February 17, 2004

The Honorable Samuel A. Alito, Jr.
United States Court of Appeals
for the Third Circuit
357 United States Courthouse
Post Office Box 999
Newark, N.J. 07101-0999

Re: Further Comments of Stephen R. Barnett
On Proposed Federal Rule of Appellate Procedure 32.1
In Reply to Judge Kozinski

Dear Judge Alito:

These are Comments in support of the proposed Federal Rule of Appellate Procedure 32.1; they reply to the Comments of Judge Alex Kozinski submitted to you by letter dated January 16, 2004 (Kozinski Comments). I have previously submitted in this proceeding two sets of Comments consisting of published articles: Stephen R. Barnett, From Anastasoff to Hart to West's Federal Appendix, 4 J. App. Prac. & Process 1 (2002) (Barnett I); and Stephen R. Barnett, No-Citation Rules Under Siege: A Battlefield Report and Analysis, 5 J. App. Prac. & Process 473 (2003) (Barnett II). I apologize for the length of this filing; at the same time, I am sorry that time has prevented me from replying to all of Judge Kozinski's points.

I urge the Committee to propose adoption of FRAP Rule 32.1. My reasons appear in these Comments and in those I have previously submitted. If adoption of the Rule is not at present feasible, however, I suggest as an alternative -- as explained in my Conclusion, infra -- that the Advisory Committee hold the issue in abeyance for two years. Given the fast-moving pace of both technological and legal developments in this area, such a waiting period could well produce new facts and new perspectives that would clarify the decision presented.

TABLE OF CONTENTS

1. Law Is Not What Judges Say; It's What They Decide 4

2. As Judge Kozinski Has Previously Recognized, Common Law Tradition Requires That Prior Decisions on Point by Courts of Equal Jurisdiction Be Acknowledged and Considered; It Thus Requires That Opinions Be Citable 7

3. Judge Kozinski Wrongly Claims That Rule 32.1 Would Make All Opinions Precedential 8

4. The Advisory Committee Is Correct That No-Citation Rules Are "Wrong As a Policy Matter"; They May Be Unconstitutional As Well 10

5. The Student Casenote from the Yale Law Journal Does Not Support the Fairness Claim It Makes 12

6. Only Four of the Thirteen Circuits -- the Second, Seventh, Ninth, and Federal -- Still Refuse To Allow Citation of Their Unpublished Opinions; Now District Courts in the Second Circuit Are Citing That Circuit's Unpublished Opinions 14

7. Fears of a Crushing New Burden of Research Resulting From Citable Unpublished Opinions Ignore the Way Legal Research Is Done Today and the Experience of Both Federal and State Jurisdictions 17

Conclusion 20

1. Law Is Not What Judges Say; It's What They Decide

The case for or against the proposed Rule depends, in part, on what law is. For Judge Kozinski, it appears that law is what judges say. Thus, in his view an essential part of the judge's task involves "anticipating how the language of the disposition will be read by future litigants and courts, and how small variations in wording might be imbued with meanings never intended . . . ." Kozinski Comments, p. 5. Given this view, Judge Kozinski sees danger in letting unpublished dispositions be cited; for such a disposition "in all probability was drafted by a law clerk or central staff attorney," and it thus may embody "fine nuances of wording" that are believed to, but do not in fact, "reflect the views of three court of appeal judges." Id., p. 3.

I submit that law is not what judges say, but what they decide. As we all learned in the first weeks of law school, what judges say is only "dictum"; such words are to be distinguished from the "holding" of a case, or the ratio decidendi, which alone is the law that is made. "No court is required to follow another court's dicta." Indiana Harbor Belt RR Co. v. American Cyanamid Co., 916 F.2d 1174, 1176 (7th Cir. 1990) (Posner, J.). This limitation on judicial lawmaking power rests, I believe, on Article III, which limits the federal judicial power to "cases" and "controversies." The power of judges to make law, unlike the lawmaking power of legislators or executive officials, is limited to -- and circumscribed by -- the judicial function of deciding cases. For judges to assert a power to declare the law, beyond the scope of a judicial decision based on actual facts, exceeds the judicial power. And likewise, the bounds of the law that judges make in a case are determined by the facts presented and the decision made, not by the identity, intent, or will of the judges.

