~~Internet~~ Web Ethics for Judges

Network of Adjudicatory Agencies CLE

Wednesday, September 30, 2020

Presenter:

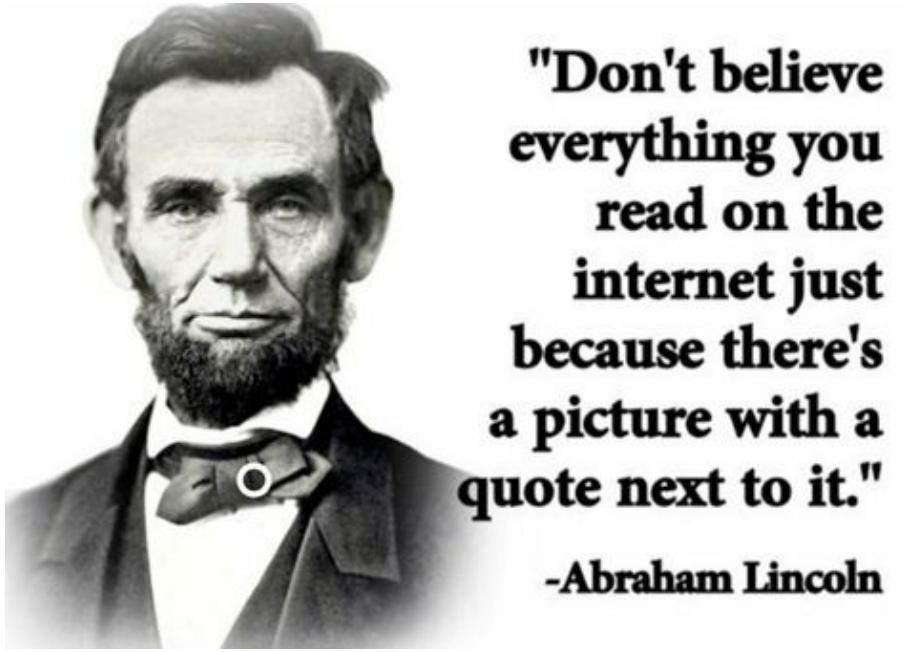
Lynn D.W. Hendrickson

Assistant Chief Industrial Appeals Judge

Board of Industrial Insurance Appeals

Disclaimer(s)

- The opinions expressed herein are those of the author/presenter and are not necessarily attributed to any individual Board Member or the Board of Industrial Insurance Appeals.



Working Definitions

- Internet = a global computer network providing a variety of information and communication facilities
- The "Web" = collection of information which is accessed via the Internet
- (Judicial) Ethics = standards and norms that bear on judges including how to maintain independence, impartiality and avoid impropriety.
- Codes: ABA Model Code of Judicial Conduct (1990, 2007) and ABA Model Code of Judicial Conduct for State Administrative law Judges (1995 – subsequent refinements with help of Lorraine Lee, Chief ALJ –Washington OAH).
- Washington State Code of Judicial Conduct (2011) – guidance
- State agency codes of conduct – BIIA, OAH examples
- Contextual definition "impartiality": not partial or biased, treating or affecting all equally (fairly), unprejudiced, not directly involved in a particular situation

Do you agree …..

- Do not discuss this case among yourselves or with anyone else, including your family and friends.
- This applies to your internet and electronic discussions as well—you may not say or write anything about the case via text messages, email, telephone, internet chat, blogs, or social networking web sites.
- If anybody asks you about the case, or about the people or issues involved in the case, you are to explain that you are not allowed to discuss it.

Do you agree …

- Do not allow anyone to give you information about the case, including in your electronic communications.
- If you overhear a discussion or start to receive information about anything related to this case, you must act immediately so that you no longer hear or see it.

Do you agree ….

- Do not read, view, or listen to any report from the newspaper, magazines, social networking sites, blogs, radio, or television on the subject of this trial.
- Do not conduct any internet research or consult any other outside sources about this case, the people involved in the case, or its general subject matter.
- You must keep your mind open and free of outside information.
- Only in this way will you be able to decide the case fairly based solely on the evidence and ……. [my instructions on the law.]

Washington Pattern Jury Instructions – Civil WPI 6.02 Before Recesses

Riddle for the Day
What is the difference between a good lawyer and a great lawyer?

Discussion Topics

- Judicial use of Social Media

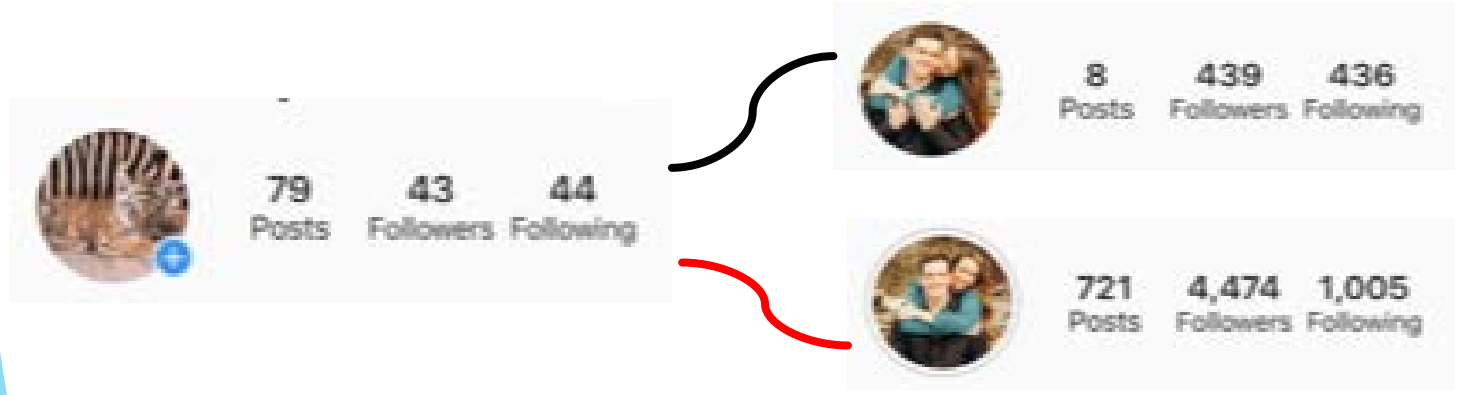
- Judicial independent investigation of adjudicative facts.

