Independent Research by Judges: Emerging Ethical Issues

National Judicial Institute & Conclave

Eric J. Magnuson, Esq.

ROBINS KAPLAN LLP
REWRITING THE ODDS

This presentation can be found at RobinsKaplan.com at http://www.robinskaplan.com/lawyers/eric-magnuson

SCENARIO 1

- Plaintiffs sued defendant auto dealership alleging violations of the Federal Credit Repair Organization Act.
- They claimed that the defendant used interstate commerce to represent that it could assist consumers to improve their credit ratings so that they could buy used cars.
- No payment was assessed for the financing service.

SCENARIO 1

- Defendant's advertisements implied that consumers with bad credit would receive a loan and reestablish their credit.
- In assessing whether defendant's conduct fell under the federal statute, defendant urged the court to examine statements made by the Federal Trade Commission through press releases and other information on its website to conclude that the conduct of the defendant "fell short" of the conduct the statute was intended to address.

Should the court have overruled plaintiff's objection concerning the use of this information because it was not submitted with an authenticating affidavit?

YES

NO

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

YES

Sannes v. Jeff Wyler Chevrolet Inc.,
1999 U.S. Dist. Lexis 21748 (S.D. Ohio, Mar. 31, 1999)

The court held that FTC press releases, printed from the FTC's government worldwide web page are self-authenticating official publications under Fed. R. Evid. 902(5). *Id.* at *8, n.3.

SCENARIO 2

- Parties were engaged in litigation in federal court .
- Jurisdiction was asserted based on diversity of citizenship.
- The complaint alleged, and the answer admitted, that the plaintiff corporation was a Missouri resident with hits principal place of business there; it further alleged that the defendant was a Delaware LLC, with its principal place of business in Illinois.
- The district court accepted the jurisdictional assertions at face value, and rendered a judgment in favor of the plaintiff.

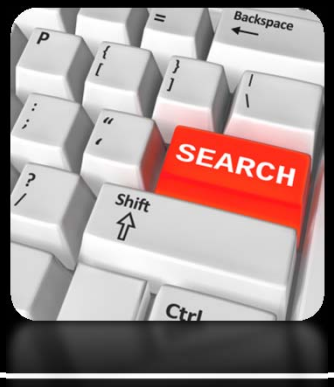
SCENARIO 2

- On appeal, the Seventh Circuit announced to the parties that it had conducted its own independent research on whether the LLC had any partners who resided in Missouri; the court discovered that the plaintiff was actually incorporated in Illinois, rather than Missouri.
- Since citizens of Illinois were on both sides of the suit, the court held that diversity of citizenship was lacking.

Did the court exceed the proper bounds in performing this research?

YES

NO



NO

Bellville Catering Co. v. Champaign Marketplace, LLC, 350 F.3d 691 (2003)

The court concluded that it had an independent duty to investigate jurisdiction. Rather than deciding the issue on its own, the court notified both sides of its research results, and asked them for comments before it ruled.

NO

Bellville Catering Co. v. Champaign Marketplace, LLC, 350 F.3d 691 (2003)

Since the court felt both sides were responsible for the error, the court said "Although we lack jurisdiction to resolve the merits, we have ample authority to govern the practice and counsel in the litigation. The best way for counsel to make the litigants whole is to perform, without additional fees, any further services that are necessary to bring this suit to a conclusion in state court, or by settlement." *Id.* at 694.

SCENARIO 3

- Medical provider sued insurer to recover first-party no-fault benefits for medical services rendered to a passenger in insured vehicle.
- The insured was U-Haul, which leased a rental vehicle to a New York resident; the injured passenger was also a New York resident
- Insurer moved to dismiss based on lack of personal jurisdiction – it did not write, sell or solicit any insurance policies in New York; policy written in Arizona.

