THE APPELLATE PRACTICE SECTION OF THE BAR ASSOCIATION OF S.F.

PRESENTS

UNPUBLISHED DECISIONS: CAUGHT BETWEEN SCYLLA AND CHARYBDIS

APRIL 24, 2001

MR. DAVIS: Thank you for coming. We have a great panel for you here today, and I know that you're already familiar with most of them, but I just can't resist saying a couple of words and picking out some of the highlights because it's so much fun.

You know, Judge Kozinski is one of our most famous judges. And you probably know he got out of Communist Rumania when he was 12 years old, and then his fertile mind just bloomed at UCLA, one of UCLA's proudest moments, and then he clerked for Judge Kennedy on the 9th Circuit, and then Chief Justice Warren Berger. He was chief judge of the Court of Claims, and then he was appointed to the 9th Circuit in 1985. And at that time he was the youngest judge to be appointed to the circuit court since William Howard Taft in 1892. And his writings and speaking are legendary. I'm sure most of you have heard him before, and we really appreciate Judge Kozinski taking the time to be with us here today.

And Professor Barnett is also one of our best known law professors. He is a product of Harvard. Clerked for Judge Friendly on the 2nd Circuit and then Justice Brennan. He was in the Solicitor General's office, where he

argued and briefed cases in the United States Supreme Court, and he's been at Boalt since 1967, and is a frequent contributor to the literature on American appellate courts.

And our third panel member, Andrea Asaro, your current co-chair, may not be a famous judge or professor quite yet, but she is an outstanding appellate lawyer and has a very interesting and distinguished career. You probably all know this, but I didn't know that she has a Ph.D. in politics from Princeton, went on to study law at the Sorbonne, and then taught at UC Santa Cruz before becoming a lawyer by going to the University of Pennsylvania Law School and then clerked for Justice Mosk. And she's currently a partner in the San Francisco firm of Rhodes and Dean and Asara here in San Francisco.

Now, the title of our program today you'll notice is Scylla and Charybdis. And you remember, that's where the ancient mariners had to go through the passage in the Spring of Siena, where Scylla is a whirlpool on one side and Charybdis is the rocks on the other side. And we used this title because all of us judges, lawyers, commentators who worry about the appellate system, face the challenge of being sucked into the whirlpool on the one hand, with too many cases to write opinions in, and hitting the rocks on the other side by sacrificing important jurisprudential principles when that is not done.

For the most part, lawyers and commentators argue that courts should write decisions with reasons in all cases and that those decisions should all be citable either as precedent or for their persuasive value. They argue that important principles of jurisprudence are sacrificed if that's not done.

Judges, on the other hand, often argue that they would drown in a sea of cases if they had to write careful decisions with reasons suitable for publication in all cases. And since they can't write that kind of opinion in all cases, they should be able to designate only those cases which they deem suitable which are published, meaning they have precedential value or cited. And they also argue that most of the cases that they decide are routine cases that are decided by well established precedent, and it would add nothing to the development of law if those cases were published or cited.

Now, there are at least three broad issues that I'd like you to keep in mind when you hear this discussion today. One is whether all decisions should be in writing with the reasons stated.

Second, whether all decisions should be published in the official reports. And this is code for having precedential value as opposed to being available informally, electronically, on the Internet, or some other way.

And third, whether all decisions should be citable by the parties and courts either as precedent or as persuasive form.

Now, one point on terminology. The word "opinion" is a word of art in the 9th Circuit meaning only those dispositions designated for publication. So to avoid confusion, we will refer to all written dispositions on the merits as "decisions," regardless of whether they were designated for publication or how long they are.

Now, we're required to give you some paper for CLE purposes, but I hope you'll appreciate this. We've been mercifully brief and given you very little stuff that you'll have to carry home. You're probably aware in the Anastosoff case holding that the Constitution requires that all cases have precedential value. And we gave you a copy of that to refresh your memory. And we included a copy of the 9th Circuit Circuit Rules 36-2 and 36-3 dealing with publication and citation.

Our panel today will focus on the federal circuit courts of appeals, not state law. So we will not be discussing California practice or the practice of any other state.

And finally, we ask that you hold your questions until the end, and we will try to reserve a little time to take questions from the floor. And please, no speeches or

long, anecdotal stories. So let's get to it.

Now, before we discuss just exactly which decisions should be published or citable or both and why, we need to spend I think just a minute to see if we agree on the premises. Why do we have written decisions for reasons stated? And why do we cite prior decisions in briefs and in decisions? Now, you all know about stare decisis. And this may all seem like elementary law school stuff, but those reasons, not all of which are obvious, turn out to be the foundation of a great deal of argument on this issue. And I think it helps if we have them in mind before we get to the tough questions.

So Professor Barnett, from your perspective, is it important to have written decisions for the reasons stated? And what purposes do they serve in the grand scheme?

PROFESSOR BARNETT: I feel like a law student here for examination.

Yeah, of course. Today the question isn't exactly that. But yes, I think it's important to have written opinions, for a number of reasons. First, looking at written opinions. They explain to the parties why the decision came down the way it did, which may or may not make the parties feel better about it, I suppose.

It provides some assurance that the decision is based on rational, legitimate criteria, the ones that can be

put in writing, rather than less permissible ones. It enables the decision to make law for future decisions. It tells the public something about what's going on in their courts. It contributes to stability in the law when the decisions are based on previous ones. It contributes to efficiency since it's easier to make a decision if you lean to some extent on what other people have done.

So there are a number of reasons why we have written opinions, I suppose, and why those opinions should be published and cited.

MR. DAVIS: Andrea, I read that as early as 1820, lawyers started complaining about there being too many opinions out there in the books they had to read. But from the lawyers' point of view and the parties' point of view, what should be done?

MS. ASARO: Well, I guess it's often said that when the courts are -- appellate courts are deciding cases, that they are doing essentially two things. One is error correction, or results of mistakes. And the other is making law. And I think from the point of view of our clients, obviously the most important thing they want to know is the error correction task. They want to know who won and why. Obviously, if someone in the 9th Circuit who wanted to be on the receiving end of a decision, spend a lot of time. They want to know -- the appellant wants to know if they've lost,

why this report was right; and obviously, the appellee wants to know why this report was wrong. And I think that's not to be minimized. Our clients want to know what happened and why. They have been in litigation a long time at this point.

The second thing that I think a written decision does is it tells the client and their lawyers and their clients recourse is whether -- what the next steps might be. A written decision allows you to tell whether in like cases are being treated alike, whether established precedent in fact is being applied, whether there's a conflict within the circuit, whether further review should be considered, or whether perhaps the only recourse is to the legislature.

And I think the next steps or component in the analysis really is about accountability. A written opinion by an appellate court serves the role of accountability.

I also think that when we start thinking about the next steps aspect of this and the possibility of further review, we really are again looking at the law-making function of the appellate court decision.

