Moskovitz On Appeal

ON "PUBLISHED" OPINIONS

By Myron Moskovitz

What's the difference between a "published" appellate opinion and an "unpublished" appellate opinion?

The dictionary provides two generally accepted meanings to the word "publish." It means "put into a book." And it means "made known to the public."

Well, *neither* a published nor an unpublished opinion is "put into a book" — so *all* of them are not published. But *both* of them are "made known to the public" — online — so they are all published!

What's going on here? Did the rule-drafters forget how to use the English language?

No, they used these terms correctly — *back when the rules were adopted*. But times have changed. These quaint misnomers — published and unpublished — are now historical relics.

Kinda like "chauvinist," which has become a synonym for "sexist." Not long ago, "chauvinist" denoted someone who was wildly nationalistic. The word came from Nicholas Chauvin, one of Napoleon's more hyper-patriotic soldiers. In the U.S. we would have called him (at one time) a "jingoist," popularized by Teddy Roosevelt's "by jingo!" approach to American foreign policy. But feminists came up with "male chauvinist pig" to describe sexists. Pretty catchy, but then it got abbreviated to simply "chauvinist" — so we've lost the original meaning, which had been rather useful.

The etymology of published opinions evolved in a similar way.

Today, if you wander through the office of any sizable law firm, you're likely to see shelves full of books — real books you can touch and hold. On the spine of each book appears "Cal.," "Cal.App.," "California Reporter," or "Federal Reporter." In the old days, you might have seen a junior associate standing there reading one of those books, and you would certainly have seen some gaps —

where books had been taken to a lawyer's office for deeper perusal. There was no online then, so that was the only way to do it.

Not anymore. No one stands there reading one of these books, and the gaps are gone. Today, lawyers stay in their offices, reading cases online. Law firms keep the bookshelves solely for show — mostly to inveigle passing clients into thinking, "Wow. Look at all these law books! Maybe these guys are actually *working* some of the mega-hours they bill me."

But back in the 1960s, before the published-unpublished breakdown, these law firms faced a growing problem. You see, the law is *alive*, and live things tend to grow. So new appellate cases kept coming down, more Cal Reports had to be published — and law firms had to keep buying more books, just to keep current. The books weren't cheap, and the rent on the office space beneath them was costing more and more each year.

Thus *money*, the true mother of invention, pushed someone to come up this bright idea: "Hey! Let's put only the *important* cases in the books. We'll call those cases 'published' opinions, because those are the only ones that will be published in the books. We'll call the others 'unpublished,' because they won't be published in any books. The courts can send paper copies of those unpublished opinions to the lawyers who litigated the case, but there's no need for anyone else to see them."

So in the beginning, when cases were put into real books, the terms "published" and "unpublished" were employed correctly.

Here's how they decided to draw the line between what was to be published and what was to be unpublished. California Rule of Court 8.1105(c) provides for "publication" if an opinion:

(1) Establishes a new rule of law;

(2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions;

(3) Modifies, explains, or criticizes with reasons given, an existing rule of law;

(4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule;

(5) Addresses or creates an apparent conflict in the law;

(6) Involves a legal issue of continuing public interest;

(7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law;

(8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or

(9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law.

These nine categories could be summed up in a single word: "important" — a more accurate description than "published."

And here's the *consequence* of the label. California Rule of Court 8.1115 provides:

"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 must not be cited or relied on by a court or a party in any other action."

(The *federal* rules are a bit different, but I don't have the space to discuss them here.)

Today you can ask a court to publish. *See* Rule 8.1120. It was not always so. A few months after the published-unpublished rules were first adopted back in the 1970s, I argued a case in one of our Courts of Appeal. It was test case, where I was trying to persuade the courts to change the old common law rule that landlords had no duty to make repairs, and to adopt a new doctrine called the "implied warranty of habitability." After arguing the merits, I added "Your honors, whichever way you decide, please publish your opinion, because this is an important issue of law." I didn't mention my true motive: If I lost, a published opinion was more likely to get me into the California Supreme Court. The Presiding Justice seemed baffled by my request, because the publication rule was so new. He turned to his fellow Justices, who shrugged. He turned back to me: "I don't think that's an appropriate argument. *We* decide what to publish, without input from counsel." As it turned out, the court ruled for me, in a published opinion. *See Hinson v. Delis*, 26 Cal.

App. 3d 62 (1972). So at that point, there was no need to go to the Supreme Court. (That need came a couple of years later, after a number of superior court judges had refused to follow *Hinson*. *See Green v. Superior Court*, 10 Cal. 3d 616 (1974).)

