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ARTICLES & ESSAYS

**Judge Kozinski Objects**

Beth Hirschfelder Wilensky

## Judge Kozinski Objects

Beth Hirschfelder Wilensky\*

Sitting judges don't get to practice law.<sup>1</sup> So although they often opine on the dos and don'ts of effective advocacy,<sup>2</sup> we rarely get to see them put their advice into practice. But a few years ago, a class-action lawsuit provided the rare opportunity to witness a federal judge acting as an advocate before another federal judge—if not in the role of attorney, then certainly in as close to that role as we are likely to see. Given the chance to employ his own advice about effective advocacy, would the judge—Alex Kozinski—practice what he preaches? Would his years of experience on the other side of the bench inform his written advocacy, or would he succumb to the same temptations that frequently undermine the advocacy of practicing lawyers? It turns out that Judge Kozinski's written advocacy did flout some persuasive-writing conventions, but it was persuasive, anyway. I wanted to figure out why. And I wanted to figure out whether his advocacy suggests lessons for practicing attorneys who might be tempted to adopt his approach.

In 2012, a class action lawsuit was filed in the Central District of California against the car manufacturer Nissan.<sup>3</sup> The lawsuit alleged significant problems with the battery in the Nissan LEAF, the carmaker's electric vehicle. Alex Kozinski, then the Chief Judge of the Ninth Circuit, was a Nissan LEAF owner—and a very unhappy one. And as a Nissan LEAF owner, Kozinski was a

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<sup>1</sup> See CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4(A)(5).

<sup>2</sup> See, e.g., ANTONIN SCALIA AND BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES (2008); Jim Moseley, *Persuasive Briefs: Tips for the First-Time Writer*, TEX. LAWYER, Apr. 23, 2012, at 18; Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567 (Spring 1999); Alex Kozinski, *The Wrong Stuff*, 1992 B.Y.U. L. REV. 325 (1992); Richard A. Posner, *Convincing a Federal Court of Appeals*, 25 LITIG. 3 (Winter 1999).

<sup>3</sup> Class Action Complaint, *Klee v. Nissan North American, Inc.* (C.D. Cal. Sept. 24, 2012) (No. CV12-08238).

class member—also a very unhappy one. So unhappy that, when the parties notified class members of their opportunity to object to the proposed settlement, Judge Kozinski and his wife<sup>4</sup> responded with a thirty-seven-page Objection to Class Action Settlement (“First Objection”).<sup>5</sup> They followed that a month later with a thirty-page Opposition to Plaintiffs’ Motion for Final Approval of Class Action Settlement (“Second Objection”).<sup>6</sup> The Objections received plenty of coverage in the legal press.<sup>7</sup> But surprisingly, no reports analyzed the Objections as written advocacy from someone with years of experience on the bench.

And we have many principles of written advocacy by which to assess Kozinski’s Objections, since so much has been written on the subject. The legal community—and especially the legal writing community—has coalesced around many principles of persuasive writing. Taken as a whole, I think of these principles as the canons of effective advocacy. Judges routinely promote the canon. Kozinski himself has done so. For example, in his article, “The Wrong Stuff,” Kozinski provides tongue-in-cheek advice on the best strategies to use if your goal is to *lose* your case—with the obvious implication that attorneys who want to win should avoid his “suggestions.”<sup>8</sup> In part I below I discuss his specific advice—and other examples from the canons of effective advocacy—and contrast that advice with Kozinski’s Objections. In part II, I suggest some theories to explain Kozinski’s deviation from the canon and why his Objections are effective, nevertheless. And in part III, I describe how the result in the case suggests Kozinski’s advocacy was effective and offer some concluding thoughts for practicing attorneys.

4 Though Judge Kozinski filed the Objections jointly with his wife Marcy Tiffany, who is herself a lawyer, I am assuming that Kozinski is the primary author of the Objections. At a conference about class actions, Judge Kozinski did say, in reference to the Objections: “Marcy and I wrote an opposition.” Alex Kozinski, *The Future of Class Action Litigation: Keynote by Chief Judge Alex Kozinski* 13:09-12 (NYU Sch. Law video Nov. 11, 2014), <https://www.youtube.com/watch?v=zipvHeC42Lw> [hereinafter Kozinski Keynote]. But they read like something he wrote. Regardless, he either wrote or approved of everything they contain, so it is fair to attribute the Objections to him. And it was Judge Kozinski—not his wife—who spoke at the court hearing on the proposed settlement, which suggests he was driving this train. Civil Minutes—General for Motion(s) Hearing, *Klee v. Nissan North American, Inc.* (C.D. Cal. Nov. 18, 2013) (No. CV12-08238).

5 Objection to Class Action Settlement, *Klee v. Nissan North American, Inc.* (C.D. Cal. Oct. 15, 2013) (No. CV12-08238) [hereinafter First Objection].

6 Opposition to Plaintiffs’ Motion for Final Approval of Class Action Settlement, *Klee v. Nissan North American, Inc.* (C.D. Cal. November 10, 2013) (No. CV12-08238) [hereinafter Second Objection].

