

**RESOLUTION 11-02-2016**

**DIGEST**

Rules of Court: Citation to Unpublished Opinions

Amends California Rules of Court, rule 8.1115, to allow the citation of unpublished opinions as persuasive authority.

**TEXT OF RESOLUTION**

**RESOLVED** that the Conference of California Bar Associations recommends that the Judicial Council amend California Rules of Court, rule 8.1115 to read as follows:

Rule 8.1115

(a) Unpublished opinion

A court may not prohibit or restrict the citation of an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published that has been issued on or after January 1, 2017. Such cases are not binding. Except as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published that was issued on or before December 31, 2016 or where review was granted or ordered depublished by the Supreme Court under Rule 8.1105(e) must not be cited or relied on by a court or a party in any other action.

(b) Exceptions

An unpublished opinion may be cited or relied on: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; or

(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.

(c) Citation procedure

A copy of an opinion citable under (b) or of a cited opinion of any court that is not available ~~only~~ in a computer-based source of decisional law must be furnished to the court and all parties by attaching it to the document in which it is cited or, if the citation will be made orally, by letter within a reasonable time in advance of citation.

(d) When an ~~un published~~ opinion may be cited

A ~~published~~ California opinion may be cited or relied on as soon as it is certified for publication or ordered published.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Bar Association of Northern San Diego County

**STATEMENT OF REASONS**

The Problem: According to the Judicial Council of California, in the year 2001, only seven percent (7%) of all Court of Appeal opinions were ordered published. However, attorneys and the bench have access to the other 93% unpublished cases in the electronic legal research databases.

The rules regarding publication prevent litigants from citing to California opinions that have applied rules of law in matters factually similar to their own matters. This prevents litigants from properly analogizing and distinguishing case law. It causes litigants to rely on published cases that are factually dissimilar even though there are available non-published opinions that regard factually similar cases that apply the very same rules of law at issue in a given case. While a Court of Appeal may not rely on non-published California cases, the Rules of Court do not prohibit citation to non-published federal cases, which may be cited as persuasive authority. (*Airline Pilots Association International v. United Airlines, Inc.* (4<sup>th</sup> Dist. 2014) 223 Cal.App.4<sup>th</sup> 706, 724 fn. 7.) This loophole demonstrates that the status of an opinion as being unpublished or published has little to do with encouraging citation to the best most applicable authority.

The Solution: This resolution mirror Federal Rules of Appellate Procedure Rule 32.1 which prohibits courts from restricting citation of federal judicial opinions after January 1, 2007. This rule went into effect 9 years ago. This resolution allows the litigants to cite to unpublished cases as persuasive authority, but still retains the binding authority of published cases.

### **IMPACT STATEMENT**

This proposed resolution does not affect any other law, statute or rule.

### **CURRENT OR PRIOR RELATED LEGISLATION**

Not known.

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### **RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

#### History:

Similar to Resolution 09-01-2005, which was approved as amended, Resolution 09-02-2005, which was withdrawn, and Resolution 01-03-2015, which was disapproved.

#### Reasons:

This resolution amends California Rules of Court, rule 8.1115, to allow the citation of unpublished opinions as persuasive authority. This resolution should be approved in principle because it will allow courts and parties to evaluate the application of relevant law in factually similar cases while also eliminating the illogical prohibition against relying on unpublished California cases when unpublished federal cases and out of state cases can be relied on as persuasive authority.

Under current law, unpublished California appellate decisions cannot be cited to or relied on for any reason. However, treatises, practice guides, unpublished federal cases, and out of state cases

can. (*Lebrilla v. Farmers Group, Inc.* (2004) 119 Cal.App.4th 1070, 1077; *Airline Pilots Association International v. United Airlines, Inc.* (2014) 223 Cal.App.4th 706, 724 fn. 7.)

The principal legislative intent and public policy behind prohibiting citations to unpublished California opinions was that the expense of researching and tracking down unpublished opinions that were not generally available to the public would create an uneven playing field and be unfair to persons with limited funds. (*Schmier v. Superior Court* (2000) 78 Cal.App.4th 703, 708-709, citing *People v. Valenzuela* (1978) 86 Cal.App.3d 427, 441 (dis. opn. of Jefferson, J.) [addressing issue not addressed in maj. opn.].) However, now there is little risk of such unfairness because California's appellate courts post all of their opinions on their public websites in searchable formats. Further, anyone can request and receive e-mail notifications about pending appellate cases. Additionally, unpublished opinions are already available through Westlaw and Lexis.

Resolution 01-03-2015 was disapproved, in part, because of a concern that courts would be inundated with citations to unpublished cases that only had tangential relevance, and because publishers do not currently provide headnotes for unpublished opinions. This resolution addresses that concern by limiting the citation of unpublished cases to those opinions issued on or after January 1, 2017. Only opinions issued going forward could be cited, which decreases the chance of obsolete and irrelevant cases being cited. This will also give Westlaw, Lexis, and other publishers an opportunity to expand their headnote services as necessary.