WESTERN CENTER ON LAW & POVERTY

# Litigation Practice Tip - October 2022

## Best Case[s] Scenarios Part 2:
### The Weight of Precedent and Which Authorities to Cite

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My last Litigation Tip discussed **how to use case law**, that is how to make the most of favorable opinions and how to distinguish less favorable ones.**[1]** This Tip addresses *which* opinions to cite, which can be surprisingly tricky.

Let's start with the basics. The gold standard is citing controlling precedent, meaning a decision a lower court has to follow whether it agrees with the precedent or not. If, on an important issue, your opponent has cited a California Supreme Court opinion and the best you can come up with is an opinion from the Middle District of Alabama, it might be a good time to start settlement negotiations.

If you don't have controlling precedent, the next best thing is persuasive precedent, an opinion your court does not have to follow but has helpful reasoning. And even if there isn't much reasoning, it's at least moderately helpful to point out that you are not completely making up your argument; at least one judge agrees with it.

What's controlling, what's persuasive, and what you should cite depend on whether you are litigating in state or federal court; what level of court you are in; and, in part, on some esoteric written and unwritten rules.

**State court**

Let's start with state court. The one opinion you must know about is *Auto Equity Sales, Inc. v. Superior Ct. of Santa Clara Cnty.*, 57 Cal. 2d 450 (1962). You have to be able to nod knowledgeably when judges and attorneys alike use *Auto Equity Sales* as a shorthand in court, at bar meetings, or, presumably, at attorney cocktail parties.**[2]**

In *Auto Equity Sales*, our Supreme Court held that "[u]nder the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction." *Id.* at 455. That means there is no point in telling a Superior Court judge that you believe a California Supreme Court or Court of Appeal opinion was wrongly decided. The response will be "*Auto Equity Sales*."

The *Auto Equity Sales* rule only applies to lower courts. So, what should a trial court do when there are conflicting appellate court decisions? As the *Auto Equity Sales* Court itself said: "Of course, the rule under discussion has no application where there is more than one appellate court decision, and such appellate decisions are in conflict. In such a situation, the court exercising inferior jurisdiction can and must make a choice between the conflicting decisions." *Id.* at 456.

That "choice" is not required to hinge on where or when the conflicting decisions were issued. While there are six Court of Appeal Districts, the geographic scheme serves

administrative rather than doctrinal purposes. A Court of Appeal opinion from any District is equally binding on trial courts throughout the state. And if there are conflicting appellate opinions, a trial court is not required to follow the one issued in its geographic area, though of course as a practical matter it may be inclined to do so to avoid reversal.

And as suggested by the *Auto Equity Sales* quote, *when* the decision was issued is also not controlling. The first Court of Appeal opinion issued on a topic does not bind all future appellate courts deciding the same issue. *See Los Angeles Police Protective League v. City of Los Angeles*, 163 Cal. App. 3d 1141, 1147 (1985) ("this Court is not required to follow a decision by another court of appeal."). Although it is far from an easy task, it is possible to convince a Court of Appeal that a previous appellate decision was wrongly decided.

*Federal court opinions in state court*

These rules apply to state court precedent, but what happens when the decision you or your opposing counsel want to cite comes from a federal court? If the issue is the meaning of state law, federal decisions hold little sway. California appellate courts have the last word.

If the issue is the meaning of federal law, U.S. Supreme Court decisions are controlling. But perhaps surprisingly, lower federal court decisions are not. Federal circuit court decisions, while entitled to great weight, "provide persuasive rather than binding authority." *People v. Bradford*, 15 Cal. 4th 1229, 1292 (1997). And if there are conflicting circuit court opinions, the views of the Ninth Circuit are no more authoritative than the opinions of other circuits. *Debtor Reorganizers, Inc. v. State Bd. of Equalization*, 58 Cal. App. 3d 691, 696 (1976).