SCENARIO 3

- Trial court denied motion to dismiss based on its own internet research, which indicated:
  - the insured was the world's largest consumer truck and trailer rental operation and did business in all 50 states.
  - A state website indicated that the insurer was licensed to do insurance business in New York.
- None of the parties presented this evidence to the trial court
- The trial court did not make a specific finding as to whether the insurer actually transacted any business in New York.

Did the trial court properly base its decision on facts it discovered on the internet?

YES

NO

NO

New York City Med. & Diagnostic v. Republic Western Insurance, 798 NYS 2d 309 (N.Y. App. Term 2004) reversing 2003 WL 21537410 (N.Y. Civ. Ct. 2003)

The appellate court concluded the trial court improperly made findings of fact based not upon the submissions of counsel but rather upon its own internet research. The dissenting judge asserted the website of the New York State Department of Insurance was properly relied upon, under judicial notice. *Id.* at 312.

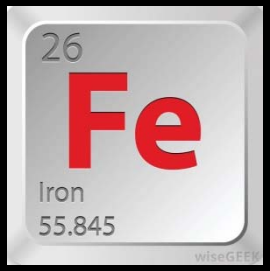
SCENARIO 4

- A trial judge is faced with difficult scientific admissibility questions in a personal injury case.
- The judge independently obtains medical journal articles on iron poisoning prior to hearing expert testimony.
- The judge excludes proffered expert testimony based in part on his research.

Did the trial court properly consider extra record medical literature?

YES

NO



YES

Johnson v. United States, 780 F.2d 902 (11th Cir. Fla. 1986)

The exclusionary ruling was reversed on other grounds. However, the court made the following observations:

YES

Johnson v. United States, 780 F.2d 902 (11th Cir. Fla. 1986)

It is a matter of common knowledge that courts occasionally consult sources not in evidence, ranging anywhere from dictionaries to medical treatises. *Id.* at 912.

A trial judge's findings are not necessarily tainted simply because the court brought experience and knowledge to bear in assessing the evidence. *Id*. at 912.

YES

Johnson v. United States, 780 F.2d 902 (11th Cir. Fla. 1986)

The trial judge may not undertake an independent mission of finding facts outside the record. *Id.* at 912.

The actions of the trial judge were affirmed based in part on his statement that he "did not rely" on the outside sources in reaching his conclusions. *Id.* at 910.

CONSIDERATIONS

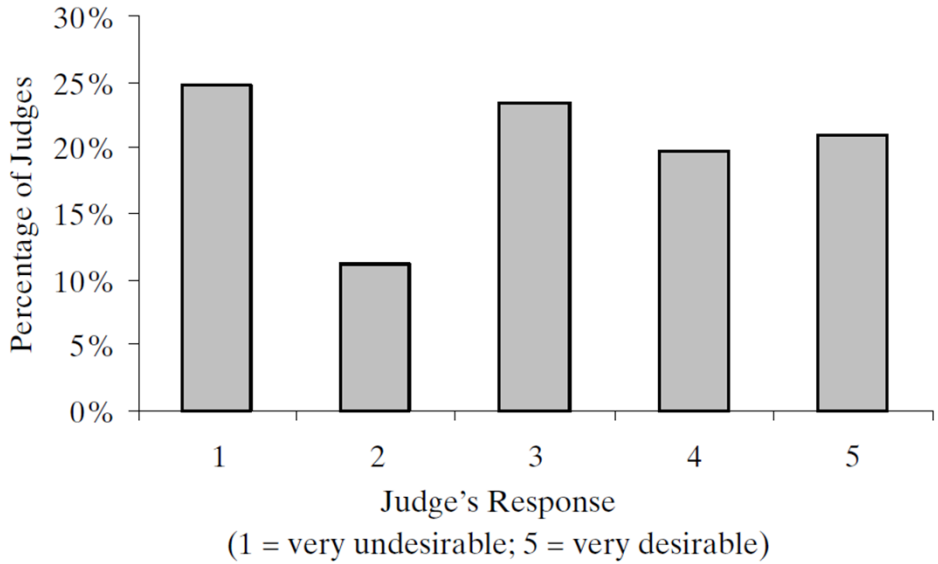
Is it desirable for a judge to find and read medical journal articles (peer-review) in a case involving medical questions?