Perspective

- Old News – Unethical Conduct
  - Inappropriate relationships
  - Independent fact investigation
  - Public comment on pending cases
  - Controversial or biased statements
- New News:
  - Judicial discipline cases involving social media have accelerated since 2009
  - “Multiplier for misconduct”, Cynthia Gray, Director for the Center for Judicial Ethics of the National Center for State Courts. www.ncsc.org

The ease of communication on social media

- Encourages informality
- Fosters illusory sense of privacy
- Enables too-hasty communications
- Posted information is surprisingly permanent



Cautionary Tales

- *In re Whitmarsh*, Determination (N.Y. Comm'n on Judicial Conduct, December 28, 2016. http://cjc.ny.gov/Determinations/W/Whitmarsh.htm accessed 7/14/2020.
- *In re Svaren*, Stipulation, Agreement and Order of Admonishment (WA CJC No. 8348-F-182, December 7, 2018)
- *In re Yu*, Stipulation, Agreement and Order of Admonishment (WA CJC No. 8960-F-183, December 7, 2018)

In re Whitmarsh, Determination (N.Y. Comm'n on Judicial Conduct, December 28, 2016)

- In March 2016, judge maintained a Facebook ("FB") account under the name "Lisa Brown Whitmarsh." Respondent had approximately 352 Facebook "friends."
- FB account privacy settings were set to "Public." = any internet user, with or without a FB account, could view content posted on FB page.
- On March 13, 2016, judge posted a comment to her FB account criticizing the investigation and prosecution of Mr. V.

In re Whitmarsh, Determination (N.Y. Comm'n on Judicial Conduct, December 28, 2016)

- Other FB users posted comments on judge's FB page, commending the statements in her post of March 13, 2016, and/or criticizing the prosecution of Mr. V.
  - The first FB user to comment was Morristown Town Court Clerk Judy Wright, who posted the following on March 13, 2016, at 7:58 AM: "Thank you Judge Lisa! You hit the nail on the head." Judge did not delete the court clerk's comment, which was viewable by the public.
  - In two comments, posted on Judge's FB page on March 13, 2016, at 8:02 AM and 8:56 AM, judge's husband, questioned whether the complainant in the *V* case had a "close personal relationship" with "our prosecutor" and called the matter a "real 'Rain Wreck,'" referring to St. Lawrence County District Attorney Mary Rain. These comments were viewable by the public.

In re Whitmarsh, Determination (N.Y. Comm'n on Judicial Conduct, December 28, 2016)

- Judge clicked the "like" button next to some of the comments to her post, including,
  - Post on March 13, 2016, at 8: 12 AM, stating that the charges against Mr. V were "an abuse of our legal system" and "uncalled for"; •
  - Post on March 13, 2016, at 9:22 AM, criticizing District Attorney Rain; and
  - Post by her husband posted on March 13, 2016, at 2:10 PM, stating, "This is what's wrong with our justice system."
- Respondent's "likes" of these comments were visible to the public when viewed online by hovering one's cursor over the "like" button next to each comment.
- According to the Facebook online Help Center, clicking the "like" button is a way for Facebook users to indicate that they "enjoy" a post. The person who posted the content receives a notification that another Facebook user has "liked" it. *See* https://www.facebook.com/help/452446998120360.
- Respondent's March 13, 2016, post about the *V* case was shared at least **90 times** by other Facebook users.

In re Whitmarsh, Determination (N.Y. Comm'n on Judicial Conduct, December 28, 2016)

- March 16, 2016, judge posted on her FB account a website link to a news article reporting that the charge against Mr. V had been dismissed.
- March 23, 2016, a local news outlet posted an article on its website reporting on judge's FB comments concerning the *V* case and re-printed judge's FB post of March 13, 2016, in its entirety.
- March 28, 2016, judge removed all postings concerning the *V* matter from FB page after receiving a letter from District Attorney Rain questioning the propriety of her comments and requesting her recusal from all matters involving the District Attorney's office.

In re Whitmarsh, Determination (N.Y. Comm'n on Judicial Conduct, December 28, 2016)

- Judge set Facebook account privacy settings to "Public" for an unrelated reason a few years earlier. At the time of her posting about the *V* case, she did not realize that her privacy settings were still set to "Public" and had intended her post to be seen by her FB "**friends"** only.
- Commenting about a pending case to an intended audience of 352 individuals is still an impermissible "public" comment under the Rules.
- Judge deleted all postings concerning the *V* matter promptly upon her receipt of District Attorney Rain's letter and, by letter dated March 28, 2016, informed District Attorney Rain of that fact.
- Soon after receiving District Attorney Rain's letter, judge recused herself from all matters involving the District Attorney's office to avoid any appearance of impropriety.

In re Svaren, Stipulation, Agreement and Order of Admonishment (WA CJC No. 8348-F-182, 12/7/18)

- Judge of the Skagit County Superior Court. Elected to the superior court in November 2016. Previously, and at the time of the conduct described herein, he was a judge of the Skagit County District Court, having served on that court since 1999.
- Maintains a Facebook page, titled "Judge David Svaren."
- October 1,2016, judge attended a "pancake feed" fundraiser, held to benefit families of victims killed on September 23, 2016, during a mass shooting that occurred at the Cascade Mall in Burlington, Skagit County, Washington.
- Judge posted to his FB page two photos of signs at the event with text that read: "The Burlington Fire Department Pancake Feed is happening now and 100% of the proceeds go to benefit the families of the victims of the recent tragedy at Cascade Mall. Please consider attending, it runs until noon today."

