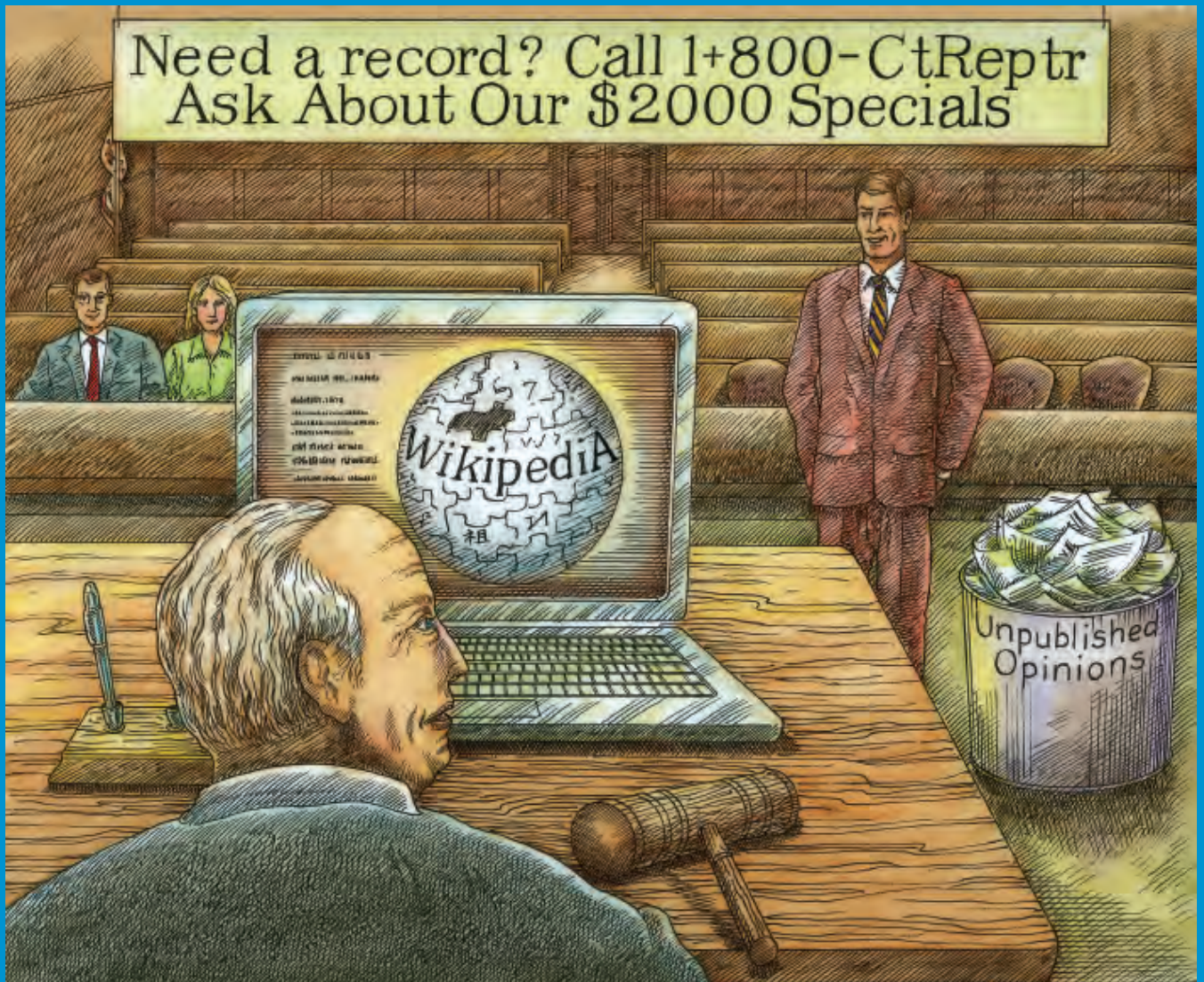


California Litigation

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To Cite or Not to Cite? That Is the Question

*Citing Unpublished Decisions in
California State and Federal Courts*

By Benjamin G. Shatz and Emil Petrossian



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Every day in California, lawyers engaging in legal research come across that perfect case that makes that key point — only to realize that the case is “unpublished.” Hence the quandary: Should the case be cited? Can it be cited?

