THE ETHICS OF JUDICIAL USE OF THE INTERNET:
10 REAL-LIFE CASE STUDIES

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JUDGES THAT GOOGLE

- Does this:

- Go with this?
CONSIDERATIONS

WHEN DID IT START?

- Primary, secondary and non-legal resources

SCENARIO 1

- Employee filed claim for workers’ compensation benefits
- Employee claimed that heart attack was caused by “unusual exertion”
- Industrial Commission denied benefits
- Intermediate App Ct reversed and remanded to award benefits
  - Ct took judicial notice of “certain scientific propositions” found in medical treatises and rejected the testimony of Employer’s medical expert
- State Sup Ct granted review
DID THE INTERMEDIATE APP CT PROPERLY APPLY THE DOCTRINE OF JUDICIAL NOTICE?

YES

NO
Sup Ct reversed, concluding it was erroneous to apply judicial notice

- 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”
Ct of App erred in relying on medical treatises not in evidence

Sup Ct rejected comparison between facts judicially noticed here with “simple mathematical calculations based on distance and speed”

“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.”

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

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 do independent research.”

SCENARIO 2

- Trial judge is faced with difficult scientific admissibility questions in a personal injury case
- Trial judge independently obtains medical journal articles on iron poisoning prior to hearing expert testimony
- Trial judge excludes proffered expert testimony
DID THE TRIAL COURT PROPERLY CONSIDER EXTRA-RECORD MEDICAL LITERATURE?

YES

NO
The exclusionary ruling was reversed on other grounds. However, the App Ct made the following observations:

- It is common knowledge that courts occasionally consult sources not in evidence, ranging from dictionaries to medical treatises
- Judge’s findings are not necessarily tainted because he brought experience and knowledge to bear in assessing evidence
Additional observations:

- Trial judge may not undertake an independent mission of finding facts outside the record
- Judge’s actions were affirmed based in part on his statement that he “did not rely” on the outside sources in reaching his conclusions
CONSIDERATIONS

Is it desirable for a judge to find and read peer-reviewed medical journal articles, or medical treatises, in a case involving medical questions?

YES

NO
SURVEY OF STATE APPELLATE JUDGES

THE MOVE TO THE INTERNET...

WHAT IS THE STATE OF THE ART?

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

- **Rule 18:** INTERNET, ELECTRONIC MEDIA AND OTHER NON-PRINT RESOURCES
  
  ➢ *Rule 18.2* covers citation of information found on the Internet
SCENARIO 3

- Federal court litigation
- Jurisdiction: diversity of citizenship
- Alleged and admitted:
  - Plaintiff corporation was MO resident with principal place of business in MO
  - Defendant was a DE LLC, with principal place of business in IL
- District court accepted jurisdictional assertions, held jury trial, and rendered judgment for Plaintiff
SCENARIO 3

- On appeal, Ct announced:
  - Ct conducted independent research on whether Defendant LLC had any partners who resided in MO
  - Ct discovered that Plaintiff was incorporated in IL, rather than MO
- Since both sides were citizens of IL, Ct held diversity of citizenship was lacking
DID APPELLATE COURT EXCEED PROPER BOUNDS IN PERFORMING THIS RESEARCH?

[Diagram with options: YES, NO]
Belleville Catering Co. v. Champaign Market Place, LLC,
350 F.3d 691 (7th Cir. 2003)

- Ct concluded that it had an independent duty to investigate jurisdiction
- Ct notified both sides of its research results
- Ct asked for comments before it ruled
- After submissions, Ct ruled there was no jurisdiction
Belleville Catering Co. v. Champaign Market Place, LLC, 350 F.3d 691 (7th Cir. 2003)

- Ct said it had authority to govern counsel:

  - “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.”
CONSIDERATIONS

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

- **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 electronic.”

ABA Model Code of Jud. Conduct, R. 2.9(C) & cmt. 6
SCENARIO 4

- Plaintiff medical provider sued Defendant insurer to recover first-party no-fault benefits for medical services rendered to passenger
- Insured was U-Haul, which leased rental vehicle to NY resident
- Passenger was NY resident
- Defendant insurer moved to dismiss for lack of personal jurisdiction
  ➢ it did not write, sell, or solicit any insurance policies in NY
  ➢ policy was written in AZ
SCENARIO 4

- Ct denied motion to dismiss based on its own internet research:
  - Insured was world’s largest consumer truck and trailer rental operation and did business in all 50 states
  - State website indicated that Defendant Insurer was licensed to do insurance business in NY
- Evidence not presented to Ct
- Ct did not make specific finding as to whether Defendant Insurer actually transacted any business in NY
DID THE CT PROPERLY BASE ITS DECISION ON FACTS IT DISCOVERED ON THE INTERNET?