In re Svaren, Stipulation, Agreement and Order of Admonishment (WA CJC No. 8348-F-182, 12/7/18)

- FB post constituted an impermissible solicitation for monetary contributions to a charity, in violation of Canon 1 (Rules 1.1 and 1.3) and Canon 3 (Rule 3.7(B)) of the Code of Judicial Conduct (CJC).
- Judge was aware the CJC prohibits such fundraising by judicial officers and stated he had taken steps in the past to avoid doing so.
- Within a few weeks of the post, judge reviewed his FB page and realized the post in question may violate the Code and removed it. He was unable to recall or explain why he had failed to recognize this post would violate the Code at the time he made it.

Violations of Canon 1, Rules 1.1 and 1.3 and Canon 3, Rule 3.7(B), of CJC

- Rule 1.1 CJC requires judges to “comply with the law, including the Code of Judicial Conduct.”
- Rule 1.3 provides "A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."
- Rule 3.7(B) allows judicial officers to participate in charitable organizations, but states that judges may solicit contributions for such organizations “… only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority…."

Fundraising Restrictions - Discussion

- The prohibition against judicial solicitation of money does not reflect on the worthiness or virtue of the charity or cause in question.
- With a few specific exceptions, the CJC has a bright line rule against a judge soliciting funds - no matter how noble the case - in order to avoid misuse of the judicial office.
- While a Facebook post presents no obvious element of coercion, it is still an abuse of the prestige of judicial office, which is appropriately reserved for the service of the office itself, and not to be used for the individual benefit of the judge or others, regardless how generally good the cause may be.
- A near blanket prohibition upon fundraising by judicial officers is necessary as it would be impossible to exercise principled distinctions based on the nature of the charity involved, and it would be improper to have a government agency such as a conduct commission make such value choices.

Fundraising Restrictions [ftnt 1]

- Avoid misuse of judicial office.
- Concerns:
  - judges may intimidate potential donors into making contributions,
  - judges may trade on the prestige of their office to raise funds on behalf of an organization, even if it does not rise to the level of intimidation;,
  - donors may expect future favors in return for their largesse.”

Judicial Conduct and Ethics. 4th Edition, Alfini, Lubet, Shaman and Geyh, Section 9.04(A), page 9-15, Matthew-Bender (2010).

In re Yu, Stipulation, Agreement and Order of Admonishment (WA CJC No. 8960-F-183, 12/7/18)

- Justice Mary Yu was appointed to the Washington Supreme Court in 2014 and subsequently elected to the Court in 2014 and 2016. Prior to that, Justice Yu served as a King County Superior Court judge for more than 14 years.
- Justice Yu has maintained a Facebook page since 2013 which identified her as a member of the judiciary. In Facebook parlance, it is a "government official" page, which means that it is an open page that anyone can access. Justice Yu does not, however, solicit "followers" nor can people "friend" her page.
- Justice Yu uses the page to help educate viewers about various subject matters related to the judicial branch. Justice Yu is actively engaged in the community and her posts are intended to make the court and judicial officers more accessible and transparent to the public.

In re Yu, Stipulation, Agreement and Order of Admonishment (WA CJC No. 8960-F-183, 12/7/18)

- On April 22, 2018, Justice Yu shared the following post from Lifelong's website on her FB page:

  Join Lifelong for Dining Out For Life on April 26!

  On Thursday, April 26, raise your fork for Dining Out For Life! Join Lifeline at one of 90 restaurants in the Greater Seattle Area who are set to donate 30-50% of their proceeds to vital programs that support people facing serious illness and poverty in our community.

  https://www.diningoutforlife.com/seattle

  Join Lifelong for Dining Out for Life on April 26! Dining Out for Life, Seattle, Lifelong AIDS Alliance, Restaurants, HIV/AIDS, fundraiser. Lifelong, DOFL,…

In re Yu, Stipulation, Agreement and Order of Admonishment (WA CJC No. 8960-F-183, 12/7/18)

- On April 28, 2018, Justice Yu wrote the following posting on her FB page about *Real Change-}*

  I know many of you wonder what you might do about homelessness. There are a myriad of policy issues that deserve your attention. I can't advise you on any of them. But, here is one concrete thing you can do each week: buy the "Real Change" newspaper from a vendor that you see on the street comers in Seattle. They buy the paper for .60 and sell it for $2.00. It is a business for each vendor. The paper has interesting articles on housing, poverty, and other social issues. If you don't have cash, most will take payment with Venmo. But how hard can it be to withdraw some cash each month, stuff it in your pocket, and just commit to buying the paper each week?

  Support these folks who are just trying hard to earn some money in an honest way.

In re Yu, Stipulation, Agreement and Order of Admonishment (WA CJC No. 8960-F-183, 12/7/18)

- In creating both posts. Justice Yu was acting on her own, and not in her official capacity.
- She is not a member, and was not acting on behalf, of either organization, nor did she believe at the time that the postings violated the Code.
- Her intent was simply to pass along information about the activities of the two organizations that serve disadvantaged populations.
- She neither intended to violate nor believed she was violating the Code. Given the elements of what constitutes a "solicitation" and the nature of her Facebook communication.
- Justice Yu did not believe the posts rise to the level of being a solicitation. Nevertheless, she acknowledges that the Commission is the body charged with interpreting facts and enforcing the Code, and she defers to the Commission and accepts its determination that the posts violated the Code.

