WHEN JUDGES RELY ON THEIR OWN ONLINE RESEARCH

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ROWE V. GIBSON, 798 F.3D 622 (7TH CIR. 2015)

- Eighth Amendment claim by prisoner suffering from gastro-esophageal reflux who was denied his Zantac medication at mealtimes
- District court granted summary judgment to prison based on uncontested affidavit from prison doctor supporting prison's Zantac regimen
- 7th Circuit reversed: whether limiting prisoner's access to Zantac was medically acceptable and caused harm was disputed issue of fact

JUDGE POSNER (MAJORITY)

- District court failed to credit prisoner's declarations about his pain, which contradicted prison doctor's assessments
- Viewed in light most favorable to plaintiff, enough to deny SJ

JUDGE POSNER (MAJORITY)

- "We base this decision on Rowe's declarations, the timeline of his inability to obtain Zantac, the manifold contradictions in Dr. Wolfe's affidavits, and last, ***the cautious, limited Internet research that we have conducted in default of the parties' having done so***."

POSNER MAJORITY (CONTINUED)

- Posner's "limited Internet research" included:
  - medical and pharmaceutical websites (e.g., WebMD, NIH, Mayo Clinic, Health Grades)
  - Wikipedia on reflux, appropriate dosages, effectiveness of Zantac
  - Zantac manufacturer's web site on timing of dosages

JUDICIAL NOTICE UNDER FRE

- **Rule 201. Judicial Notice of Adjudicative Facts**
- **(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
- **(b) Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it:
  - **(1)** is generally known within the trial court's territorial jurisdiction; or
  - **(2)** can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

POSNER MAJORITY (CONTINUED)

- Acknowledges that these facts are not subject to judicial notice" under FRE 201
  - Not "legislative facts"
  - Don't meet high standard for judicial notice of "adjudicative facts"
  - They fall "somewhere between" the two; there should be a third category with less rigorous standard

POSNER MAJORITY (CONTINUED)

- **Does adversarial process work in a case like this?**
- "Shall the unreliability of the unalloyed adversary process in a case of such dramatic inequality of resources and capabilities of the parties as this case be an unalterable bar to justice?"
- "It is heartless to make a fetish of adversary procedure if by doing so feeble evidence is credited because the opponent has no practical access to offsetting evidence."

JUDGE HAMILTON (DISSENTING)

- Majority opinion is an "unprecedented departure from the proper role of an appellate court" and this "case will become Exhibit A in the debate" over whether appellate courts can "decide cases based on their own research of adjudicative facts."

HAMILTON (CONTINUED)

- Appellate courts must reverse when trial court goes outside the record.
  - District judges can't do independent research, per FRE 201
  - Jurors can't do their own research without risking a mistrial
  - Immigration judges and ALJs are subject to reversal for going outside the record
- Majority is sanctioning the opposite: **"[w]hat was forbidden is now required"**

HAMILTON (CONTINUED)

- Problems with independent judicial fact-finding:
  - Impedes adversarial process by requiring parties to go beyond their opponent's evidence and anticipate a judge's own research and findings
  - Improperly transforms the judge into an advocate

HAMILTON (CONTINUED)

- Reliability concerns: on many of the websites Posner cited, there are disclaimers that emphasize the need to filter the info through medical expertise
- "[I]nternet research is not a reliable substitute for proper evidence subjected to adversarial scrutiny"

JUDGE ROVNER (CONCURRING)

- "A disagreement about the outcome of this relatively simple case has morphed into a debate over the propriety of appellate courts supplementing the record with Internet research."
- No need for extra-record findings, since inferences drawn in Rowe's favor at SJ

EN BANC REVIEW DENIED

- En banc review denied Dec. 7, 2015, by 4-4 vote
- "The panel majority should not be read as holding that we expect district judges to do their own factual research or as suggesting anything at all about the propriety of internet research."

EN BANC REVIEW DENIED

- "This case ultimately rests on the unremarkable proposition that we must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in his favor."

- "Given our continued belief that any factual research conducted by the panel majority was unnecessary to that outcome, we believe nothing about this case warrants rehearing or rehearing en banc."