I happen to be of the view that when appellate courts are making decisions, they are applying established precedent to the new facts that are before them. And unless the precedent is identical to the case in hand, I think inevitably the law -- the precedent is just being transformed or expanded to a certain extent and that therefore the new

case is in a certain sense making the law. And in that sense, I think, again, lawyers on behalf of their clients want to be able to cite those cases to the extent that they're helpful. So again, we come back to the client's perspective.

Also, to the extent that we are -- that the new case is in effect making new law in whatever fundamental sense, that has to also advise our clients as to future exposure and liability, and in that sense it communicates these new decisions I think affect clients' future conduct, and we may advise them as well to that.

MR. DAVIS: Judge Kozinski?

JUDGE KOZINSKI: I agree with most of what occurred -- most of what I heard, but there are some additional factors leading in part to what has been said but may be blocked out separately. Written decisions, written, published, settled decisions are the means by which higher courts will control the behavior of the lower courts.

The United States Supreme Court has not only 13 federal circuits, but -- I forget the number -- 90 district courts with appellate and federal judges, and of course, state courts also have to apply federal law. And so for it to set an intelligible body of law as to issuing the decisions and opinions that set forth the principles and ways of analyzing the law as you apply the precedents of the law

as to how you view future cases. And the same thing, of course, is true with the circuits.

The issue of written opinions, published opinions, citable opinions, give guidance both to ourselves, future panelists of our court, but also many district judges, majesty judges, magistrate judges, Social Security, administrative judges, other agency actors that come within our jurisdiction. It is a way of explicating and giving new assistance to the law.

MR. DAVIS: Like all cases that the circuit courts decide don't get dispositions, don't get decisions, and all cases that are in writing with reasons stated, and all of them don't -- aren't certified for publication so that the parties can cite them. Why can't we have it all?

JUDGE KOZINSKI: Well, for the same reason you can't have the United States Supreme Court can't grant cert and decide every case on the merits.

It would be very nice if every case in every federal issue were ultimately decided by the 9 justices. Then we would know. We would have ultimate justice. Often the cases have been delegated, and what you have to do is come up with a body of law that's consistent and applicable to future cases. And writing something that is of precedential significance is simply a tedious, time consuming, exacting task; and not only for the judges

involved, but also for the whole court. A panel of our circuits, when it speaks, binds not just the three judges, but every other panel in the circuit in the future of each such case, unless there is an en banc vote and hearing which is an enormously involved process. So the first to hit an issue and publish opinion may in fact move facts into law.

We had -- I think you all know this. We had 9200 cases last year, and we have something like 30 to 35 judges in our court, if you include senior judges, and you have to divide that by three, because all mem dispositions are decided by the three judge panels, so essentially 10 panels, you do the math, the number comes to something like 415 case dispositions a year. I don't think it's possible to have a consistent body of law where you are writing 415 cases where each judge participates in binding disposition more than once a day, every day of the year, weekends and holidays, Christmas, Hanukkah, 4th of July. It is not possible. So what happens is you get -- you have to make choices. And you want to write something that communicates to the parties as to why they won or lost. But when you're speaking to the parties, you're speaking to people who know the case and know it very well. So all sorts of things determine this, and there all sorts of things where you can be much less careful about it.

Just to give you a couple of examples. I was

thinking about this when I was working on some cases, and some of you might be familiar with Title VII law, and you'll know that in a case of retaliation, an employer's level of liability, liability of employment_____sexual harassment, it depends on whether it's a supervisor or non-supervisor.

I was in the middle of writing on what turns out to be a mem dispo a while back. I noticed that we didn't make clear whether this one supervisor or employee was a supervisor or not a supervisor. And there was no reason to do it. It was not an issue in the case. If you look at the disposition, it was, I forget, you know, it was possible to construe _____ As it happens, it was not an issue in the case. There was nothing that was faced. There was nothing that was contested among the parties.

So thinking only about the parties here, and knowing that they know what the issues are and what the cited facts are, I decided not to go back and deal with that issue, which is basically a non-issue, something totally between these parties. Were I writing an opinion, I would be careful to write what level of supervisor that person is or what the level of employment, and whether that is a visiting supervisor, first level supervisor, second level supervisor -- all of which would make a difference on the subject of the law. Becomes an issue in and of itself.

So if you read mem dispos -- they'll be out, if it

isn't already out, no telling when this happened, thinking about it, you know, the case will be out. It'll be out soon.

You may, when you try to in time apply it to you, it would in fact be possible to argue that they apply the wrong standard. They apply the standard to -- the supervisor standard to somebody who's not, and vice versa. And if you wanted to make an argument, you know, you might make some headway.

There are other cases -- and there are dozens, scores of cases. I was reviewing _____a supervisor chambers where secondary review de novo, and reviewing de novo we are _____what. This type of case, the case is not exactly on one point. Maybe it's a de novo standard, maybe it's not a de novo standard. Maybe it is an obvious discussion standard or a somewhat substantial evidence standard review. And, of course, that makes a difference in a close case. But this was not a close case. You could argue de novo until tomorrow. You'd get the same result. It didn't matter whether you applied the reasonable use of discretion. It didn't matter whether it was going to be used for substantial evidence. It didn't matter whether you did it de novo. Absolutely clear what the result would be.

Now, if this was citable, I would have to spend time in figuring out what exactly the standards do need to apply. But why do it in a case that makes no difference?

Isn't it more prudent, isn't it more appropriate in terms of judicial administration, in terms of speaking dicta, to find a case where the standard of review makes a difference and then publish an opinion in the case where you apply one standard that comes out one way, you find another standard that comes up another way? Then it can be said you applied the standard of care.

We get things like that all the time, where things are perfectly fine for the explanation of the parties. It is not wrong, it is not a lie. It is simply not the kind of disposition that can be trusted to be used by somebody who does not know the fact situation as it is. And if in every one of these cases that we write, as I said, I dispose of over 415 cases, I have to worry not only about communicating to the parties, but I also have to worry about communicating to all those other people out there who might misunderstand, might not know all the facts, might read things into language which we wouldn't have put there. You would wind up spending an incommensurate amount of time writing these dispositions. But in fact we do. And what in fact we do do right now a general order that commands us to throw the facts out. It's General Rule 4.3. Go back and read it. And you may not have the case that in our circuit that gives you against a large client and is a very great, of course, new client, and we would like to make sure the court has a couple of beginners

stands against something like, I'm sure no one has presented no evidence of the invocation of order 984 was defective. When the justice objected because of contention that he wasn't properly placed in exclusion proceedings. Because I'm sure he was probably placed in proceedings upon his attempted re-entry into the United States. We already lack jurisdiction to entertain this motion to reopen the prior vocation proceedings. Citation from the statute. That's what you get.

I would think it would be more satisfying to the parties and to the lawyer, to have them know that we do understand the facts and that we do understand the -- that we have in fact taken a close look at the case. But I am not with my colleagues. Not everybody loosely take out those facts when they make mem dispos, precisely because of the pressure from lawyers, that when you put them in, they're going to say, "Aw, how come I can't cite it?" Well, the reason you can't cite it is because it's a lie. Because it is not a true statement of what happened in the case that can be understood. It's an indication to people who know the case, and it is not a fair and accurate representation of what the case is about and communicated in the case.

