03-AP-408

February 15, 2004

Hon. Samuel A. Alito, Jr.
Chair, Advisory Committee
on Appellate Rules
United States Court of Appeals
Room 357, 50 Walnut Street
Newark, NJ 07101

Re: Proposed Fed. R. App. P. 32.1

Dear Judge Alito:

I write to refute the arguments of those who oppose the portion of proposed Rule 32.1 that would require the U.S. Courts of Appeals to permit citation to any written appellate disposition, and to urge amendment to the proposed Rule so that it accords precedential effect to all written appellate dispositions.

Specifically, I write to refute the arguments offered by eight members of the U.S. Court of Appeals for the Seventh Circuit in their letter to you dated February 11, 2004; and by Ninth Circuit Judge Alex Kozinski in comments quoted in an article published in the *New York Times* on December 25, 2003 and in his letter to you dated January 16, 2004; and by attorney and *Findlaw* commentator Edward Lazarus in an article published there on November 27, 2003 (which, I presume, have been reiterated formally to your Committee).

I am in an excellent position to know how the current system, at least in my home Circuit, the Seventh, operates in practice, as opposed to how it operates in platitude. I have been a victim of it—on more than one occasion.

The overriding theme of the opponents of Rule 32.1 is that the appellate courts exist primarily as quasi-legislative, or lawmaking, bodies and only incidentally, as time permits, as courts that review and correct trial-court error concerning already-established law. An undercurrent, stated surprisingly bluntly by the judges and discreetly hinted at by Mr. Lazarus, is that there are only certain lawyers (e.g. Mr. Lazarus) who qualify, either by virtue of their prestigious resume or of their client's special status within the court system (e.g., governments; large corporations), to propose quasi-legislation to appellate courts.

And so there are only certain litigants, those represented by a member of that rarefied bar, who are authorized to have quasi-legislation proposed on their behalf and considered by courts of appeals. And because this selection process occurs (apparently) in most instances before any judge has cracked the binding of the appellant's brief, there are only certain litigants—those represented by a member of that rarefied bar—who are authorized to receive meaning appellate review.

No one else need apply, although many, many do—some of them enduring *very* significant financial hardship in order to do so. Some of them enduring *very* significant financial hardship for the privilege of participating as the dupe in an institutionalized charade.

The judges, after all, shamelessly concede in their statements to your Committee as well as in published comments elsewhere that the very purpose of this parallel appellate system is to deny meaningful judicial consideration in most appeals—this, of course, in the name of providing the public with impeccably phrased and flawlessly nuanced lawmaking. And, coincidentally, of providing the judges with an instrument for primping and a mechanism by which to ever so quietly yet fundamentally alter the right to appellate review and even the right to the benefit of critical substantive law itself.

The Seventh Circuit judges in their letter to your Committee, and Mr. Lazarus (rather elaborately) in his *Findlaw* article, represent that (with the exception of appeals in which a non-attorney party is *pro se*) the Seventh and Ninth Circuit Courts of Appeals abide by the terms of their court's published criteria for determining when an opinion will be published and accorded perceptual effect. The pertinent Seventh Circuit rule, Rule 53, is titled "Plan for Publication of Opinions of the Seventh Circuit Promulgated Pursuant to Resolution of the Judicial Conference of the United States", and promises that "[a] published opinion will be filed when the decision ... establishes a new, or changes an existing rule of law."

George Orwell would be proud—and not only because of that title, but also because of that tautology: by virtue of the Rule, a decision does not establish a new, nor change an existing rule of law *unless* it's published and designated as precedential. The chicken hatches the egg here. Or is it the reverse?

The Seventh Circuit letter signatories claim that their court uses the device only in what Mr. Lazarus in his *Findlaw* article calls the "easy" cases. "Interestingly," wrote Mr. Lazarus, "the way the judges approach routine, 'easy' cases is different not only in degree, but also in kind, from the way they approach groundbreaking 'hard' case. Not only do they spend more time on the hard cases, but their analysis in those cases is much more searching, as well."