ROWE V. GIBSON: REACTIONS WITHIN THE LEGAL COMMUNITY

- Debate cuts to the heart of philosophical tensions in the American legal system. "What is the role of a judge, and how much discretion do we trust them with? Does the collision of adverse litigants reliably illuminate the truth and . . . what *is* [a] 'genuine issue of material fact'?"
  (Roland Nadler, Stanford Law School Fellow)

ROWE V. GIBSON: REACTIONS WITHIN THE LEGAL COMMUNITY

- "*Rowe* could be seen as exceptional because it involved a *pro se* plaintiff and a self-serving expert opinion given by a defendant. But *pro se* plaintiffs are the majority of all appellants (51% in 2014) and suspect expert opinions are not in short supply." (Colter Paulson, Squire Patton Boggs)
- "[T]his sounds a lot like saying that courts should do factual research on behalf of *pro se* plaintiffs or plaintiffs who look overmatched in the adversarial process. Where does that end?" (Prof. Gerard Magliocca, Indiana U.)

ROWE V. GIBSON: REACTIONS WITHIN THE LEGAL COMMUNITY

- "[I]t is hard to imagine a consensus of federal appellate judges getting comfortable with reversing the decision below based on Internet searches, especially when those sources contradict the record." (Colter Paulson, Squire Patton Boggs)

- This debate "will only intensify in the years ahead, as younger lawyers who are more comfortable with citing internet sources eventually become judges." (David Lat, Above the Law)

JUDICIAL NOTICE

JUDICIAL NOTICE AT COMMON LAW (PRE-FRE)

- Judicially noticed facts traditionally came from customary sources of collected knowledge: e.g., almanacs, maps, dictionaries, government documents
- Judges were considered to act as proxies for general knowledge of the community

EXAMPLES OF JUDICIALLY NOTICEABLE FACTS

- Scientific facts: gravitation, properties of matter, heat, light
- Geographic info: location of rivers, mountain ranges, etc.
- Facts in history and literature
- Facts required for judicial responsibilities
- Local facts; facts of "general knowledge"

EXAMPLES OF JUDICIALLY NOTICEABLE FACTS (CONTINUED)

- Supreme Court of Indiana (1855) -- beer is no more harmful than lemonade or ice cream

- US Supreme Court (1900) -- tobacco could not be classified as a health menace

JUDICIAL NOTICE UNDER FRE

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JUDICIAL NOTICE IN APPEALS

- The FRE apply to the U.S. Courts of Appeal under FRE 1101; FRE 201(d), and appellate courts take judicial notice of adjudicative and legislative facts
- Reluctance to judicially notice facts that were available to party below, based on fairness (Posner)
- Generally use abuse of discretion standard to review trial court's decision to take judicial notice or not

ADJUDICATIVE FACTS

- FRE 201 limited to adjudicative facts
- Adjudicative facts = "simply the facts of the particular case"; they relate to the parties and their activities and their dispute (Advisory Comm. Notes)
- Rationale (Adv. Comm.): facts related to dispute should be resolved through safeguards of adversarial process, regarded as best mechanism for assuring reliability and resolving controversies.

LEGISLATIVE FACTS

Facts of general "relevance to legal reasoning and the lawmaking process," Fed. R. Evid. 201(a) Adv. Comm. Note

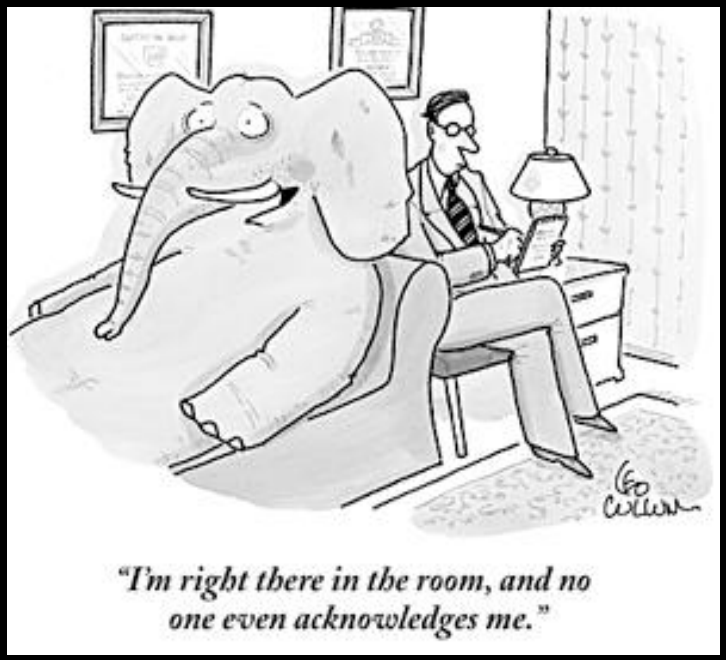
"Established truths, facts or pronouncements that do not change from case to case" and "do not relate specifically to the . . . litigants." *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