Washington State Ethics Advisory Committee

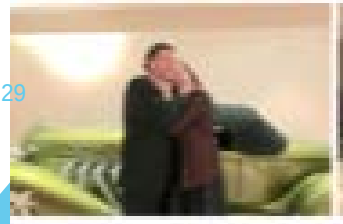
- Opinion 09-05 addresses the question of whether a judicial officer can have an internet blog where the judicial officer would post an essay and people would be able to comment and the judicial officer respond to those comments.
- The Code of Judicial Conduct does not specifically prohibit a judge from blogging on the internet but
- "[E]ven though a judicial officer may post a blog on the internet, caution should be exercised as to how that blog is used and comments responded to in order to make sure that the judicial officer's impartiality is not called into question or the action does not impair the judicial officer's ability to decide impartiality issues that come before the judicial officer."
- http://www.courts.wa.gov/committee/?fa=committee.home&committee_id=124

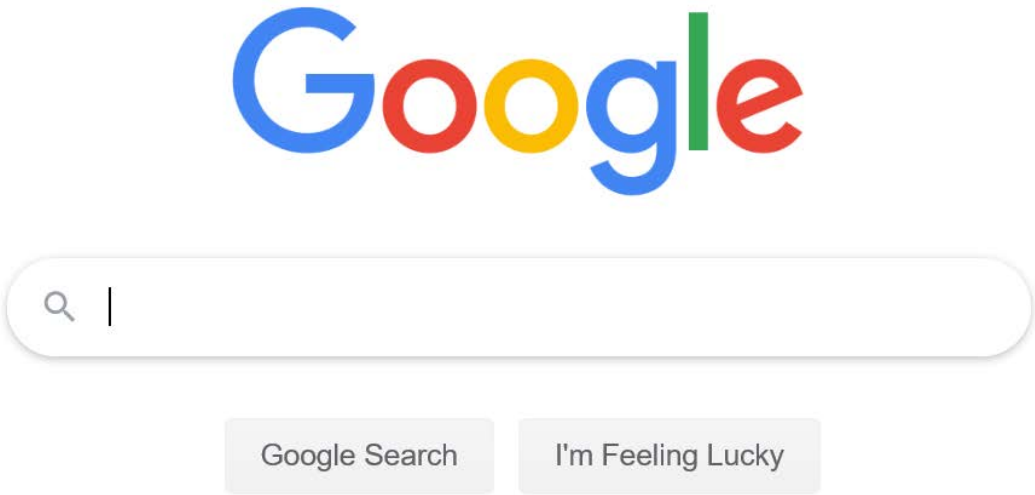
Other ethical considerations

- Rule 1.2 – act in a way that promotes public confidence in the judiciary
- Rule 2.9 prohibition on ex parte communications outside presence of other parties or their lawyers concerning a pending or impending matter, subject to a few exception.
- Rule 2.10 – refrain from making public statement in pending or impending matters in any forum that could affect the outcome in the matter or impair its fairness
- Do not offer any legal advice to others either directly or indirectly via social media. Practice of law might be permitted in limited (family) circumstances.

Judicial Use of Social Media Take Away(s)

- Judges can take part in social media (electronic social networking)
- As with all social relationships and contacts comply with relevant ethical codes
- Anticipate intensive scrutiny
- Accept burdensome restrictions that do not apply to other users
- Assume all communications on social media will be accessible to the public as a permanent record and post accordingly
- Use common sense
- Avoid: posts, comments, or even "likes" that are political, show a strong bias or possible influence, are discriminatory or derogatory, or display inappropriate humor, post/comments about pending/impending cases, personal criticism of political figures, lawyers, litigants, ex parte communications, provisions of legal advice, posts relating to fundraising.




Google
Google Search
I'm Feeling Lucky


Prehistoric Googling

American Bar Association –
Standing Committee on Ethics and Professional Responsibility

- Formal Opinion 478 (December 8, 2017)

  Independent Factual Research by Judges Via the Internet

- Subject of recent legal periodical commentaries

- ABA Formal Opinions are persuasive authority, cited by WA courts and WSBA Ethics Committees. See, *Rafel Law Group PLLC v. Defoor*, 176 Wn. App. 210 (2013); *In re Disciplinary Proceeding Against Halverson*, 140 Wn.2d 475 (2000); *Matter of Firestorm 1991*, 129 Wn.2d 130 (1996).

Comparison ABA Model Code of Judicial Conduct and WA CJC 2.9 regarding judicial investigation of facts

ABA Model Code

- (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.

- Cmt. 6

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

WA CJC

- (C) A judge shall not investigate facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law.

- Cmt. 6

[6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

Definition of terms – WA CJC Terminology Section

- Pending matter = “a matter that has commenced. A matter continues to be pending through any appellate process until final disposition.
- Impending matter = “a matter that is imminent or expected to occur in the near future”
- Facts =
  - Evidence Presented =
  - Judicially Noticed =
- Expressly authorized by law = “encompasses court rules as well as statutes, constitutional provisions, and decisional law”
- Information available in all mediums, including electronic

ABA Formal Op. 478 (12/8/17)

Guidelines for Independent Factual Research by Judges Via the Internet

When deciding whether to independently investigate facts on the Internet, the judge should consider:

- Is additional information necessary to decide the case? If so, this type of information generally must be provided by counsel or the parties, or must be subject to proper judicial notice.
- Is the purpose of the judge's inquiry to corroborate facts, discredit facts, or fill a factual gap in the record? If the facts are adjudicative, it is improper for a judge to do so.

ABA Formal Op. 478 (12/8/17)

Guidelines for Independent Factual Research by Judges Via the Internet

- Is the judge seeking general or educational information that is useful to provide the judge with a better understanding of a subject unrelated to a pending or impending case? If so, the inquiry is appropriate. Judges may use the Internet as they would other educational sources, like judicial seminars and books.

- Is the judge seeking background information about a party or about the subject matter of a pending or impending case? If so, the information may represent adjudicative facts or legislative facts, depending on the circumstances. The key inquiry here is whether the information to be gathered is of factual consequence in determining the case. If it is, it must be subject to testing through the adversary process.