7 See, e.g., Alison Frankel, *Lawyers’ Nightmare: When 9th Circuit Chief Judge Kozinski is Class Objector*, REUTERS L. BLOG (Nov. 20, 2013), <http://blogs.reuters.com/alison-frankel/2013/11/20/lawyers-nightmare-when-9th-circuit-chief-judge-kozinski-is-class-objector/>; Debra Cassens Weiss, *Electric-car owner Alex Kozinski offers ‘scathing’ objection in class action*, ABA JOURNAL (Nov. 21, 2013, 11:45 AM CST), [http://www.abajournal.com/news/article/nissan\\_leaf\\_owner\\_alex\\_kozinski\\_is\\_scathing/](http://www.abajournal.com/news/article/nissan_leaf_owner_alex_kozinski_is_scathing/); William Peacock, Esq., *Kozinski Crashes Nissan Leaf Settlement Party—As a Plaintiff*, FINDLAW (Nov. 22, 2013, 3:37 PM), [http://blogs.findlaw.com/ninth\\_circuit/2013/11/kozinski-crashes-nissan-leaf-settlement-party---as-a-plaintiff.html](http://blogs.findlaw.com/ninth_circuit/2013/11/kozinski-crashes-nissan-leaf-settlement-party---as-a-plaintiff.html).

8 Kozinski, *supra* note 2, at 325.

## I. Kozinski's Objections: The Good, the Bad, and the Ugly

Kozinski's Objections take issue with both the substance of the Nissan LEAF settlement and the process by which it was reached. Substantively, Kozinski attacks the settlement as worthless because it provides only an enhanced warranty for the battery, and, according to Kozinski, Nissan had already provided that to all class members in response to consumer complaints. And he attacks the enhanced warranty as itself inadequate to address all of the problems with the LEAF's battery that the Complaint describes. As a result, according to Kozinski, the settlement would leave class members *worse off*, because it would require them to give up their right to sue in return for nothing of value. He also attacks the fee class counsel would receive under the settlement—\$1.9 million—as outrageously high and undeserved, especially because class counsel did minimal work. They took no discovery from Nissan before reaching the settlement and so didn't learn anything about the battery problems or Nissan's knowledge of them. Kozinski asserts that, as a result, class counsel couldn't possibly know whether they were getting a good deal for the class.

Kozinski's Objections adhere to the canons of effective advocacy in several ways. They express a core theory that threads his arguments together: the settlement is the product of no work by the attorneys that offers no benefits to the class. The Objections use facts persuasively. They are written with Kozinski's usual bracing clarity in a highly accessible style. They are organized to lead the reader through the arguments effortlessly, with helpful headings as a guide. In short, both Objections are engaging and reader-friendly, as all effective advocacy must be.

But frankly, it's more fun to consider how the objections *deviate* from the canons of effective advocacy. Let's take a look:

### A. Attacks on Counsel

The canon is clear that attacks on counsel are ineffective. In "The Wrong Stuff" Kozinski has this advice for attorneys looking to convince the court that their arguments are stinkers: "One really good way of doing this is to pick a fight with opposing counsel. Go ahead, call him a slime. Accuse him of lying through his teeth. . . . [Tell the court that what] is really going on here is a fight between the forces of truth, justice, purity and goodness—namely you—and Beelzebub, your opponent."<sup>9</sup> Justice Ginsburg has said that "[a] top quality brief . . . scratches put[-]downs and indignant remarks about one's adversary . . . ."<sup>10</sup> And in their book,

<sup>9</sup> Kozinski, *supra* note 2, at 328.

<sup>10</sup> Ginsburg, *supra* note 2, at 568.

“Making Your Case,” Justice Scalia and legal writing expert Bryan Garner advise advocates not to “accuse opposing counsel of chicanery or bad faith, even if there is some evidence of it.”<sup>11</sup>

It is somewhat surprising, then, that Kozinski’s Objections to the Nissan settlement are filled with accusations that the lawyers for both parties are ethics-challenged liars, and that they colluded to enrich and protect themselves to the detriment of the class. As discussed in section II below, collusion is a risk present in class-action lawsuits, and Rule 23 tries to manage this risk by requiring the court to ensure that counsel is acting in the class’s interests. But raising a concern about collusion doesn’t require the level of contempt for counsel that Kozinski demonstrates. He could have laid out all of the facts and then said something like this: “These facts raise the possibility of collusion between class counsel and Nissan’s counsel. At a minimum, they suggest that class counsel have put their own interests first and therefore are not representing the class adequately.”

Instead, Kozinski baldly asserts that the Nissan attorneys are “in cahoots” with Plaintiffs’ counsel to “buy[] off” the named plaintiffs’ consent “to a settlement that causes nothing but harm to the other class members.”<sup>12</sup> After describing how favorable the proposed settlement is to Nissan, Kozinski writes, “but it could not have been achieved without the duplicity of Plaintiffs’ Counsel.”<sup>13</sup> He writes that “Plaintiffs’ Counsel used the threat of future class suits to extract for themselves a nice bounty,”<sup>14</sup> and that Plaintiffs’ Counsel’s incentive was to “get the settlement finalized so they could cash in their bounty.”<sup>15</sup> He writes that “Counsel [for the Plaintiffs] misled the court” when they claimed that the proposed settlement was “just what Plaintiffs asked for.”<sup>16</sup> As for the Defendant, Kozinski writes,

We know for a fact that Nissan lies to its customers. Nissan is, after all, engaging in a huge deception right now by representing to this Court that it is implementing the warranty in order to settle its case, while telling its customers that it’s doing so to “improve our customers’ satisfaction” and “put customer minds at ease.”<sup>17</sup>

Kozinski concludes his First Objection by asking the court to refer the attorneys on both sides to the California State Bar “for investigation of

11 SCALIA AND GARNER, *supra* note 2, at 34.

12 First Objection, *supra* note 5, at 27–28.

13 *Id.* at 14.

14 *Id.* at 35.

15 Second Objection, *supra* note 6, at 5.

16 First Objection, *supra* note 5, at 21 (quoting Memorandum of Points and Authorities in Support of Unopposed Motion for Preliminary Approval of Class Action Settlement at 1, *Klee v. Nissan North American, Inc.*, (C.D. Cal. July 8, 2013) (No. CV12-08238).