I thus agree with one of the conflicting pictures of the Ninth Circuit's judicial product that Judge Kozinski presents. I do not agree with his characterization of the unpublished dispositions of the Ninth Circuit as "sausage" that the makers tell us is "not safe for human consumption." Kozinsky Comments, p. 4. Rather, I accept Judge Kozinski's assurance that

"[w]e are very careful to ensure that the result we reach in every case is right, and I believe we succeed." Id., p. 5 (emphasis in original). I agree that the essential thing is the result that the court reaches. That is the law that a court makes when it decides a case. And under the common law system, every court decision does make law. "To the common lawyer, every decision of every court is a precedent; . . . [and] it is the decision -- not the opinion -- that constitutes the law." Danny P. Boggs and Brian P. Brooks, Unpublished Opinions & the Nature of Precedent, 4 Green Bag 17 (2000) (Boggs and Brooks). The value of a decision as a precedent for future cases, however, cannot be determined by the judges who decide the case at the time they decide it; that determination must wait until a subsequent case comes along with facts that are arguably governed by the prior decision.

These points are well expressed in a recent article by Professor Cappalli. Richard B. Cappalli, The Common Law's Case Against Non-Precedential Opinions, 76 S. Cal. L. Rev. 755 (2003). Among many other apt observations, Professor Cappalli makes these points:

* "One who is trained in legal method must have difficulty accepting Judge Kozinski's views about an appellate judge's duties in creating law." Id. at 774. [1] This is in part because "the power to determine the holding of a judicial precedent resides in future judges applying it." Id. "Lacking omniscience, an appellate court cannot predict what may come before its court in future days." Id. at 773. "The common law method accepts the impossibility of such prevision by judges and wisely leaves the implications of a precedent in the hands of future courts." Id. at 775.

* "When Judge Kozinski stated in Hart that the 'rule must be phrased with precision and with due regard to how it will be applied in future cases,' he

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[1] Professor Cappalli refers throughout to Judge Kozinski's opinion for the court in Hart v. Massanari, 166 F.3d 1155 (9th Cir. 2001); Judge Kozinski expressed there essentially the same positions that he takes in his Comments here.

confused the judicial with the legislative role. Every word of a statute is law; no word of a judge is law. . . ." Id. at 774-775.

* "Judge Kozinski and others have posited a new common law in which a precedent controls not through its ideas but through its verbal expression. This reverses the maxim, 'It is not what a court says, but what it does.'" Id. at 775.

* "[T]he common law insists that far more important than verbiage to the understanding of a decisional rule is an appreciation of the case facts that generated the rule." Id. at 779.

* "Judge Kozinski is not saying that the ruling has been so scantily considered that it may be wrong and its error should not proliferate. All supporters of the current policy defend the quality of these non-precedential rulings. He is saying that: (1) We will determine ex ante that this case makes no usable law under whatever circumstances may arise, (2) having made that determination, we see no need to write a careful opinion, and (3) because of our guess as to the ruling's future inutility, and because our ruling is rough, we prefer to hide it in a file." Id. at 773.

I respectfully urge the Advisory Committee to read Professor Cappalli's article.

2. As Judge Kozinski Has Previously Recognized, Common Law Tradition Requires That Prior Decisions on Point by Courts of Equal Jurisdiction Be Acknowledged and Considered; It Thus Requires That Opinions Be Citable

Since Judge Kozinski, in his present Comments, evidently views unpublished dispositions of the Ninth Circuit as not embodying the words of

judges and thus not "making law," he can defend the Ninth Circuit's rule banning the citation of those dispositions. In the past, however, Judge Kozinski appeared to take a different position. In his opinion for the court in Hart v. Massanari, supra (266 F.3d 1155), Judge Kozinski wrote that "we would consider it bad form to ignore contrary authority by failing even to acknowledge its existence"; and "[s]o long as the earlier authority is acknowledged and considered, courts are deemed to have complied with their common law responsibilities." Id. at 1169-1170. Why must earlier authority be "acknowledged and considered"? Because, one would think, case decisions, under our common law system, are law. See Boggs & Brooks, supra, at 17.

It is not easy to square the rule that Judge Kozinski defends now with what he wrote in Hart. The Ninth Circuit's Rule 36-3, by prohibiting courts of the circuit from citing unpublished dispositions, requires those courts to "ignore contrary authority by failing even to acknowledge its existence." When an earlier authority cannot be cited to a court, it cannot be "acknowledged and considered" by the court. Thus the Ninth Circuit itself, through Judge Kozinski's opinion in Hart, would appear to have acknowledged that the circuit's no-citation rule fails to comply with the court's "common law responsibilities."