Rowe v. Gibson, 798 F.3d 622 (2015)

- Prisoner brought § 1983 claims against prison administrators and employees of a prison medical services company, claiming that defendants were deliberately indifferent to his serious medical needs by preventing prisoner from having access to heartburn medication before he ate meals, and by denying prisoner access to prescribed, rather than over-the-counter, heartburn medication for 33 days, in violation of the Eighth Amendment.
- United States District Court for the Southern District of Indiana, Sarah Evans Barker, J., 2014 WL 1631636, granted summary judgment to defendants.
- Prisoner appealed.

Rowe v. Gibson – Procedural Information

- Prisoner is self-represented
- At least one of defendants is a physician
- District Court ruling is grant summary judgment to defendants
- 7th Circuit Court of Appeals held
  - issue of fact as to whether restricting the time prisoner took heartburn medication departed from professional practice precluded summary judgment on Eighth Amendment deliberate indifference claim, and
  - issue of fact whether prison medical staff told prisoner that they were withholding prisoner's heartburn medication to convince prisoner not to file lawsuits precluded summary judgment on prisoner's First Amendment retaliation claim.
- Affirmed in part, reversed in part, and remanded.

Richard A. Posner

Dockets:	38
Cases:	8976
Trial Court Documents:	284

See Full Profile

Pick a Side

David F. Hamilton

Dockets:	3913
Cases:	3793
Trial Court Documents:	330

See Full Profile

- Team Posner [8/17/15]

  [Majority opinion]
- GERD – www.nlm.nih.gov
- www.mayoclinic.org
- www.webmd.com
- Reference to medical information in different case
- http://en.Wikipedia.org
- www.acpm.org
- www.healthgrades.com
- www.zantacotc.com
- www.healthline.com
- www.pdr.net

- Team Hamilton [Concur/Dissent]
- Reversal of SJ on timing of medication based on "evidence" appellate court found by its own internet research
- Parts I, II, III and IV
- Website disclaimers – not a substitute for professional judgment
- Varying website content

798 F.3d 622, 630 (2015)

- We have decided to reverse the judgment. 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. We add that the judge erred not only by giving undue weight to Wolfe's internally contradictory affidavit but also by relying on a defendant (Wolfe) as the expert witness. There are expert witnesses offered by parties and neutral (court-appointed) expert witnesses, but *defendants* serving as expert witnesses?—and in cases in which the plaintiff doesn't have an expert witness because he doesn't know how to find such a witness and anyway couldn't afford to pay the witness? And how could an unrepresented prisoner be expected to challenge the affidavit of a hostile medical doctor (in this case *really* hostile since he's a defendant in the plaintiff's suit) effectively? Is *this* adversary procedure?
- Appendix to Majority opinion, p. 632 - 635

HAMILTON, Circuit Judge, concurring in part and dissenting in part

- Agrees with majority's disposition of most claims and issues: affirming summary judgment for defendants on several claims and reversing on Rowe's retaliation claim and his claim for complete denial of his Zantac medicine for 33 days in July and August 2011.

798 F.3d 622, 636 (2015) Hamilton dissent

I must dissent, however, from the reversal of summary judgment on Rowe's claim regarding the timing for administering his medicine between January and July 2011 and after August 2011. On that claim, the reversal is unprecedented, clearly based on "evidence" this appellate court has found by its own internet research. The majority has pieced together information found on several medical websites that seems to contradict the only expert evidence actually in the summary judgment record. With that information, the majority finds a genuine issue of material fact on whether the timing of Rowe's Zantac doses amounted to deliberate indifference to a serious health need, and reverses summary judgment. (The majority denies at a couple of points that its internet research actually makes a difference to the outcome of the case, see ante at 629, 630, but when the opinion is read as a whole, the decisive role of the majority's internet research is plain.)

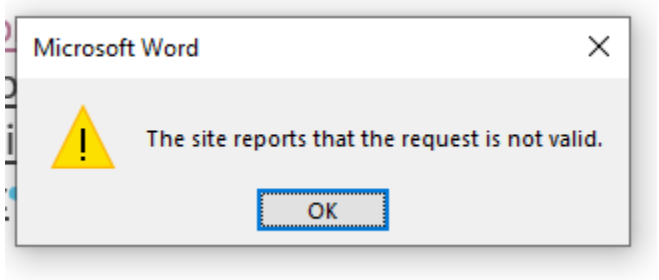
“Link Rot” – References present/absent [7/14/2020]

- Present
- GERD
- www.nlm.nih.gov
- www.webmd.com
  - See disclaimer”
- http://en.Wikipedia.org “Ranitidine” (Zantac)

This page was last edited on 2 June 2020, at 16:58 (UTC).

- Reference to medical information in different case
- www.acpm.org
- www.zantacotc.com
- www.healthline.com
- www.pdr.net

- Absent
- www.mayoclinic.org



- www.healthgrades.com

2020 Copyright of website

https://www.webmd.com/about-webmd-policies/additional-info

Additional Information

The contents of the WebMD Site, such as text, graphics, images, and other material contained on the WebMD Site ("Content") are for informational purposes only. The Content is not intended to be a substitute for professional medical advice, diagnosis, or treatment. Always seek the advice of your physician or other qualified health provider with any questions you may have regarding a medical condition. Never disregard professional medical advice or delay in seeking it because of something you have read on the WebMD Site!

If you think you may have a medical emergency, call your doctor or 911 immediately. WebMD does not recommend or endorse any specific tests, physicians, products, procedures, opinions, or other information that may be mentioned on the Site. Reliance on any information provided by WebMD, WebMD employees, others appearing on the Site at the invitation of WebMD, or other visitors to the Site is solely at your own risk.