17 Second Objection, *supra* note 6, at 10.

misconduct in the negotiation of this phony settlement.”<sup>18</sup> And he asks for the appointment of a Special Master “to determine whether counsel should be sanctioned for their lack of candor to the court and betrayal of the class.”<sup>19</sup>

But maybe this was one of those rare instances in which the attorneys *were* acting unethically? No. Kozinski himself eventually admitted that they weren’t (or at least that Plaintiffs’ Counsel weren’t). After he filed his First Objection, Kozinski met with Plaintiffs’ Counsel. He then filed a one-page amendment to his Objection that said he was “now convinced that Plaintiffs’ Counsel acted in good faith” and that he was “withdraw[ing] any suggestion that Plaintiffs’ Counsel acted unethically in the conduct of this litigation.”<sup>20</sup> In other words, he had too quickly concluded that the substantive deficiencies in the proposed settlement were the product of unethical representation by class counsel, and he had (wrongly) made that accusation a cornerstone of his initial, thirty-seven-page Objection.

### B. Snark. Hyperbole. Anger.

In “Making Your Case,” Scalia and Garner urge advocates to “[r]estrain your emotions”<sup>21</sup> and to “[c]ultivate a tone of civility, showing that you are not blinded by passion.”<sup>22</sup> In his book “The Winning Brief,” Garner tells advocates to “[b]e the voice of reason—with a tone of unflappable calm. Forswear hyperbole and personality attacks.”<sup>23</sup> He writes that “[c]hurlish, bellicose writing suggests a loss of self-control, which itself points to personal failings that can only make a lawyer less effective.”<sup>24</sup>

The media described Kozinski’s Objections as “scathing,”<sup>25</sup> “withering,”<sup>26</sup> and comprising “thirty[]pages of rage.”<sup>27</sup> And that’s accurate. The Objections are filled with hyperbole and snarky attacks on the parties and their arguments. In multiple places, Kozinski describes the settlement as a “sham”<sup>28</sup> and “bogus.”<sup>29</sup> After quoting class counsel’s statement that

<sup>18</sup> First Objection, *supra* note 5, at 35.

<sup>19</sup> *Id.* at 3.

<sup>20</sup> Amendment to Objection at 1, *Klee v. Nissan North American, Inc.* (C.D. Cal. Nov. 5, 2013) (No. CV12-08238). The record doesn’t illuminate Kozinski’s reasons for withdrawing his suggestion of unethical conduct with respect to only Plaintiffs’ Counsel. Presumably, Plaintiffs’ Counsel reached out to him after he filed his First Objection, and Defendant’s Counsel did not.

<sup>21</sup> SCALIA AND GARNER, *supra* note 2, at 34.

<sup>22</sup> *Id.* at 34.

<sup>23</sup> BRYAN A. GARNER, *THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS* 459 (3d ed. 2014).

<sup>24</sup> *Id.* at 461.

<sup>25</sup> Weiss, *supra* note 7.

<sup>26</sup> Y. Peter Kang, *Nissan Leaf Class Deal “Smacks of Collusion,” Court Told*, LAW360 (May 27, 2015, 4:27pm EDT), <http://www.law360.com/articles/660518/nissan-leaf-class-deal-smacks-of-collusion-court-told>.

<sup>27</sup> Peacock, *supra* note 7.

<sup>28</sup> First Objection, *supra* note 5, at 2.

<sup>29</sup> *Id.* at 3, 37.

class members would receive the enhanced warranty only through the settlement, he inserts a paragraph consisting entirely of a single word: Hokum.<sup>30</sup>

Kozinski describes Nissan as hoping to “wipe out future lawsuits by pesky consumers.”<sup>31</sup> In attacking the \$5,000 the named plaintiffs would receive under the settlement, Kozinski writes, “So, [the named plaintiffs] turned over a few papers, chatted with class counsel and let someone look at their cars. The Named Plaintiffs did so little, [counsel] had to repeat the list twice just to fill out a paragraph” in the settlement Memorandum.<sup>32</sup> He also describes the Memorandum as containing “a bunch of lame excuses by Plaintiffs’ Counsel for turning tail and running.”<sup>33</sup>

In the settlement Memorandum, class counsel assured the court that the settlement responded to consumer concerns “as expressed on blogs and in Internet message boards.”<sup>34</sup> Kozinski responds with this: “Objectors are not impressed by counsel’s claim that they deserve to be paid huge sums for surfing the Internet.”<sup>35</sup> And this: “In other words, in evaluating the settlement, Plaintiff’s Counsel engaged in some mighty aggressive Googling and then assuaged their concerns by relying on self-serving documents . . . spoon-fed to them by Nissan.”<sup>36</sup>

Kozinski writes that “Plaintiffs’ Counsel applaud themselves heartily for the brilliant settlement they supposedly extracted from Nissan.”<sup>37</sup> He urges the court to “disregard counsel’s last-minute attempt to slap lipstick on this porcine settlement.”<sup>38</sup> He concludes by suggesting that Plaintiffs’ lawyers, having done almost no work on behalf of the class, are now “free to use [their] \$1.9 million fee from the LEAF settlement to buy themselves Teslas.”<sup>39</sup> And those are just some of the snarky comments that Kozinski sprinkles liberally throughout his sixty-seven pages of argument. It’s all fun to read, but I suspect it wouldn’t fly if filed by an attorney appearing before Judge Kozinski, himself.

30 *Id.* at 4.

31 *Id.* at 8.

32 *Id.* at 26.

33 *Id.* at 29.

