When Can You Cite Unpublished Decisions?

We’ve all been there. You find just the right case that says just what you want, but it’s unpublished. You know it’s not binding. But you think it’s persuasive. Can you cite it? You don’t know (or remember). So you walk down the hall or pick up the phone to ask your cohorts. But you get different answers. Well, here’s my answer.

U. S. Supreme Court

Who knows? I don’t practice in the U.S. Supreme Court much. But I would try to cite that Court only its own opinions (it doesn’t issue unpublished ones), except to show there is a conflict in Circuits or something like that.

Ninth Circuit

Yes. Rule 32.1, F.R.A.P., governs. It says you can cite “federal judicial” unpublished decisions to the federal appellate courts as long as those decisions are “issued on or after January 1, 2007.”

What about citing unpublished Arizona district court decisions to the Ninth Circuit? Rule 32.1 F.R.A.P. doesn’t say you can’t. And there is authority that a circuit rule prohibiting citation of unpublished court of appeals opinions doesn’t prohibit citing (or courts from considering) unpublished opinions by district courts or by other courts of appeals.

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1 See also, 9th Cir. R. 36-3. For unpublished decisions issued before January 1, 2007, you can’t cite them to the Ninth Circuit, except for the usual exceptions. See footnote 3 for the usual exceptions. Also, note that the U.S. Supreme Court “promulgated” Rule 32.1, F.R.A.P.


3 See, e.g., Renick v. Dun & Bradstreet Receivable Mgmt. Servs., 290 F.3d 1055, 1058 (9th Cir. 2002) (“Ninth Circuit Rule 36-3 quite clearly prohibits citations only of our unpublished dispositions; it does not apply to unpublished dispositions issued by any other courts within our circuit or elsewhere.”); Alvarenga-Villalobos v. Reno, 133 F. Supp. 2d 1164, 1168 (N.D. Cal. 2000) (“Since the Third Circuit case cited above is not an unpublished disposition of the Ninth Circuit, the court concludes that its citation does not run afoul of Rule 36-3. The Ninth Circuit itself has on occasion cited unpublished decisions from other circuits. See, e.g., United States v. Garcia, 210 F.3d 1058, 1059 (9th Cir. 2000); Axess Intern., Ltd. v. Intercargo Ins. Co., 183 F.3d 935, 942 (9th Cir. 1999).”); In re Antablian, 140 B.R. 534, 536 (Bankr. C.D. Cal. 1992) (“The Debtor would have me apply 9th Cir.R. 36-3 to obviate consideration of that decision. However, that rule applies only to establish that decisions of the Ninth Circuit which are not properly designated for publication may not be regarded as precedent and may not be cited to courts of this circuit. It has no application to consideration of an unpublished opinion of any other court.”).
What about citing unpublished decisions by state courts to the Ninth Circuit? Rule 32.1, F.R.A.P, doesn’t say you can’t, so I think technically you can. But there are two caveats. Sitting in diversity jurisdiction and being asked to decide a state-law question, a federal court may refuse to consider an unpublished decision from a state court whose rules prohibit citing its unpublished opinions. And, similarly, out of comity, a federal court (or any court) may refuse to consider an unpublished decision from a court whose rules prohibit citing its unpublished decisions. These caveats apply equally to the sections below. And, although these caveats don’t prevent you from citing unpublished decisions, they may make you think twice about doing so.

Arizona District Court

Yes. The F.R.A.P govern only the federal appellate courts, so Rule 32.1 doesn’t apply to the Arizona District Court. But I’m not aware of a F.R.C.P., an Arizona district court local rule, or a Ninth Circuit or district court case that prohibits citing unpublished decisions to the district court, so, again, I think you can. The authority cited in footnotes two and three would seem to support this.

Arizona Supreme and Appellate Courts

No. Rule 28(c), A.R.A.P., governs. It says “[m]emorandum decisions shall not be … cited in any court …” This Rule reads as if it applies to only the “memorandum decisions” from the Arizona Supreme and Appellate Courts. Arguably, the Rule doesn’t apply to unpublished decisions from other courts, like the Ninth Circuit, the Arizona district court, or some other state court.

But the Arizona Supreme Court has held otherwise: “‘We find no reason for out-of-state memorandum decisions to be more citable than in-state memorandum decisions.’” Simat Corp. v. Arizona Health Care Cost Containment System, 203 Ariz.

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4 Minuteman International v. Great American Insurance Co., 2004 WL 603482, n.2 (N.D.Ill. March 22, 2004) (“Unpublished decisions of other courts are not to be considered to the extent the rules of the issuing court prohibit consideration of the unpublished decision,” citing authority and holding that the “unpublished California Court of Appeal case that is cited by defendant will not be considered[,]” because that issuing court’s rules prohibited citing its unpublished decisions), and citing Aetna Casualty & Surety Co. of Hartford, Conn. v. Kerr-McGee Chemical Corp., 875 F.2d 1252, 1255 n. 2 (7th Cir.1989); Kingvision Pay Per View, Ltd. v. Boom Town Saloon, Inc., 98 F.Supp.2d 958, 959 n. 1 (N.D.Ill.2000). See also Doty v. Doyle, 182 F.Supp.2d 750, 752 n. 3 (E.D.Wis.2002). (“California rules do not permit unpublished appellate court decisions to be considered, even for their persuasive value.”); In re Antablian, 140 B.R. 534, 536-37 (Bankr.C.D.Cal.1992) (the bankruptcy court was precluded from considering unpublished opinions of California appellate court as precedent to determine how California court would rule on issue in bankruptcy case).

5 See Rule 1, F.R.A.P. (“These rules govern procedure in the United States courts of appeals.”)

6 The Rule gives the usual exceptions, like to prove res judicata, collateral estoppel, and law of the case, or to convince the court that a legal issue is opinion-worthy.

**Arizona Superior Court**

Yes. The A.R.A.P govern only to the Arizona Supreme and Appellate Courts, so Rule 28(c) doesn’t apply to Arizona superior court.7 I’m not aware of any A.R.C.P. or Pima County local rule that prohibits citing unpublished decisions, so, once again, I think you can.

Some superior court judges disagree with this, and when you’re in their court, then obviously, they’re right and I’m wrong.

Also, just because you can do something doesn’t mean it’s a good idea to do it.

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7 *See* Rule 1, A.R.A.P. (“These rules … shall govern the procedure in civil appeals to the Court of Appeals and the Supreme Court …”)