- YES
- NO
NYC Medical & Neurodiagnostic, P.C. v. Republic W. Ins. Co.,

- App Ct concluded the trial court improperly made findings of fact based upon its own internet research
- Dissenting judge asserted website of the NY Department of Insurance was properly relied upon, under judicial notice
CONSIDERATIONS

Fed. R. Evid. 201 -- Judicial Notice of Adjudicative Facts

- **Facts** not subject to reasonable dispute:
  1. generally known within Ct’s territorial jurisdiction; or
  2. from sources whose accuracy cannot reasonably be questioned

- **Notice:**
  1. Ct may take judicial notice on its own; or
  2. Ct must take judicial notice if a party requests it and Ct is supplied with necessary info

- **Timing:** any stage of the proceeding

- **Opportunity to be heard:** a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed
“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.’”

Elizabeth G. Thornburg, The Lure of the Internet and the Limits on Judicial Fact Research, 38 Litig. 41, 43 (2012)
“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 parties. The cross-reference to judicial notice also tends to elide the ethics and evidence rules.”

Elizabeth G. Thornburg, The Lure of the Internet and the Limits on Judicial Fact Research, 38 Litig. 41, 43 (2012)
SCENARIO 5

- Plaintiff Inmate diagnosed with GERD receives Zantac only at 9:30 a.m. and 9:30 p.m., not at mealtimes
- Plaintiff sues Defendant prison officials for infliction of physical pain and serious medical harm in violation of VIII Amendment
- Dis Ct grants Defendants summary judgment based on prison doctor’s testimony that it doesn’t matter what time of day Zantac is administered
SCENARIO 5

- App Ct reverses:
  - Cites Mayo Clinic’s and Zantac manufacturer’s websites that recommend taking Zantac shortly before meals
  - Finds genuine issue of material fact on whether timing of Zantac doses amounts to deliberate indifference to a serious medical need
DID THE APP CT PROPERLY RELY ON INFORMATION FROM MEDICAL WEBSITES THAT CONFLICTS WITH THE ONLY EXPERT EVIDENCE IN THE RECORD?

YES

NO
Rowe v. Gibson,
798 F.3d 622 (7th Cir. 2015)

- Purpose: to create a genuine issue of material fact
  - **Fed. R. Evid. 201** was not being relied on, internet research was not completely indisputable
  - Ct didn’t have to characterize its research as conclusively true because of its purpose
Judge Posner, writing for the majority:

- “When medical information can be gleaned from the websites of highly reputable medical centers, it is not imperative that it instead be presented by a testifying witness for the purpose of assessing whether a factual dispute exists sufficient to defeat summary judgment.”
Judge Posner, writing for the majority:

- “We base this decision on Rowe’s declarations, the timeline of his inability to obtain Zantac, the manifold contradictions in the opposing expert witness opinion, and, last, the cautious, limited Internet research that we have conducted in default of the parties’ having done so.” (emphasis added)
In part-concurrence, part-dissent, Judge Hamilton:

- “Appellate courts simply do not have a warrant to decide cases based on their own research on adjudicative facts. This case will become Exhibit A in the debate.”
CONSIDERATIONS

- Wikipedia.com is a collaborative effort on the internet that anyone can edit or supplement. It does not carry the same weight as an official governmental website or even the website 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 & Joseph H. Lange, Jr., Off the Record or Not?, 90 Fla. Bar J. 10 (Dec. 2016)
A search of LEXIS revealed that in 2015, Wikipedia was cited in court opinions at least 200 times

- Out of 200, 6 erroneously cited to “wikipedia.com” instead of “wikipedia.org”
CONSIDERATIONS

- **12 cases were from federal circuits**
  - 11 from the 7th Cir
    - 7 authored by Judge Posner
    - 2 from Posner panels
  - Other from 1st Cir
CONSIDERATIONS

Where is it going?

LINK ROT

Websites change. Perma Links don’t.

Perma.cc helps scholars, journals, courts, and others create permanent records of the web sources they cite.

Perma.cc is simple, free to use, and is built and supported by libraries.
SCENARIO 6

- Defendant was convicted of dealing drugs within “one block” of a park
- Park is across the street from the city block that the prosecution used to measure the distance
- Location of the drug sale was on the far side of the block, and not the side closer to the park
SCENARIO 6

- Defendant argued that “one block from the park” meant length of one side of a city block
- Prosecution argued that 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, appellate judge distributed copy of MapQuest aerial map to the other appellate judges and the advocates
DID THE APPELLATE JUDGE PROPERLY USE EXTRA RECORD MATERIALS PULLED FROM MAPQUEST?

YES

NO
Neither party objected during or after oral argument

Ct’s opinion contained references to the dictionary definitions of “block” and “city block”

Ct’s opinion did not mention MapQuest map
A search of the Lexis Online Legal Database conducted in May 2004 showed that between 2000 and 2004, there were 47 decisions nationwide that cited to MapQuest.