Last updated on November 02, 2016

Medical Information in Different Case

- As we explained in a recent case in which, as in this case, a prison inmate complained of failure to treat his GERD (and we reversed the grant of summary judgment in favor of the prison staff), "GERD can … produce persistent, agonizing pain and discomfort. It can also produce 'serious complications. Esophagitis can occur as a result of too much stomach acid in the esophagus. Esophagitis may cause esophageal bleeding or ulcers. In addition, a narrowing or stricture of the esophagus may occur from chronic scarring. Some people develop a condition known as Barrett's esophagus. This condition can increase the risk of esophageal cancer.' *WebMD, Heartburn/GERD Health Center,* "What Are the Complications of Long–Term GERD?" www.webmd.com/heartburn-gerd/guide/reflux-disease-gerd1?page=4." *Miller v. Campanella,* 794 F.3d 878, 880, 2015 WL 4523799, at *2 (7th Cir. July 27, 2015).

Other Judicial Research of Internet cases and commentary

- *People For the Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of Western Maryland*, No. 17-cv-2148, order issued, 2018 WL 1083641 (D. Med. Feb. 28, 2018)(visit to zoo website and Yelp.com)
- *Jackson v. Pollion*, 733 F.3d 786 (2013)(definitions of hypertension)
- *Ananias v. Stratton*, 2012 WL 1434880 (April 25, 2012)(court follows tracking number on an exhibit to find untimely appeal)
- *Jenkins v. Astrue*, 836 F.Supp. 2d 211 (2011)(denial of SSD benefits - Ct uses DSM4 to explain record, looks up drug applications and other medical information)
- *US. Bari*, 599 F.3d 176 (2d Cir. 2010)("the man in the yellow rainhat", google of availability of hats match video and physical evidence)
- *Kiniti-Wairimu v. Holder*, 312 Fed. Appx. 907 (2009)(Immigration judge violated right when used internet search to make adverse credibility determination)
- *N.Y.C. Medical & Neurodiagnostic P.C. v. Republic Western Insurance Co.*, 8 Misc. 3d 33 (App. Term.2d Dep't 2004)(reverse trial court use of interest research to determine jurisdiction in automobile accident case)
- *People v. Mar*, 28 Cal.4th 1201 (2002)(Ct researches stun belt information discussed in law review articles)

Judicially noticed – WA ER 201
Judicial Notice of Adjudicative Facts

(a) **Scope of Rule.** This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary. A court may take judicial notice, whether requested or not.

(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

"Adjudicative Fact" – Black's Law Dictionary (11th ed. 2019)

- **- adjudicative fact** (ə-**joo**-di-kay-tiv *or* -kə-tiv) (1959) A controlling or operative fact, rather than a background fact; a fact that is particularly related to the parties to a proceeding and that helps the tribunal determine how the law applies to those parties. • For example, adjudicative facts include those that the jury weighs. *See* Fed. R. Evid. 201. Cf. *legislative fact*.

“Legislative Fact” - Black’s Law Dictionary (11th ed. 2019)

- **- legislative fact** (1828) A fact that explains a particular law's rationality and that helps a court or agency determine the law's meaning and application. • Legislative facts are not ordinarily specific to the parties in a proceeding.

Judicial Notice in Administrative Proceedings

- Methods of Presentation
  - Formal motion
  - Informal request
  - Oral statement during deposition
  - By Administrative Law Judge
  - By Board or Commission members
  - _____

Judicial Notice

14A Wash. Prac., Civil Procedure § 30:7 (3d ed.)

- Term *judicial notice* refers to the practice of assuming certain facts to be true, without the need for formal proof in the courtroom.
- Court may do so on motion of a party, or on its own initiative.
- Judicial notice of facts generally known within the territorial jurisdiction of the court
- Judicial notice of facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Judicial Notice

14A Wash. Prac., Civil Procedure § 30:7 (3d ed.)

- If a party requests that the court take judicial notice of a fact, and the party furnishes the court with the necessary information showing that the fact rises to the requisite level of indisputability, no element of discretion is involved. The court must take judicial notice.

- Conversely, it is error to take judicial notice of facts that do not rise to the requisite level of indisputably.

Judicial Notice Parameters

- Judicial notice should not be confused with a judge's personal knowledge about facts at issue. The judge may not relieve a party of formal proof simply because the judge “knows” that something is true. 14A Wash. Prac., Civil Procedure § 30:7 (3d ed.)

- Probate court was not entitled to rely on its own memory of oral testimony from previous dissolution trial between decedent and his wife, presided over by same judge, regarding their intent to rescind their community property agreement; judge's memory of oral testimony was subject to reasonable dispute and was therefore not a proper subject for judicial notice.

Vandercook v. Reece (2004) 120 Wash.App. 647, 86 P.3d 206.

Judicial Notice

- Bernal v. American Honda Motor Co., Inc., 11 Wash. App. 903, 527 P.2d 273 (Div. 1 1974), judgment rev'd, 87 Wash. 2d 406, 553 P.2d 107, 111 (1976)

  In addition to affidavits, pleadings, depositions and admissions on file, which are specifically permitted by statute, judicial notice, presumptions and briefs of counsel may be considered in determining motion for summary judgment

- Supreme Court may take judicial notice of the record in the case presently before it or in proceedings engrafted, ancillary, or supplementary to it; however, Court cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties. In re Adoption of B.T. (2003) 150 Wash.2d 409, 78 P.3d 634

Brief Survey of Judicial Notice Rulings Content / Docket / IAJ or Board

Declined

- Conduct of party in prior appeals [in support of CR 11 mxn]
- Weather data from “Weather Underground” website
- DSMV proof PTSD caused by cumulative trauma
- Statement in textbook about TOS

Taken

- BIIA did not receive an appeal in prior CNR
- PDO & Order Adopting in prior docket
- DLI Self-Insurance Claims Adjudication Guidelines regarding “non-standard” wages
- Prior BIIA D&O
- AMA Guides 5th – upper extremity

