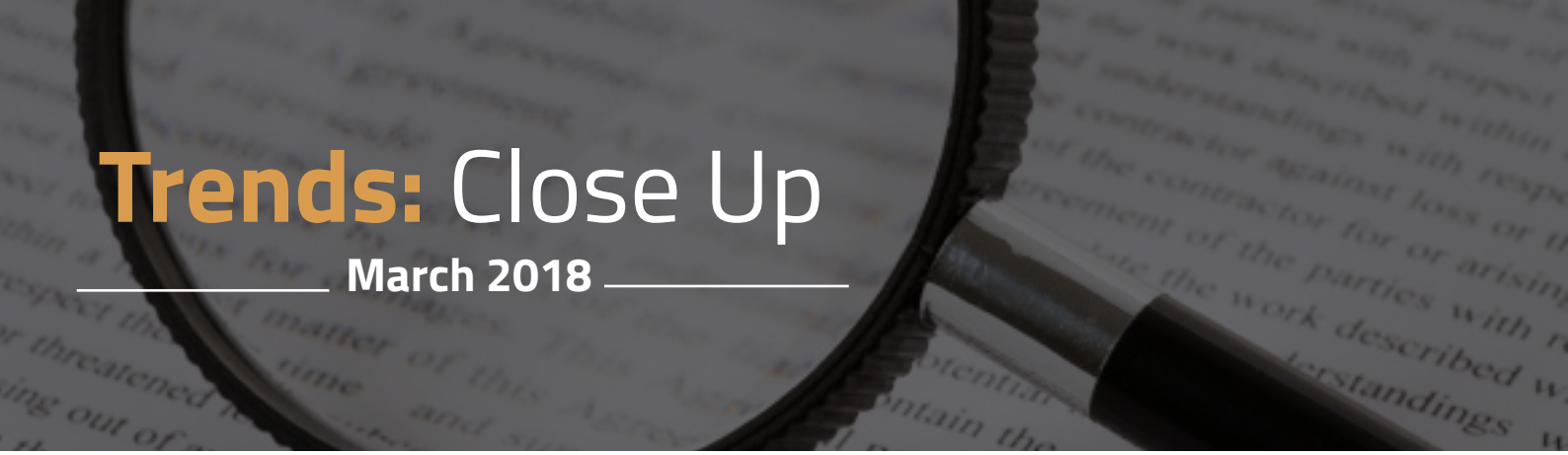


Trends: Close Up

March 2018

The Ethics of Search Engines and Judging

Suppose you are a judge preparing for a complex piece of commercial litigation. As a conscientious, hard-working jurist, you want to familiarize yourself with the commercial setting of the dispute, including information about the relevant industry and industry practices. Websites maintained by the parties to the dispute, and websites from trade groups and other sources, can provide significant background. In addition, you might like to learn about the backgrounds of some of the lawyers if they have never appeared before you.

Before going further, however, you need to be aware of the ethical pitfalls attending independent fact research by judges. This has been a hot topic in judicial ethics for years, and is now the subject of a formal opinion from the ABA Standing Committee on Ethics and Professional Responsibility (Ethics Committee), interpreting the ABA Model Code of Judicial Conduct (Model Code).

Some General Principles

Issued on December 8, 2017, Formal Opinion 478 (Formal Op) takes as its point of departure the axiom of judicial impartiality and the general proposition, subject to such exceptions as may be provided by law (e.g., from the law of evidence, the concept of judicial notice), that in our adversarial system a judge may properly consider only evidence presented on the record by the parties in court.

About the Series

These special reports are part of the National Center for State Courts' "Trends in the State Courts" series and serve as informative and timely updates for state court leaders. Any opinions expressed herein are those of the authors, not necessarily of the National Center for State Courts.

Rule 2.9(C) of the Model Code provides:

> 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.

Comment 6 clarifies that this prohibition "extends to information available in all mediums, including electronic."

A majority of states have adopted the Model Code's Rule 2.9(C) either verbatim or with substantially similar language. Judges should consult their state codes of judicial conduct for appropriate guidance.

Note that Rule 2.9(C) draws no distinction between trial- and appellate-level judges. Independent factual research is treated equally whether conducted during or before a trial, or during appellate review of an established factual record.

Finally, Rule 2.9(C) also applies to judicial clerks and other court personnel. Judges are given primary responsibility in Rule 2.9(D) to ensure their compliance: "A judge shall make reasonable efforts,

including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control."