YES

NO

Cheng, Edward K. "Independent Judicial Research in the *Daubert* Age." *Duke Law Journal* 56, 1263-1318 (2007)

Figure 1. Desirability of Judges Independently Reading Medical Journals



CONSIDERATIONS

Is it desirable for the judge to read medical treatises to learn more about the medical issues?

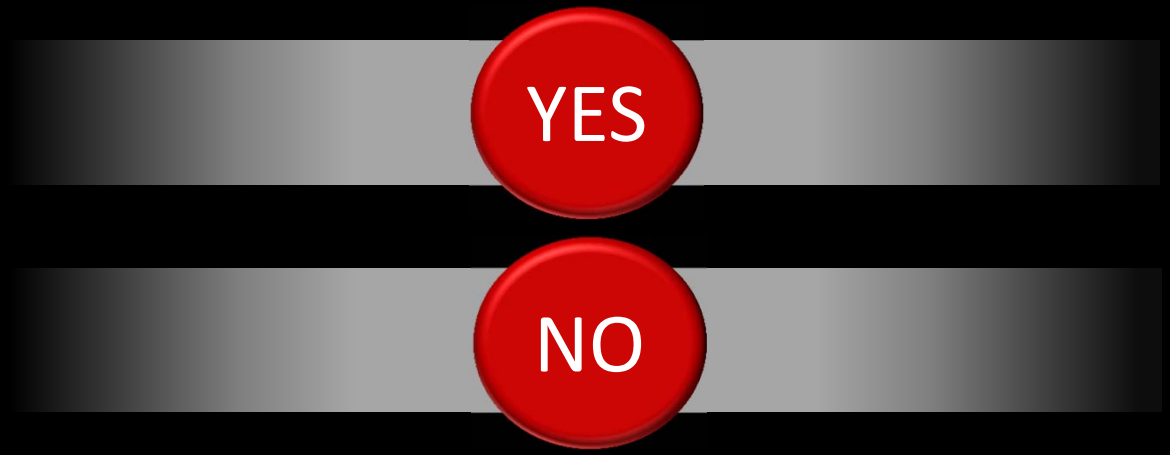


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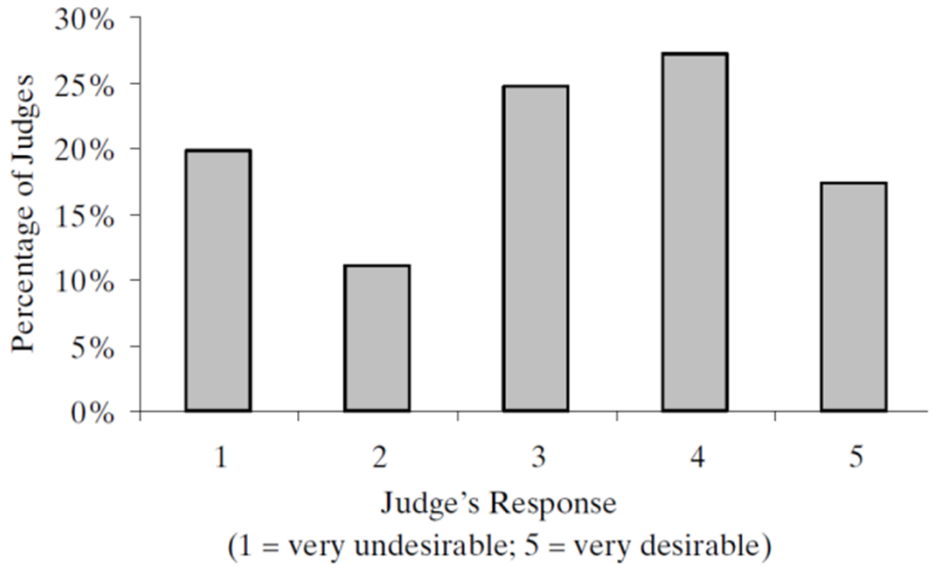
Figure 2. Desirability of Judges Independently Reading Medical Treatises



SCENARIO 5

- Injured employee filed a claim for workers compensation benefits.
- The injured employee claimed that his heart attack was caused by “unusual exertion”.
- Industrial Commission denied benefits.
- Intermediate appellate court reversed and remanded to award benefits.