34 Notice of Motion and Unopposed Motion for Preliminary Approval of Class Action Settlement; Memorandum of Points and Authorities at 6, *Klee v. Nissan North American, Inc.* (C.D. Cal. July 8, 2013) (No. CV12-08238) [hereinafter Preliminary Settlement Memorandum].

35 First Objection, *supra* note 5, at 31.

36 *Id.* at 32.

37 Second Objection, *supra* note 6, at 2.

38 *Id.* at 8.

39 *Id.* at 27.

### C. Intensifiers

Intensifiers are those little words and phrases—“clearly” “it is obvious” “there can be no doubt”—that advocates use as a crutch. At best, they are a lazy writer’s way to avoid *showing* the reader that the point is clear or obvious. At worst, they are an ineffective attempt to mask the fact that the point is actually *not* clear or obvious—or correct. Nearly every authority on legal writing advises advocates to eschew intensifiers.<sup>40</sup>

But Kozinski uses plenty of them. He writes that Plaintiffs’ Counsel have “clearly” placed their own interests first,<sup>41</sup> that “it’s clear” that Nissan has already given consumers what the settlement purports to provide,<sup>42</sup> that “[i]t’s perfectly clear” that Nissan learned about the battery problems from consumers and not from the lawsuit,<sup>43</sup> and that “it seems perfectly clear that plaintiffs have an excellent case” (i.e., not a difficult one that would warrant a large payout to class counsel).<sup>44</sup> He writes that “[i]t is perfectly obvious that Plaintiffs’ Counsel did very little useful work on this case,”<sup>45</sup> that “[i]t is obvious” that the parties’ estimate of the potential value of the settlement is worthless,<sup>46</sup> and, after asking a rhetorical question about what class counsel did to deserve their fee, that “[t]he obvious answer is that they delivered the class to Nissan on a silver platter” so Nissan could protect itself against future claims.<sup>47</sup> Kozinski twice states that there is “no doubt” that consumers have already received the sole benefit of the settlement—the enhanced warranty<sup>48</sup>—and also writes that “it’s plain as day” that Nissan was planning to provide the enhanced warranty regardless of the lawsuit.<sup>49</sup>

### D. Length

In “The Wrong Stuff,” the first piece of advice Kozinski provides to attorneys who “want to tell the judges right up front that you have a rotten case” is “to write a fat brief.”<sup>50</sup> Similarly, Judge Patricia Wald complains that “[t]he more paper [lawyers] throw at us, the meaner we get, the more

<sup>40</sup> See, e.g., ALEXA Z. CHEW & KATIE ROSE GUEST PRYAL, *THE COMPLETE LEGAL WRITER* 394 (2016) (“[I]ntensifiers often have the opposite effect and actually make your argument *less* compelling.”); GARNER, *supra* note 23, at 520 (“Shun *clearly*, *obviously*, and their dogmatic siblings.”); MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 266–67 (4th ed. 2014) (Intensifiers “have been so overused that they go beyond having no meaning to having a negative meaning.”).

<sup>41</sup> First Objection, *supra* note 5, at 3

<sup>42</sup> *Id.* at 7.

<sup>43</sup> Second Objection, *supra* note 6, at 9.

<sup>44</sup> *Id.* at 12.

<sup>45</sup> First Objection, *supra* note 5, at 33.

<sup>46</sup> Second Objection, *supra* note 6, at 18.

<sup>47</sup> First Objection, *supra* note 5, at 34.

<sup>48</sup> *Id.* at 6, 14.

<sup>49</sup> *Id.* at 34.

<sup>50</sup> Kozinski, *supra* note 2, at 326. Judge Kozinski recently provided a colorful example of his disdain for “fat briefs.” He dissented from a Ninth Circuit order granting a request from a litigant to file a brief that exceeded the permitted word limit, and stated that he wouldn’t read beyond the limit imposed by the court’s rules. Order at 3–4, *Cuevas v. Hartley* (9th Cir. Aug. 4, 2016) (No. 12-55807) (Kozinski, J., dissenting).



irritated and hostile we feel . . . . Repetition, extraneous facts, over-long arguments (by the 20th page, we are muttering to ourselves, ‘I get it, I get it. No more for God’s sake.’) still occur more often than capable counsel should tolerate.”<sup>51</sup>

Although no court rule governs the length of class-action objections, a comparison with other filings suggests Kozinski got carried away. Kozinski filed sixty-seven pages of argument in two Objections. His First Objection was thirty-seven pages. The Plaintiffs’ Settlement Memorandum, to which he was objecting? Eighteen pages.<sup>52</sup> Nine other class members objected to the settlement,<sup>53</sup> and Kozinski’s First Objection alone was longer than all nine other objections *combined*.<sup>54</sup> The Plaintiffs’ response to *all* of the initial objections—Kozinski’s and the other nine—was only twenty-one pages.<sup>55</sup> Kozinski then responded with thirty more pages of argument in his Second Objection.

And he didn’t need all of those words to make his argument. Here is just one example of overkill: Kozinski includes six pages of particulars just to show that the enhanced warranty was not the product of the class action.<sup>56</sup> In excruciating detail, he goes through “multiple public statements by Nissan”<sup>57</sup> on this point. He quotes at length from a letter posted on Nissan’s website, pointing out in multiple places where Nissan explained that it was acting solely to enhance customer satisfaction.<sup>58</sup> And then he describes another letter that precedes the letter he already

51 Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. APP. PRAC. & PROCESS 7, 9–10 (1999).

52 Preliminary Settlement Memorandum, *supra* note 34.

53 In its order granting approval of the final settlement, the court identified fourteen objectors, but noted that three of those objections had not been docketed because they didn’t comply with the court’s rules. Order Granting Final Approval of Class Action Settlement and Awarding Attorneys’ Fees at 4, n. 2, *Klee v. Nissan North American, Inc.* (C.D. Cal. July 7, 2015) (No. CV12-08238). And the court mistakenly counted one objector twice (Robin Jans). *Id.* So there were ten docketed objections, including Judge Kozinski’s.