MR. DAVIS: Steve, you've been nodding. What's wrong with that?

PROFESSOR BARNETT: Well, I don't know that --

There may be nothing much wrong about these particular examples that Judge Kozinski has given, and they are part of a larger argument that there are too many -- there's too many unhappy consequences if all mem dispos can be cited. In the cases that judge put, it seems to me you can argue that where is the greater harm? If the unpublished opinion is really that unclear, nobody will want to cite it. If they want to cite it, the cite will be easily shot down.

But more broadly, I think the short answer to these claims that the sky will fall in one way or another if all unpublished decisions are citable lies in looking at the practice and the experience of the other federal circuits. The fact is now that of the 12 territorial federal circuits, a clear majority of them, 7 out of the 12, not counting the 9th Circuit -- counting the 9th Circuit as one of the 5, not one of the 7 -- 7 out of the 12 now do allow the citation of unpublished opinion. They all seek to discourage it by calling it disfavor, and I would agree it ought to be discouraged. But 7 of the 12, a clear majority, a growing majority that's up from 2 in 1994, do allow the citation. They allow it either on the basis in two circuits that the unpublished opinion is thought by counsel to have some precedential value. In four other circuits they allow it on the basis not that it's precedent. They specifically say these decisions are not precedent. But they may be cited if

they are persuasive. This system apparently works in the other circuits. One hears no complaints about it. The number of circuits allowing it has been growing.

This kind of 7 out of 12 was before the Anastasoff opinion came down last year, which opinion has certainly, if nothing else, strengthened the case for allowing citation of unpublished opinion. So I think what happens when they can be cited is that they become a sort of second class precedent, which I think they should be. I think they're not necessarily binding. I think they ought to be treated as second class precedents, much as the Supreme Court, U.S. Supreme Court treats its summary dispositions. But nonetheless, they are a necessary safety valve. So if there is an unpublished opinion out there that counsel really thinks is helpful to the client or if there is something going on that the public ought to know about or if there are fears of unequal decisions and other problems in a world where 80 percent of our law is secret law that cannot be cited to another court, allowing the citation provides a safety valve on that, and apparently it does not in fact create the kinds of problems that Judge Kozinski is worried about.

MR. DAVIS: Andrea, Judge Wald said about unpublished decisions that they increase the risk of non-uniformity, allow difficult issues to be swept under the

carpet, and result in a body of secret law, practically inaccessible to many lawyers. Is it necessary for appellate courts to allow citation of all merits decisions to legitimize the judicial branch of government in the eyes of its citizens and of the parties?

MS. ASARO: Well, I guess the short answer from my perspective is yes; but I need to qualify it. I agree that there are -- I'm not sure who I agree with or disagree with, but I understand what Judge Kozinski is saying that there are cases where indeed this is so routine that this is a big plus, but I think we all know of cases.

JUDGE KOZINSKI: I didn't say anything like that.

MS. ASARO: I'm sorry. I always -- But I think we all have those kinds of experiences. I don't know. But I certainly think anecdotally there is evidence that we have had experiences where unpublished decisions were not of the sort of routine, non-precedent making kinds of cases. And in those situations I think it is extremely frustrating, and we do feel as though by not publishing a decision the court is either avoiding a difficult decision or sweeping it under the carpet. I think that's a -- I think that if the issue is so complex and so controversial that three judges are having so much trouble with it, then surely it warrants the kind of effort to go into a reasoned decision that should be published. At least that's my view. And again, from the end

user point of view, the client and the attorney who spent all this time on the case, it certainly is not very -- doesn't give you a great deal of respect for the system when what you perceive to be a case where really there is an issue lurking, where it's not a routine case, to get a two line decision that is non-published and uncitable.

MR. DAVIS: Judge, I'm going to give you a chance to respond, but before you do, let me lay another one on you to help that out. Yesterday a decision came down from the United States Supreme Court that I think bears on this issue, and we know about it, and my partner Katherine Banky was involved in that case. And this was a retaliation Title VII case that came out of Nevada, and the district court granted summary judgment for the defendant. The 9th Circuit reversed with one judge dissenting in an unpublished opinion, and which we argued was contrary to the law of other circuits and also contrary to the law of this circuit. The Supreme Court granted cert and issued a preferring opinion the same day, without further briefing and argument. And I think the implicit message in that was unhappiness that this was not only decided that way but that it was decided in an unpublished opinion. That's Clark County School District versus Shirley A. Breman. And the problem is that we've all had circumstances where opinions are not published and they don't meet the criteria, and it happens enough that it's

disturbing.

JUDGE KOZINSKI: Well, you know, in Clark County, Clark County was _____ of the week and there was nothing in Clark County from the disposition of our court _____ into the law. It applied the standard law of our circuit in a really weird way. And maybe they should have published, maybe they should not have published.

What it does show is that non-publishing does not mean escape from Supreme Court review. We do -- occasionally we get reversals on published dispositions. I've gotten reversals on unpublished dispositions. I follow circuit authority, plain, on point case authority. In the meantime, since our opinion on point had come down another circuit I guess built another conflict and they took our case and reversed. Short of going in bank in a case like that, there's nothing you can do.

Now, let me talk to Steve. He has been talking about all these other circuits and doing business. He doesn't tell you who they are, these circuits. He doesn't tell you that the circuits that we like to compare ourselves to, that we think are of our way, the 7th Circuit, the 2nd Circuit, the 1st Circuit, the D.C. circuit, federal circuit, all have -- all have strict nonpublication rules. I have sat for some judges from the circuit that do allow citations, and my impression -- and I can't really much more than impression

because we don't regularly sit with other judges. They see us every couple years. Their approach to precedent is quite different from ours. And today precedent is a much more flexible concept. We have, for better or for worse, a rule in a case called Antonio, Supreme Court case, I don't know, it says that if you run across two precedential published opinions that are conflict, you may not decide the conflict. You can't go over one to another. You have to call for it en banc. There's no other mechanism to resolve it. A court our size and the number of judges that we have, the chances of stuff like that happens even in unpublished cases actually turns out to be more often than you think. If you counted in the additional 85 percent, additional 4,000 unpublished dispositions where that could happen, you can do nothing but take in cases en banc that proceed to conflict and bring earlier dispositions.

But it is not -- Again, the lawyers can look at something and think, gee, this case is directly on point. And that's because you're looking at the disposition issues that were meant to be read by the lawyers in the case. There are things we put in and things we left out that we would not have put in and would not have left out if we had thought they would be read by other eyes. That's why I draft an opinion in my opinion, I only draft 44 or 45 of them. I'll show it to you if you want it. Not a lot of drafts. It is

not on its way out the door when you draft 44 or 45. It is close. It hasn't even been reviewed by my colleagues. And the reason is that everything you say in published opinion, everything that's precedential, you have to think carefully how is a clever lawyer going to take it and use it. You have to find yourself saying things like we're not deciding this issue, we're not deciding that issue. If you add a fact, the _____you're somehow permitting it or explaining it. Because, again, it will be read, and it will stand on its own.

