United States Court of Appeals
for the Third Circuit

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RUGGERO J. ALDISERT
SENIOR CIRCUIT JUDGE

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03-AP-293

January 30, 2004

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Sam:

Our colleague, Alex Kozinski, of the Ninth Circuit, in his letter to you of January 16, 2004, summarizes my feelings toward the proposed Rule 32.1. I repeat the opening paragraph of his letter:

> I write in opposition to the proposed Federal Rule of Appellate Procedure 32.1. The proposed rule would make more difficult our job of keeping the law of the circuit clear and consistent, increase the burden on the judges of our lower courts, make law practice more difficult and expensive, and impose colossal disadvantages on weak and poor litigants. None of the reasons the Advisory Committee note advances in support of this rule is remotely persuasive. Circuits differ widely in size and legal culture, and the current situation – where the matter is left to the informed discretion of the Court of Appeals issuing the disposition – has caused no demonstrable problem. I urge the Committee to abandon this ill advised proposal and move on to more pressing matters.

Certainly, by definition "non-precedential" opinions do not have the bite of precedent. They cannot meet the basic definition of a legal rule as formulated by Roscoe Pound: "[Rules] are precepts attaching a definite detailed legal consequence to a definite detailed state of facts."

See Roscoe Pound, *Hierarchy of Sources Formed in Different Systems of Law* 7 Tul. L. Rev. 475, 482487 (1933).

"A judicial precedent attaches a specific legal consequence to a detailed set of facts in an adjudged case or judicial decision, which is then considered as furnishing the rule for the determination of a subsequent case involving identical or similar material facts and arising in the same court or a lower court in the judicial hierarchy." Allegheny Cty. Gen Hosp. v. NLRB 608 F.2d 865, 969-970 (3d Cir. 1979). I call your attention to the emphasis on "a detailed set of facts" and "identical or similar material facts."

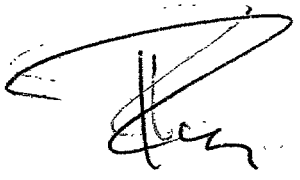
Because non-precedential opinions contain truncated facts, or none at all, they may not qualify as precedential. Nor may they be considered as persuasive argument as in the case of a treatise or law review article which are well documented. At best, with *extremely truncated facts* these opinions are merely statements of law.

Arguments, persuasive or otherwise, are based essentially on analogy. A non-precedential opinion, by definition, may not serve as analogy. What is an analogy? " J.S. Mill reduced it to a formula: Two things resemble each other in one or more respects: a certain proposition is true of one; therefore it is true of the other. In legal analogies, we may have two cases which resemble each other in a great many properties, and we infer that some addition property in one will be found in the other. Moreover, the process of analogy is used in a case-by-case basis. It is used to compare factual or procedural resemblance in a prior case or cases to the case at bar." Aldisert, *Logic for Lawyers, A Guide to Clear Legal Thinking* 93 (3d Ed. 1987) See the specific treatment of analogy in In re Linerboard Antritust Litigation , 305 F.3d 145, 156-157 (3d Cir. 2002.)

In this respect my view coincides precisely with Judge Kozinski's more detailed statements on pages eight and nine of his letter. His explanation between a published opinion and an unpublished disposition is something that the Committee must not ignore.

Finally, I turn to the old master, the great Cardozo. "Of the cases that come before the court on which I sit, a majority, I think, could not, with semblance of reason, be decided in any way but one. The law and its application alike are plain. *Such cases are predestined so to speak, to affirmance without opinion." Nature of the Judicial Process* 177 (1921). What Cardozo describes as his experience in the New York Court of Appeals, applies with equal force 82 years later to the cases for which we prepare a non-precedential opinion.

I thank you for all your courtesies.



Cc: Hon. David F Levi
Peter McKabe, Administrative Office, U.S. Court
Hon. Alex Kosinski

The Honorable Samuel A. Alito, Jr.
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