Judge Kozinski has heard this point before (Barnett I, at 14-16). In his comments here he offers no explanation for the apparent conflict in his positions.

3. Judge Kozinski Wrongly Claims That Rule 32.1 Would Make All Opinions Precedential

Judge Kozinski attributes to the Advisory Committee a "spurious attempt to draw a distinction between citability and precedential value." Kozinski Comments, p. 4. "No such distinction is possible," he asserts, and the Committee "naively" claims otherwise. Id.

The ground of Judge Kozinski's assertion is not clear. The Committee's proposed Rule plainly bars restrictions on simply the "citation" of judicial opinions, without requiring that the cited opinions be precedential. [2] The Committee's chair is at pains to stress that the proposed rule "says nothing whatsoever about the effect that a court must give" to an unpublished opinion, and that the "one and only issue" addressed by the rule is "the ability of parties to cite opinions . . . . " Committee Memorandum at 28 (emphasis in original).

A.

Judge Kozinski may be relying on a sort of syllogism. He states, correctly, that "[b]y saying that certain of its dispositions are not citable, a court of appeals is saying that they have zero precedential value." Kozinski Comments, p. 4. From this, Judge Kozinski suggests that the converse also applies: "By requiring that all cases be citable, proposed FRAP 32.1 is of necessity saying that all prior decisions have some precedential effect." Id. (emphasis in original). But this does not follow. From stating that if opinions are not citable, they have no precedential effect, it does not follow that if they are citable, they must have some precedential effect.

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[2] Proposed FRAP Rule 32.1 (a) reads:

> (a) Citation Permitted. No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions.
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> See Memorandum from Judge Samuel A. Alito, Jr., Chair, Advisory Committee on Appellate Rules, to Judge Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure, Re: Report of Advisory Committee on Appellate Rules (May 22, 2003) (Committee Memorandum), at 28-29.

B.

Another possible ground for Judge Kozinski's all-precedential claim is his asssertion that "cases are cited almost exclusively for their precedential value." Id. p. 4 (emphasis in original). The party citing a case is saying, Judge Kozinski writes: "This is what that court did in very similar circumstances, and therefore, under the doctrine of stare decisis, this court ought to do the same." Id. The party indeed may be saying that, but party claims are not necessarily law. Where the unpublished opinions are "not precedential" and are citable only for their "persuasive" value, as is true now in four circuits, [3] and as could be true in any circuit under the proposed Rule 32.1, [4] the party's reliance on stare decisis, if admissible at all, would lack legal force. The court would decide whether the prior decision was persuasive, regardless of its status as a prior decision. [5]

C.

It is true that the concepts of precedent and persuasiveness may overlap. A prior decision on point, cited to the court, tends to be more persuasive than the absence of such a decision. Other things being equal, it is easier to follow a lead than to blaze one's own trail. So if prior opinions may be cited, they will be followed, I think, more often than if they may not be cited. Judge Kozinski, however, has disagreed, suggesting that citation does not have even a persuasive effect: "Citing a precedent is, of course, not the same as following it; 'respectfully disagree' within five words of 'learned colleagues' is almost a cliche." Hart v. Massanari, supra, 256 F.3d at 1170. If citing a case thus may not have even persuasive effect, a fortiori it need

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[3] 5th Cir. R. 47.5.3 (opinions issued on or after Jan. 1, 1996); 8th Cir. R. 28A(i); 10th Cir. R. 36.3; 11th Cir. R. 36-2; see Barnett I at 11-12.

[4] See Committee Memorandum at 28.

[5] For a decision rejecting three prior unpublished dispositions as not persuasive" under such a rule, see Williams v. Dallas Area Rapid Transit, 242 F.3d 315, 318-19 n. 1 (5th Cir. 2001), rehearing en banc denied, 256 F.3d 260 (2001).

not have precedential effect, as Judge Kozinski claims. Moreover, four circuits, [6] as well as a number of states, [7] have rules providing that unpublished opinions may be cited for "persuasive" value alone, and expressly not for "precedential" value.

The Advisory Committee's distinction "between citability and precedential value" thus is not a "spurious" one. By requiring that all cases be citable, the proposed Rule would not be saying that all prior decisions have some precedential effect.