More interestingly, I submit, is that the way the judges decide, at least in civil cases, which appeals they'll designate as "easy" and which as "hard" has less to do with whether the issues the appeal presents are truly routine than on the identity of the appellant and her counsel. In order to know what issues the appeal does present, the judges would, after all, have to at least skim the Table of Contents to the appellant's brief.

We have now, in essence, two legislative branches—one so named, the other only a quasi one and thus named the "judicial branch"—and no branch, no institution, that has as a primary purpose the implementation of the constitutionally mandated equal protection of the law. We have no institution that operates primarily as a reviewing

court. The public has a body of meticulously worded appellate law, with all its "t's" crossed and "i's" dotted and replete with clever phrases and thoughts. Judge Kozinski, for example, is quoted in the above-referenced *New York Times* article as saying that he sometimes writes 70 to 80 drafts of a single opinion.

Now all the public needs, or at least ordinary individual members of the public involved in litigation need, is the financial wherewithal and the sophistication to *purchase* some semblance of access to genuine appellate review—and to the critical substantive law itself. They all should consider retaining Mr. Lazarus.

Assuredly, though, they'd be touched by the Seventh Circuit judges' concern that Rule 32.1 would increase by a few billable hours the cost of legal research to large corporations, who rarely are among those quietly foreclosed from access to real appellate review. They'd be moved also by those judges' lament that Rule 32.1 would force them to reduce the time they and their staff spend conducting independent research on behalf of one or another select litigant whose lawyer might have missed some useful citation; all that time, you know, that because of Rule 32.1 they'd now have to waste skimming the briefs of appellants whose cases they otherwise wouldn't give even a moment's thought.

The Seventh Circuit judges, in their letter to your Committee, profess religious fidelity to the criteria stated in that court's Circuit Rule 53. It's a curious representation, given that the letter's author, Judge Richard Posner (its written in his distinctive style of prose), has publicly acknowledged otherwise. In extensive comment about the topic of nonpublication of appellate court opinions, in a chapter in his 1996 book *Federal Courts: Challenge and Reform* aptly titled "...And Is Streamlined," he established that many decisions that decide important issues and that, if published and designated as precedential, would alter significantly or add significantly to the law, are nonetheless unpublished and designated as nonprecedential.

I recall also reading, perhaps three or four years ago in (I believe) a newspaper article, Posner quoted as telling the article's author that he himself is far less careful in resolving appeals in which the decision will be designated unpublished and uncitable than in resolving appeals designated as precedential. Back then, he cited this as reason to *abolish* such Circuit Rules as his court's Rule 53. Now, of course, he cites it as reason to maintain such Circuit Rules. The explanation presumably is that Judge Posner is older now and wants to slow down a tad.

Among the opponents of proposed Rule 32.1 whose objections I've read, only Judge Kozinski has to my understanding acknowledged during the current debate that appellate courts do *not* adhere to the strictures of their respective Circuit's Rule. Judge Kozinski argues that not every case is suitable for preparation of a precedential opinion not because it's routine but because it's *not* routine—and thus the decision resolving it would, if designated as precedential, make rather than reiterate law:

> Many cases are badly briefed; many others have poorly developed records. Quite often, there is a severe disparity in the quality of lawyering between the parties. A

> party may lose simply because its lawyer has not done an adequate job of making a record or developing the best arguments for its position. It is often quite apparent that, with better lawyering, the rationale and perhaps even the result of our disposition might be different—yet we must decide the case on the record and arguments before us. At the same time, however, it's important not to foreclose prematurely a particular line of legal analysis. Issuing a precedent that rejects outright a party's argument may signal the death of a promising legal theory, simply because it was poorly presented in the first case that happens to come along.

An absolute hallmark of federal appellate resolution, at least here in the Seventh Circuit if not also in the Ninth, is the near-categorical foreclosure of access to this quasi-legislative—this lawmaking—process, at least in civil lawsuits, by no-name appellants represented by no-name attorneys.

On several occasions within the last few years, I've brought to that court, as the appellant, complex and novel issues of constitutional and procedural interpretation. In no instance did the court in its short unpublished affirmance even *acknowledge* the *actual* issues I'd raised, much less the arguments I'd made in support of them, less still the legal and factual grounds I detailed for seeking reversal of the district court. In *each* instance, sometime within the following (perhaps) 18 months, that court has issued a published opinion that addressed in detail either a key issue I'd raised or a closely analogous one.