Brief Survey of Judicial Notice Rulings Content / Docket / IAJ or Board

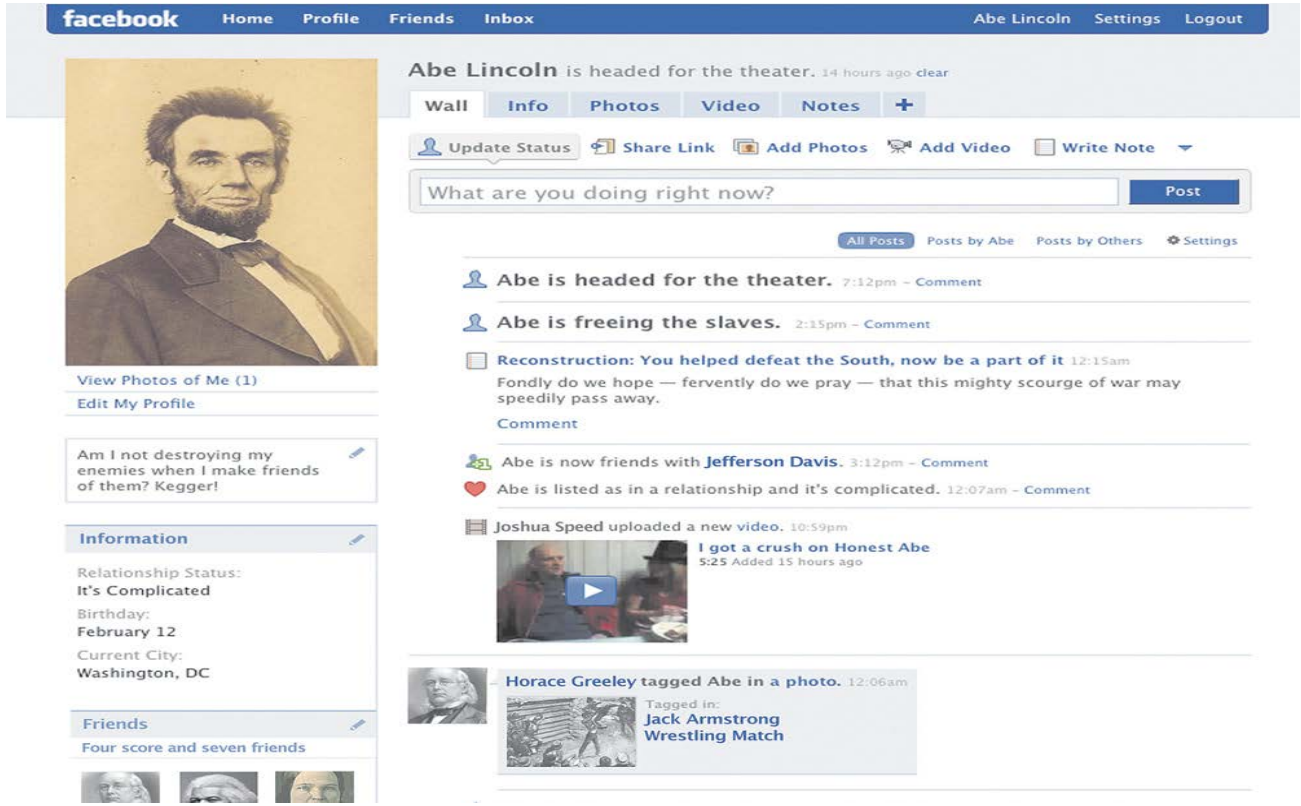
Declined

- Everett CC receptionist reqmt
- Criminal record of non-testifying physician
- US Dep't Labor decision on Energy Employee Occ. Illness
- DLI Guidelines re CRPS – given to Board (not provided to IAJ)
- CA experience as Russian linguist and linguistic decoding generalities

Taken

- Schedule of Benefits to determine amount of PPD owed
- US Dept Commerce "Record of Climatological Observation"
- AOC website listing of certified court interpreters
- Resolution by OAP of prior appeal
- Content of DLI order segregating condition in prior claim
- DOT lifting restrictions for sedentary & light work

The End


facebook
Home
Profile
Friends
Inbox
Abe Lincoln
Settings
Logout
Abe Lincoln is headed for the theater. 14 hours ago clear
Wall
Info
Photos
Video
Notes
+
Update Status
Share Link
Add Photos
Add Video
Write Note
What are you doing right now?
Post
All Posts
Posts by Abe
Posts by Others
Settings
Abe is headed for the theater. 7:12pm - Comment
Abe is freeing the slaves. 2:15pm - Comment
Reconstruction: You helped defeat the South, now be a part of it 12:15am
Fondly do we hope — fervently do we pray — that this mighty scourge of war may speedily pass away.
Comment
Abe is now friends with Jefferson Davis. 3:12pm - Comment
Abe is listed as in a relationship and it's complicated. 12:07am - Comment
Joshua Speed uploaded a new video. 10:59pm
I got a crush on Honest Abe
5:25 Added 15 hours ago
Horace Greeley tagged Abe in a photo. 12:06am
Tagged in:
Jack Armstrong
Wrestling Match
View Photos of Me (1)
Edit My Profile
Am I not destroying my enemies when I make friends of them? Kegger!
Information
Relationship Status:
It's Complicated
Birthday:
February 12
Current City:
Washington, DC
Friends
Four score and seven friends

Addendum - Hypotheticals

ABA Formal Opinion 478 (December 8, 2017)

[Footnote references are extensive and omitted from this presentation]

ABA Formal Opinion 478 (December 8, 2017)

- **Hypothetical #1:** In a proceeding before the judge in a case involving overtime pay, defendant's counsel explains that the plaintiff could not have worked more than 40 hours per week because defendant's restaurant is in an "industrial area" and only open for breaks and lunch during the work-week and not on weekends. The judge is familiar with the area and skeptical of counsel's claims. The judge checks websites like Yelp and Google Maps, which list the restaurant as being open from 7 am to 10 pm, seven days each week. Does this search violate Rule 2.9(C) of the Model Code of Judicial Conduct?