The Ethics Committee Opinion

In our legal system, with limited exceptions, evidence is reliable only when tested by cross-examination and other adversarial scrutiny. The Formal Op is a reasonably straightforward application of this principle and the Model Code provisions quoted above. Extremely useful is the opinion's discussion of five hypothetical scenarios, which will repay repeated reading and thought. However, the Formal Op does leave open some significant questions.

Independent Research of "Adjudicative Facts"

At the outset, it is unclear whether the Ethics Committee intentionally interpreted the proscription on independent fact investigation as being limited to "adjudicative facts." No such limitation is envisioned by the Model Code. Yet the summary at the beginning of Formal Opinion 478 states, "Independent investigation of *adjudicative facts* generally is prohibited unless the information is properly subject to judicial notice" (emphasis added). This is echoed in the conclusion:

> Information properly subject to judicial notice is well within the judge's discretion to search and use according to the applicable law. On the other hand, *adjudicative facts* that are needed to determine an issue in a case, but which are not properly subject to judicial notice, may not be researched without violating Rule 2.9(C). Stated simply, *a judge should not gather adjudicative facts* from any source on the Internet unless the information is subject to proper judicial notice. Formal Op. at 11 (emphasis added).

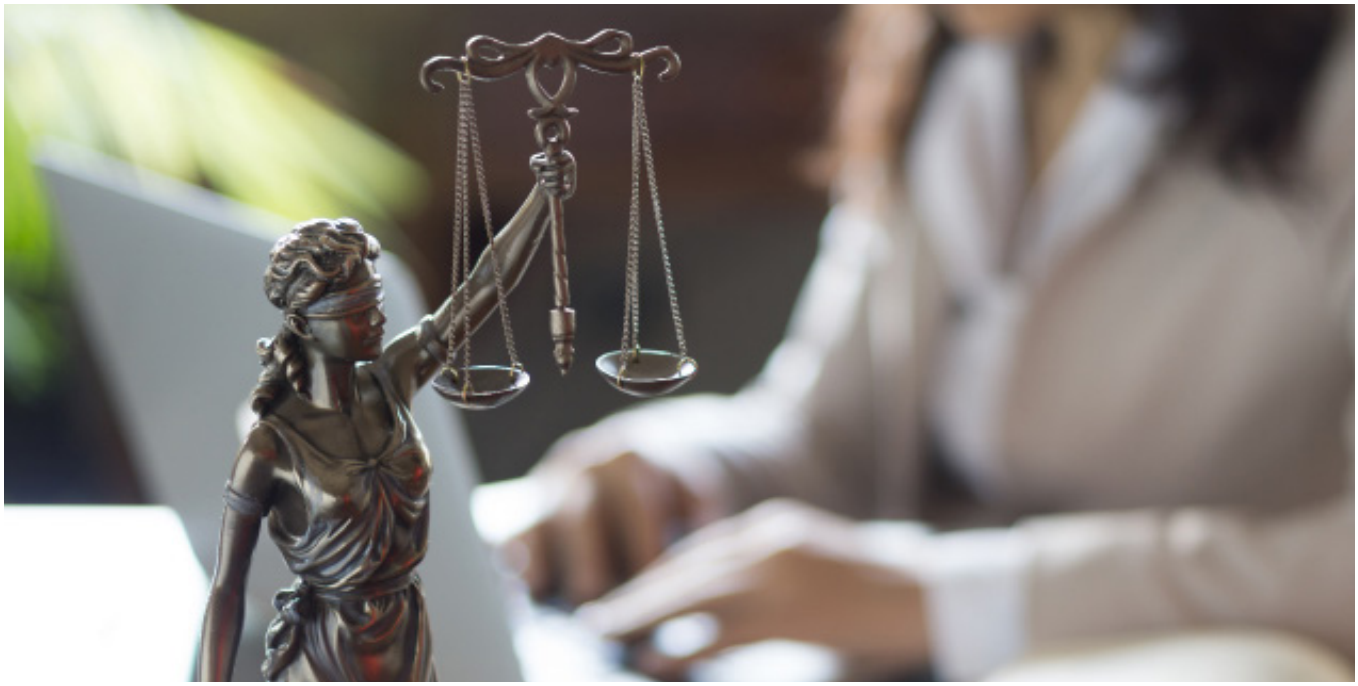
The conclusion continues, however, as follows: "Further, and within the guidelines set forth in this opinion, judges should not use the Internet for independent fact-gathering related to a pending or impending matter where the parties can easily be asked to research or provide the information." This language might be construed as expanding the interpretation of the prohibition on independent fact research to more than just "adjudicative facts." Such an interpretation is bolstered by the reference to two defined terms in the Model Code—a "pending" matter, which has already commenced, or an "impending" matter, which "is imminent or expected to occur." For impending matters, an "adjudicative facts" limitation seems counterintuitive.