4. The Advisory Committee Is Correct That No-Citation Rules Are "Wrong As a Policy Matter"; They May Be Unconstitutional As Well

The Advisory Committee takes the view that no-citation rules are "wrong as a policy matter" and suggests that they may raise First Amendment problems. Committee Memorandum at 27, 35. Judge Kozinski, usually one of our most stalwart defenders of First Amendment values, staunchly defends no-citation rules and dismisses any First Amendment concerns. Kozinski Comments, p. 20. I want simply to suggest that there is an entire case, untouched by Judge Kozinski, to be made against no-citation rules.

While Judge Kozinski complains that the Committee Note "provides no authority" for its suggestion that no-citation rules may violate the First Amendment (Kozinski Comments, at 20), such authority is readily available. See, e.g., Salem M. Katsch and Alex V. Chachkes, Constitutionality of "No-Citation" Rules, 3 J. App. Prac. & Process 287 (2001) (no-citation rules unconstitutional under First Amendment and Article III); Marla Brooke Tusk, No-Citation Rules As a Prior Restraint on Attorney Speech, 103 Colum. L. Rev. 1202 (2003) (impermissible prior

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[6] See supra note 3.
[7] See Barnett II at 482, 299.

restraint on attorney speech); Jon A. Strongman, Comment, Unpublished Opinions, Precedent, and the Fifth Amendment: Why Denying Unpublished Opinions Precedential Value Is Unconstitutional, 5 U. Kan. L. Rev. 195, 212 (2001) ("[d]enying litigants the opportunity to rely on the prior decisions of a court offends the notion of fairness demanded by procedural due process"); cf. Legal Services Corp. v. Velasquez, 531 U.S. 533, 545 (2001) (congressional prohibition on using Legal Services Corp. funds to challenge existing welfare law struck down under First Amendment as "inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments necessary for the proper resolution of the case").

As a matter of policy, moreover, bans on citation of judicial opinions override what Professor Schauer has identified as the values of precedent -- fairness (or equality), predictability, and efficiency. See Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 595-602 (1987).

Judge Kozinski himself has framed the essential vice of no-citation rules. He argues: "By saying that certain of its dispositions are not citable, a court of appeals is saying that they have zero precedential value -- no inference may be drawn from the fact that the court appears to have acted in a certain way in a prior, seemingly similar case." Kozinski Comments, p. 4. That is the trouble. Why doesn't a litigant have the right to be treated by a court in a similar way to a litigant in a "prior, seemingly similar case"? For a court to deny such treatment arguably achieves a constitutional hat-trick, offending simultaneously the First Amendment and the Equal Protection and Due Process Clauses. Judge Kozinski never confronts these normative and constitutional arguments against a rule that prohibits an attorney from telling a court what a judge has decided in a prior, similar case.

5. The Student Casenote From the Yale Law Journal Does Not Support the Fairness Claim It Makes

Judge Kozinski devotes three pages of his Comments (pp. 13-17) to reprinting and praising a student casenote from the Yale Law Journal -- homage worthy of the student's mother. The student author asserts, "persuasively" in Judge Kozinski's view, that allowing citation of unpublished dispositions "would systematically and unfairly disadvantage individual litigants with limited resources (including pro se and public-interest litigants and public defenders) by making it harder for them to present their cases." See Kozinski Comments, p. 14 (reprinting casenote). This would happen in two ways: "First, [allowing citation] would increase delays in adjudication, delays from which the poorest litigants are likely to suffer the most, and second, it would create a less accessible class of precedents." Id.

How would citability of unpublished opinions "increase delays in adjudication"? The author's only specific claim relates not to lawyers but to judges: "The high volume of cases makes the production of fully reasoned opinions enormously expensive." Id. at 14. This is not only hyperbolic (the opinions would not have to be "fully reasoned"), [8] but the author provides not the slightest evidence in support of the claim -- easily obtained evidence such as, for example, comparative case-disposition times of circuits that do, and ones that do not, allow citation of their unpublished opinions.

Just as the author does not show increased delays in adjudication, neither does he show that such delays, if they existed, would be ones from which "the poorest litigants are likely to suffer the most." Id. at 14. The author asserts that "prisoners bringing habeas claims who rely on the efficient adjudication of their cases will suffer particularly from clogged dockets." Id. at 15. Prisoners bringing habeas claims will suffer from delay only if their claims will be successful and produce their release; that is true, surely, of only a small fraction of habeas claimants. (The more numerous habeas claimants who will lose their claims may benefit from delay, because

[8] See New York's "memorandum" opinions discussed below.

it extends their period of hope.) But the whole idea of prisoners languishing in jail because unpublished opinions may be cited is so speculative, far-fetched, and unencumbered by facts as to verge on the absurd.