LEGISLATIVE FACTS (CONTINUED)

- US Supreme Court has relied on legislative facts in constitutional cases:
  - *Brown v. Board of Education* (effects of racial segregation, discrimination)
  - *Roe v. Wade* (medical information about gestation periods, risk of mortality from abortions)
  - Obscenity cases ("contemporary community standards" – often based on the judge's personal experience in the community)

LEGISLATIVE FACTS (CONTINUED)

Legislative facts are left unregulated; they are "the proverbial elephant in the room – no one points or stares, even though chaos could ensue at any moment" (Brianne Gorod)



IS THE FRE'S DISTINCTION USEFUL?

- The distinction between legislative and adjudicative facts is well-established, but elusive, and some states think the distinction is not useful

FACT FINDING ON THE INTERNET

- Efficient and cost-effective. Helps equalize resources.
- Enables judges to access a wide range of info
- Avoids substantial evidentiary hurdles -- authentication and hearsay -- when the source is reliable under FRE 201

- E.g., using Google Maps to establish distance between two points, driving time estimates, location of home or group of protestors

INDEPENDENT JUDICIAL FACT-FINDING – THE DEBATE

INDEPENDENT FACT-FINDING

- Judges are going outside the record all the time, especially on the Internet
- Especially the US Supreme Court (over 100 Supreme Court opinions over a 15-year period cite authority for a legislative fact never mentioned in the briefs).
- Of the 120 most salient SCOTUS decisions from 2000-2010, 56% contain at least one assertion of a legislative fact independently researched

CONCERN #1: RELIABILITY

- Lack of procedural safeguards to ensure rigorous testing of judges' evidentiary sources → undermines commitment to adversarial justice
- Reliability concerns are exacerbated by judges' use of the Internet: how can we verify accuracy in a uniform way? No guidance on assuring reliability of legislative facts.
- Confirmation bias: judges may be more prone to rely on their own research to confirm their visceral views

CONCERN #1: POSNER'S RESPONSE

"Of course Web research can result in errors. But no one should be so naïve as to believe that the determination of facts by the familar adversary process . . . Is proof against error."

- "Inestimable value" of seeing and hearing a live witness "is one of those commonsense propositions that may well be false."
- E.g., mistaken eyewitness IDs contributed to 76% of the first 250 post-conviction DNA exoneration cases in the U.S.

CONCERN #1: POSNER'S RESPONSE (CONTINUED)

- Concerns about reliability are predicated on too narrow an understanding of the term. Reliability should encompass not only the veracity of evidence but a broader, objective understanding of the social, economic, psychological, scientific and technological landscape that forms the context of litigation, and the practical consequences of the fact finder's decision.

CONCERN #2: LACK OF NOTICE & RULE OF LAW ISSUES

- Parties will have to shoulder a higher burden and cost in preparing to meet a judges' extra-record fact-finding
- Disparities among judges re: the extent they believe the law permits them to engage in extra-record fact-finding will result in disparities in the way that the law is applied
- No common set of rules for judges to follow that parties can rely on.

CONCERN #2: LACK OF NOTICE & RULE OF LAW CONCERNS (CONTINUED)

- Judges can't control whether their research will uncover what are ultimately legislative or adjudicative facts, or whether the facts they find will meet the accuracy and reliability requirements of FRE 201.
  - Judges can't "unsee" information they discover or avoid it affecting their views in a particular case
  - Could result in judges creating material issues of fact where none would otherwise exist (see Hamilton's dissent)

CONCERN #2: POSNER'S RESPONSE

- "My response is that lawyers should do the research and spare me the bother"
  - Lawyers shouldn't have to be given notice of issues they should have thought of themselves
- The internet is an invaluable source of information that is widely underutilized
- Judges sometimes have to fill the gaps

ONE APPELLATE LAWYER'S CONCERNS ABOUT NOTICE AND TRANSPARENCY

- What don't I know? -- Judges' Internet research is opaque to me as an advocate until it's too late
- No chance for me to address what judges have found
- When I see the opinion, what can I do? Petitions for rehearing rarely granted.
- Can't see what else might have influenced the panel that's not cited in the opinion
- How far can I stretch the rules of judicial notice as an advocate?

