Nobody
<nobody@uscbgov.ao.dcn>
01/30/2004 01:00 PM

To: Rules_Support@ao.uscourts.gov
cc:
Subject: Submission from http://www.uscourts.gov/rules/submit.html

03-AP-223

Salutation: Mr.
First: David
MI: R
Last: Fine
Org: Kirkpatrick & Lockhart LLP
MailingAddress1: 240 North Third Street
MailingAddress2:
City: Harrisburg
State: Pennsylvania
ZIP: 17101
EmailAddress: dfine@kl.com
Phone: (717) 231-5820
Fax: (717) 231-4501
Appellate: Yes
Comments:

I have written before to the committee on the issue of citation to so-called non-precedential or unpublished opinions. See Letter from David R. Fine to Prof. Patrick J. Schiltz, May 5, 2003. I write now to comment on and support Alternative B of the proposed Fed. R. App. P. 32.1. I described the reasons for my support in my previous letter to the committee and in published commentary. See David R. Fine, Hitting right notes on cites, The National Law Journal (May 12, 2003) at 34; David R. Fine, Keeping mum kills precedents, The National Law Journal A23 (February 19, 2001), and Richard H. Cooper and David R. Fine, What's Past is Prologue, The Orange County Lawyer (February 2001). I will not repeat those reasons here, in part because I know they have been well articulated by others.

I would, however, like to briefly respond to the comments submitted to the committee by the Honorable Alex Kozinski in his letter to Judge Alito dated January 14, 2004. I have great respect for Judge Kozinski, and I regard anything he writes as worth careful attention, but I think he is simply wrong on this issue. Nothing in any of the alternative versions of the proposed rule makes a circuit court treat all opinions as precedential. Most of Judge Kozinski's concerns seem to assume that the rule would have that effect.

For example, Judge Kozinski writes that enactment of any variation of proposed Rule 32.1 would undermine uniformity and clarity of law in the circuits. That might be so if the rule required that unpublished opinions be treated as binding authority, but it does not. Judge Kozinski's principal challenge is that lower federal courts and counsel tend to treat unpublished opinions as stronger authority than they are. That may be, but the answer to that is greater education, not circuit rules that pretend that legal decisions made by

three Article III judges have nothing to say except to the counsel and parties in a particular case.

Judge Kozinski writes that allowing such citation would increase the burden on lawyers and the cost to clients. Not so. Assume for the moment that all circuits decide that such opinions may be cited only as persuasive authority. A lawyer's baseline obligation is to direct the court to controlling precedent, which these opinions would not be. If the concern is that well-heeled litigants would have better resource to persuasive authority, one could say they already do. Moreover, it is not ordinarily the purpose of rules of procedure to level the economic playing field among litigants.

Judge Kozinski asserts that the inconsistency between federal and state practice on the issue would cause lawyers confusion. With respect to a fine jurist, that doesn't make sense. There are already so many differences between federal and state practice in most places that a lawyer who is prone to such confusion would be confused anyway and probably ought not be out representing clients in both federal and state courts.

Judge Kozinski's last challenge, that there's no need for a national rule or that such a rule impinges on the "sovereignty" of the individual courts of appeals, again ignores existing practice. There are now 48 Federal Rules of Appellate Procedure from which the individual courts of appeals are not free to depart.

In the end, I think Judge Kozinski reads too much into the proposed alternatives. None is likely to bring about the parade of horribles of which he complains. I urge the committee to adopt Alternative B.

submit2: Submit Comment

HTTP Referer: http://www.uscourts.gov/rules/submit.html
HTTP User Agent: Mozilla/4.0 (compatible; MSIE 6.0; Windows NT 5.0)
Remote Host:
Remote Address: 10.213.201.7