The quagmire of handling unpublished case law has thickened in our digital age,

where nearly all written opinions can be readily located electronically via Westlaw, Lexis, Google Scholar, and other sources. This increased access to unpublished decisions has made it more tempting to cite them, while at the same time giving rise to

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much confusion regarding the propriety of doing so.

To complicate matters, California has unique practices regarding unpublished, partially published, and even depublished appellate opinions; and federal practices governing the citation of published and unpublished authority have a complicated history. Given that precedent is the lifeblood of legal argument, understanding how to deal with unpublished authority is essential knowledge for any litigator. To help eliminate some of the confusion surrounding unpublished decisions, this article aims to provide a roadmap for California practitioners to determine whether a particular decision may be cited in state and federal courts in California.

Citations in California State Courts

The rules governing the citation of unpublished California state-court opinions in California state courts are relatively straightforward. All decisions of the California Supreme Court are automatically published in California Reports, and thus may be cited. (Cal. Rules of Court, rule 8.1105(a).)

The problem of unpublished decisions arises with opinions from the Court of Appeal or superior court appellate division. Opinions of these courts are not published unless specifically certified for publication. (Rule 8.1105(b).) Fortunately, a simple rule of court exists to provide guidance: Any decision that is not certified for publication (or not ordered published) “must not be cited or relied on by a court or a party in any other action.” (Rule 8.1115(a).) So far, so good.

The rule has two express exceptions: An unpublished opinion may be cited or relied on when the opinion is (1) “relevant under the doctrines of law of the case, *res judicata*, or collateral estoppel”; or (2) “relevant to a criminal or disciplinary action because it states reasons for a decision affecting the same defendant or respondent in another such action.” (Rule 8.1115(b).) These exceptions rarely come into play.

The next question is, “when” is an appellate opinion ripe for citation? The rule again is clear: As soon as the Court of Appeal issues an opinion for publication, it may be cited. (Rule 8.1115(d).) This is true even though

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the Ninth Circuit,
as they must, California’s
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also generally apply
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regarding the citation of
unpublished or depublished
California cases.’*

the decision is not technically “final” for another 30 days after it is published — *e.g.*, the Court of Appeal has jurisdiction to change the opinion *sua sponte* or via a petition for rehearing; and the possibility of review by the Supreme Court still exists (generally for another 100 days).

The same is true for a previously unpub-

lished decision that has been ordered published: As soon as the decision is certified for publication, it may be cited. (Rule 8.1115 (d).) Sometimes opinions are only partially published, so be sure to cite only to the published portions of such decisions. (Rule 8.1110.)

Understand, however, that citing recently published cases within this 100-day window carries some risk. If the Court of Appeal grants a rehearing or if the Supreme Court grants review, then the opinion is immediately superseded and no longer considered published, and thus is not citable. (Rule 8.1105 (e)(1).) Moreover, the Supreme Court has authority to order that an unpublished opinion be published, and to decertify the publication of a published opinion. (Rule 8.1105 (e)(2).) Accordingly, when contemplating freshly hatched decisions, extra diligence is required.

The precise wording of Rule 8.1115's restrictions on the citation of unpublished opinions makes clear that the rule applies to opinions of the Court of Appeal and superior court appellate division. Thus, California's Rule does not extend to unpublished decisions from other jurisdictions, including federal courts. Precedent consistently recognizes this basic limitation on the rule's scope. (See, e.g., *Haligowski v. Superior Court* (2011) 200 Cal.App.4th 983, 990, fn. 4 ["Unpublished federal opinions are citable notwithstanding [Rule 8.1115] which only bars citation of unpublished *California* opinions." (emphasis in original)]; *Harris v. Investor's Bus. Daily, Inc.* (2006) 138 Cal. App.4th 28, 34 ["[E]ven unpublished federal opinions have persuasive value in this court, as they are not subject to [Rule 8.1115], which bars citation of unpublished California opinions" (citation omitted)]; *Bowen v. Ziasun Techs., Inc.* (2004) 116 Cal.App.4th 777, 787, fn. 6; *City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.* (2003) 109 Cal.App.4th 1668, 1678, fn. 5.)