*Unpublished Court of Appeal opinions*

California's arcane rules governing unpublished opinions merit separate discussion. The vast majority of Court of Appeal opinions are unpublished. And even though they are now all accessible on Westlaw and Lexis, California Rule of Court 8.1115 prohibits citation of a Court of Appeal opinion that has not been certified for publication in the Official Reports (i.e., Cal. App. through Cal. App. 5th) or has been ordered depublished. Generally, that means you can't cite an unpublished opinion for its result or its reasoning, though you are free to plagiarize the reasoning.

The rule has written and unwritten exceptions. The written exception in civil cases—Rule 8.1115(b)(1)—permits a litigant to cite an unpublished opinion as relevant to the law of the case, res judicata, or collateral estoppel.

As an unwritten exception, litigants filing petitions for review in the California Supreme Court frequently cite unpublished opinions not as authority but to show that there is a conflict among Court of Appeal decisions that requires Supreme Court review to secure uniformity of decision. The Supreme Court seems to accept this practice, and on occasion cites unpublished opinions itself for purposes collateral to the merits of those opinions.**[3]**

Importantly, Rule 8.1115 only prohibits citation of unpublished California Court of Appeal opinions. The rule does not prohibit citation of unpublished federal court opinions. *Harris v. Investor's Business Daily, Inc.*, 138 Cal. App. 4th 28, 34 (2006) (stating that "unpublished federal opinions have persuasive value in this court, as they are not subject to California Rules of Court, rule 977 [since re-numbered 8.1115], which bars citation of unpublished California opinions.").

**Federal court**

Federal stare decisis rules differ from California rules in two important respects. First, federal district courts in California are only bound by Supreme Court and Ninth Circuit decisions. Decisions of the other Circuit Courts of Appeals provide only persuasive authority.

Second, unlike in state appellate courts, a Ninth Circuit panel is required to follow the

decision of a previous panel even if the later panel disagrees with the earlier decision. Existing Ninth Circuit precedent may be overturned only by the Supreme Court or after rehearing by an 11-judge *en banc* panel, a rarely used procedure. *Jeffries v. Wood*, 114 F.3d 1484, 1492 (9th Cir. 1997).

Federal courts sometimes exercise supplemental jurisdiction over California state law issues. In such cases, federal courts are required to follow California Supreme Court precedent. And in the absence of any indication that a state's high court would act differently, federal courts follow state Court of Appeal decisions. *In re Kirkland*, 915 F.2d 1236, 1238-39 (9th Cir. 1990)

*Unpublished Ninth Circuit opinions*

A Ninth Circuit opinion not intended for publication is called a Memorandum and is available on Westlaw. Federal Rule of Appellate Procedure 32.1 provides that a court may not prohibit citation of a federal judicial opinion, no matter what it is called. But the Ninth Circuit, which vociferously opposed enactment of Rule 32.1, has declared that unpublished dispositions "are not precedent." Circuit Rule 36-3. So, you can cite a Memorandum, but do so at your own risk.

As always, please feel to reach out to **me** if you have any questions about how to use case law or legal writing.

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**[1]** Litigation Practice Tip – July 2022, **Best Case[s] Scenarios: 12 Tips for Best Use of Opinions in Your Briefs**

**[2]** I say "presumably" because I don't get out much, and if I did, attorney cocktail parties would rank slightly below root canal surgery as a choice event.

**[3]** Here is an excerpt from a recent petition for review: "Petitioner cites these unpublished opinions not as controlling or persuasive authority, but to show the need for uniformity of decision in this area. Despite the general prohibition in California Rules of Court, rule 8.1115(a) against citing unpublished opinions, this Court has often noted such opinions for similar purposes. (See, e.g., *Williams v. Chino Valley Indep. Fire Dist*. (2015) 61 Cal.4th 97, 113 [noting that the plaintiff had referenced an unpublished case to show that litigation costs can be substantial]; *Conrad v. Ball Corp.* (1994) 24 Cal.App.4th 439, 444, fn. 2 [the "message from the Supreme Court seems to be that unpublished opinions may be cited if they are not 'relied on'"].)

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