JANUARY 28, 2016

"Referencing" and "mentioning" unpublished opinions in petitions for review

http://www.atthelectern.com/referencing-and-mentioning-unpublished-opinions-in-petitions-for-review/

Rule 8.1115(a) provides generally 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." The rule states some exceptions: "When the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or . . . [w]hen 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."

There is also at least one unstated exception. When petitioning for review, it is considered appropriate to tell the Supreme Court about unpublished opinions demonstrating that there is a division in the lower courts about a question of law or that an issue is frequently recurring. Thus, the unpublished opinions are not being cited for any precedential value, but to establish the most fertile grounds for review: that review is "necessary to secure uniformity of decision or to settle an important question of law." (Rule 8.500(b)(1).)

This exception might be unstated in the rules, but commentators have written about it over the years. The current version of the California Criminal Appellate Practice Manualsays, "In addition to the exceptions specifically enumerated in the rule, counsel have occasionally discussed unpublished cases – without protest from the court – when the use of the cases is consistent with the rationale underlying the general no-citation rule. A petition for review, for example, may point to unpublished cases to show conflicts among the courts on a particular issue, the frequency with which an issue arises, or the importance of an issue to litigants and society as a whole. . . . [This is] consistent with the general no-citation rule because [it is] referring to the unpublished cases, not as*authority* or *precedent* to persuade the court on the merits of an issue, but as *evidence*of some external fact." (Footnote omitted.) See also Daniel U. Smith & Valerie T. McGinty, "*Obtaining California Supreme Court Review*," Plaintiff Magazine (Dec. 2012) ("Citing unpublished decisions to show the issue is unsettled does not violate . . . rule 8.1115(a) because the petitioner is not relying on the unpublished decision as precedent that should be followed").

Because the rule on its face bars "cit[ing] or rel[ying] on" unpublished opinions, courts and litigants, when wanting to talk about those opinions, have resorted to using verbs different from — although essentially synonymous with — "cite" and "rely." The Supreme Court recently noted — without complaining — a party's "reference[ ]" to an unpublished opinion; in the case before it the reference was to show costs in FEHA cases can be substantial. (*Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 113.) A few years ago, a Court of Appeal "mention[ed]" and "simply note[d]" a depublished case; the court said it knew about the rule "barring citation to or reliance upon a depublished California case," but the "mention" was "in order to accurately describe the current state of law." (*Robinson v. SSW, Inc.* (2012) 147 Cal.Rptr.3d 230, 235 & fn. 7.) (Ironically, the *Robinson* opinion itself was depublished by the grant of review.)

As long as the Supreme Court is considering changing the rule that automatically depublishes review-granted Court of Appeal opinions, the court might also look at revising the rule about citation of unpublished opinions. Instead of sending courts and parties to the thesaurus for alternate ways to say "cite" or "rely on," why not change the rule to say something like, unpublished opinions cannot be "cited or relied on ***as binding or persuasive precedent***" (new language emphasized)? (If that change were made, the current rule's stated exceptions could be deleted as superfluous.) It would make the rule roughly equivalent to the non-hearsay rule that allows admission into evidence of another's statement if the statement is not being offered for the truth of the matter stated.

Excellent research for this post was provided by Horvitz & Levy appellate fellow Jessica Di Palma.