The ambiguity may have arisen inadvertently from the discussion of the distinction between "adjudicative facts" and "legislative facts" in connection with judicial notice. "Adjudicative facts" concern the parties to the litigation, and the court will apply the law to those facts; "legislative facts" do not concern the parties but represent general information of use to the court in deciding questions of law or policy. A subset of the legislative facts are generally thought to be suitable for judicial notice.

The concept of judicial notice is somewhat distinct from independent factual research, not only because of the narrow categories of information that may be subject to notice but also because a judge typically is required to disclose on the record when he or she is taking judicial notice of a fact. The parties can then contest the propriety of taking judicial notice and the nature of the fact to be noticed.

Independent Investigations of Law Overlap Investigations of Fact

Researching law by judges and their law clerks is both commonplace and uncontroversial. At times, however, case law, treatises, and articles may discuss facts that could be in dispute in a matter before the court, and the question is whether that impermissibly taints legal research.



For example, in *People v. Mar*, the California Court of Appeal cited an out-of-state law-review student comment about the technology of a stun belt being considered for a criminal defendant. The California Supreme Court characterized the student comment "[a]s a lengthy and well-researched article that has been cited in a number of prior judicial decisions," saying "[i]ts factual description of the REACT stun belt and its operation, of the manufacturer's promotional materials, and of the instances in which the stun belt has been activated are consistent with descriptions reported in numerous other articles." *People v. Mar*, 28 Cal. 4th 1201, 1215 n.1 (Cal. 2002) (citations omitted).

This result seems at odds with the Ethics Committee's conclusion, as plainly factual information was reviewed and relied upon as part of the appellate court's research in *Mar.* Judges should consult authorities in their own jurisdictions if this question arises.

When Adversarial Safeguards Fail

Finally, the Formal Op's reliance on fundamental principles of our adversarial system assumes the system is operating properly—or at all. Where that fails, so too does the Formal Op's conclusion. An example is a relatively recent case in which U.S. Court of Appeals Judge Richard Posner (now retired), who had a reputation for doing independent Internet research, was taken to task by one of his colleagues.

In *Rowe v. Gilson*, 798 F.3d 622 (7th Cir. 2015), *reh'g denied*, 2015 U.S. App. LEXIS 23072 (7th Cir., Dec. 7, 2015), a prisoner-civil-rights case, the plaintiff was denied treatment, and then given ineffective treatment, for gastrointestinal reflux disease. The district court granted summary judgment to state officials because the "expert" evidence of the prison doctor (who was a named defendant and, therefore, not a disinterested expert) was not rebutted by the prisoner, who could not afford his own expert or even his own lawyer.

A split Seventh Circuit panel reversed. Judge Posner did extensive Internet research on the disease and the over-the-counter medication used to treat it (Zantac) that discredited the prison doctor's and other defendants' testimony. Judge Hamilton, dissenting, severely criticized Posner's resort to non-record

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factual material. Judge Rovner, concurring, agreed with Posner that this was permissible in this case because the doctor's testimony was inadequate and, in reviewing grants of summary judgment, benefit should be given to a non-moving party who cannot afford a lawyer or expert. Posner justified his research, in part, on the procedural posture of the case and the mismatch in the parties' resources; his claim was not that his Internet research was true or conclusive, merely adequate to highlight material facts in dispute and the inappropriateness of summary judgment.

Arguably, there should be an "interests of justice" exception to the default principle of Rule 2.9(C) for circumstances (like *Rowe v. Gilson*) where the protections of the adversary system fail their essential purpose. In administering justice, judges should always be attuned to such possibilities.

As a matter of policy though, we want to avoid a culture of "trial by search engine"; so, in the majority of cases, in accordance with the Formal Op's guidance, judges and their staff should avoid the temptation to conduct independent factual research.

For more details, please see the full-length version of this article available at www.ncsc.org/ethics

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