The author's second claim is that citability of unpublished opinions "would create a less accessible class of precedents." Id. at 14. He avoids saying how, and never confronts the fact that the citable unpublished opinions would be easily searchable in LEXIS, Westlaw, and other data bases. [9] There is some suggestion that "impecunious litigants" cannot afford "commercial databases" like LEXIS and Westlaw (id. at 15); but the author, wisely, does not deny that public defenders and public-interest litigants have access to these now-standard methods of legal research. If they do not, then they and their clients are at a real disadvantage in being unable to search published cases, and the existence of citable unpublished cases that they cannot search will add little to their plight. As for the "pro se" litigants, to remove all their comparative disadvantages would require switching to a system of free legal services for all in civil cases (and they still would be disadvantaged in their choice of lawyers); since we have not done that, the additional disadvantage resulting from not having access to commercial databases to search for unpublished opinions is de minimus. [10]

In sum, although Judge Kozinski not only endorses the Yale student's claim but inflates it to assert "colossal disadvantages [imposed] on weak and

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[9] Such computerized searches are notably unlike the quests for the "proverbial needle in the haystack" to which the author equates them (id. at 15); or rather it's a radio-transmitting needle that quickly identifies itself to the searcher.

[10] Judge Dannny J. Boggs and Brian P. Brooks have provided an apt response to the Yale student's argument, suggesting that his proposal ntails dumbing down the system (Yale n. 37): "Surely proponents of this 'fairness' rationale cannot mean that the courts ought to adopt Harrison Bergeron-like rules that level the playing field by imposing artificial impediments on lawyers smart enough to follow developments in their field of specialty." Boggs and Brooks, supra, at 17.

poor litigants" (Kozinski Comments, at 1), it is hard to conclude that this political plaint is not, indeed, "exaggerated" and "misplaced." Id. at 16.

6. Only Four of the Thirteen Circuits -- the Second, Seventh, Ninth, and Federal -- Still Refuse to Allow Citation of Their Unpublished Opinions; And Now District Courts in the Second Circuit Are Citing That Circuit's Unpublished Opinions

In deciding whether to adopt a uniform rule for the Federal Circuit Courts of Appeals, it is highly relevant, of course, to take account of what the circuits are now doing. There is a clear trend toward citability, with the result that nine of the thirteen circuits now allow citation of their unpublished opinions (apart from related cases, where it is always allowed).[11] See Barnett II at 474-476. I so reported in my second set of comments in this proceeding, noting that the Second, Seventh, Ninth, and Federal Circuits were the remaining holdouts. Id.

There is reason now to suggest that one of these holdout circuits, the Second, may be on the way to changing its position. The facts are reported by Ira Brad Matetsky, Esq., in his Comments filed in this proceeding on February 10, 2004, and his article attached to those Comments. See Ira Brad Matetsky, Ignoring Rule 0.23: Citing Summary Orders in the Second Circuit, N.Y.L.J. 4 (Feb. 9, 2004). Mr. Matetsky points out that Second Circuit Local Rule 0.23 has provided since 1973 that the court's "summary orders" -- orders accompanied by brief written statements, which the court uses to resolve about 60 percent of its cases -- "shall not be cited or otherwise used in unrelated cases before this or any other court." 2d Cir. Local Rule § 0.23. This is because the summary orders "do not constitute

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[11] Judge Kozinski's cavil that most of the rule changes "impose some limitations -- such as the requirement that there be no published authority directly on point" (p. 11), seems irrelevant, since FRAP 32.1 could and should allow individual circuits to impose such a requirement. See Barnett II, at 496-497.

formal opinions of the court and are unreported or not uniformly available to all parties." Id.

Nevertheless, within the past two years, three district judges in the Second Circuit -- Senior Judge Charles S. Haight, Judge Gerard E. Lynch, and Judge Kimba M. Wood -- have cited and relied on summary orders of the Second Circuit. Four other district judges then have cited the same Second Circuit cases, and a visiting district judge from another circuit has cited two others. One of the district judges, Judge Gerard E. Lynch, has explained:

There is apparently no published Second Circuit authority directly on point for the proposition [at issue]. In the "unpublished" opinion in Corredor, which of course is published to the world on both the LEXIS and Westlaw services, the Court expressly decides the point . . . Yet the Second Circuit continues to adhere to its technological[ly] outdated rule prohibiting parties from citing such decisions, Local Rule § 0.23, thus pretending that this decision never happened and that it remains free to decide an identical case in the opposite manner because it remains unbound by this precedent. This Court nevertheless finds the opinion of a distinguished Second Circuit panel highly persuasive, at least as worthy of citation as law review student notes, and eminently predictive of how the Court would in fact decide a future case such as this one.