I don't know how the other circuits run their business. I do point out, however, the circuits who do this decide something like a thousand cases or close to a thousand cases per judge. The 11th circuit decided 848 cases, have 848 cases per judge. The 5th circuit had 714 merit cases per judge. The 4th Circuit, 571 case dispositions per judge. And it just boggles the mind that you can write, a judge participates in two cases, not one case a day, Christmas, holidays, 4th of July and Hanukkah, but two of them every day where you sign off and make the law that will then bind everybody. You know, maybe they are super people. I don't know. I met Ms. Jones. Nice woman. But I don't know that I think they are super people.

I do know that we take this very seriously, and that I can tell you how it goes in our court, and I can tell

authoritatively in our court that this is something that a number of our judges agree with us, and that if we were required to have these things cited, we would change our way of doing business substantially. Maybe other circuits don't care. Maybe other circuits don't take precedents as seriously as we do. Maybe Antonio versus Warren Pact is not an issue. But it's already started.

General Rule 4.3 came down about five years ago. If you look at the length of our mem dispos are getting shorter and more compact and more compact, it's because of pressure of the bar. It's because we are afraid one of these days our colleagues are going to change the rule. And then we're going to have this whole body of law that nobody reviewed and didn't go through the fact process, didn't go through the normal memorandum process we have for publishing opinions, and then all of a sudden they will become binding on everybody.

PROFESSOR BARNETT: Well, yeah. They don't have to become binding. I think if most mem dispos were citable, you should change the rules. For example, the rule that a panel cannot overrule a decision but only the en banc court can. That rule ought to be changed so that panels can overrule unpublished decisions. The rule that the panel can't resolve --

JUDGE KOZINSKI: Wait a minute, Steve. Let's

discuss that. How do you change that rule? What do you have, choosing panels? You have different panels, different courts of appeals making different law? What do these three judges do? What do the lawyers do? Do they say, oh, if I'm on this nutty fudgy panel and they go one way, here comes Kozinski, Kleinfelter or Scanlon, you know. They have two different parts of the law. Both on each other, one thing after another.

PROFESSOR BARNETT: Well, once a published opinion is overruled by a panel in the published opinion, then that panel decision becomes the law, and the unpublished decision is no longer a precedent of any sort.

JUDGE KOZINSKI: It's a --

PROFESSOR BARNETT: They could be treated as second class --

JUDGE KOZINSKI: In the meantime, unpublished is read by district judges, it's read by bankruptcy judges, it's read by magistrate judges, and it has not _____

MS. ASARO: It's read by lawyers.

JUDGE KOZINSKI: It's read by lawyers. That's right. It's read by lawyers. It shouldn't be. It's meant as a letter from our court to parties to come -- And we would tell them much more if you didn't insist on sharing it, if you didn't insist on using it in the next case, we tell you a whole lot more about what we're doing. The Babina case, look

at my -- and you say, oh, the three judges decided this point. It is not a fact. If we really meant this for you all to look at and apply and derive precedents from it, we would be looking further and reviewing it more.

MS. ASARO: Well, rather than speaking to that, actually I had a couple of thoughts while you were speaking, Judge Kozinski.

First of all, the notion that the unpublished mem dispo is a letter to the parties I think ignores the fact that out there in the real world there are computers. A lot of other people are reading this mail. And maybe that even though you can't cite it, these unpublished decisions are really informing how people think about how to litigate cases.

JUDGE KOZINSKI: No problem.

MS. ASARO: Particularly institutional clients.

JUDGE KOZINSKI: So if you get a good idea, use it. We give it to you for free. But what you want, you want is, you want the added benefit to say, oh, those three judges endorse this argument. Were those three judges going to endorse that argument, they wouldn't put -- they would publish something.

MS. ASARO: I understand that point. But I was trying to make a different point, which is that there is some inequity I think just by virtue of the fact that the large,

repeat, institutional client such as the government, for example, or the insurance industry, has ready access to these unpublished decisions. They read them. They reference them. They keep records of them. They know exactly what's up. And they really have a whole sort of hidden jurisprudence at their fingertips that the individual plaintiff who comes along and files their one case doesn't really have access to them. And I think that's an unfair mistake.

JUDGE KOZINSKI: You know, I've heard this for years, and I've never found it persuasive at all. First of all, they're now all available in Lexis and Westlaw, so anybody who wants it can get it. So this thing from hidden jurisprudence is -- sort of doesn't exist anymore. But it is only hidden jurisprudence to the effect -- to the extent that these decisions are a fair reflection of what the thinking of the court is. And for reasons I'm explaining. I can go to 20, 30, 40, a hundred examples in writing mem dispos. The things that are put in mem dispos do not reflect the full thinking of the court or even the most -- on the most important issue. In the case where we don't decide the most important issue made is the standard of review. But in the case where the standard of review is met no matter what it is, all you decide is that this case is a loser or winner, regardless of the standard. Nobody really has said this is the standard of review. You take away from it the idea that,

oh, three judges have decided the standard of review is de novo, they need this one.

MS. ASARO: Then I think that can get into the problem of if that's all that the mem dispo's saying, and if it is so limited and if we're not supposed to read more into it, then what is it the mem dispos is saying to the litigants in the case? What is it that the mem dispo is not saying? How satisfying is it to be on the receiving end?

JUDGE KOZINSKI: It's saying we have reviewed your case by the most generous standard known to the law and you lose.

MS. ASARO: What happens --

JUDGE KOZINSKI: Doesn't mean that in a close case, that will be the standard. It means that it could be an open question, could be a closed question, could be a difficult question, and we're going to reserve it to decide on the case where when you review for the most generous candidate you come up one way, and you review if to the less generous candidate you come up another way, and that's the case that's published.

PROFESSOR BARNETT: So the mem dispo is a decision. It's an application of the law of fact. Somebody wins, somebody loses. That's law. You ought to be able to rely on that in a future case.

JUDGE KOZINSKI: You say that why should it ought

to be. You say it ought to be, like that's, you know, it's words from God. Explain it. I mean, tell me why it ought to be.

PROFESSOR BARNETT: Because the law consists largely of the decisions of the court. It's not what the court says --

JUDGE KOZINSKI: But the mem dispos don't reflect the decisions of the court. They reflect the result in a particular case that may or may not contain all of the decision that went along the way to the just result. In the case where the standard makes no difference, you have made no decisions in the standard. All you have done is decided that no matter what the standard, this case loses.

PROFESSOR BARNETT: How do you justify the proposition that you're an attorney, you have a client, you have a case. You know of a prior decision of the court right on the same facts, the very same court, and you think it would help your client, and the rule says you cannot tell the court about that? Is that really justifiable?

JUDGE KOZINSKI: Absolutely. What's the problem with that?