While it's important not to foreclose prematurely a particular line of legal analysis, it also was important—if not to the self-designated gatekeepers of access to the quasi-legislative function of appellate courts, then certainly to those who've been so foreclosed—that the courts not institutionalize, as they have done, a by-permission-only system of access to that function of appellate courts.

We potential victims of attorney incompetence in earlier appeals surely appreciate Judge Kozinski's concern for us, and thus his justification for baldly disregarding the written parameters of his court's Circuit Rule. But we also appreciate that the *real* legislative systems—the ones run by Congress and by the state legislatures—are thoroughly elitist, and I appreciate especially that most of this country's appellate courts, federal and state, are now nearly every bit as elitist, having been rendered so by the appellate judges themselves, through court Rules promulgated internally within their respective courts.

In the appeals I brought to the Seventh Circuit Court of Appeals, I had performed a more-than-adequate job of making a record and developing the best arguments for my position. What is quite apparent is that in each instance, with a "name" lawyer representing a "name" client, the court's rationale and perhaps even the result of its disposition would have been different—and was, at least in key respects, soon afterward, in analogous cases. Had the court been compelled by a federal rule of appellate procedure designating the result precedential or at least citable, the court might have decided those cases on the record and arguments before it.

Judge Kozinski's stock representation rings hollow that the appellate courts must decide each case on the record and arguments before it: If they must, then why don't they, except in cases in which they want to? It's precisely in an effort to turn that stock truism into a truth that I and others on the wrong side of the prestige fence object so ardently to the judges' litany of self-serving canards.

If it's quite apparent in a particular case that, with better lawyering, the rationale and perhaps even the result of the court's disposition might be different, then the remedy is for the court to do what appellate courts often do: identify the potentially valid rationale and not that it was not argued in that case but remains available as an issue in a future, similar case.

If a precedent that rejects outright a party's argument simply because it was poorly presented in the first case that happens to come along, it's within the court's power to reconsider the issue when asked to do so by counsel who presents the issue more competently—or when argued by counsel who's brief the judges have opened. Thus the court may resurrect a legal theory that was argued sufficiently competently even in the first instance to signal to Judge Kozinski and his colleges that it was a promising one.

If the appellate judges make good on their threats to simply stop providing explanations for the decisions they'd like to designate as nonprecedential, then the appropriate response is not to submit to that blackmail but instead to require that the appeals courts provide explanations for the decisions.

The larger issue hardly implicates merely administrative matters of the sort contemplated in the grant of authority to the individual circuit courts to establish their own administrative rules. It cuts instead to the very heart of the real meaning of law, and of the equal protection of it.

Some of us who support, at a minimum, a national codified mandate as enunciated in proposed Rule 32.1 do *not* ask or expect that appellate judges will work longer hours than they now do; some, perhaps most, judges are already working flat out, as the Seventh Circuit letter signatories claim. Nor are we interested, as the letter claims, in increasing the time judges spend refining the wording of unpublished orders—although if the judges' personal vanity would prompt that, then so be it. We're interested in increasing the time judges spend in learning about *our* appeal, in learning what *our* appeal is about.

And all of us who support that are interested in what we used to think, until we learned better, was paramount to the concept of law: it's equal protection.

The tone that permeates the Seventh Circuit judges' letter, from its opening sentences to its final ones, a proprietary one. It veritably reeks of entitlement, of unmitigated self-service, of audacity. The letter observes:

> For if a lawyer states in its brief that in our unpublished opinion in *A v. B.* we said X and in *C v. D* we said Y and in this case the other side wants us to say Z, we

can hardly reply that when we don't publish we say what we please and take no responsibility.