54 See Notice of Objection by Patricia and Mervyn Devine, *Klee v. Nissan North American, Inc.* (C.D. Cal. Sept. 26, 2013) (No. CV12-08238) (3 pages); Notice of Objection by Robin Jans, *Klee v. Nissan North American, Inc.* (C.D. Cal. Sept. 26, 2013) (No. CV12-08238) (2 pages); Notice of Objection by Roberta Friedman and Leslie Kornblum, *Klee v. Nissan North American, Inc.* (C.D. Cal. Oct. 1, 2013) (No. CV12-08238) (3 pages); Objection to Proposed Class Action Settlement by Mark D. Larsen, *Klee v. Nissan North American, Inc.* (C.D. Cal. Oct. 3, 2013) (No. CV12-08238) (5 pages); Notice of Objection by Jonathan Eckhart and Colleen Walsh-Eckhart, *Klee v. Nissan North American, Inc.* (C.D. Cal. Oct. 4, 2013) (No. CV12-08238) (3 pages); Notice of Objection by Chinh T. Vo Owner of Nissan Leaf and Request for Evidentiary Hearing, *Klee v. Nissan North American, Inc.* (C.D. Cal. Oct. 10, 2013) (No. CV12-08238) (3 pages); Objection to Proposed Class Action Settlement by Cody Pelech, *Klee v. Nissan North American, Inc.* (C.D. Cal. Oct. 18, 2013) (No. CV12-08238) (3 pages); Objection to Proposed Settlement by Jon Chun, *Klee v. Nissan North American, Inc.* (C.D. Cal. Oct. 21, 2013) (No. CV12-08238) (3 pages); Objection to Proposed Class Action Settlement by Charles Gregory Smith, Jr., *Klee v. Nissan North American, Inc.* (C.D. Cal. Oct. 21, 2013) (No. CV12-08238) (4 pages).

55 Plaintiff’s Response to Objections to the Settlement, *Klee v. Nissan North American, Inc.* (C.D. Cal. Nov. 11, 2013) (No. CV12-08238).

56 First Objection, *supra* note 5, at 8–14.

57 *Id.* at 8.

58 *Id.* at 8–10.

59 *Id.* at 10–11.

described.<sup>59</sup> And then he describes another document—a series of questions and answers about the warranty—that follows the two letters he already described.<sup>60</sup> And then he provides even more evidence from two internal Nissan communications about the warranty.<sup>61</sup> Honestly, I was convinced by the first document. By the time I got to the fifth, I was well past bored. In fact, Kozinski had me wondering whether he was hedging against some contrary evidence he *wasn't* showing me.

### E. Block Quotes

Here is what Kozinski says about block quotes in “The Wrong Stuff”: “[T]hey take up a lot of space but nobody reads them. . . . Let’s face it, if the block quote really had something useful in it, the lawyer would have given me a pithy paraphrase.”<sup>62</sup>

Kozinski’s lengthy Objections are made even lengthier by his use of block quotes. Very, very long ones. In his First Objection, he includes two-and-a-half pages of uninterrupted block quotes of material from the Complaint, sandwiched between two short paragraphs that state simply that the proposed settlement abandons the claim he quotes from.<sup>63</sup> And the six pages of argument he includes about the genesis of the enhanced warranty, described above, would be shorter if Kozinski hadn’t interspersed ten paragraphs of block quotes throughout,<sup>64</sup> including one page that contains four uninterrupted paragraphs of block quotes.<sup>65</sup>

Now, it is true that Kozinski is quoting from the Complaint and evidentiary materials, while judges’ scorn for block quotes might be directed more at quoting from case law. But these are outrageously long quotes, with plenty of detail that can’t all be necessary. If he wanted to be sure the evidentiary materials were part of the record, he could have attached them to his Objections and then, in his argument, written something like this: “In 12 separate places across five documents, Nissan says that it is providing the enhanced warranty merely to bolster customer relations, without once mentioning this lawsuit.” Or he could have quoted much more selectively in his argument. In fact, Kozinski helpfully underlines those parts of the block quotes that, I take it, he deems most significant. Perhaps he should have quoted just those parts.

60 *Id.* at 11–12.

61 *Id.* at 12–14.

62 Kozinski, *supra* note 2, at 329.

63 First Objection, *supra* note 5, at 21–24.

64 *Id.* at 9–13.

65 *Id.* at 9.

And now let me embrace some irony and drop in a block quote of my own. In an interview with Bryan Garner, Judge Kozinski said this about reading block quotes as a judge:

You know what? I don't read block quotes. I skip over them. To me, this is "yabba yabba yabba yabba yabba." If there's something good in there, I expect the lawyer to tell me what it is. So the bigger the block quote, the less I'm likely to find what you're looking for. . . . But saying just "Here's a quote: Ta da!" It's just foolish. It just means the lawyer was lazy. . . . What I expect you to do is I expect you to go through and pull that stuff, and make a judgment about the things that work, the things that will persuade, and the things that are just "yabba yabba yabba yabba yabba." . . . I mean, you know what happens when I've got "yabba yabba yabba yabba yabba." . . . My mind goes and I now start thinking about something else. I start thinking about another case. Or probably I start thinking about my gardening, or my chickens, . . . and pretty soon I've forgotten about the case.<sup>66</sup>

Taking a cue from Judge Kozinski himself, I mostly skipped over the block quotes in his Objections. I am sure there was some good stuff in there, but if Kozinski couldn't be bothered to pinpoint it, I certainly wasn't going to search for it.