Harris v. United Federation of Teachers, 2002 U.S. Dist. LEXIS 15024, *2 n.2 (S.D.N.Y. 2002); see also Security Insurance Co. v. Old Dominion Freight Line, Inc., No. 02 Civ. 5258 (GEL) (2003) (Lynch, J.) ("the Court of Appeals prefers to pretend that such 'unpublished' opinions . . . do not exist").

Mr. Matetsky also reports finding fifty instances in which federal district judges in New York "have noted that counsel cited a Second Circuit summary order in violation of the rule." Matetsky, supra, at 6. It is impossible to know how many parties and judges have cited such orders without that fact's surfacing in a court opinion.

With at least seven district judges in the Second Circuit citing and relying on unpublished summary orders of the Circuit, and with an unknown number of litigants doing so as well, it may be suggested that citability is the present practice in that circuit at the district court level. With one of the district judges in addition openly criticizing the Circuit rule that prohibits such citation, and with the Second Circuit itself remaining silent (in the rulemaking forum as well as in adjudication), it soon may be suggested that the court of appeals has acquiesced in what the district judges are doing, and has de facto abrogated its rule. Such a conclusion would draw support from the rule itself. The reason given for and by the rule is that summary orders "are unreported or not uniformly available to the parties." Local Rule § 0.23. That may well have been true in 1974, when the rule was adopted, but it is not true today, when the summary orders are both reported and uniformly available -- when, as Judge Lynch put it, they are "published to the world on both the LEXIS and Westlaw services." The need to save shelf space that originally animated the rule also no longer applies in the online era. The reasons for the rule having expired, the rule should as well. Thus it may be that adoption of FRAP Rule 32.1 would not change the citation practice as it presently exists in district courts of the Second Circuit.

7. Fears of a Crushing New Burden of Research Resulting form Citable Unpublished Opinions Ignore the Way Legal Research Is Done Today and the Experience of Both Federal and State Jurisdictions

Finally, Judge Kozinski and others claim that making unpublished opinions citable would impose a crushing new burden of research on attorneys and courts. As Judge Kozinski puts it, while noting that unpublished dispositions in the Ninth Circuit outnumber published dispositions by a factor of 7 to 1,

Once all of these cases become citable authority, lawyers will be required as a matter of professional responsibility to read them, analyze them and figure

out a way they might be helpful to their clients. All of this will take time and money, contributing greatly to the appalling rise in the cost of litigation. [Kozinski Comments at 12-13.]

This picture of lawyers having to "read" and "analyze" the four thousand unpublished dispositions issued by the Ninth Circuit each year -- one sees a mountain of paper burying the hapless lawyer -- has little to do with the way legal research is done today. [12] (If the fact were otherwise, we scarcely would see the pronounced trend we do see among both federal circuits and state courts toward embracing what would be such a suffocating burden.)

Legal research is done today, of course, by computerized data-base searches. Some data bases are segregated into published and unpublished cases, such as Westlaw's California Reported Cases and California Unreported Cases (which can be combined for search purposes, of course). More often, the unpublished and published cases are included in the same data base, with the unpublished cases plainly marked as such; as Judge Kozinski states, "[e]very single unpublished disposition that appears online has a reference to the local rule limiting its citability." Kozinski Comments, p. 18. See, e.g., Westlaw's data base of Ninth Circuit opinions, which includes both published and unpublished ones.

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[12] The same solecism comes from Professor Kelso in his article quoted by Judge Kozinski at page 12 of his testimony. Professor Kelso wrote that "if these opinions were published and citable, lawyers would have to search them to confirm that nothing useful was in them, thereby increasing the cost of legal research." (p. 12) Searching sources "to confirm that nothing useful [is] in them" is done today by computers; sources with "nothing useful in them" simply are not reported as search results. (Judge Kozinski mistakenly calls this a "later article" by Professor Kelso (p. 12), when it was dated 1994, seven years prior to the Task Force Report to which Judge Kozinski refers. See p. 12. In 1994, computer searching was not nearly so familiar and universal as it is today.)

