

8/14/12

LEGAL BYTE

Greetings to my valued connections!

Another byte of law for your interest: Citing to unpublished appellate opinions: may I?

Anyone who practices litigation has found that perfect case to support his/her argument but the case is an unpublished opinion. The general rule is that unpublished opinions may not be cited to for support of analysis. Cal. Rules of Court 8.1115(b). However . . .

What about using judicial notice? Judicial notice allows the court to accept a fact as true without out proof by the offering party. Judicial notice can be sought for facts so well known no proof is necessary, court records, county state and federal records, etc. Judicial notice has been and should be sufficient to allow use of an unpublished opinion as authority for a point of law or analysis. While there is constitutional tension between the no-citation rule and the court's power to take judicial notice of court records, a court may take judicial notice of the existence of judicial opinions and court documents, along with the truth of the results reached in the documents such as orders, statements of decision, and judgments. It may not, however, take judicial notice of the truth of hearsay statements in decisions or court files, including pleadings, affidavits, testimony, or statements of fact. *People v. Harbolt* (1997) 61 Cal.App.4th 123, 127 (review granted on a different issue) and cases cited therein. There is case law both ways on this point. Ironically, there is no issue about citing to unpublished opinions of out of state jurisdictions as persuasive authority. *Lebrilla v. Farmers Grp., Inc.* (2004) 119 Cal.App.4th 1070, 1078, *Harris v. Investor's Bus. Daily, Inc.* (2006) 138 Cal.App.4th 28, 34 (federal unpublished opinions).

For a comprehensive analysis of the "unpublished opinions" issues, see: Note: *Judge Nullification: A Perception of Unpublished Opinions* by Rafi Moghadam, *Hastings Law Journal* Vol. 62, no. 5, pg. 1397. Thank you, Rafi.

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By: Alan M. Goldberg

alangoldberglaw@gmail.com

Appeals; civil trials; family law; assist with trial preparation: 2nd chair, motions, research, witnesses, all aspects of trials; local counsel (California); referral fees paid.

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