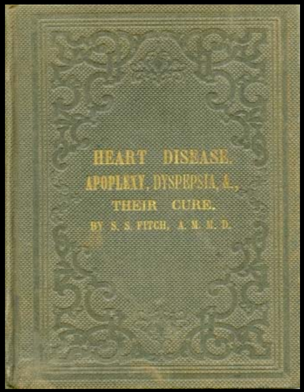
SCENARIO 5

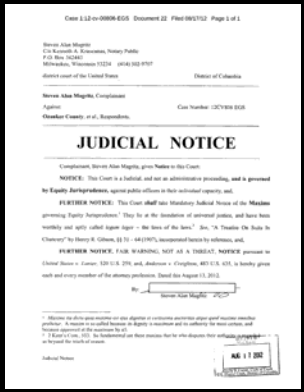
- In reaching its decision, the intermediate appellate court took judicial notice of “certain scientific propositions” found in medical treatises, and rejected the testimony of the employer’s medical expert.
- State Supreme Court granted review.

Did the intermediate appellate court properly apply the doctrine of judicial notice?

YES

NO





NO

Prestige Homes, Inc. v. Legouffe, 658 P.2d 850 (Col. 1983)

The Colorado Supreme Court reversed concluding that the court of appeals erred in applying the judicial notice rule.

NO

Prestige Homes, Inc. v. Legouffe, 658 P.2d 850 (Col. 1983)

Facts subject to judicial notice are those "not subject to reasonable dispute" and must be either "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* at 853.

The court of appeals erred in relying on medical treatises not offered or admitted into evidence and not cited by any of the medical experts. *Id.* at 853.

NO

Prestige Homes, Inc. v. Legouffe, 658 P.2d 850 (Col. 1983)

The Colorado Supreme Court rejected the comparison between the type of facts judicially noticed in this case with "simple mathematical calculations based on distance and speed" as one example. *Id.* at 854.

"Courts cannot indulge in arbitrary deductions from scientific laws as applied to evidence except where the conclusions reached are so irrefutable that no room is left for the entertainment by reasonable minds of any other conclusion." *Id.* at 854.

CONSIDERATIONS

Alli Orr Larson, *"Confronting Supreme Court Fact-Finding*." 98 Va. L. Rev. 1255 (2012).

- ABA Model Code of Jud. Conduct, R. 2.9 (c): "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed."
- Fed. R. Evid. 104(a) – the court "is not bound by evidence rules, except those on privilege" in determining scientific admissibility questions

"Judges deciding scientific admissibility questions can therefore evade some obstacles which would ordinarily hinder their ability to independent research." 56 Duke Law Journal at 1289.

SCENARIO 6

- Defendant is convicted of dealing drugs within “one block” of a park.
- The park is across the street from the city block that the prosecution used to measure the distance.
- The location of the drug sale was on the far side of the block, and not the side closer to the park.

SCENARIO 6

- The defendant argued that “one block from the park” meant the length of one side of a city block; the state argued that the entire block was appropriately used to measure the distance, and the fact that the transaction took place on the other side of the rectangular city block from the park still satisfied the statute.
- At oral argument, one of the appellate judges hearing the case hands out to the rest of the court and the advocates a copy of an aerial map that he printed from MapQuest.

Did the appellate judge properly use extra record materials pulled from MapQuest?