MS. ASARO: Let me tell you what Judge Holloway in the 10th Circuit said. Judge Holliday in the 10th circuit said, "No matter how insignificant a prior ruling might appear to us in the court, any litigant who . . ." No. I'm

sorry. "Any litigant who can point to a prior decision of our court and can demonstrate that he's entitled to relief under it, should be able to do so as a matter of essential justice and fundamental fairness. To say . . . " I didn't get that right. Sorry.

"To deny a litigant this right may well have overtones of Constitutional infringement because of the arbitrariness, irrationality, and unequal treatment of the law."

JUDGE KOZINSKI: Wow. That's so clever.

MS. ASARO: So what?

JUDGE KOZINSKI: So he says that. So what if he says it?

MS. ASARO: You're asking for the source, and --

JUDGE KOZINSKI: No. I'm asking for a reason, not a quote. I'm asking for a reason. Why should you be able, where is it written that because the court in a case of a particular party decides a particular way or what may or may not be the rationale that's reflected in the opinion or on the disposition, on the decision, that other parties can then scour that thing for meaning, look for negative pregnants the way lawyers do. Lawyers don't just say, hey, you know, my client's name is Peter, just like this client's name, you know, there are four of them, just like 4, you know, 4 -- they say, no, they don't do this. They take that precedent

and they say, look what it did here. They apply the standard of review. Oh, look at this case. They treated this guy, the supervisor, even though if you look at facts two and three and four that are in here, they are not the supervisor, and therefore somebody who looks just like this guy ought not to be the supervisor. You know, that's what lawyers do. They don't just say, oh, this is a hundred percent. They want to argue from precedent.

We said before good, lawyers do that, and that's why we have opinions that set out cases where we have prepared them to be argued from precedent. We set out principles. We think ahead about how the next case or the next case and the case after that will be decided or the point to be raised. We limit it so we don't overreach beyond the facts of the case. At the same time we try to set a principle in terms of a way so that when it gets to be by the next time you would more be able to get reason out of it. And that's a tough job.

PROFESSOR BARNETT: Well, you want the reasons? First of all, there's a right to equal protection of the law. In a like case regarding --

JUDGE KOZINSKI: You lost that. The California Supreme Court said --

PROFESSOR BARNETT: Let me finish. Another reason is a matter of it's not a Constitutional law or policy when

there's this vast body of underground law where 80 percent of the decisions are not citable to other courts. Things are hidden that shouldn't be, or the public suspects, anyway, that more things are hidden that shouldn't be.

JUDGE KOZINSKI: Those are language, not reasons. It's not hidden. Anybody can get anything off Lexis if they go in and they pay cash.

PROFESSOR BARNETT: It cannot be cited to other courts.

JUDGE KOZINSKI: It cannot be cited to this circuit. If you want to cite it to the 8th Circuit where they love these things, you can go ahead and do it. Okay? That's fine. It can't be cited as the law of the circuit because when our circuit speaks, it sets the law of the circuit. But we speak in an opinion, district judges are not free to disagree in this regard.

PROFESSOR BARNETT: The law is not just what you say, it's what we decide. I thought we all learned that in law school, the first thing in law school.

JUDGE KOZINSKI: Absolutely. But it is not what we say to decide. So that it's a -- the mem dispo misleads as to what actually happened in the decision making process, as it must mislead. Because it is truncated. And that's why opinions are never as short as mem dispos. Because you add facts, you add legal principles, you build up whole structure

of precedential value. Insofar as it gives you a little sliver which is good enough with respect to the parties. It does not in fact tell you what was decided. It just tells you the explanation you gave to the parties, which may be good enough for this case because this case checks out.

MS. ASARO: Should an initial decision as to whether this is going to go to the mem dispo route or not be made by clerks in the cases? I mean, who decides whether this is a case that's headed for the memorandum dispo group as opposed to a case that really is going to make, clarify, modify or whatever the criteria?

JUDGE KOZINSKI: Good question. The decision is made by all three judges on the panel. We have one judge opt out rule. Any judge may insist on publication. There are some cases that go to the screening route, but they present the screening cases, and with some regularity a case gets pulled out of that process and they get published opinions or they get sent to a merits panel or to a more careful merits panel who may want to publish the opinion. You have cases that go to an argument calendar and the judges go in and say, gee, this is as we though it would be, and it sometimes doesn't get argued. If it does get argued, it's argued, it's decided, no, this is not something that merits publication. But the decision is made by the judges.

MS. ASARO: Realistically, though, what hope is

there for a case that's been initially cast to the mem dispo pool for resurrection?

JUDGE KOZINSKI: You know, it's a little bit hard to say what you mean by that. The suggestion is that it goes there. It's _____

MS. ASARO: Right.

JUDGE KOZINSKI: We have experienced staff, and usually when they make a decision to send something there, it's because this is the kind of decision that is correct, and it's one the judge can agree with. If you're saying judges don't rereconsider that decision, then you're wrong.

MS. ASARO: I'm not asking that.

JUDGE KOZINSKI: Well, what are you asking?

MS. ASARO: No. I'm asking to what extent do judges reconsider that decision. And I guess --

JUDGE KOZINSKI: On a regular basis. You know, on a regular basis. Every time we have a screening calendar, there are a number of cases that either get a published opinion or one of the judges will take it back to chambers and work it out and come up with a published opinion, or more frequently will say, no, this is not a screening case because of this and that brief, and then will send it to a merits panel. It happens. And it's something _____ If in doubt in that skinny panel, if in doubt, it goes to a single judge. But the default is it goes to the merits panel.

MR. DAVIS: You know, Judge Larkin, I think he's in the 4th Circuit, said in his article that he himself cites to unpublished decisions in 7 percent of the cases he decides. Very high percentage. And some of the commentators argue that judges that decide the case shouldn't be the ones to decide whether the case sets precedential value or whether it's important for a variety of reasons. Now, how does the panel feel about that issue? Are judges the right ones to decide, or should it be done some other way?

PROFESSOR BARNETT: Well, ideally someone else would be better, but I suppose -- I should think the considerations of efficiency in having the same judges make the decision decide on publishability. I should think they outweigh the greater accuracy you would get from bringing in three new judges.

MS. ASARO: I would guess the judges would be able to say.

JUDGE KOZINSKI: You know, if I did not control, I would simply say affirmed-denied. And I'm not the only one. I would never again be doing something that I did not. Just as simple as that. I cannot be in the business of having other people assign the words that I think are ready to be used as precedent, that I had spent 43 or 86 or 95 drafts going through and thinking about it. I take these things very seriously. I issue opinions. I may not always

be right. I've been reversed by the Supreme Court, but it doesn't land on my record.

But there is usually not a doubt as to what I say, that I may think through the process extremely carefully. And I'm perfectly willing to sign on for reasons that I think approximate that if they are going to the parties. But I must tell you, I spent the last five years hacking away at mem dispos from other judges. They've come up with a 6, 7, 8 page essentially a bench memo that was, you know, they put a caption on it, and I will join them. I ruthlessly hack away them, hack them down to a page or two. And not that we _____parties _____a brief _____ by the court. It is the fear that somebody's going to cite these things that did not get our full review, they can't possibly get our full review, and are then going to be setting forth principles of law.