## II. Some Theories

As I discuss in section III below, Kozinski's advocacy appears to have been highly effective; his Objections persuaded both the parties and the court to take another look at the settlement. After mediation in which Kozinski himself participated, the parties revised the final settlement to account for his concerns, and the court approved that revised final settlement. Kozinski's Objections were persuasive even though he seems not to have taken his own advice. Why can he get away with deviating from the canons of effective advocacy? I have a few theories:

### A. Theory One: Judges Are People Too

Perhaps Kozinski's Objections are evidence that judges, like many attorneys, can't resist the lure of the snarky attack, the intensifier, the urge to throw in every possible argument with an excruciating level of detail.

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<sup>66</sup> Bryan Garner, *Judge Alex Kozinski, U.S. 9th Circuit Court of Appeal (Pasadena): Overquoting* (LawProse video Dec. 25, 2014), <http://www.lawprose.org/bryan-garner/garners-interviews/judges-lawyers-writers-writing/judge-alex-kozinski-u-s-9th-circuit-court-of-appeals-pasadena-overquoting/>.

Perhaps judges, like many attorneys, believe that principles of effective written advocacy discouraging such excesses are usually wise, but gosh, *my* case is a special one. All writers bring their own blinders to their writing. Surely federal judges aren't exempt.

But here's the thing. Kozinski's Objections are effective. They are compelling and persuasive in spite of—and in some cases, *because of*—his unorthodox stylistic choices. The snarky comments make us, the reader, feel like we are in on the joke, teaming up with Kozinski against those naughty lawyers. The hyperbole and informal language make the arguments vivid and engaging. The “clearly” and “obviously” phrases are unnecessary but not damaging.

There are only two deviations from the canon that really *do* undermine Kozinski's arguments: (1) His “fat briefs.” Certainly, they leave the impression that Kozinski doth protest too much. (2) The numerous and extensive block quotes, which lead the reader to skip over everything, and thus pick up on nothing they contain. With those exceptions, Kozinski's Objections work. We need some other theories to figure out why.

## **B. Theory Two: Class Actions Are Special**

Of course, Kozinski isn't writing as an attorney representing a client in an ordinary lawsuit. He is writing as a class member acting on his own behalf. He can take more liberties with his writing style than an attorney could. That is partly because he doesn't have to worry about undermining his client's case when he writes in whatever style he pleases; his own interests are the ones on the line. That doesn't necessarily mean Kozinski *should* ignore the canons of effective advocacy. If his goal is to persuade, it doesn't matter whether he is representing a client or acting on his own behalf. But a class member's objection might be amenable to a looser writing style without undermining its persuasive effect, because expectations for class members are different than those for practicing attorneys. Unlike attorneys, class members are not officers of the court. They have a personal stake in the litigation, and so have some room to bring their outrage, their emotion, and their personality to their argument in ways that enhance, instead of detract from, their argument.

With respect to the attacks on counsel, there is another reason the class-action context makes Kozinski's approach more acceptable: the conflict-of-interest problem that results from class representation. While the attorney–client relationship always has the potential for such conflicts, they are particularly salient in consumer class actions like the Nissan LEAF litigation. This is a common criticism of consumer class actions,

from both the bench<sup>67</sup> and academia.<sup>68</sup> Judge Posner has observed that “courts have often remarked [on] the incentive of class counsel, in complicity with the defendant’s counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers . . . .”<sup>69</sup> That, of course, is precisely the concern that Kozinski centers his Objections around. And when reviewing class-action settlements, federal courts consider whether there is evidence of collusion between the parties.<sup>70</sup> In fact, one commenter has recently observed that courts are growing more hospitable to charges of unethical attorney conduct in class-action litigation, and that both attorneys and objectors are growing increasingly bold about leveling such charges.<sup>71</sup> Courts also recognize a presumption that the settlement is fair where the parties engaged in arms-length negotiation after “meaningful discovery.”<sup>72</sup> For all of these reasons, it makes sense for Kozinski to highlight the conflict-of-interest class counsel faces, and even suggest collusion and significant discovery deficiencies, where those problems resulted in an arguably bad outcome for the class. And as I discuss in the next theory below, Kozinski not only has a particular interest in the conflict-of-interest present in class representation, his day job as a judge gives him special insight into it.

It is also significant that the Nissan LEAF litigation was a settlement class action, which means that the court hadn’t even certified a class action when Kozinski filed his Objections. The court would be considering the adequacy of class counsel’s representation as part of its review of the proposed settlement. To certify the class (and approve the settlement), the court had to find that the named parties adequately represented the class.<sup>73</sup> That requirement has been interpreted to mean that the named parties “*and their counsel* [will] prosecute the action vigorously on behalf of the class.”<sup>74</sup> And in approving class counsel’s representation, the court would have to consider (among other things) “the work counsel has done

67 See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 (1999); *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litigation*, 827 F.3d 223, 234 (2d Cir. 2016); *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 918 (7th Cir. 2011).

68 See, e.g., Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1102–40 (1996); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1367–84 (1995).

69 *Creative Montessori Learning Ctrs.*, 662 F.3d at 918.

70 See, e.g., *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005); *In re Citigroup Inc. Securities Litigation*, 965 F. Supp. 2d 369, 380–81 (S.D.N.Y. 2013).

71 Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L. J. 1569, 1586 (2016).

72 *Wal-Mart Stores, Inc.*, 396 F.3d at 116.