YES

NO

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State v. Carufel, *783* N.W.2d 539 (2010)

No one objected during or after the argument, and while the opinion contained references to the dictionary definition of “block” and “city block”, the MapQuest map was not mentioned.

SCENARIO 7

- Defendant was convicted of selling powdered cocaine in violation of federal law. On appeal, he claimed that there was insufficient evidence for the conviction.
- Part of the evidence was a text message in which the defendant referred to "18th Street", which the prosecution contended was code for a street price of $1,800 for the drugs.
- The prosecution's arguments were based on its claim that there was no "18th Street" in the city.
- The appellate court affirmed the conviction, based in part on its use of City records available on the Internet that showed the former 18th Street had been renamed Dr. Martin Luther King Jr. Drive.

Did the appellate court properly rely upon this extrinsic internet evidence?

YES

NO

YES

United States v. Harris, 271 F.3d 690 (7th Cir. 2001)

The dissent pointed out that someone using MapQuest would not find an 18th Street in the city, but someone using MapBlast! would. 271 F.3d 690, 708, n.1 (7th Cir., 2001) (Wood, J., dissenting). *Id.* at 708, n.1 (Wood, J. dissenting).

CONSIDERATIONS

A search on the Lexis Online Legal Database conducted in May 2004 showed that between 2000 and 2004, 47 decisions nationwide cited to MapQuest. *Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case*" David H. Tenant and Laurie M. Seal, at n.12.

CONSIDERATIONS

WHEN DID IT START?

- Barger, Colleen M., *On the Internet, Nobody Knows You're a Judge: Federal Appellate Courts' Use of Internet Materials in Judicial Opinions*, 4 Journal of Appellate Practice and Process 417 (2002).

"On the Internet, nobody knows you're a dog."

CONSIDERATIONS

WHERE IS IT GOING?

- Jackson, L. Jay. "'Link Rot' is Degrading Legal Research and Case Cites." *ABA Journal*. (1 Dec 2013).

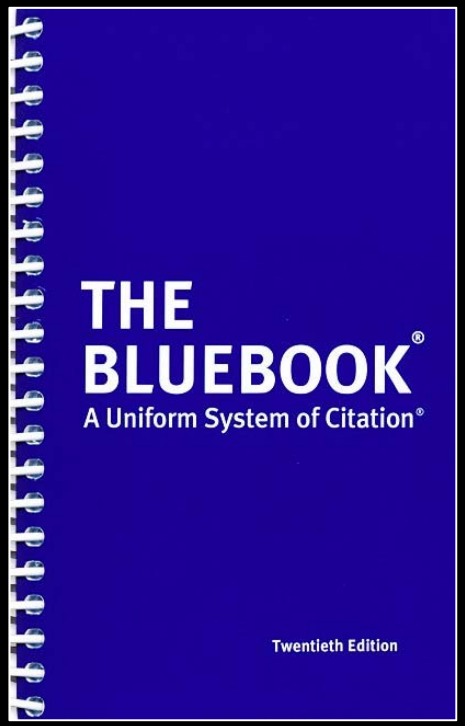
CONSIDERATIONS

WHAT IS THE STATE OF THE ART?

THE BLUEBOOK – a Uniform System of Citation (20th Edition).

INTERNET, ELECTRONIC MEDIA AND OTHER NON-PRINT RESOURCES

This rule covers citation of information found on the internet (rule 18.2); widely used commercial databases such as Westlaw and LEXIS (rule 18.3); CD Roms (rule 18.4) microform (rule18.5); films, broadcasts and non-commercial video materials (Rule 18.6); and audio recordings (Rule 18.7).



SCENARIO 8

- Defendant was charged with interfering with peace officer in the performance of his or her duties.
- During trial, the defendant objected to being required to wear a stun belt while testifying.
- The appellate court considered whether the record supported the trial court's decision to require the stun belt.
- Because the question of prejudice was close, the appellate court examined magazine and newspaper articles on stun belts.

