03-AP-454 RECEIVED 2/17/04

via Rules Comments mailbox

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February 16, 2004

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VIA INTERNET
The Honorable Samuel A. Alito, Jr.
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RE: Proposed changes to Federal Rules of Appellate Procedure

Dear Judge Alito:

I write to commend you and the Advisory Committee on Appellate Rules for the time and labor you have invested on the proposed amendments to the Federal Rules of Appellate Procedure, and to offer my brief comments on two of the proposed changes.

First, the proposed changes to Federal Rule of Appellate Procedure 35 are a welcome improvement. Judge Carnes' thorough discussion of Rule 35 in Power Company v. Federal Communications Comm'n, 226 F.3d 1220, 1221-26 (11th Cir. 2000) (Carnes, J., concerning denial of reh'g en banc), *rev'd sub nom.* National Cable & Telecomm. Ass'n., Inc. v. Gulf Power Co., 534 U.S. 327 (2002), convincingly demonstrates the wisdom of the Committee's proposed approach. For reasons explained by Judge Carnes, the "case majority" approach is the most preferable among the three interpretations to present Rule 35. In sum, I support the changes to Rule 35 making the "case majority" approach the uniform rule nationwide.

The second issue on which I comment concerns a more controversial matter, newly proposed Rule 32.1. With exceptional jurists like Judges Alex Kozinski and Stephen Reinhardt steadfast in their opposition to any proposed rule prohibiting the Courts of Appeal from enforcing a "no citation" local rule, I confess I feel a bit like a Lilliputian among intellectual giants. However, from the perspective of an advocate, albeit one with limited appellate experience, the proposed rule is far and away superior to the status quo.

First, the critics of the proposed rule are waging war on an issue that is simply not encompassed in the Committee's compromised approach–the effect that a court must give to its "unpublished" or "non-precedential" decisions. In fact, Judge Kozinski laments that "[n]o such distinction" between citability and precedential value can be maintained. Jan. 16, 2004 Letter from Hon. Alex Kozinski to Hon. Samuel A. Alito, Jr., p. 4. That may or may not be true–and I tend to agree with Judge Kozinski's foresight on this–but if that criticism holds water, a jurisprudential approach which *permits* citation of unpublished authority is clearly more defensible than a caste system in which the overwhelming majority of decisions, representing the final say on issues of enormous impact to the lives of the named parties, are routinely dispatched to the leper colony of unpublished authority, never to be seen or heard from again. In other words, if we're going to sanction and even encourage the federal appellate courts to designate *a priori* certain decisions–which statistics indicate represent the clear majority of all decisions issued by the appellate courts–as cases having "zero precedential value" and from which "no inference may be drawn from the fact that the court appears to have acted in a certain way in a prior, seemingly similar case," id., permitting litigants *to cite* unpublished decisions to the court issuing the decisions helps insure consistency among published and unpublished dispositions, preserves some measure of balance between the twin aims of efficiency on the one hand, and cohesiveness among unpublished and published authority on the other, and is preferable to the caste approach presently utilized by several courts.

Second, many of the criticisms aimed at the Committee's circumscribed proposal have little basis in fact. For instance, much has been made of the purported increased in cost–to litigants and courts alike–that would purportedly ensue from enactment of proposed Rule 32.1. But the notion that it takes days and perhaps even weeks longer to research unpublished authority than it does published authority alone, or that the technology required to locate and utilize unpublished authority is prohibitively expensive, is misplaced. Competition among the very same computer database programs used by the courts, namely Westlaw and Lexis (to say nothing of Findlaw, circuit court websites, and other public and private databases of opinions), has now made affordable the means to exhaustively search unpublished authority (at least in those circuits which release their decisions to the online services or post all decisions on the circuit website, which in a few months will include all circuits). In the same vein, a query search in Westlaw's "CA9" database, to take one example, presently yields, arranged according to relevance, a mix of both published and unpublished authority. Stated differently, when researching circuit authority, it is hardly unusual to be hit square in the face with on-point unpublished authority. In those instances, isn't it both less expensive and more preferable to cite directly the unpublished authority, rather than needlessly extending the analytical process by deciphering, *from the unpublished authority*, the closest on-point *published* authority and then extrapolating (wastefully) from that authority to the facts at hand? In short, litigants are *already* routinely researching unpublished authority, and the proposition that the proposed rule would somehow increase the cost appellate litigants must bear is unsupportable.