So, an appellate lawyer *cares* about whether his case results in a published opinion. Sometimes a lawyer will call me: "I just won an appeal, but it was unpublished. Can I ask the court to publish it?"

"Of course," I reply. "Just show them how Rule 8.1105(c) is satisfied. But why do you want it published?"

He stumbles, "Well, you know...."

"Right," I say. "You want your name in lights. Nothing wrong with that, but you'd be putting your client at risk."

"Why, how?"

I explain: "If you get it published, that will give your opponent a better chance of getting review in the California Supreme Court, which only rarely grants review of unpublished cases."

Thus, back then, the words "published" and "unpublished" were used accurately. And the motive — saving money — was worthy, if not noble. Today, however, it would be more accurate to call the published opinions "precedential," and call the unpublished opinions "non-precedential" — because of Rule 8.1115, which says which opinions you may cite.

But wait a minute! Why should *any* opinion be deemed non-precedential?

Now that *none* of the opinions gobble up any valuable downtown rental space, is there any good reason *not* to publish *all* appellate opinions — the way it used to be? As judges themselves are apt to say, when a reason for a rule evaporates, it's time to reconsider the rule.

This requires us to address a basic question: What is "the law"?

The Rules of Court seem to assume that only explicit holdings ("We hold that the new rule is...) make up "the law." Opinions that don't meet this standard are "mere applications" of the law. But that's never been how the common law has worked. It

develops slowly, one small step at a time. A jumble of "mere application" cases often coalesces into a stated rule, then courts apply the rule to a multitude of factual situations, then exceptions and nuances emerge, and then some court pulls it altogether and announces a modified rule — and so it goes. The cases *applying* the rule to varied fact situations are *crucial* to this development.

Sometimes an opinion announces a clear rule — one with definite boundaries. Like, a notice of appeal must be filed within 60 days of the judgment or post-judgment order from which you are appealing. No exceptions, period.

But most rules are fuzzier, like "a motion to set aside a default must be made within a reasonable time." What is "a reasonable time"? There's only one way for a lawyer researching and arguing this issue to tell: Read a bunch of opinions *applying* that term to specific sets of facts. Those *applications* cumulatively constitute "the law." But if the applications are buried in a series of unpublished opinions that the lawyer can't cite and judges aren't supposed to read, neither the lawyer nor the judges are applying "the law."

Lawyers often tell me, "This opinion qualified for publication. The Justices knew it, but they didn't publish it because they know that they weren't following the law. Also, they know that the Supreme Court would be more likely to grant review if they published, so they wanted to immunize it from review." Lawyers who lose are a suspicious lot, and there's no way to confirm or disprove their suspicions about the court's motives.

But are they correct when they say the Justices "weren't following the law"? Maybe not. When a judge writes an opinion that appears to deviate from a rule announced in a prior case, the judge is *making* law — even if she says she's merely following an established rule. She is creating an exception, modifying the rule — or silently *explaining* what the rule means by her application of the rule to certain facts. And sometimes she is indeed silently overruling or "violating" the rule, because she believes the rule is unjust. Whichever it is, her opinion should be treated as "law" — because it reflects what real judges believe the law really is.

On occasion, I've used unpublished opinions in exactly this way — in a petition for review to the California Supreme Court, to show that there is *actually* a conflict among Courts of Appeal, or that an issue is important. (Am I violating Rule

8.1105? I'm not "relying" on unpublished decisions, but I am "citing" them. But Courts of Appeal themselves do this occasionally. *See* Eisenberg, Horvitz, & Wiener, "Civil Appeals & Writs," ¶11.186.5.)

In *Schmier v. Supreme Court*, 78 Cal. App. 4th 703, 712 (2000), the court rejected a challenge to the rule allowing "non-publication" of court of appeal opinions, stating:

"Our typical opinions in such cases add nothing to the body of stare decisis, and if published would merely clutter overcrowded library shelves and databases with information utterly useless to anyone other than the actual litigants therein and complicate the search for meaningful precedent."

I disagree. "Law" is more than what judges *say*. It's also what judges *do*. Over 90% of our Court of Appeal opinions are unpublished — even though they tell us what these courts *do*. They are *the stuff of* the "law." Let's use them. (And "overcrowded library shelves" are a thing of the past.)

The development of the common law depended on the ability of lawyers and judges to use *any* case as precedent. One could never tell in advance whether an opinion might later become significant. All this came to a screeching halt in the early 1970s, when both California and federal courts adopted this publication distinction. As there's no longer any justification for it, and it might well inhibit the evolution of the best rules, it's time to dump it.

And instead of writing "Certified for Publication" at the top of the first page of its opinion, a court should be allowed to write "We Think This Opinion Is *Really Important*!" Says the same thing, but in proper English.

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