SCENARIO 8

- Based on that review, the court listed as grounds for its opinion that there was prejudice:
  - Promotional material from the manufacturer that "champions the ability of the belt to provide law enforcement with 'total psychological supremacy…of potentially troubling prisoners."
  - Statements by trainers employed by the manufacturer that "at trials, people noticed that the defendant will be watching whoever has the monitor."

Did the appellate court exceed the proper bounds of appellate review by supplementing the record with promotional statements made in manufacturing literature and marketing statements?

YES

NO

NO

People v. Mar, 52 P.3d 95 (Cal. 2002)

The majority: there was no problem with its use of internet resources as background material.

THE DISSENT

"[O]ne would hope, with the resources available to us, we would find a better means of informing ourselves than relying on such secondary sources as a student comment in a law journal…and a progressive magazine article that bears its heart in its subtitle – *Stunning Technology: Corrections Cowboys Get a Charge Out of Their New Sci Fi Weaponry*". *Id.* at 1232.

THE DISSENT

"We are a court of review. The question for review here is whether the judgment of conviction must be overturned because defendant was required to wear a stun belt, and the answer is, we should have affirmed the judgment because no prejudice was shown. Full stop. The question in this case is not whether stun belts pose serious medical risks for persons with heart problems or other medical conditions, nor was it whether the current design of the stun belt could be improved upon. There is absolute no evidence in the record bearing on those questions." *Id.* at 1233.

SCENARIO 9

- Convicted defendant brought a *Batson* challenge, claiming that the prosecutor improperly used peremptory challenges to remove Hispanic jurors.

SCENARIO 9

- Magistrate judge independently researched whether a potential juror's name was Hispanic in an effort to see if a prosecutor had unlawfully excluded Hispanic jurors using peremptory challenges.
  - The magistrate judge did a Google search to resolve a conflict between the *voir dire* transcript records and the prosecutor's notes concerning the proper spelling of the prospective juror's last name.
  - Based on the search of a school district website, the magistrate judge concluded that the prosecutor's notes were correct, and the juror's full name was "probably" consistent with the prosecutor's notes.
  - The magistrate judge concluded that the full and correct name of the prospective juror was Hispanic.

Did the magistrate judge exceed the proper bounds of judicial inquiry?

YES

NO

Google

?

Rodriquez v. Schriver, 392 F.3d 505 (2nd Cir. 2004)
reversing *Rodriquez v. Schriver,* 2003 U.S. Dist. Lexis 20285 (SDNY 2003)

The appellate court did not comment upon the magistrate judge's actions; instead, the court reversed the intermediate appellate court's decision to vacate the conviction because the prosecutor's explanation of his reasons for removing the juror were neutral, and there was a failure on the part of defense counsel to contemporaneously object. "Because the prisoner's claim with respect to the juror was procedurally defaulted on independent and adequate state grounds, there was no cause to review this claim on the merits." *Id.* at 512.

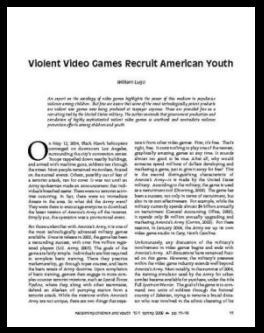
SCENARIO 10

- The appellate court is considering a law which restricts the sale of violent video games to minors.
- One of the justices, with the assistance of the court's library, compiles an appendix of academic journals weighing in on the debate that violent video games cause psychological harm to children.
- He cites a YouTube video, explaining that filters on video games are easy to evade since it "takes only a quick search on the internet to find guides on how to circumvent any such technical controls."
- Much of this research is not in the record and did not come in any of the briefs.

Is the research conducted by the justice appropriate?

YES

NO



Violent Video Games Recruit American Youth

William Lugo

YouTube

NO

Brown v. Entm't Merchs. Association, 131 S.Ct. 2729 (2011)

See Breyer, J. dissenting, *Id.* at 2771 and 2770-71; *See* majority opinion in *Id.*, at 2739, n.8, (noting that the preponderance of the dissent research is outside of the record.)