Likewise, the pervasive critique of the proposed rule emphasizing that the Committee's approach would exponentially increase the workload of the federal bench blindly ignores the tightly confined scope of the proposed rule. To that end, a majority of Seventh Circuit judges complain that "judges of a court will be naturally reluctant to repudiate or ignore previous [unpublished] decisions" and that "[w]e will have a moral duty to explain, distinguish, reaffirm, overrule, etc. any unpublished order brought to our attention by counsel." Feb. 11, 2004 Letter on Behalf of Majority of Seventh Circuit Judges to Hon. Samuel A. Alito, Jr., p. 1. In appropriate instances, *i.e.*, when unpublished authority clearly is in conflict with the holding set forth (or about be to be set forth) in published authority, that is precisely the point. However, the often unstated premise underlying the status quo–that no discernible distinction of adjudicatory significance exists between published and unpublished authority–combined with the fact that the proposed rule still permits appellate courts to treat unpublished authority as non-precedential and non-binding, suggests that critics of the proposed rule overestimate its impact.

Indeed, the proposed rule may further the aim of judicial efficiency. Defenders of the status quo recognize that lower court judges and trial litigants often wrestle with the meaning of unpublished authority, even in circuits which strictly prohibit citation of such decisions to or by the lower federal courts of the circuit. See Jan. 16, 2004 Letter from Hon. Alex Kozinski to Hon. Samuel A. Alito, Jr., pp. 2-3 (explaining 9th Cir. R. 36-3 and observing: "I have read a number of transcripts in which an unpublished disposition was the subject of discussion. The judge and opposing counsel often spent endless pages of transcript debating what Judges X, Y, and Z might have meant when they used a particular phrase in an unpublished disposition"). While I lack the omniscience to know for certain how the Ninth Circuit or the other appellate courts will be impacted by adoption of the proposed rule, I can state with utmost certitude that, when confronted by or cited to unpublished decisions, lower court judges and trial court litigants alike will follow the guiding example set by the governing appellate court in this matter. If Judge Kozinski in the future cavalierly tosses aside unpublished authority with the ease Emmitt Smith once bounced away defenders impeding his advancement down the football field, be assured that trial judges, their clerks, and the bar will follow. Because "no citation" rules *ipso facto* preclude appellate courts from addressing unpublished authority with any frequency, the confusion now prevalent among the lower courts and the bar over how to treat unpublished authority, and which Judge Kozinski candidly acknowledges, is inevitable. Thus, once the microscopic focus shifts from the appellate courts only, and the effectiveness of both the trial *and* appellate courts are considered, proposed Rule 32.1 is seen as *advancing* the quality, performance, and efficiency of the federal judiciary *as a whole*. The proposed rule simply is *not* the Pandora's Box its detractors make it out to be.

In conclusion, anyone and everyone with any familiarity of the federal courts empathizes with the ever-increasing demands made on the federal judiciary. No one wants to exacerbate (to even a small degree) the crushing workload already confronting our federal judges. Nonetheless,

as members of the bar, we all must be sensitive to the related truisms that the legitimacy of the courts depend wholly on the reasoning and rationale articulated by *human* judges, and that the courts possess nothing but the wellspring of legitimacy and credibility they harvest to enforce the decisions they issue. As Justice Kennedy reminded members of the local bar here in Augusta, Georgia not so long ago, precedent is both backward-and-forward looking; we can and do expect a lot from our judges, but the assumption that *any court* can know, at the time of issuing a decision, that the decision neither adds (whatsoever) to already existing case law and that it could *never* contribute (in any way) to future development of the law, strikes even me as hero-worship taken beyond the cusp of reality. The Committee's proposed approach would permit litigants to cite unpublished authority to the issuing courts, and would therefore provide the appellate courts with occasions to confront and distinguish *perceived* inconsistencies in the law. Even if the courts only seldom embrace such opportunities, litigants will be grateful for the chance to bring *all* pertinent authority to the court's attention. In short, the Committee's proposed rule is a modest step, and the adjudicatory process is improved because of it. Notwithstanding the criticism it has received, I support proposed Rule 32.1.

I thank you for this opportunity. Should you, members of the Committee, or any members of the Third Branch have criticisms or comments in response to this letter, I will eagerly receive them. Thank you again for your service.

Sincerely,

Michael Loebl

Michael N. Loebl

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