CONCERN #3: NEUTRALITY CONCERNS

- Judicial fact-finding threatens to transform judges into advocates, rather than neutral decision-makers
- Compromises faith and transparency in the judicial system
- Litigation is growing increasingly complex; judges should defer to experts to weigh in on technical and other factually complicated disputes in which judges have little or no experience

CONCERN #3: POSNER'S RESPONSE

- Responsible judges will avoid legislating from the bench
- Better for judges to acknowledge that they do make policy
- Better for judges to make sure they render decisions that make sense as a matter of public policy and are understandable and "subject to serious reliability scrutiny in the court of public opinion." (Robertson)
  - Judges' candor re: their own fact finding can enhance transparency

CONCERN #3: POSNER'S RESPONSE (CONTINUED)

- Given growing complexity of activities giving rise to litigation, the internet can serve as a "life saver" to compensate for judges' lack of expertise

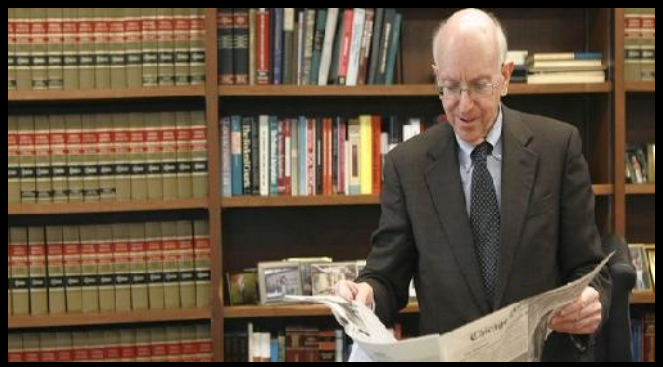
- Besides, most judges know things they can't put out of their minds even if they tried and there is no good reason to try to render a judge's mind devoid of relevant knowledge

CONCERN #4: PROCEDURAL CONCERNS

- Independent judicial research undermines deference owed to fact-finding role expertise of trial court
- Disrupts traditional standards of appellate review;
- Can create a factual stare decisis unchecked by the rules of evidence
- Violates Rule 2.9 of the Model Code of Judicial Conduct

CONCERN #4: POSNER'S RESPONSE

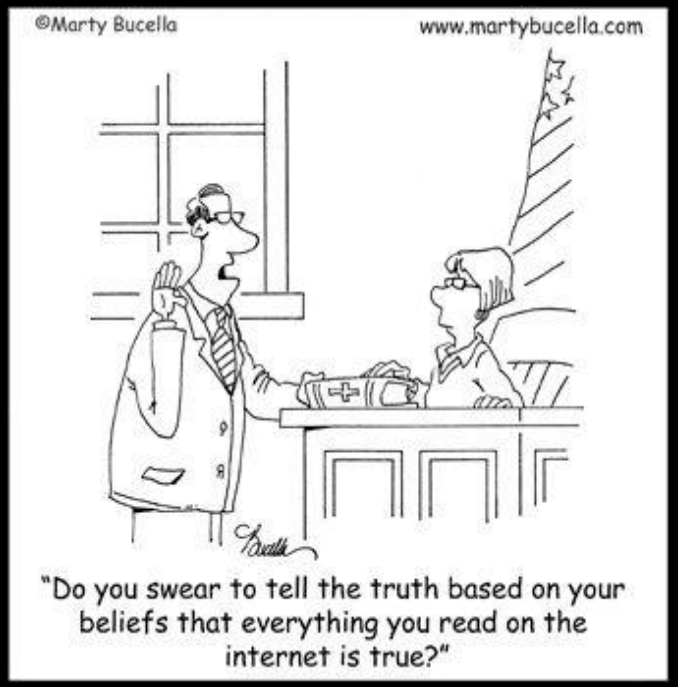
- "Deference is earned, not bestowed" (Posner)
- Discouraging judicial fact finding could decrease reliability



- Re Model Rule 2.9 – actually allows judicial research on legislative facts and anything that fits within FRE 201 (Thornburg)

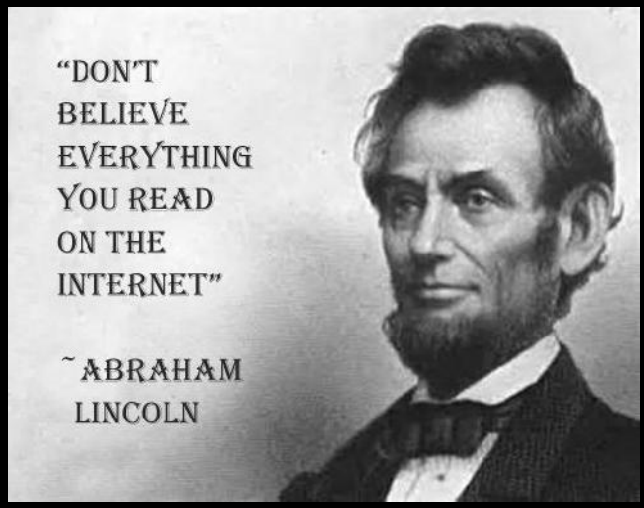
SPECIAL CONCERNS ABOUT RELIABILITY OF INTERNET FACT FINDING

- How do we determine reliability, accuracy of independently ascertained sources?
- Would all of Judge Posner's sources in *Rowe* conformed to the standard of accuracy that "cannot be reasonably questioned"?