Exactly. When they don't publish they *do* say what they please and take no responsibility. Judge Posner himself has written, in *Federal Courts: Challenge and Reform* and several opinions he's written for his court, that it's precedent that constitutes notice to the public of what the law on a particular matter is, so they can be guided by it in their decisions, including whether or not to pursue to specific litigation, and at what cost (financial and otherwise) in pursuing it. He and seven of his colleagues offer no selfless justification for continued denial to unwitting litigants of the benefit of notice of what the relevant law is, so they can be guided by it in their decisions, including whether or not to pursue to specific litigation, and at what cost, financial and otherwise, in pursuing it.

Instead they offer a tautology and disguise it as support for the entitlement they assert. "The practice of state courts is instructive," the write. And indeed it is. Or at least the specific example they choose is, although hardly in the manner they pretend. Illinois Supreme Court Rule 23, the example they use, "provides standards for the publication of decisions of the intermediate appellate courts. Rule 23(a) permits the disposition of a case by written opinion 'only when a majority of the panel deciding the case determines that at least one of the following criteria is satisfied...(1) the decision establishes a new rule of law or modifies, explains, or criticizes an existing rule of law; or (2) the decision resolves, creates, or avoids an apparent conflict of authority within the Appellate Court.'"

Illinois Supreme Court Rule 23 is so reviled among such a broad swath of litigators, at least here in Cook County, that four years ago current Supreme Court Justice Thomas R. Fitzgerald, then the presiding judge of Cook County's criminal courts, won an intensely vitriolic primary for the Democratic nomination to the seat Fitzgerald now holds, beating two prominent Illinois appellate judges. A campaign promise that helped gain him the support (and campaign contributions) of many, many local litigators (including numerous prominent ones): that as a Supreme Court justice he would work to vacate or at least amend significantly Illinois Supreme Court Rule 23. To the anger of some layers who supported him on that basis, it's a promise that more than threes years into his ten-year term of office, he's made no evident effort to fulfill.

An effort in the late 1990s to have the Illinois courts themselves hold the law unconstitutional under the Fourteenth Amendment and a comparable provision of the Illinois Constitution proved unsuccessful, of course, but it's noteworthy nonetheless because of the identity of the attorney who litigated it on behalf of a client who been victimized by it. The lawyer, Ruth VanDemark (now retired), who a year or two earlier had opened a solo appellate practice, was a former president of the Illinois Appellate Lawyers Association and a former chair of the extensive appellate practice at the law firm of Wildman, Harrold, Allen & Dixon, a very big name here in insurance-defense litigation.

I urge your Committee to a step forward and deprive the federal courts of their similar docket management tools—their term the Seventh Circuit judges chose, and a descriptive one indeed. These judges don't want their words thrown back in their faces—to borrow phrasing from their letter—unless they authorize their words to be thrown back in their faces.

And if the appellate court system existed to serve their interests, they'd be entitled to continue their gag policy.

Sincerely,

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02/24/2004 01:20 PM

To: Rules_Comments@ao.uscourts.gov
cc:
Subject: Supplemental comment in support of proposed FRAP 32.1

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February 23, 2004

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice &
Procedure Administrative Office of the
U.S. Courts One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Supplemental comment in support of proposed FRAP 32.1

Dear Mr. McCabe:

On February 15, I submitted a seven-page letter in support of the proposed FRAP 32.1 to the extent that it would require the circuit courts to permit citation to any written disposition in a federal-court appeal irrespective of designation by the issuing court regarding its precedential effect. My letter mainly rebutted the February 11, 2004 letter of nine Seventh Circuit Court of Appeals judges, the January 26, 2004 letter of Ninth circuit Court of appeals judge Alex Kozinski, and a November 27, 2003 article by Los Angeles attorney and legal-issues commentator Edward Lazarus published on Findlaw.com, opposing the proposed Rule.

I was unaware then of the web site secretjustice.org, which, as I'm sure you know, is publishing all (or perhaps only most) of the comments submitted to your office regarding proposed Rule 32.1. I've now read approximately 15 of the posted comments, most of them submitted by various members of the federal appellate bench in opposition to the proposed Rule, and a February 13, 2004 letter (not yet posted on secretjustice.org, but available via link from appellateblog.blogspot.com) submitted by Seventh Circuit Court of Appeals Judge Frank H. Easterbrook in support of the proposed Rule. (In my earlier letter, I said I presumed that Mr. Lazarus had submitted comments to your office reflecting the sentiments he expressed in his Findlaw.com article, but the secretjustice.org web site indicates no such submission, so I'll just note here that the Findlaw.com article, which I did not identify by title, is called "The Proposed Change to the Federal Rules of Appellate Procedure Allowing Citation of Unpublished Opinions: Why It Will Be Harmful," and is at http://writ.news.findlaw.com/lazarus/20031127.html.)