Of course, unpublished decisions of federal district and appellate courts — even on

issues of federal law — are not binding on California state courts and constitute only persuasive authority. (See *Ticconi v. Blue Shield of Cal.* (2008) 160 Cal.App.4th 528, 541, fn. 10.) Even courts viewing federal decisions on federal issues to be deserving of "great weight," recognize that, in some circumstances, California state courts may ignore federal precedent. (E.g., *Etcheverry v. Tri-Ag Serv., Inc.* (2000) 22 Cal.4th 316, 320; *People v. Williams* (1997) 16 Cal.4th 153, 190; *Pac. Shore Funding v. Lozo* (2006) 138 Cal.App.4th 1342, 1352 [lower federal court decisions on federal law are not binding on state courts; such decisions are persuasive and entitled to great weight; but where lower federal precedents are divided or lacking, state courts must necessarily make an independent determination of federal law].)

Citations in California Federal Courts

Turning to the federal court system, opinions from the Supreme Court of the United States, are, of course, all published and always citable. Similarly, with limited exceptions noted below, district court decisions are also citable whether they appear in a print publication or not. (*Sorrels v. McKee* (9th Cir. 2002) 290 F.3d 965, 971.)

The complications arise at the intermediate appellate level. Like California's Court of Appeal, the federal circuit courts of appeals issue both published and unpublished decisions. Published decisions appear in West's Federal Reporter (starting with cases from 1880), and — somewhat ironically — starting in 2001, "unpublished decisions" (from most circuits, including the Ninth Circuit) typically appear in a case law reporter titled the Federal Appendix. Thus, it is perfectly accurate to say that "unpublished cases are published in the Federal Appendix" — although a non-lawyer might perceive this as lawyer's double-talk.

The governing citation rule in the Ninth Circuit is Circuit Rule 36-3, which provides

that unpublished Ninth Circuit dispositions and orders are (a) not precedent (*i.e.*, not binding on district courts or other Ninth Circuit panels), except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion; (b) citable to courts within the Ninth Circuit if issued on or after January 1, 2007; and (c) not citable if issued before January 1, 2007, except under limited circumstances (e.g., when relevant under preclusion doctrines, or for factual purposes, or to demonstrate the existence of a conflict). (See *Sorchini v. City of Covina* (9th Cir. 2001) 250 F.3d 706, 708 [the “factual purposes” exception “permits the citation to an unpublished disposition where the very existence of the prior case is relevant as a *factual* matter to the case being briefed,” which “will almost always involve one or both of the parties to the pending case” — the exception does not permit citation for the purpose of providing “notice” to a court of the existence or absence of legal precedent (emphasis original)].)

Thus, the key date to remember is 2007: Unpublished Ninth Circuit decisions issued in or after 2007 are citable without restriction as persuasive authority. But pre-2007 unpublished decisions are not citable, subject to certain rare exceptions.

By its express terms, Rule 36-3 extends only to unpublished Ninth Circuit decisions, not to decisions or orders issued by other courts, including district courts within the Ninth Circuit. (See *Renick v. Dun & Bradstreet Receivable Mgmt. Servs.* (9th Cir. 2002) 290 F.3d 1055, 1058 [“Rule 36-3 quite clearly prohibits citations only of our unpublished dispositions; it does not apply to unpublished dispositions issued by any other courts within our circuit or elsewhere”].)

Thus, federal courts in California generally can (and often do) rely on unpublished orders and opinions from district courts and courts of appeals from circuits other than the Ninth Circuit. (E.g., *Alvarenga-Villalobos v. Reno* (N.D.Cal. 2000) 133 F.Supp.2d 1164,

1167–1168 [citing and relying on an unpublished Third Circuit case].) Even Ninth Circuit decisions rely on sister-circuit unpublished precedent from time to time. (E.g., *EEOC v. United Parcel Serv., Inc.* (9th Cir. 2002) 306 F.3d 794, 803, fn. 5 [citing a 4th Circuit Federal Appendix case]; *United States v. Arellano-Rivera* (9th Cir. 2001) 244 F.3d 1119, 1126.) Under the federal doctrine of stare decisis, of course, these authorities are only persuasive precedent. (*Hart v. Massanari* (9th Cir. 2001) 266 F.3d 1155, 1169–1174.)