73 FED. R. CIV. P. 23(a)(4).

74 *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (emphasis added).

in identifying or investigating potential claims in the action”<sup>75</sup> and “the resources that counsel will commit to representing the class.”<sup>76</sup> The court could also consider “any other matter pertinent to counsel’s ability to fairly and adequately represent the interests of the class.”<sup>77</sup> Those provisions made concerns about whether class counsel was fairly representing the class particularly appropriate concerns to raise in the Objections to the settlement. In fact, one of Kozinski’s goals in his First Objection was appointment of new class counsel because of the possible collusion he identifies.<sup>78</sup> But those provisions don’t require an objector to raise those concerns with vitriol, snark, and requests for ethics investigations by the bar.

### C. Theory Three: Judges Are Special

Kozinski isn’t just any class member objecting to a settlement. He’s also a federal judge. He walked into this lawsuit with built-in credibility and prestige, and he can take advantage of that—whether intentionally or subconsciously. He can get away with some things that would undermine the credibility of an ordinary advocate. (It is also true that when he filed his Objections, Kozinski was Chief Judge of the Ninth Circuit—the Circuit that hears appeals from the Central District of California, where the Nissan LEAF litigation was docketed. His participation might have raised concerns about his outsized influence on the lower-court judge. However, those concerns were eliminated when a flurry of district-court judges recused themselves in quick succession, leading to the appointment of a senior status Ninth Circuit judge to sit by designation.)<sup>79</sup>

More broadly, Kozinski may be drawing on his position as a judge to suggest problems with the class-action system. In fact, at a conference about class actions at New York University School of Law, Kozinski explicitly connected his own experiences in the LEAF litigation with broader concerns about whether class actions are really working as they

<sup>75</sup> FED. R. CIV. P. 23(g)(1)(A)(i).

<sup>76</sup> FED. R. CIV. P. 23(g)(1)(A)(iv).

<sup>77</sup> FED. R. CIV. P. 23(g)(1)(B).

<sup>78</sup> First Objection, *supra* note 5, at 3.

<sup>79</sup> Judge Pregerson, who was originally assigned to hear the case, recused himself because he had a social relationship with Judge Kozinski, and had actually spoken with him about his Nissan LEAF. Order to Reassign Case Due to Self-Recusal Pursuant to Section 3.2 of General Order 08-05, *Klee v. Nissan North American, Inc.* (C.D. Cal. Nov. 5, 2013) (No. CV12-08238). The two judges who were subsequently assigned to hear the case each recused based simply on Judge Kozinski’s position as the Chief Judge of the court to which their decisions were appealed. Order Re Recusal, *Klee v. Nissan North American, Inc.* (C.D. Cal. Dec. 19, 2013) (No. CV12-08238); Order of Recusal, *Klee v. Nissan North American, Inc.* (C.D. Cal. Jan. 24, 2014) (No. CV12-08238). Ultimately, Judge Tashima—who was then a senior-status judge on the Ninth Circuit itself—was assigned to hear the case, sitting by designation. Designation of a Circuit Judge for Service in a District Court within the Ninth Circuit, *Klee v. Nissan North American, Inc.* (C.D. Cal. Jan. 29, 2014) (No. CV12-08238).

were intended to work.<sup>80</sup> In a “Keynote Conversation” with Arthur Miller, Judge Kozinski started by saying this about consumer class actions: “Theoretically they’re great. As a practical matter, they seem to wind up generating a lot of money for the lawyers and a lot of gornisht [Yiddish for ‘nothing’] for the consumers.”<sup>81</sup> He went on to suggest ways to achieve what he views as some of the goals of consumer class actions—detering and correcting bad behavior by companies—while rethinking the mechanism through which those goals are achieved.<sup>82</sup> Then he pivoted to a lengthy discussion of his own experiences as a class member in the Nissan LEAF litigation, further drawing out those themes about the roles of class counsel, judges, and class members in consumer class actions.<sup>83</sup>

Given the way class actions work, if Kozinski didn’t use his Objections to make detailed arguments about the problems he observed in the lawsuit, it is likely that no one else would have. In fact, no one else did—at least not with the specificity with which Kozinski did. In the Keynote Conversation at NYU, Arthur Miller made precisely this point to Judge Kozinski:

Part of it has got to lie with the degree of supervision the district judge will impose on the settlement process. How much can we realistically expect the district judges to do in what ends up as a non-adversary—except if you’re hanging out—[proceeding]?<sup>84</sup>

In other words, it was only because Judge Kozinski was “hanging out” in the lawsuit, through his Objections, that arguments against the settlement were aired and taken seriously by the judge. That doesn’t mean Kozinski needed—or benefited from—every last detail he included. In fact, he probably could have made an equally or more compelling argument with, for example, fewer block quotes from the record. But as a sitting federal judge, Kozinski could rely on the likelihood that the judge hearing the case would read his Objections closely. And even if the judge

**80** Kozinski Keynote, *supra* note 4.

**81** *Id.* at 2:19–2:34.

**82** *Id.* at 5:00–7:17.

**83** *Id.* at 10:00–18:05.

**84** *Id.* at 18:13–18:37. Many commentators have identified the nonadversarial nature of class settlement hearings as a barrier to a judge’s ability to determine whether a settlement is fair. *See, e.g.*, William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1445 (2006) (“Because counsel for the plaintiff class and the defendant share an interest in obtaining court approval of the settlement, judges are unlikely to receive information that could be relevant to the fairness of the settlement from the parties themselves.”); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 808 (Spring 1997) (“Perhaps in no other context do we find courts entering binding decrees with such a complete lack of access to quality information and so completely dependent on the parties who have the most to gain from favorable court action.”).

didn't read all of those block quotes, Kozinski could rely on the judge's trusting his assurance that that they really did contain copious evidence for the points he was making. In other words, Kozinski gets some benefit out of emphasizing the *quantity* of evidence; and the multitude of block quotes and lengthy list of details help him do that by providing cues *visually*, even if the judge doesn't read them. An ordinary objector—or attorney—probably can't get away with that. The better approach for most writers is the one I suggested in section I above: attach the documents separately and then quote them selectively in the argument.