I submit this supplemental letter in order to address the comments of those federal appellate judges.

A few of the comments from the Ninth Circuit judges are genuinely stunning in their disclosure of behind-the-scenes court procedure. Others are, literally, loopy; they're nothing more than syllogisms—circularities that present themselves as justifications of the current system by virtue of nothing more than that system exists in its present form. And others are outright misrepresentations of fact—in some instances flagrantly so because they are mutually exclusive of other facts stated by the same judge in the same letter of comment or by that judge's colleague who sits on the same court of appeals.

The most startling is the revelation by Ninth Circuit Judge Barry G. Silverman that a very substantial percentage of cases in his court are decided by a single staff attorney, who presents the (purported) merits-panel with a pre-drafted "mem dispo" complete with the result—inevitably

an affirmance, although of course Judge Silverman doesn't acknowledge that—drafted before any judge even knows that the case exists. Coupled with Judge Kozinski's disclosure that his court's merits panels devote an average of five or ten minutes to each case—a comment that I interpreted initially as referring only to the time the panel, meeting together, spends on each case, but that I now understand refers to the *total* time any panel member spends on the case—this describes an institutionalized fraud on litigants that is breathtaking in its pervasiveness.

Judge Kozinski represents that they are very careful to ensure that the result we reach in every case is right, and that he believes they succeed. Judge Silverman says this program works extremely well, thanks to the careful identification of cases selected for this process and the conscientiousness of the staff attorneys, and that, amazingly, very few mistakes are made. Either these two judges, and their colleagues who insist the same, are too irrational to understand that they would have no way to know whether or *not* they reach the right result in any case in which they've done nothing but listen to a few words about the case from a staff attorney, or they're lying. Unless these judges eventually review (even just skim) the appellant's brief, they have no conceivable way to *know* whether they've ensured that they reached the right result.

Judge Silverman says the focus is on deciding the cases correctly, not on dotting I's and crossing T's. But he and Judge Kozinski have described a process in which the focus is on *nothing at all* except disposing of the appeal without their knowing anything about the case other than what some staff attorney has told them in a few-minute presentation.

These judges have no idea whether the staff attorney herself has done anything more than just read the district court's memorandum opinion dismissing the case, and they certainly have no idea whether that staff attorney has even opened the appellant's brief. In my earlier letter of comment to this Committee I said it's been commonplace in my experience that whoever drafted the unpublished order in certain cases had read only the appellee's brief. Stark errors and key omissions in the appellee's brief are adopted as uncontested although even a cursory review of the appellant's opening brief and reply brief—heck, even a review of the Table of Contents—would have clued in the reader that the very essence of the appeal concerned errors and omissions by the district judge that the appellee simply repeats as though accurate.

In one such instance, here in the Seventh Circuit, in which I was involved, the district judge flatly misstated which party had won in a particular U.S. Supreme Court opinion. The appellee's brief simply reiterated the error as fact ("As the district court noted, the Supreme Court held in ....". This notwithstanding that the appellant's brief not only noted the district court's error but quoted the paragraph of the Supreme Court opinion that stated the grounds for the holding. The unpublished order, bearing the names of Seventh Circuit judges Easterbrook, Manion and Kanne, and affirming the district court, simply reiterated the error as fact.

Ninth Circuit Judge Richard Tallman chimes into his colleagues' chorus with an observation that clients don't care whether or not their case sets precedent; clients, he says, just want to know that the court of appeals looked at their case and considered the issues raised. Actually, though, clients want to know that a pertinent rule of law enunciated in another case, or in a slew of other cases, was applied in theirs as well. Here in the Seventh Circuit and, according to Judge Boyce Martin Jr. in his comment to this Committee, in the Sixth Circuit as well, and—

the protestations notwithstanding—surely in the Ninth, as well, clients are surprised to learn that it did not.

