

Citing the uncitable



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EXCEPTIONALLY APPEALING

California practice sure is special. Other jurisdictions might say "wacky." Our appellate practice, for instance, has due dates for principal briefs, but they are extendable up to 60-days by stipulation, and also subject to a 15-day "grace period," as lawyers call it (or "default period" as court clerks see it). The grace-period notice converts the due date into a real deadline. This approach to appellate briefing reflects a laid-back vibe in harmony with our Golden State style. Non-Californians can appreciate this credo, even if ridiculing it. But what seems truly bizarre to outsiders is another California peculiarity: how our appellate opinions can vanish into thin air.

Many jurisdictions have unpublished cases, but California takes publication, nonpublication and depublication to heights unheard of elsewhere. A Cal.App. citation is no guarantee that the case actually exists at the given page; nor does a Cal.Rptr. citation mean the cited decision is actually citable precedent. Understanding California publication practice is essential, especially since citing the uncitable is sanctionable. To avoid punishment, practitioners must understand what can be cited, what can't, and what exceptions might apply to allow citation of unpublished or depublished opinions.

California's publication rules appear in Title 8, Division 5, of the California Rules of Court, aptly titled "Publication of Appellate Opinions." These six rules address publication, partial publication, depublication, how to request publication and depublication, and citation of opinions. As Rule 8.1100 explains, Division 5's rules governing publication are adopted by the Supreme Court under section 14 of article VI of the California Constitution. This makes Division 5 exceptional, because although the Judicial Council may amend other rules, Division 5 is an explicitly enumerated exception: Only the Supreme Court may amend the publication rules. (Rule 8.13.)

The rules appear straightforward. All Supreme Court opinions are published. Court of Appeal and superior court appellate division opinions are published if a majority of the rendering court timely certifies the opinion for publication. Rule 8.1105(c) sets forth standards for certification. Publication is appropriate, for example, for opinions that: establish new rules of law; apply existing law to a new set of facts; modify, explain, or criticize an existing rule; advance a new interpretation, clarification, or criticism of a law; address or create an apparent conflict in the law; involve legal issues of public interest; make a significant contribution to legal literature; or invoke a previously overlooked rule. In considering whether to publish or not, courts are not to consider the potential embarrassment of a litigant, lawyer, judge or other person. (Rule 8.1105 (a)-(d).) Publication need not encompass an entire opinion, giving the court freedom to publish only specific portions of an opinion. (Rule 8.1110.)

Published opinions are, of course, citable. Indeed, an opinion is citable immediately when certified for publication, even if there is still time for further appellate activity, such as rehearing or a petition for review. (Rule 8.1115(d).) The flip-side, however, is that opinions not certified for publication "must not be cited or relied on by a court or a party in any other action." (Rule 8.1115(a).) Thus the general rule is that unpublished opinions may not be cited.

Where things get tricky is that publication status may change. First, if rehearing is granted, then the opinion is no longer considered published. (Rule 8.1110(e).) Second, an unpublished opinion

can become published, if the court so rules, typically after someone requests publication. (Rule 8.1120.)

Third, the Supreme Court has the power to (1) publish unpublished opinions; (2) depublish published opinions, and (3) depublish parts of an opinion after the granting review. (Rule 8.1105(e); see also Rule 8.1125 [procedures for requesting depublication].) Until amendments effective in 2016, the mere grant of review used to automatically depublish an opinion. But under existing rules, a grant of review does not affect publication. Instead, while Supreme Court review is pending, the published opinion "has no binding or precedential effect, and may be cited for potentially persuasive value only," and any citation must note the grant of review. (Rule 8.1115(e)(1).) After the Supreme Court issues its own opinion, the earlier Court of Appeal opinion remains "citable and has binding or precedential effect, except to the extent it is inconsistent with" the Supreme Court's opinion. (Rule 8.1115(e)(2).)

Having seen how publication status can change, let's return to the general rule that unpublished opinions are not citable. Citing unpublished cases can lead to sharp rebuke and even sanctions. *E.g.*, *Alicia T. County of L.A.*, 222 Cal. App. 3d 869 (1990). Careful lawyers ensure that every case they cite really is citable, and check citations from the other side in the hopes of catching an improper citation. One easy clue in hunting for bad citations is to look for citations to non-official reporters, e.g., California Reporter, Pacific Reporter, or electronic citations. That said, even Cal.App. citations might be improper, because a Cal.App. citation may have been subsequently depublished.

Enter the exceptions. Rule 8.1115 precluding citation to unpublished or depublished opinions contains two express exceptions. First, under Rule 8.1115(b)(1), an unpublished case may be cited when "the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel." Invoking this exception requires strict compliance with those specific doctrines. *E.g.*, *KG v. Meredith*, 204 Cal. App. 4th 164, 172 n.9 (2012) (citation under Rule 8.1115(b)(1) rejected "because nonmutual offensive collateral estoppel is not available against a government entity"). Second, under Rule 8.1115(b)(2), an unpublished case may be cited 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." These two exceptions are (and are meant to be) very narrow. Creative attempts to expand them have failed. *E.g.*, *People v. Superior Court*, 4 Cal. App. 5th 410, 415 n.2 (2016).

A third exception appears to exist, at least for *judges* who wish to cite unpublished cases "to explain the factual background of a case" rather than "as legal authority." *KG*, 204 Cal. App. 4th at 172 n.9; *e.g.*, *TURN v. PUC*, 223 Cal. App. 4th 945, 951 n.3 (2014). Practitioners are warned not to try this trick at home.

A further exception -- for use by practitioners -- involves writ petitions and petitions for review, where lawyers have been known to safely cite unpublished opinions simply to demonstrate that factually there is a split of authority in the application of the law. Such use is not citing or relying on the unpublished opinions for their reasoning, but instead supports the argument that a given case should be heard on its merits to resolve an existing conflict in the law. *E.g.*, *Mangini v. J.G. Durant Int'l*, 31 Cal. App. 4th 214, 219 (1994) (citing depublished cases to show a "recurring issue remains unresolved").

A final exception is citing unpublished California appellate opinions in *federal* court. Rule 8.1115's prohibition against citing unpublished opinions applies to *California* courts. Thus, federal courts can be fair game -- unless the federal court has a specific rule against citing cases that may not be cited in their home jurisdiction. Northern District of California Local Rule 3-4(e), is such an example -- yet it also provides "except when relevant under the doctrines of law of the case, res judicata or collateral estoppel." So, citing an unpublished California opinion in that court under that exception is an example of an exception to a (local) rule, which is an exception to a general rule (that citation in federal court is OK), which is an exception to the general rule (that citing unpublished cases isn't allowed). Mic drop. Exeunt euphoric Exceptional Lawyer.