases be considerable.’ ” (*Id.* at p. 113; cf. *People v. Gentile* (2020) 10 Cal.5th 830, 849-850 [noting two unpublished opinions cited by an amicus curiae to illustrate alternate factual scenarios]; *McArthur v. McArthur* (2014) 224 Cal.App.4th 651, 656, fn. 5 [citing unpublished opinion “for purposes of factual context only”].)

Courts also occasionally cite unpublished opinions to explain the effect of depublishation orders entered in other cases. For example, in *People v. Saunders* (1993) 5 Cal.4th 580, 607-608 (dis. opn. of Kennard, J.), a dissenting justice cited the Supreme Court’s decision to depublish two opinions and its simultaneous decision to deny review of a contrary opinion to explain how the Court viewed the merits of a legal issue. Similarly, in *Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 443, footnote 2, the Court of Appeal cited an unpublished opinion to discuss the effect of the order depublishing that opinion and a prior order denying a request to depublish a contrary opinion.

One can envision other circumstances in which an attorney might cite an unpublished opinion for purposes that are just as inoffensive as those discussed above. For example, an attorney who seeks publication of a Court of Appeal opinion under rule 8.1120(a) of the California Rules of Court may wish to cite other unpublished opinions that address the same issue to show that the issue is a recurring one that warrants treatment in a published opinion. (See Cal. Rules of Court, rule 8.1105(c)(6), (8) [an opinion “should be certified for publication” if it “[i]nvolves

a legal issue of continuing public interest,” “[i]nvolves a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision”].) Another example: When crafting an argument, an attorney may employ the reasoning of an unpublished opinion without citing the opinion to the court, a citation that would violate rule 8.1115(a). (See Eisenberg, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2020) ¶ 11:186.13, p. 11-84 [“Of course, counsel are free to use the *reasoning* in an unpublished opinion”].) But suppose that reasoning triggers a sanctions motion accusing the attorney of advancing a frivolous argument. Under those circumstances, the attorney should be allowed to cite the unpublished opinion to show that the argument is not frivolous because an appellate court had adopted it.

Courts and attorneys that cite unpublished opinions in the circumstances described above are acting in accordance with the spirit of rule 8.1115 because they are not citing unpublished opinions as precedent or authority, but for other unobjectionable purposes. This practice does, however, violate the letter of the rule, which categorically states that an unpublished appellate opinion “must not be cited or relied on by a court or a party in any other action” subject to the two narrow—and inapplicable—exceptions set forth in rule 8.1115(b). (Rule 8.1115(a).)

Perhaps it is time to consider revising rule 8.1115 to ensure that its terms are consistent with the spirit of the rule and current practice. Indeed, clarity in the rule is critical because attorneys can be sanctioned for citing unpublished opinions in violation of rule 8.1115. (See Cal. Rules of Court, rule 8.276(a)(4); *People v. Williams* (2009) 176 Cal.App.4th 1521, 1529 [admonishing counsel for citing

unpublished opinion and observing that “persistent use of unpublished authority may be cause for sanctions”]; *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 884-886 [imposing monetary sanctions on counsel for, among other things, repeatedly citing unpublished opinion]; see also Eisenberg, Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 11:183, p. 11-80 [“Improper citation of an unpublished or depublished opinion in an appellate brief may cause the court to return or strike the brief as defective; and, in egregious cases, the practice may lead to *monetary sanctions*”].)

Two possible modifications come to mind.

First, a modest revision would expressly authorize the most commonly accepted reason to cite unpublished opinions—i.e., to demonstrate the existence (or nonexistence) of a conflict among Court of Appeal decisions or of an important legal issue for the purpose of obtaining (or defeating) Supreme Court review. To this end, rule 8.1115(b) could be modified by adding a third exception, as follows (revisions appear in italics): “An unpublished opinion may be cited or relied on: [¶] (1) When the opinion is relevant under the doctrines of law of the case, *res judicata*, or collateral estoppel; [¶] (2) When the opinion 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; or [¶] (3) *When the opinion is relevant to demonstrate whether or not there is a need to secure uniformity of decision or to settle an important question of law under rule 8.500(b)(1).*” This new exception would somewhat resemble the approach taken by Ninth Circuit Rule 36-3(c), which includes the following exception to the prohibition against citing certain unpublished dispositions: “in a

petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders.” While this proposal would benefit litigants by expressly authorizing one of the most commonly accepted reasons to cite unpublished opinions, rule 8.1115 would still prohibit the citation of unpublished opinions in other unobjectionable situations, including those discussed above, that are consistent with the spirit of the rule.

A more comprehensive revision to rule 8.1115 would limit the current categorical prohibition against citing unpublished opinions by barring only those citations that are used as *precedent* or *legal authority* on the merits of a legal issue. To this end, rule 8.1115(a) could be modified as follows (revisions appear in italics): “An opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on *as binding or persuasive precedent* by a court or a party in any other action.” This new language is similar to that added to rule 8.1115 when it was amended in 2016 to allow Court of Appeal opinions to remain published after the Supreme Court has granted review. Rule 8.1115(e)(1), for example, provides that a published opinion in a case pending review “has no binding or precedential effect, and may be cited for potentially persuasive value only.”

Rule 8.1115(b) could be modified to make clear that the prohibition in rule 8.1115(a) does not apply where the unpublished opinion might be binding under the doctrines of law of the case, *res judicata*, or collateral estoppel, or where the opinion is relevant to a criminal or disciplinary action involving the same litigant. For example, the introductory clause to rule 8.1115(b) could be revised as

follows (revisions appear in italics): “*Nothing in (a) prevents a court or party from citing or relying on an unpublished opinion.*” The rest of rule 8.1115(b) would remain intact. If revised in this manner, rule 8.1115 would be more narrowly tailored to resolve the problem it was presumably intended to address—i.e., to prevent courts and counsel from citing unpublished opinions as precedent on a point of law. Such a rule would allow unpublished opinions to be cited in the circumstances discussed above, and other equally unobjectionable situations, in accordance with current practice.

In sum, rule 8.1115’s no-citation rule is overly broad and does not reflect the apparent spirit of the rule or current practice among California courts and attorneys. At a minimum, the rule should be revised to expressly authorize attorneys to cite unpublished opinions for the purpose of establishing that Supreme Court review is necessary or unnecessary to secure uniformity of decision or to settle an important question of law. A more comprehensive approach would allow courts and counsel to cite unpublished opinions for any purpose other than as binding precedent or persuasive authority on the merits of a legal issue.

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