So if there are 4,000 unpublished cases added annually to the data base, this means, not that the attorney must read or examine those 4,000 cases, but that a given search may retrieve more cases than previously. The attorney may simply narrow the search terms accordingly. Among the retrieved cases, the attorney will prefer published cases to unpublished ones (other things being equal), viewing unpublished cases more critically and using them more rarely, both because of court rules frowning on their use and because the published cases in any event will remain superior as precedents. See Barnett I, at 22. Any additional research time required by the presence of unpublished cases in the data base thus should be small and could well be imperceptible.

The cost of any such time may well be outweighed, moreover, by the value to the client, the court, and the legal system of finding a case that is in point on its facts. As Judge Richard A. Posner has written, "Despite the vast number of published opinions, most federal circuit judges will confess that a surprising fraction of federal appeals, at least in civil cases, are difficult to decide not because there are too many precedents but because there are two few on point." Richard A. Posner, The Federal Courts: Challenge and Reform 166 (1996). See also Harris v. United Federation of Teachers, supra.

Consider the experience of one state, New York. New York's intermediate appellate courts (Appellate Division and Appellate Term) decide some twelve thousand cases per year. See State of New York, Twenty-Fifth Annual Report of the Chief Administrator of the Courts for Calendar Year 2002 (www.courts.state.ny.us.%2F), at 6, 7. All these cases are decided with opinions -- of which some 92 percent are brief "memorandum" opinions, averaging about a page in the printed reports but often running a good deal longer. All the Appellate Division decisions are published in the Official Reports. And all of New York's appellate decisions, all 12,000 of them, are citable.

These 12,000 new opinions per year are more than twice the roughly 5,000 annual dispositions in the Ninth Circuit. See Kozinski Comments, p. 6. How do New York lawyers and judges survive under this supposedly crushing burden of cases to research? I put this question recently to about a dozen lawyers, judges, and court administrators in New York. They uniformly report that it is simply no problem. The people I questioned had differing views about the ubiquitous Memorandum decisions -- some finding them generally too brief to be useful in research -- but all agreed that the Memorandum decisions are often cited and that they can be useful, "especially when the facts are right on point." Most important, no one in New York voiced any problem with the task of researching all those citable decisions. It used to be difficult to research them, before computers came along, but now it can easily be done on line, one lawyer said.

Nor is New York marching to its own drummer. Texas last year abolished its category of "unpublished" appellate opinions in civil cases and made all those cases citable. See Barnett II, at 479 n. 37. Back in the federal courts, other circuits that allow citation of their unpublished opinions have numbers comparable to the Ninth Circuit's volume -- some 3,000 unpublished opinions yearly in both the Fifth and Eleventh Circuits. [13] In the light of the experience of these state and federal courts, Judge Kozinski's fear of great new burdens of research time being imposed by making opinions citable may well be chimerical.

CONCLUSION

The Advisory Committee should propose that FRAP Rule 32.1 be adopted. The fundamental reason, never addressed by Judge Kozinski, lies in the Committee's recognition (p. 27) that no-citation rules are "wrong as a policy matter" -- that the federal courts cannot defensibly prohibit lawyers and litigants from telling a court what another court (or even the same court)

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[13] Judicial Business of the U.S. Courts, Table S-3 (period ending Sept. 30, 2000) (www.uscourts.gov/judicialfactsfigures).

has done in a similar case, and that judicial decisions should be fully in the public domain. Now that online capability is available to obviate any burden of additional research or additional shelf space, and now that nine of the thirteen circuits have "voted" to allow citation of their unpublished opinions, the Judicial Conference should not perpetuate conflict among the circuits on such a fundamental question.

If it is considered, however, that opposition from one or a few circuits prevents adoption of the proposed rule at this time, then I would make an alternative proposal: That the Advisory Committee hold this issue in abeyance -- put its proposal on the shelf -- for two years. Developments are moving so rapidly in this area, both in technology and in rule-making by both state and federal jurisdictions, that the picture could well look different, and clearer, two years from now. At that time, based on the trove of Comments which this rule-making proceeding has produced and perhaps on supplemental comments reflecting the two-year hiatus, the Committee as then informed could decide whether to recommend adoption of the proposed Rule.

Respectfully submitted,

Stephen R. Barnett
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cc: The Honorable David F. Levi
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