Finally, Kozinski's participation in the lawsuit also resulted in negative publicity for the proposed settlement that the settlement almost certainly would not otherwise have merited.<sup>85</sup> While Judge Kozinski has disclaimed any intent to stir up publicity through his Objections,<sup>86</sup> the stylistic choices he made—the hyperbole, the snark, and the rage—likely amplified the media attention his Objections received, placing additional pressure on the parties and the court to revisit the settlement terms.

#### D. Theory Four: Judge Kozinski Is Special

Alex Kozinski isn't just any federal judge. He is a federal judge known for his engaging and accessible writing style that often features a healthy dose of snark, hyperbole, and colloquialisms. As readers who have come to expect this kind of writing from Kozinski, we would have been disappointed if he *hadn't* employed his usual bluster and homespun style.

And let's face it: Kozinski writes better than the rest of us mortals. He can get away with writing this way because he is so good at it. So though most attorneys should adhere to the canons of effective advocacy, there are exceptions for masters like Kozinski. He knows how to write playfully in measured and skillful ways that end up being effective. Most writers aren't that good. In "Making Your Case," Justice Scalia and Brian Garner make a similar point when they discuss whether attorneys should attempt to use humor during oral argument. They write that "only someone with a genuinely good sense of humor, and a feel for when humor is appropriate, can pull this off," and that "many of us who think we have those qualities don't."<sup>87</sup> They conclude that "the benefit [of using humor] is not worth the risk."<sup>88</sup> The same is almost certainly true of attempts to deviate from the canons of effective advocacy: some advocates can do it well, but not nearly

85 See *supra* notes 7, 26–27.

86 Kozinski Keynote, *supra* note 4, at 14:10–14:25.

87 SCALIA AND GARNER, *supra* note 2, at 187.

88 *Id.*



as many of us do it as well as think we can, and not as frequently as we think we can. And the benefit is rarely worth the risk.

### III. Some Final Thoughts for Practitioners

Kozinski's Objections violate the rules of persuasive writing and yet are still persuasive. All four theories I articulate above are probably at play in explaining why that is. For attorneys seeking persuasive-writing inspiration from Kozinski's turn as an advocate, the most important takeaway might be this one: Don't Try This At Home. It would almost certainly be a mistake for attorneys to read Judge Kozinski's Objections and conclude that it is fine to allow attacks on counsel, snark, intensifiers, bloated arguments, and lengthy block quotes to sneak into their own advocacy. But Kozinski's Objections *do* illustrate some macro lessons from the canons of effective advocacy: overarching considerations like credibility and audience matter.<sup>89</sup> Kozinski leverages both the credibility he has earned as a federal judge and his knowledge of courts' expectations for class-action objections, and uses them to his advantage in drafting persuasive arguments.

You may be wondering at this point whether, in light of Judge Kozinski's multiple deviations from the canons of effective advocacy, I am wrong about how persuasive his Objections really are. But it's not just my own sense that his Objections are so compelling; the record contains independent evidence that Kozinski's advocacy made a difference. After he filed his Objections, Kozinski participated in mediation with the parties. The parties then sought approval for a final settlement that addressed his primary concerns. The revised settlement—which the court ultimately approved—included these provisions:

- An extended warranty that provided for replacement, not merely repair, of batteries that had lost enough capacity to trigger the warranty. The replacement battery Nissan would provide would be the same one Nissan was installing in current model-year cars instead of the original, deficient kind of battery.<sup>90</sup>
- Three months of free access to vehicle-charging stations for class members residing in states where Nissan's vehicle-charging program was available.<sup>91</sup>

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<sup>89</sup> See, e.g., *id.* at 5–7 (discussing the importance of knowing what your audience wants) 205–06 (discussing the importance of an advocate's credibility); BEAZLEY, *supra* note 40, at 253 (discussing importance of credibility); IAN GALLACHER, LEGAL COMMUNICATION AND RESEARCH 22–23 (2015) (discussing role audience expectations play in legal writing).

<sup>90</sup> Order Granting Final Approval of Class Action Settlement and Awarding Attorneys' Fees at 5, *Klee v. Nissan North American, Inc.* (C.D. Cal. July 7, 2015) (No. CV12-08238) [hereinafter Order Granting Final Approval].

<sup>91</sup> *Id.*

- A check for \$50 to class members who no longer owned their Nissan LEAF or who lived in a state without Nissan’s vehicle-charging program.<sup>92</sup>

In other words, the final settlement provided additional consideration beyond the enhanced warranty that Nissan had already independently provided. Based on the revisions to the settlement, Kozinski withdrew his Objections.<sup>93</sup> And in approving the settlement, the court noted that “Kozinski and [his wife] Tiffany’s withdrawal of their objection was in direct response to mediation and the subsequent increased benefits for the entire class.”<sup>94</sup> Those “increased benefits for the entire class” were almost certainly in direct response to Kozinski’s highly effective—and highly unusual—advocacy.

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<sup>92</sup> *Id.* at 5–6.

<sup>93</sup> Notice of Withdrawal of Objection of Marcy Tiffany and Alex Kozinski to Plaintiffs’ Motion for Final Approval of Class Action Settlement, *Klee v. Nissan North American, Inc.* (C.D. Cal. May 4, 2015) (No. CV12-08238).

<sup>94</sup> Order Granting Final Approval, *supra* note 90, at 22.