

VISITING SCHOLARS

The Honorable Alex Kozinski of the Ninth Circuit Delivers the 13th Annual Kaplan Lecture

by Tara Wilson '02

On October 20, 1999, Judge Alex Kozinski, Circuit Judge for the United States Court of Appeals for the Ninth Circuit, delivered the 13th Annual Howard Kaplan Memorial Lecture to a large audience of faculty, administrators and students in the Arthur and Deanne Indursky Lecture Hall. His lecture, "Things Judges Say," left the audience in admiration of his enthusiasm for the law, and in high spirits after his witty and entertaining presentation.

Judge Kozinski began with an anecdote about his mother, who he describes as one of the most creative legal minds that he has ever encountered,

to open his discussion of creative lawyering skills. Shortly after moving to the United States from Romania, Kozinski recalled, he entered a contest that required him to write a 25-word essay about a local mall. When he became troubled at not being able to cut his essay down from 27 to 25 words, his mother told him not to worry and launched into an argument claiming that 25 words surely does not mean

25 words. His mother told him to look at the "spirit" of the rule. The judges simply wanted a brief description and 27 words are within the "penumbra" of 25 words. The young Kozinski was skeptical, so his mother launched into a second line of argument stating that the small words, such as "a" and "the" do not really count towards the 25 words. The main rule was that the mall must be described in glowing terms, and the secondary, less important rule, was the 25-word limit. Therefore, Judge Kozinski's mother exclaimed, "your poem is too short." Unfortunately, Judge Kozinski lost the contest and dismissed his mother's legal analysis until he encountered the same creative lawyering skills at UCLA Law School.

Kozinski learned a valuable lesson from his early experience with the law that should resonate in the minds of all those in the legal profession: exceptions happen in all facets of the law. He used the example of §487 of the California Penal Code for grand theft. The law clearly defines grand theft as property valued at more than \$400. An exception occurred when a California judge pronounced that stealing crustaceans worth more than \$100 also constituted grand theft. This kind of exception could never occur without a judge creatively "twisting the law beyond recognition."



Judge Kozinski talks with Hofstra Law faculty.

It is difficult to determine when a judge will make a departure from an apparently plain meaning in law. Judge Kozinski warned the audience about the term "little construction," or worse yet, "technical little construction." A judge will often state that this is "a case of first impression," and go on to give his own opinion, without regard to precedent. All one has to do is determine where an ambiguity lies and,

given that words in the English language frequently have more than one meaning, it is usually easy to find an ambiguity. Looking at his own circuit's decision in *Allstate Insurance Company v. Pacheco*, 851 F.2d 257 (1988), Kozinski relayed to the audience that he was baffled that his colleagues could find ambiguity in the term "motorized vehicle." Not only does this phrase appear to have a simple, direct meaning, but the Allstate policy defined the term and gave examples of "motorized vehicles." Nevertheless, his colleagues still took it upon themselves to deem the term ambiguous. Once an ambiguity is found, the meaning of the ambiguity lies within the judge's own interpretation.

To the surprise and delight of the audience, Judge Kozinski then broke into song, giving an in-depth probe inside a judge's

mind, with his "apologies to Paul Simon," although nobody seemed to mind:

"The problem is all inside your
head you will agree;
Contracts are easy if you don't
read 'em logically;
I'd like to help you in your
struggle to be free.
There must be 50 ways to break a contract:
Just misread the text, Rex,
And let in parole, Joel,
Find terms that conflict, Nick,
And you've got it licked.
Call it a tort, Mort;
Find economic duress, Les;
Skip paragraph three, Lee,
and set yourself free."

Kozinski then asked the audience, "Does this mean that there are no principled ways of deciding cases?" He answered by acknowledging the assertion that language has no definitive meaning and, therefore, there can be no binding constraints on

how courts interpret. In his own experience, Judge Kozinski has found that conflicts arise when one party finds a term inconvenient leading to an attempt to cloud the meaning. He suggested a remedy in which the parties concentrate their efforts on clarifying ambiguities in the drafting stage.

Judge Kozinski tried to end on a more serious note by inviting questions from the audience, although he could not help making the audience laugh when answering a question from Professor Silber regarding the fine-print contracts present on the back of car rental agreements, airline tickets and such. His answer was to acknowledge that in a mass economy it is simply cheaper to use form contracts to deal with millions of consumers. If individuals would like to negotiate their own contracts they can do so, but at a price.

Then, based on a question from Professor Monroe Freedman about a judge's discretion, Judge Kozinski acknowledged that judges are hired for their life experience and exercise discretion, sometimes inadvertently, by their own notion of fairness. Judges are rarely called on what they say, but maybe they should be.



The Honorable Alex Kozinski