Likewise, Ninth Circuit Rule 36-3 does not cover unpublished state-court decisions. Nonetheless, the Ninth Circuit and federal district courts in California typically apply state rules governing the citation of unpublished state court decisions. For example, in *Rennick v. O.P.T.I.O.N. Care, Inc.* (9th Cir. 1996) 77 F.3d 309, 317, the plaintiffs cited *Ciampi v. Red Carpet Corp.* (1985) 167 Cal. App.3d 336, *rehearing granted*, to support their argument that the defendant violated California’s Franchise Investment Law. The Ninth Circuit refused to consider *Ciampi*, however, because the California Court of Appeal had granted rehearing, thereby superseding the opinion and rendering it unpublished under California’s publication rules.

Similarly, in *Credit Suisse First Boston Corp. v. Grunwald* (9th Cir. 2005) 400 F.3d 1119, the Ninth Circuit refused to consider *Jevne v. Superior Court* (2003) 113 Cal. App.4th 486, *review granted*, based on the California Supreme Court’s grant of review. The court explained: “Under California Rules of Court, a superseded opinion is not considered published, and an unpublished opinion cannot be cited to or relied on by other courts. In short, an unpublished opinion does not constitute binding precedent. Accordingly, we are not bound by the Jevne court’s analysis of California law.” (*Grunwald, supra*, 400 F.3d at p. 1126, fn. 8.)

Taking their cue from the Ninth Circuit, as they must, California’s federal district courts

also generally apply California's rules regarding the citation of unpublished or depublished California cases. (*E.g.*, *Taylor v. Quall* (C.D.Cal. 2006) 458 F.Supp.2d 1065, 1068 [rejecting citations to two unpublished California Court of Appeal opinions].) However, at least one federal district court in California has refused to be bound by those rules. In *Cole v. Doe 1* (N.D.Cal. 2005) 387

‘ *A final consideration
is that federal district
courts have the power
to prohibit or restrict the
citation of unpublished
decisions by local
court rule.* ’

F.Supp.2d 1084, 1103, fn. 7, the district court cited and relied on an unpublished California case, reasoning that California's rule was “not binding in the federal courts,” as determined by the Eighth Circuit, *In re Temporomandibular Joint Implants Prods. Liability*

Litig. (8th Cir. 1997) 113 F.3d 1484, 1493, fn. 11 (“Joint Implants”).

Cole's reliance on *Joint Implants* seems erroneous, because the Eight Circuit's determination regarding the applicability of California's citation rules directly contradicts the Ninth Circuit's rule. *Cole* also suggested that it was permitted to rely on the unpublished state-court decision “not...as decisional law but rather for its persuasive reasoning.” (*Cole, supra*, 387 F.Supp.2d at p. 1103, fn. 7.) But such a rule undermines California's prohibition of unpublished state-court decisions, because all unpublished decisions constitute persuasive (albeit uncitable) authority. Thus, citing an unpublished decision for its “persuasive reasoning” is no different than citing it as “decisional law.” Indeed, this is precisely the type of argument that practitioners should *never* make to support citing a noncitable unpublished decision.

Ultimately, the applicability of California's citation rules in federal courts makes sense. Federal courts charged with the task of resolving issues of state law must determine how state courts would rule on those same issues. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 691 [state courts are the ultimate expositors of state law, and federal courts “are bound by their constructions except in extreme circumstances”].) This purpose would be undermined if federal courts could consider unpublished cases that state courts could not rely on. (See, *e.g.*, *Antablían v. State Bd. of Equalization* (Bankr. C.D.Cal. 1992) 140 B.R. 534, 536–537 [recognizing that because its task was “to determine how a California state court would rule,” the court could not reasonably rely on an unpublished California state-court decision “as an indication of how a California appellate court would rule”].)

Moreover, federal courts' ability to cite unpublished state-court decisions might lead to disuniformity in the law, which, in turn, could engender forum shopping between the state and federal court systems. Thus, Cali-

ifornia federal courts' application of California's state rules regarding the citation of unpublished California state-court opinions brings stability to both court systems.