David H. Tenant and Laurie M. Seal, Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?, 16 ABA Prof. Lawyer 2, 2 n.12 (2005).
SCENARIO 7

- Defendant was convicted of selling cocaine and appealed, arguing insufficient evidence.
- Evidence included text where Defendant referred to “18th Street”.
- Prosecution argued “18th Street” was code for street price of $1,800 based on its claim that there was no “18th Street” in the city.
- App Ct affirmed, 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
Dissent pointed out that someone using MapQuest would not find an 18th Street in the city but someone using MapBlast! would
A search of LEXIS indicated that in 2015, there were at least 24 decisions nationwide that cited to MapQuest and Google Maps.

Thank you to Geoffrey Kozen, associate at Robins Kaplan, LLP, for doing this research.
SCENARIO 8

- Plaintiffs lessees sued Defendant auto dealership alleging violations of the Credit Repair Organization Act
- Plaintiffs claimed 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 assessed for financing service
SCENARIO 8

- 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 FTC through press releases and other info on FTC website to conclude that conduct of Defendant “fell short” of conduct statute was intended to address.
WAS THE EVIDENCE PROPERLY ADMITTED EVEN THOUGH IT WAS NOT SUBMITTED WITH AN AUTHENTICATING AFFIDAVIT?

YES

NO
Sannes v. Jeff Wyler Chevrolet Inc.,

- Ct held that FTC press releases that are printed from the FTC’s government worldwide web page are self-authenticating official publications under Fed. R. Evid. 902(5)
Fed. R. Evid. 902(5)

“The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

... 

(5) *Official Publications*. A book, pamphlet, or other publication purporting to be issued by a public authority.”
SCENARIO 9

- Defendant was charged with interfering with peace officer in the performance of his duties
- Defendant objected to wearing stun belt while testifying at trial
- App Ct reviewed lower court’s decision to require stun belt
- Because question of prejudice was close, App Ct examined magazine and newspaper articles on stun belts
SCENARIO 9

Based on that review, App Ct listed these 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 APP CT EXCEED THE PROPER BOUNDS OF REVIEW BY SUPPLEMENTING THE RECORD WITH STATEMENTS MADE IN MANUFACTURING LITERATURE AND MARKETING MATERIALS?

YES

NO
People v. Mar,
52 P.3d 95 (Cal. 2002)

- The majority held that there was no problem with its use of internet resources as background materials in reviewing the district court’s decision.
But the Dissent notes: “[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.’”
Dissent continues: “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 absolutely no evidence in the record bearing on those questions.”
SCENARIO 10

- Sup Ct reviews law restricting sale of violent video games to minors
- Justice Breyer compiles appendix of academic articles addressing whether violent video games cause psychological harm to children
- Justice Breyer cites YouTube video, explaining that filters on video games are easy to evade because it “takes only a quick search on the internet to find guides on how to circumvent any such technical controls”
- Much of Justice Breyer’s research was not in the record and was not referenced in any of the briefs
WAS THE RESEARCH CONDUCTED BY THE JUSTICE APPROPRIATE?

YES

NO

- Majority (Scalia, Kennedy, Ginsburg, Sotomayor, Kagan):
  - “Justice Breyer would hold that California has satisfied strict scrutiny based upon his own research into the issue of the harmfulness of violent video games. The vast preponderance of this research is outside the record ....” (citation omitted)
  - 1 internet citation: FTC report, available online & in Clerk’s file
Justice Breyer, dissent: “Experts debate the conclusions of all these studies [on the harm from playing violent video games]. Like many, perhaps most, studies of human behavior, each study has its critics, and some of their own in which they reach different conclusions. (I list both sets of research in the appendixes.) I, like most judges, lack the social science expertise to say definitively who is right.”

Justice Breyer, dissent:

- 2 Appendixes: almost 150 published studies listed
- 8 internet citations
  - FTC, Census Bureau; YouTube, CNN, medical ass’ns, etc.
  - Link Rot? “Internet materials … [are] available in Clerk of Court’s case file”
Concurrence (Alito, with Roberts joining):

- 15 internet citations:
  - FTC report
  - Videos of sample games
  - Articles from media outlets (CNN, PCMag, Slate.com, Popular Mechanics)

- Internet materials available in Clerk case file
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<th>Case Number</th>
<th>Case Name / Cited Material</th>
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<tr>
<td>16-5247</td>
<td>Sireck v. Florida</td>
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<td>15-698</td>
<td>Pena-Rodriguez v. Colorado</td>
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<td>Besch v. United States</td>
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<td>15-254</td>
<td>Water Splash, Inc v. Benson</td>
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“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.”

TAKEAWAYS?

- Government websites generally accepted
- Non-government sites less clear
  - Geographic-based sites generally accepted
    - GoogleMaps, MapQuest, etc
  - Open-source sites often criticized
    - Though also often accepted:
      - Wikipedia
Standards for court’s consideration of an extra-record source of facts not cited in the briefs:

1. Courts should expressly state facts it is judicially noticing; &

2. Courts should attach all such sources as appendices to any opinion citing them.

Sylvia Walbolt & Joseph H. Lange, Jr., *Off the Record or Not?*, 90 Fla. Bar J. 10 (Dec. 2016)
“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