It's a very serious business. Writing opinions, writing precedential value is an extremely difficult, serious business. You need opinions that don't have that kind of work into them. Look at them and they say, gee, what did they mean here. What they meant is they didn't go back and think about what the scheme for future cases and future arguments and future fact situations.

PROFESSOR BARNETT: Well, there are two questions here, it seems to me. One is if you're going to have some

opinions that are not citable. I would agree with Judge Kozinski, that it is better to have the panel decide which ones those shall be than some different judge. But on the broader question of whether you should have such opinions, I think the judges deciding the case are in no position to make the best judgment as to whether this case is going to have some precedential impact in the future or not. It's for the same reason that economic planning doesn't work. People can't see that well into the future. It's also for the same reason that prices are a better way that -- the market is a better way of setting prices than planning is. In this case, lawyers working for clients who have their clients' interests at heart, are able to see things in opinions that the judges making the decision sometime in the past will not see. That's one reason why all opinions should be citable.

JUDGE KOZINSKI: That's what I fear. That's precisely what I fear. Because if I write an opinion, I go through those drafts. And I'll show you these. These are no chickenshit drafts. These are real drafts that I've gone through and made some changes to. All of them have been precisely to try to figure out what lawyers in future cases are going to look in this case and what they're going to derive out of them. It's the responsibility you have as a judge in writing opinions that have precedential value is to clear the path to make clear for lawyers to advise their

clients for future courts to file precedents to set the limits and say, look, we go this far and no farther, we're leaving the following open. And that's a difficult, delicate process.

The ideal is that these things I sign off on that may have been drafted by staff attorneys, 40 percent of ours are drafted by staff attorneys, that I have had maybe ten minutes to look at the actual draft, are then going to be parsed bylawyers to see what negative pregnants, what significance or what hidden meanings they're going to find in it. It's just a frightening prospect to me.

MR. DAVIS: Andrea, Judge Kozinski, if I heard him right, said that if all of these decisions were citable, that he would be very concerned about signing on to them _____ lawyer. Is that something that you think the public and the parties and the lawyers would welcome?

MS. ASARO: Well, that's a long list, and still don't think the parties or the lawyers would welcome them having a one word disposition after spending years in litigation all the way to the 9th Circuit to end up with the word "affirmed" or, worse, get reversed. So I think clearly it's not --

JUDGE KOZINSKI: Well, but half the people get one half and have the other. I have a case now where both sides lose. But that's okay, you know. You know, I'll have to

send _____

PROFESSOR BARNETT: A case in which you feel that way about the lawyers on both sides, they both deserve to lose.

MS. ASARO: That would be the reversing part. The determining part would demand it.

But to answer Peter's question, or at least to start to --

JUDGE KOZINSKI: No, no, no. In my case, both sides lose. I'll tell you the case. I can't speak about it. Both sides in fact lose. For years I've tried to read that case.

MS. ASARO: Well, I'm glad it's not of mine.

JUDGE KOZINSKI: No, it's not one of yours.

MS. ASARO: But clearly it's not a very satisfying result for someone to go up from the district court, up from the Court of Appeal, the time it takes depending on the nature of the case, whether it's an individual plaintiff in a sexual harassment case or a corporate client from a major commercial institute. Clearly not very satisfying to have a one word disposition. That goes without saying.

JUDGE KOZINSKI: How about this? Nonabeer versus Schecter by the 2nd Circuit. "Upon new estimation, it is hereby ordered, adjudged and decreed. . ." (who knows, a judge can decree) ". . . that the judgment of this acquittal

is affirmed for the reasons stated in the court's memorandum dated June 15th, 1998." That really gets you here, doesn't it?

MS. ASARO: I've actually gotten a couple of those where you don't get affirmed, but you get affirmed for the reasons stated by the district court. Which tells you why in a very narrow sense; but, again, it doesn't tell you why the district court was right or wrong.

JUDGE KOZINSKI: It mostly doesn't tell you that minds engaged in your argument. That's the problem.

JUDGE KOZINSKI: It really doesn't, no. It's not very -- how do you call your clients and say, affirm or reverse.

MR. DAVIS: And it doesn't tell you, as Judge Kane said in the 5th Circuit practice; if the district court has written a long, really good opinion, you know, that tells you why. But that doesn't always happen. So we really don't have any reasons for the district court's opinion. And they still do, which is what happens. Then it doesn't tell you anything.

JUDGE KOZINSKI: I looked for years for the chance to write "Reversed for the reasons below." One of these days I'm going to.

PROFESSOR BARNETT: But, you know, this bugaboo of one word opinions doesn't appear to be real. Last year there

were only about a thousand such decisions in all the federal circuits and, mind you, and only about 4 percent.

JUDGE KOZINSKI: Yeah, yeah. That's right.

PROFESSOR BARNETT: And that number was down from 4.9 percent the previous years. So it doesn't appear that there is a surge in one word dispositions.

JUDGE KOZINSKI: That's right. That's because there's ones with eight words. "The court's order granted in defendant's motion for summary judgment is affirmed for the reasons stated therein." 11 words. So yes, there was a surge of one word dispositions and there was a big stink about it, and the 3rd Circuit, they used to do it a lot, stopped doing it because they got so embarrassed. So what it points to are these things. I mean, we have pages and pages upon them. "The adminnistration is hereby ordered -- the Secretary of the Treasury did not issue an order denying application for or suspending or revoking or annulling a basic permit." This is all in quotes. "We therefore find jurisdiction over court's _____."

Well, poop on the court. It must have though it had jurisdiction, and just citing them back the statute is not going to make him or the lawyers feel any better. What court _____that's all you asked for. When a court is BATF, number 99-71022, that's all he knows. You know anything about that? Because if we told them more, I was

afraid professors like Steve and clever lawyers like you folks here are going to say, oh, well, you have meanings in that that even the judges don't realize, and by God, you're not the right ones to make decisions as to whether there is hidden significance to what you've done.

PROFESSOR BARNETT: Judge, you now have had an experiment going in the 9th Circuit for two and a half years where you were trying out having decisions be citable but only to show conflicts. What's wrong with having a two year experiment with allowing citations of unpublished opinions which you regard as pervasive? The 10th Circuit tried that. And after two years, they decided they liked it.

JUDGE KOZINSKI: I seldom follow for a variety of reasons, and Judge Holloway being one of them.

PROFESSOR BARNETT: They grudgingly followed you in Cartoons case.

JUDGE KOZINSKI: What?

PROFESSOR BARNETT: The Cartoons case on the right of publicity, they followed your dissent.

JUDGE KOZINSKI: Oh, they followed my dissent. Vote no.

PROFESSOR BARNETT: But anyway, once again, what's the experiment like? See if the sky really falls or not.