UPDATED TEST FOR JUDICIAL NOTICE IN THE INTERNET AGE?

- Jeffrey Bellin & Andrew Guthrie Ferguson have proposed a three-step inquiry for courts to test reliability of judicially noticed online facts under Rule 201. **Look at source's:**
  - 1. Knowledge of the subject matter
  - 2. Independence from relevant bias, and
  - 3. Incentive to assure accuracy



BACK TO *ROWE V. GIBSON*

- One writer (M. Cristina Martin) applied Bellin & Ferguson's framework to *Rowe v. Gibson*
  - Mayo Clinic, WebMD, NIH – probably satisfied the three criteria
  - Wikipedia, Health Grades, and Zantac website – significant concerns

•AMICUS BRIEFS

AMICUS CURIAE – FRIEND OF THE COURT

- Federal Rule of Appellate Procedure 29(b)(2) requires the amicus to state its interest and show why content is relevant to the disposition of the case
- Supreme Court Rule 37 defines a helpful amicus brief as one "that brings to the attention of the Court relevant matter *not already brought to its attention by the parties*"
- '"Amicus curiae' means friend of the court not friend of the party" (Posner)

AMICUS BRIEFS

- Amicus briefs are a classic source of legislative facts
- Most prevalent at the U.S. Supreme Court
- Fewer filed in federal appellate courts and in state appellate courts. Even fewer in trial courts.
- Fair amicus briefs should "open the court's mind to 'real-world activities that give rise to… litigation' and enhance the court's capacity to 'produce reliable reality-based decisions'" (Robertson, quoting Posner)

CONCERNS ABOUT AMICUS BRIEFS

- One scholar (Allison Larsen) identified 606 citations to amicus briefs in the 417 SCOTUS decisions issued from 2008 to 2013
  - 124 used to support a factual claim – i.e., a "theoretically falsifiable observation about the world"
  - 97 used to answer an outcome-determinative question – i.e., a question the Justices needed to address to resolve the case

CONCERNS ABOUT AMICUS BRIEFS, CONTINUED

- Less than a third were contested by the parties in their briefs
- 76 were relied upon by the Justice as the exclusive authority for the factual claim, without accompanying evidence

CONCERNS ABOUT AMICUS BRIEFS

- *Gonzales v. Carhart* (2007): The Court upheld a partial-birth abortion statute and concluded there were legitimate governmental objectives in its enactment.

- In support of this conclusion, the Court acknowledged a lack of measurable reliable data but deemed it "unexceptionable to conclude" that some women come to regret having had an abortion and experience depression and loss of self-esteem as a result. *Citing amicus brief on behalf of "180 women injured by abortion."*

EXAMPLES OF OFFENDING AMICUS BRIEFS

- Amici who make a factual claim and then drop a footnote explaining that the source of the claim is not published or is merely "on file" with the amicus
  - Even the Solicitor General has made unsupported factual assertions that have made their way into published opinions
- Citing sources prepared in anticipation of litigation
- Citing sources the amici funded itself
- Citing an "authority," which is actually a minority view in the relevant field

POSSIBLE SOLUTIONS

- Use the same 3-factor test proposed by Bellin & Ferguson for reliability of Internet sources of information (knowledge/expertise; independence from bias; incentives for accuracy)
- Require amicus briefs citing studies to provide information on expertise and independence of those conducting studies, methodology, funding, and currency.
- Require disclosure of basis for statistical or scientific assertions
- Require affidavits for personal or organizational experiences cited

CLOSING

"Posner is correct that we need a new category for easily searchable facts falling between judicial notice and traditional adversarial evidentiary process. Hamilton is wise to urge that judges approach any non-adversarial fact finding with fear and trembling, lest they help themselves to dangerous power. Somewhere between these jurists' crossed pens is a wise policy, waiting to be pioneered."
(Roland Nadler, Stanford Law School Fellow)

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