In my earlier letter, I disputed the representation of the nine Seventh Circuit appellate judges in their February 11 letter that their court's unpublished orders neither address issues of first impression nor depart from precedent, and I reiterate that here.

Judge Easterbrook in his recent letter reiterates that claim, citing as evidence his court's relatively high rate of publication. It's a *non sequitur*; it means only that his court doesn't misuse the nonpublication Rule as often as other appellate courts do. It's also a flat misrepresentation of fact. And as the judge who's perfected to a science the art of basing unpublished-order affirmances on citation to the very published opinion of his court that created the exception to, or the expansion of, settled law which the appellant seeks to invoke—Judge Easterbrook's tongue presumably was planted deeply in his cheek when he wrote that paragraph. Unpublished orders that bear his name depart dramatically from settled law, sometimes in dismaying and profound respects regarding some very basic principles of law. But, unlike, say, Ninth Circuit Judges Stephen Lott, Richard Tallman and Pamela Rymer, at least he didn't simply recite the parameters of his circuit's nonpublication Rule that apply settled law as his declaration that his court complies with those parameters. At least he acknowledges that a rule that permits its use only in routine cases can be employed in other cases as well.

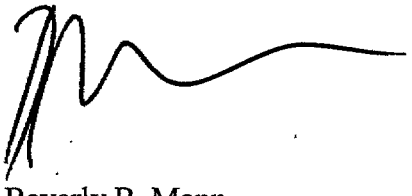
As for Judge Kozinski, he says he's aware of generic such complaints in his circuit but that the complaints never identify specific instances. If he's interested in learning of such instances, he might consider reading some of the petitions for rehearing filed with his court, rather than relying for a summary of the contents of those rehearing petitions on the very staff attorney who wrote the mem dispo from which rehearing is sought.

Judge Trott's statement that he's never seen a memorandum disposition that he needed in order to decide other "like cases" is as pointlessly circular as is Judge Kozinski's statement that unpublished, nonprecedential orders are not, as a practical matter, reviewable en banc by virtue of their being unpublished and nonprecedential. Judge Trott asserts outright that his court's uncitable memorandum dispositions do nothing more than apply settled circuit law to the facts and circumstances of an individual case. Perhaps. Of course, he also asserts that no two cases are so factually and procedurally alike such that equal protection and due process will be denied if the appellate courts "do not add other 'similar' unpublished cases to the scale." Perhaps not, but his colleague Judge Rymer apparently begs to differ.

Judge Rymer writes that people, and lawyers, rely on precedential decisions and govern their lives and fortunes accordingly. Clarity matters, she says. And indeed they do, and it does—as I know from especially painful and very personal experience. So maybe Judge Rymer can explain in a supplemental letter, then, why appellate judges should continue to be allowed to casually exempt any appellate litigant they choose from the equal protection of precedent. Or perhaps she can explain why, given her adamance that her court doesn't depart from settled law, she's so very nervous that proposed Rule 32.1 would be retroactive. Might it be that, while, as Judge Tallman wrote to this Committee, not all cases are equal, it's also true that cases that *are* equal don't necessarily have appellants who are equal?

Sixth Circuit Judge Martin argues that in his circuit, proposed Rule 32.1 is unnecessary because any party who requests oral argument is granted a 15-minute argument. That's nice; that surely goes far to remediate judicial cluelessness about the *actual* issues presented in the appeals they—or more accurately their staff attorneys—are deciding. It does not remediate, even in his own circuit, the other problems with the current system and it surely doesn't correct the situation in the circuits—including my own, the Seventh—in which nonpublication of dispositions correlates highly with denial of requests of oral argument. Given that a national rule is the only way to force a correction in those circuits that regularly, institutionally, violate even very basic due process and equal protection guarantees in the respects that by now are so clear, and given the relatively small impact a national rule would have on circuits that have not committed such wholesale breaches, Judge Martin shouldn't mind.

Sincerely,



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