JUDGE KOZINSKI: You don't play with fire. You don't experiment with dynamite. You know, you don't have

unprotectd sex in the city. This is a very dangerous thing to try to do. To take things -- I mean, we're now talking about a body of unpublished precedents going back 25 years, written and argued off by judges with the expectation and the understanding that these things are not to be cited back. To take all these things and all of a sudden make them precedential, and make them citable, is to open up a real -- you know, you're asking for real serious trouble.

PROFESSOR BARNETT: Well, okay. And then you suggested have a reverse grandfather clause and the old decisions get decided.

JUDGE KOZINSKI: Oh, but that kind of experiment can only allow you to go back at least five years at a time, and you have to police it as to whether it fell on this side of the law or on that side of the law. And even with the experiment now, people are pushing the line with these "C" violations -- In my last sitting, people started coming in and saying, oh, we thought the rule was this, the rule was that, and not even disclose they're unpublished and just weave them in. So you have to have of course the other side of the response.

The problem -- I mean, one of the problems on unpublished is it takes away from the lawyers -- you know, one lawyer raises it. The other lawyer has to come back and respond. _____Peter too short written page

limits; right? Peter was on the rules committee, was the chairman of the rules committee when we used the page limits. Are then taking up disputing over things that may be of some significance to the lawyers but the judges don't consider significant at all as to whether or not this particular mem dispo is or is not relevant. So you wind up having these little bitty fights over things, taking away pages and arguments from.

MS. ASARO: This is something on point, and if it is something unpublished in the mem dispo, then that's where the law is.

JUDGE KOZINSKI: Nobody can say it's in the law. What do you mean that's where the law is? It may be that a mem dispo seems to have a fact pattern that is closer to yours than published, but it doesn't really mean that's what had animated the court's decision. It just means that as much as they chose, the court, to put in the mem dispo, realizing that it would not be cited. And I can say it again and again and again. You put more -- you put in more and less and shape it differently if we knew that we're right and the parties don't know the full facts of the case.

MR. DAVIS: I promised everybody several minutes to sum up, and we're going down to the end. So Steve, another two or three minutes.

PROFESSOR BARNETT: I have a question I'd like to

put to the judge. I'm a long admirer of Judge Kozinski, and as such, I would have expected to find him on the other side of this question. After all, consider, for example, Judge Kozinski is a famous defender of free speech, and here he is insisting that litigants and the lawyers be gagged from telling the court about a previous court decision that they think will help their case. And in fact it turns out Judge Kozinski has taken the position that I find hard to square with his thoughts here today. It's always a little complicated, but bear with me.

In 1994, in the strange and quasi-case called Yuppies Prado, the lawyer for an Elliot, in this case the 9th Circuit, had remanded the Board of Immigration Appeals, kept writing letters to the court, that the court and the INS were taking too long. So a panel of the court decided to ask the government whether it wanted to respond to these letters. Judge Kozinski wrote a fiery dissent from this decision to ask the government that. He argued in his dissent that the court had no case before it, it had no business nudging the government on behalf of the Elliot. Judge Kozinski insisted that his dissent be published, since, as he said, the message sent by the court's action, quote, "Is the type of information that should not be kept from the practicing bar of the 9th Circuit," unquote.

Well, in support of that last statement, Judge

Kozinski cited with a CF cite, an article in the Daily Journal by Los Angeles criminal defense attorney Stanley Greenberg. In that article, Mr. Greenberg excoriated the conduct of a federal district judge whom he named in the case of Greenberg that had just been affirmed by the 9th Circuit. And Greenberg also excoriated the 9th Circuit's opinion in particular for being unpublished. He charged that the 9th Circuit, quote, "Completely whitewashed substantial misconduct and bias by the judge." And he wrote, quote, "Worse, it was done in an unpublished decision that hides the judge's conduct from the public, preventing the legal community from subjecting the decision to a healthy scrutiny," unquote.

Now, that's the article that Judge Kozinski cited in his dissent. So what are we to make of Judge Kozinski citing this article with apparent approval? Is this the same Judge Kozinski that now defends the non-publication rule that suppressed the court's opinion in Greenberg's case? Now, it's true the opinion today would be available on line, but it remains the case that the rule barring the citation of unpublished opinions keeps them secret from other courts and does much to keep them secret from the bar and the public. As I've said, the secrecy imposed is one of the major vices I think of non-citation rules.

So it seems to me there's a question. Which is

the real Judge Kozinski? The one who stands for free speech and openness, or the one who defends these non-citations? Judge Kozinski?

JUDGE KOZINSKI: Boy, he got me on that one. Wow. I changed my mind.

First of all, this is a first amendment made argument. You've made this argument, Steve, over and over again. It's not -- you know, come on, it's not a serious argument. You can publish an unpublished decision in the San Francisco Examiner. You can put it on line on a web page. You can tattoo it to your chest. You can write articles about it. You can't do it in a brief.

PROFESSOR BARNETT: Have you thought about the Velasquez decision in this context? The U.S. Supreme Court's recent decision in Legal Services Corporation versus Velasquez, voting that violation of the First Amendment for a statute that says the Legal Service lawyers can't challenge existing law. It violates the First Amendment because it prevents lawyers from doing what they generally do, it truncates the presentation of the case to the court and so forth.

JUDGE KOZINSKI: What it does is it says -- What it says is the issue of our lawyer, you can't be prevented from making arguments on behalf of your client taking a position, not the limits citing authority. It's saying where

you can't -- you can -- you can't for example, argue the statute's unconstitutionality. _____

PROFESSOR BARNETT: It isn't quite so.

JUDGE KOZINSKI: But that is not a First Amendment issue. You can -- These are not secrets. Just like you can write a newspaper article misstating precedent.

PROFESSOR BARNETT: Which you can't do in a brief.

JUDGE KOZINSKI: You can't misstate precedent in a brief. But you're free by the First Amendment to write articles misstating precedent or lying about cases or anything else. It's the First Amendment. The First Amendment does not apply to the pages of a brief.

PROFESSOR BARNETT: How about the openness question defending that decision that defends a district judge --

JUDGE KOZINSKI: We can talk all day if you want. We can have another panel. I'll be happy to come back and talk about the terms of nonpublication and how the non-publication rule can be tweaked or ought to be tweaked in the law in order to make it more appropriate. We can talk about that all day long, but suffice it to say the rule is not perfect, although in our case it worked perfectly well. There used to be a time when our circuit had a rule that said in order to get something published you needed two judges. Josephine was a case, and he was a dissenter and he requested

the panel to publish and the panel refused, and that case said, okay, I'm publishing my dissent, and he put the majority opinion in a footnote to his dissent. Okay? It goes to show you. To have an article 3 in a lifetime is a wonderful thing.

So after that, people realized it was a stupid rule and that every member of the panel can publish. And that's why I decided that prerogative in the Josephine case -- I've forgotten. Is it '84?

PROFESSOR BARNETT: '94.

JUDGE KOZINSKI: '94, whatever. I certainly think it is appropriate to protect lawyers for criticizing judges, criticizing judges for whatever reason, and I do think that it is appropriate to publicize when a court does not protect the rights of judges -- I'm sorry -- the rights of lawyers to criticize judges.

