

Published and Unpublished Cases

Research Guide

Last Updated: January 2013

Scope:

This research guide discusses published and unpublished case opinions, and when and how each can be cited in a case and used as authority.

Not all court decisions are published. All United States Supreme Court decisions are published in the Court's official reporter, but many appellate and lower court decisions are not published. For example, in fiscal year 2006-07, only about 9% of the majority opinions issued by the California Courts of Appeal were published in California official reporters.

Can you cite (or use to prove a legal point) an unpublished case in your brief?

California Court Opinions:

California Rules of Court Rule 8.1115 states that "...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 by a court or a party in any other action," with certain limited exceptions, such as where the opinion is relevant to a case under the doctrines of law of the case, res judicata or collateral estoppel, or is relevant to a criminal or disciplinary proceeding because it states reasons for a decision affecting the same defendant or respondent (in essence, if the opinion involves a party in your case and some or all of the facts of your case). This rule governs only the California state courts, and so establishes only that you may not cite unpublished California court opinions in California cases.

If you cite an unpublished decision, even one that is going to be published but is, as yet, available only in a computer database such as Westlaw or Lexis or in the Daily Appellate Reports, you must attach copies of the opinion to briefs that you file with the court and serve on any other parties. *California Rules of Court, Rule 8.1115.*

Federal Court Opinions:

The federal courts have traditionally had similar rules prohibiting the use of unpublished cases. In 2006, however, the Judicial Conference of the United States issued Federal Rule of Appellate Procedure 32.1, a new rule governing all federal courts, which states:

"A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

- (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
- (ii) issued on or after January 1, 2007."

Ninth Circuit Federal Court of Appeals Rule 36-3(b) states that “[u]npublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with Fed. R. App. P. 32.1.” Unpublished cases and orders issued before January 1, 2007 may not be cited to except for example, “when relevant under the doctrines of law of the case,” res judicata or collateral estoppel, or “as to show double jeopardy.” *Ninth Circuit Federal Court of Appeals Rule 36-3(c)*.

As with the federal rule, this rule governs only the federal courts, and establishes only that you may cite “unpublished” federal opinions issued after January 1, 2007 in federal court cases.

You must serve and file with your brief copies of any cases “not available in a publicly accessible electronic database” (which includes, according to the Advisory Committee Notes, a “commercial database maintained by a legal research service”) which you cite in the brief. *Federal Rule of Appellate Procedure 32.1 (b)*. In other words, if the case is available through a service like Westlaw, Lexis or Loislaw, you do not have to attach it to your brief.

So, can you cite unpublished federal opinions in state court cases, or unpublished state court opinions in federal court cases? This is not clear, because while the language of the rules is broad, the Federal Rules of Appellate Procedure govern only the Federal Appellate Courts, and the California Court Rules govern only the California Courts.

Here are the official reporters for the most commonly cited Federal and California Courts. If you need to know the official reporter for another state or federal court, consult a reference librarian or look at the California Style Manual (Ref. Desk KFC 75 .F6).

<u>Court</u>	<u>Reporter</u>
United States Supreme Court	United States Reports (U.S.).
Federal Courts of Appeal	Federal Reporter (F., F.2d, F.3d), West’s Federal Appendix (F. App.) (this reporter contains opinions issued by the U.S. Courts of Appeal that have not been officially certified for publication. Only those issued after January 1, 2007 are always citable).
Federal District Courts	Federal Supplement (F. Supp., F. Supp. 2d), Federal Rules Decisions (F.R.D.), Bankruptcy Reporter (B.R.).
California Supreme Court	California Reports (Cal., Cal.2d, Cal.3d, Cal.4th).
California Courts of Appeal	California Appellate Reports (Cal.App., Cal.App.2d, Cal.App.3d, Cal.App.4th).
California Superior Court, Appellate Division	California Appellate Reports Supplement (Cal.App.Supp., Cal.App.2d. Supp., Cal.App.3d Supp., Cal.App.4th Supp.)

Advance Sheets and Newly-Issued Opinions

Many of the official reporters issue advance sheets that are paperback booklets that you will find at the end of the shelf containing the most recent reporter volumes. The opinions included in these advance sheets are not officially published yet, and may be amended, withdrawn, superseded or depublished before the final bound volumes are issued. Opinions that appear in the Daily Appellate Report or an online service like Lexis or Westlaw, and that have been approved for publication and even assigned a volume and page number in one of the official reporters, may not actually be included when the bound volume is issued. If you decide to cite such an opinion, Shepardize (see below) it frequently so that you know if the opinion has been reversed, overturned, withdrawn or depublished before you submit your brief or before your hearing. If you see that the California Supreme Court has granted review of a Court of Appeals ruling, note that the Court of Appeals opinion “is no longer considered published.” *California Rules of Court Rule 8.1105 (e)*. For a California case, you can also find this information in the Cumulative Subsequent History Table in the back of the latest official advance sheet booklet, although it will be two or three weeks behind.

Making Sure a Case is Still Good Law

Just because a case is published in an official reporter does not mean that it can be cited to prove a legal point. Even an opinion that has been published may later be amended or withdrawn, or may be reversed by a higher court. To ensure that a particular case is still valid or good law you must Shepardize (on Lexis) or Key-Cite (on Westlaw) the case. Shepard’s and Key-Cite are online services that report the subsequent history of each published case (e.g., whether it has been overturned or reversed), as well as any subsequent cases that have cited that case. The library provides free access to Shepard’s and Key-Cite on all our patron computers.

Old Cases

Finally, if you are citing an opinion that is very old and has not been cited by another case for many years, you may want to search the subject of the opinion in the appropriate state codes or statutes to make sure that it has not been superseded by a statute. As statutory law has expanded in most states over the years, it has come to govern many areas of law that were once governed by case law.