A notable exception to the application of California's rules in federal courts appears in *Powell v. Lambert* (9th Cir. 2004) 357 F.3d 871 and its progeny. In *Powell*, the Ninth Circuit held that litigants may cite to and rely on unpublished state appellate decisions where the issue presented is the adequacy of a state procedural bar — particularly when the bar prevents the assertion of federal rights. (*Powell, supra*, 357 F.3d at p. 879.) *Powell* reasoned that reliance on unpublished decisions for this limited purpose is appropriate because “it is the actual practice of the state courts, not merely the precedents contained in their published opinions, that determine the adequacy of procedural bars preventing the assertion of federal rights.” (*Ibid.*, citing *Valerio v. Crawford* (9th Cir. 2002 *en banc*) 306 F.3d 742, 776.) *Powell* further explained that “[u]npublished decisions are not irrelevant to a determination of a court’s actual practice. Indeed, to the extent that decisions of the state courts are unpublished because they involve only routine application of state court rules, unpublished decisions are a particularly useful means of determining actual practice.” (*Powell, supra*, 357 F.3d at p. 879.)

Subsequent court decisions relying on *Powell* seemingly have expanded its holding to cover any state statute, the actual application of which by the state court is relevant to the issues before the federal court. (See, *e.g.*, *Vizcarra-Ayala v. Mukasey* (9th Cir. 2008) 514 F.3d 870, 876, fn. 3 [relying on unpublished California decisions regarding the application of Cal. Penal Code § 475, proscribing specific forms of forgery]; *Castillo-Cruz v. Holder* (9th Cir. 2009) 581 F.3d 1154, 1161, fn. 9 [unpublished cases “are pertinent for showing that there is a ‘realistic probability’ that [Cal. Penal Code § 496] has been and will be applied to conduct falling

outside of the generic definition of a crime of moral turpitude.”]; *Nunez v. Holder* (9th Cir. 2010) 594 F.3d 1124, 1137, fn. 10 [unpublished state-court decisions are “pertinent to show how a statute has been applied in practice”].)

A final consideration is that federal district courts have the power to prohibit or restrict the citation of unpublished decisions by local court rule. The local civil rules presently in effect in the Central, Eastern, and Southern Districts of California do not prohibit or restrict citations to unpublished district court decisions. The Northern District, however, expressly prohibits citation to “[a]ny order or opinion that is designated: ‘NOT FOR CITATION,’ pursuant to Civil L.R. 7-14 or pursuant to a similar rule of any other issuing court...either in written submissions or oral argument, except when relevant under the doctrines of law of the case, res judicata or collateral estoppel.” (N.D.Cal. Civ. L.R. 3-4(e) [emphasis added].) Accordingly, in the Northern District, unpublished decisions from any jurisdiction with a non-citation rule or applicable procedure are not citable.

The rules governing citation of unpublished opinions should be carefully followed. Mistakes can be costly. (See *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App. 3d 869, 885–886 [monetary sanctions imposed to discourage violation of the citation rules].) But depending on the venue and circumstances, unpublished opinions may be a useful source of persuasive authority. Practitioners should tread carefully and double-check the rules when citing unpublished decisions, keeping in mind that the mere fact that a decision is unpublished does not necessarily mean that it cannot be cited in any and all courts.

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Letters to the Editor

Re: To Cite or Not to Cite?

Gentlemen:

I am writing to let you know that I just read your article published in the recent edition of *California Litigation*. Lots of articles on litigation subjects are interesting, useful, and generally helpful. Rare are articles that address some thorny issue — like citations to unpublished cases — in such a helpful way that the article must be clipped and remain available at a moment's notice. Yours is just such an article.

I write lots of briefs and motions — mostly at the trial court level, but some in California and 9th Circuit appellate courts — and I have lived by my personal bright-line rule to avoid all forms of unpublished decisions. Your article will come in handy in those times when I find an unpublished case that seems useful enough to cite. The answer may still be that I cannot cite it, but at least I have a reference to check to make sure I am not ruling out a case that I could somehow use.

Thanks for writing such a great article. I will be scanning it into my Evernote account, and there is a good chance a print copy will be attached to my Blue Book and California Style Manual.

Warmly,

Thomas H. Vidal, Esq.

Abrams Garfinkel Margolis Bergson, LLP

Los Angeles, CA

The authors respond:

We were pleased to receive letters like the one from Mr. Vidal finding our article to be a useful tool. That was our intent.