PROFESSOR BARNETT: Not many cases are publicized. We're talking about 80 percent of the 9th Circuit decisions that were not published.

JUDGE KOZINSKI: Well, not every one of them will raise that kind of issue. We can talk about whether, for example, death cases should never be unpublished. So it's an issue. I can't say any more about it. But it's an issue in our court whether certain kinds of cases are never to be unpublished. You talk about the make-up of the rule, and I'm

perfectly willing to consider, and perhaps that class of cases, cases like the others where in fact, where the commentary is on the judicial case where we Yack case where we ought not to be able to not publish not because it sets creates legal precedent, but because we ought not to have the power to hide things that concern criticism of us, where we are sort of implicated, either ourselves, or our colleagues. And I think Yakis, Yakman and many cases like that may very well be the kind of cases where whether or not it sets a legal rule or principle, we ought to publish something just for the knowledge that one who has the discipline to criticize it. Judges are the major offenders on something like that. I'm perfectly willing to do that. But the fact that I may disagree with a non-publication decision in a particular case and the case was reversed, whether it's Clark County of whatever, and I've been on the panel and I've been the dissenter, Judge Hernandez was _____ I'm not as nice as Judge Hernandez. Sweet guy. I assisted in publishing. I might have had a few more choice words about it, but it would be unnecessary. But the fact that I may disagree with a non-publication decision in a particular case, its publication doesn't in any way undermine my position on non-publication rules. We couldn't operate sanely without it. And that ultimately the people who would be hurt if we were required to give precedential value of an opinion would

be the litigants. I would get my salary no matter want, you know. I just have to live and breathe. I'm going to get pay. I have a commitment to the law. I have a commitment to the administration of justice. I know a lot about how we do business and how -- I sat as a district judge. I know a lot that, and how we do business. I just find this really scary, really scary stuff.

PROFESSOR BARNETT: Andrea, you're entitled to your three minutes.

MS. ASARO: Well, I guess on behalf of the litigant I have to come back to where I started, which is that I think for the system to have the respect of lawyers and of clients, we're going to have to do reasonable decisions of cases until or there should be reasonable decisions in cases that tell the parties and the lawyers who won and why in a meaningful way.

I guess I beg to differ with Judge Kozinski on the notion that a court can decide whether it is or isn't making precedent. I think philosophically this may be one of the things you can argue forever about. I think the cases -- that the courts do make law when they decide cases, when they apply precedent to the facts. And I think that if the problem isn't what to say about it when we were doing it in terms of the mem dispo, but it may be as much a resource issue as much as anything else. I don't know. I'm sure

Judge Kozinski would agree with that. I think that something -- I think that the parties and the public are entitled to know what the court is doing and when it's deciding cases, and I think that mem dispos or unpublished decisions should be cited for their persuasive authority, and I would hope that if ever that were to occur, I'd realize it's unlikely, that I would hope that the court would not then retreat to saying less and less in unpublished decisions as a result.

MR. DAVIS: Judge Kozinski, do you want to respond to that?

JUDGE KOZINSKI: I think I've said more than my share.

MR. DAVIS: You know, usually as lawyers we stand up there and get beaten up by three judges.

(GAP IN TAPE)

MR LEVINE: That group of GAP cases you'd find a fairly active bar and on the insurance defense bar or corporate bar. It seems to me that without doing this research, we are all flopping around in an environment of lack of knowledge.

JUDGE KOZINSKI: Arthur Hellman of the University of Pittsburgh did view at least once, maybe twice, unpublished decisions in the 9th Circuit looking for these hidden conflicts. And I say that their efforts even proved that it wasn't there. Now, I couldn't, the way I develop the

thought, do this research, but we have also done internal studies. We have mechanisms in place to self study things that flag certain kinds of dispositions for review. None of this guarantees that we see everything or that we can catch everything because not everything can be read and reviewed. But we have made strenuous efforts to try to deal with this in the fear of a hidden body of law that's different, inconsistent with -- if we have found that there was, we would be acting under different assumptions. Our findings have been pretty much on the case.

MR. DAVIS: One more question from the gentleman.

UNIDENTIFIED VOICE: How do the members of the panel other than Judge Kozinski go about challenging this rule?

MR. BARNETT: Ask Judge Kozinski that. On thing that can be done. There is a lawsuit pending against the 9th Circuit on this ground recently dismissed by Judge Walker in the district court and going up for appeal. Otherwise I suppose the 9th Circuit has rule making. Is it possible for an outsider to propose a group change in the rules in the 9th Circuit?

JUDGE KOZINSKI: Absolutely. But the attempt to make unpublished citable has been tried and tried again and rejected by the court except for this little exception.

PROFESSOR BARNETT: Well, now they make

Constitutional arguments that weren't made with that.

JUDGE KOZINSKI: _____I suppose you could.

MR. DAVIS: From my perspective, and when I was chair of the rules committee, this came up twice. I think these kinds of discussions are useful because I haven't heard the answer. Judge Kozinski in my view makes a very valid point that there's too many cases for us to create careful work product in every case and precedent, and it's a problem. And the people in this room don't see this because you're not dealing with representative cases. You're dealing with one percent of the cases. Go listen to some of those oral arguments. Some extremely high percentage of those cases shouldn't be there. Your dog would decide it the same way. And I talked to a law clerk just last week who told me -- in the 9th Circuit, who told if he that 80 percent of the briefs she saw are garbage. One percent are really good, and others are, you know, they're okay. So we're giving them garbage in, and yet we expect them to give us some great work product coming out when the -- when most of those cases, it doesn't matter how you massage it. It doesn't matter what you do with them. Those cases are not going to be worth doing anything.

The difficulty that I think we're having is how do you separate the wheat from the chaff. I don't think that the process works as well as it should. And we have

anecdotal examples of problems in there. Judge Kozinski may be right, that this is not a systemic issue where 10 or 20 or 30 or 50 percent of the cases, if any of us decided those case we would decide them differently or decided that they should be published. But because the issue has so much importance to the public and the legitimacy to the system and its concern about judges hiding things, I think we need to keep working on that. And I would take you up on your offer, Judge Kozinski, to keep working on that aspect of the problem and do a better job in the selection process. It seems to me that's one thing that can be done.

JUDGE KOZINSKI: I'm willing. We're all willing. I think the cutting problem and issue on more time, and you have other problems. If you find two inconsistent, unpublished opinions on a disposition of our court, send them to me. If you find an unpublished decision of our court conflicts with an earlier published disposition, send it to me. I want to know about it. We are not out to try to have an uneven body of law. We are trying very hard, given the hugeness of the circuit, given the number of judges we have, given the number of cases that we have, to apply the law equally to everybody in the courts. But this is very different from saying that we do that by having every word that we say become the law.

MR. DAVIS: And to that, it's two clock, and we

reluctantly have to come to a close. I'd like thank the panel members for coming, am I hope we gave you something interesting and thoughtful to think about.