OTHER EXAMPLES

In re Terry, No. 08-234
(N.C. Judicial Standards Commission, April 1, 2009)

A trial judge hearing a child custody dispute "friended" the husband's lawyer on Facebook and posted on his wall the comment that he had "two good parents to choose from," to which the husband's lawyer replied "I have a wise judge." The judge also independently looked up the wife's photography business and poetry on Google.

Available at www.aoc.state.nc.us/www/public/co/jsc/public reprimands/jsc08-234.pdf

Kiniti-Wairimu v. Holder, 312 F. Appendix 907 (9th Cir. 2009)

An immigration judge, in ruling on a Kenyan citizen's application for withholding of removal under the Convention Against Torture, conducted independent internet research on the applicant's family's circumstances, and based on that research, concluded the applicant was not credible.

Mendler v. Winterland Products Ltd., 207 F.3d 1119 (9th Cir., 2000) (Rymer, J., dissenting)

In a Ninth Circuit case interpreting a contract, the majority used "two websites, one computer software user's guide, one book, two dictionary definitions, and six newspaper or magazine articles – none of which was referred to, introduced, validated, used or argued in the district court or to [the court of appeals]."

CONSIDERATIONS

Wikepedia.com is a collaborative effort on the internet that, as of this writing, anyone can edit or supplement. As such, it certainly does not carry the same weight as an official governmental website or even the Web site of a party to the case. Nonetheless, the *New York Times* reports that "more than 100 judicial rulings have relied on Wikipedia, beginning in 2004, including 13 from circuit courts of appeal."

Sylvia Walbolt and Joseph H. Lange, Jr., *Off the Record,* the Florida Bar Journal, November 2007, Volume 81, No. 10.

CONSIDERATIONS

The ABA Commission to evaluate the Code of Judicial Conduct explicitly addressed the research issue in the 2007 ABA Model Code.

Rule 2.9(C) provides: "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may be properly judicially noticed."

Comment 6 notes that "[t]he prohibition against a judge investigating the facts of the matter extends to information available in all mediums, including electronics."

CONSIDERATIONS

Judges may not independently investigate adjudicative facts – the facts that are at issue in a particular case – unless [in the words of Federal Rule of Evidence 201] they are 'not subject to reasonable dispute" because they are generally known or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." But they may independently ascertain and use information that meets the requirements of judicial notice, and they may investigate "legislative facts those that inform the court's judgment when deciding questions of law or policy – to their hearts' content, bound by no rules about sources, reliability or notice to the party. The cross-reference to judicial notice also tends to elide the ethics and evidence rules." The Lure of the Internet and the Limits on Judicial Fact Research, Elizabeth Thornburg, Litigation Magazine, Vol. 38, No. 4, Summer/Fall 2012.

CONSIDERATIONS

"In appellate courts, independent research crosses another boundary: the case's trial court record." Normally any introduction of facts into the record occurs at the trial level. The appeal is a structured, stylized review of what happened below, complete with application of the burden of proof and carefully prescribed standards of review. Litigants are generally not allowed to introduce new evidence at the appellate level; an appellate judge who is doing his or her own factual research may be improperly committing the same error." *Id.*

FINAL THOUGHTS

“Google can bring you back 100,000 answers. A librarian can bring you back the right one.” — Neil Gaiman, Goodreads Author

“With a library it is easier to hope for serendipity than to look for a precise answer.” — Lemony Snicket, When Did You See Her Last?

“People who seek answers are often not looking for truth.” — Jonathan Renshaw, Dawn of Wonder

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ROBINS KAPLAN LLP

REWRITING THE ODDS

Eric J. Magnuson, Partner
EMagnuson@RobinsKaplan.com
612.349.8548
www.robinskaplan.com