The final segment of our article, however — about the citation of unpublished California decisions in federal court — prompted some confusion. Attorney Gary Ostrick wrote that, in his reading, the article unduly discouraged such citation. Somewhat similarly, appellate specialist Charlie Bird interpreted the article as stating that Ninth Circuit decisions flatly foreclose citation to unpublished California appellate opinions. But that was not what the article stated or intended to state.

To be clear, as the article noted, “Ninth Circuit Rule 36-3 does not cover unpublished state court decisions,” nor do local rules in three of California’s four district courts. The article went on to note that, as a result, federal courts in the Ninth Circuit typically apply state rules governing the citation of unpublished state court decisions, providing examples of such decisions being both rejected by and cited by federal courts. A search of any case law database will yield decisions going both ways. But the fact that federal courts sometimes rely upon unpublished state court decisions does not change the authors’ view that most federal courts usually decline to do so.

Further, the question whether *federal judges* sometimes cite unpublished state court decisions does not mean

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preclude the homeowner's use of a loan modification. For example, the determination that the property that is being foreclosed is not the plaintiff's primary residence has been made in a hasty and erroneous way. Moreover, the numbers being used by the lenders are simply wrong. The income numbers are often faulty." (*Ibid.*)

The program has brought added benefits for homeowners. "The biggest upside for Orange County litigants is that at our mediations we have certified housing counselors present and sitting with the mediator," said Pat Pinto, Manager of the Foreclosure Mitigation Unit at the Legal Aid Society of Orange County. "The housing counselor asks the homeowner certain financial questions and determines eligibility for any existing loan modification program. When the housing counselor confirms to the mediator that a homeowner qualifies for a loan modification program it is extremely difficult for a lender to deny that homeowner a loan modification."

The experience of Orange County shows

that there is a better way to deliver justice in foreclosure litigation. California courts can create mediation programs where homeowners and lenders can work out their differences, without expensive and time-consuming litigation. Other California communities that continue to suffer from consequences of the mortgage meltdown could benefit as well.

A wider mediation program could help undo some of the damage caused by the foreclosure crisis by giving homeowners who have a legitimate claim a good opportunity to modify their mortgages, bringing fairness to foreclosures and expediting the process for both homeowners and servicers. Banks and other home lenders and servicers should embrace such programs because they can avoid costly, lengthy and unnecessary litigation.

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Letters to the Editor

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that *lawyers should* do so. Many federal judges are familiar with state rules and may (or may not) look unfavorably on the citation of unpublished cases. The article sets forth other reasons why such citations may generally be undesirable. But overall, of course, there is no specific rule preventing such citation — except in the Northern District. (N.D. Cal. Civ. L.R. 3-4(e).)

As to that court, Mr. Bird takes the position that if he had "an on-point California nonpub," he would "not hesitate" to cite it in the Northern District, premised on citations to unpublished state-court decisions in that district and the Ninth Circuit. This is a judgment call each lawyer must make, based on any given situation. But there is risk to that approach because Northern District judges do enforce their local rule: *e.g.*, *Ferretti v.*

Pfizer Inc. (N.D. Cal. 2012) 855 F.Supp.2d 1017, 1023, fn. 1; *Vedachalam v. Tata America Int'l Corp.* (N.D. Cal., July 13, 2011, No. C-06-0963 CW) 2011 WL 2747578, *1, fn. 1; *Hall v. Apartment Inv. & Mgmt. Co.* (N.D. Cal., Feb. 18, 2011, No. C 08-03447 CW) 2011 WL 940185, *1, fn. 2; *Smith v. Cardinal Logistics Mgmt. Corp.* (N.D. Cal., Sept. 5, 2008, No. 07-2104-SC) 2008 WL 4156364, *6, fn. 5. For this reason, the authors took the more cautious approach and did not encourage practitioners to attempt to argue around the rule.

In sum, although no rule specifically prevents federal courts from considering unpublished state court decisions most federal judges seem willing to apply California's rule prohibiting the citation of unpublished decisions. Even so, sometimes federal courts cite them, and if the need arises, lawyers may consider citing them. The article merely points out reasons for caution in this regard.