- **Analysis #1:** This search violates Rule 2.9(C) of the Model Code of Judicial Conduct because the restaurant's hours of operation are key to whether the plaintiff could prevail on a claim of unpaid overtime. The judge should ask the parties and their counsel to provide admissible evidence as to the restaurant's hours of operation.

ABA Formal Opinion 478 (December 8, 2017)

- **Hypothetical #2:** The judicial district in which the judge is assigned has many environmental contamination cases involving allegations that toxic chemicals have been released and have contaminated soil and groundwater. The judge is unfamiliar with this area of environmental law. Before a case is assigned to the judge, the judge reads online background information including articles. Does this action violate Rule 2.9(C) of the Model Code of Judicial Conduct?

- **Analysis #2:** Judges may educate themselves by independent research about general topics of interest, even on topics that may come before the judge. General background learning on the Internet may be analogized to attending judicial seminars or reading books, so long as there is reason to believe the source is reliable. Even general subject-area research is not permissible, however, if the judge is acquiring information to make an adjudicative decision of material fact.

ABA Formal Opinion 478 (December 8, 2017)

- **Hypothetical #3:** A social media-savvy lawyer just has been appointed to the bench. Before being appointed, this lawyer used social media to conduct extensive background research on potential jurors and opposing parties. The judge has been assigned to hear a complex, multiparty case involving lawyers from out of state. The judge wants to review the social media and websites of each of the parties and of the out-of-state lawyers to learn background information about the parties, to read the lawyers' writings, and to review a list of the lawyers' current and former clients. Does this action violate Rule 2.9(C) of the Model Code of Judicial Conduct?

- **Analysis #3:** While the Model Code of Judicial Conduct does not prohibit a judge from personally participating in electronic social media ("ESM"), a "judge must . . . avoid using any ESM site to obtain information regarding a matter before the judge in violation of Rule 2.9(C)." On-line research to gather information about a juror or party in a pending or impending case is independent fact research that is prohibited by Model Rule 2.9(C).

ABA Formal Opinion 478 (December 8, 2017) Hypothetical #3 cont.

- Gathering information about a lawyer is a closer question. The judge's information-gathering about a lawyer may be permissible if it is done merely to become familiar with counsel who appear before the court similar to how a judge may have, in the past reviewed a legal directory like Martindale Hubbell, or to determine whether the lawyer is authorized to practice in the jurisdiction. However, the judge's independent research about a lawyer is not permitted if it is done to affect the judge's weighing or considering adjudicative facts. If an otherwise permissible review results in a judge obtaining information about the existence or veracity of adjudicative facts in the matter, the judge should ask the parties to address the facts in the proceeding through evidentiary submissions.

ABA Formal Opinion 478 (December 8, 2017)

- **Hypothetical #4:** A trial judge presiding over an owner's claim for insurance coverage heard testimony from competing experts about their investigation and opinions about the cause of a fire that destroyed plaintiff's property. While preparing findings of fact and conclusions of law the judge received summaries her law clerk created from journals and articles on the proper techniques and analysis for investigating fires of unknown origin. Does this action violate Rule 2.9(C) of the Model Code of Judicial Conduct?

- **Analysis #4:** By searching the Internet for journals and articles on investigating fires, the law clerk engaged in an improper independent factual investigation. The method and extent of the expert's investigation is an issue in dispute, *i.e.*, an adjudicative fact. The respective experts' investigative methods related directly to the weight and credibility given to testimony concerning an adjudicative fact, and fall within the prohibition in Rule 2.9(C). The trial court, therefore, could not properly take judicial notice of these facts as being "not subject to reasonable dispute" because they are neither "generally known within the trial court's jurisdiction" nor can they be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). If the summaries addressed material facts in dispute and the judge used the summaries to make findings of fact without allowing the parties to test the factual content of the summaries through evidentiary submissions, the judge violated Model Rule of Judicial Conduct 2.9(A) by considering *ex parte* information, and violated Rule 2.9(D) by failing to require that the law clerk act in a manner consistent with the judge's obligations under the Code.

ABA Formal Opinion 478 (December 8, 2017)

- **Hypothetical #5:** To render an accurate decision in a pending matter, a judge needs to know whether a party is or was the subject of other judicial proceedings. The judge searches the court's electronic files of the other cases and the facts of each case, including sealed information. The search reveals several other cases, some pending and some concluded and some within and some outside the judge's jurisdiction. Does the judge's search violate Rule 2.9(C) of the Model Code of Judicial Conduct?
- **Analysis #5:** Model Rule 2.9(C) does not prohibit consideration of "facts that may properly be judicial noticed." For example, a judge may take judicial notice of a guilty plea entered before the judge in a previous case and of other court records maintained by the clerk of the court in which the judge sits. Court records can be judicially noticed for their factual existence, and the occurrence and timing of matters like hearings held and pleadings filed, but not for the truth of allegations or findings therein. "[T]he law treats different portions of the files and records differently." Standards of judicial notice require the judge to give notice and an opportunity to be heard either before or after taking judicial notice. Again, each judge should determine the law of judicial notice in the applicable jurisdiction.

ABA Formal Opinion 478 (December 8, 2017) Hypothetical #5 Analysis cont.

- Even when reviewing court records, however, a judge should be mindful of the following caution, from Illinois Judicial Ethics Opinion 2016-02:
- the particular judge's competence to navigate the computerized court records is essential . . . only facts which are 'not subject to reasonable dispute' are the proper subject of judicial notice. The judge must be confident that his or her review will lead to *accurate* information. For example, indexes of computerized court records are likely to contain individuals with the same name; is the inquiring judge capable of finding the appropriate records and accurately matching them to the party in question? Judges must be aware of their own skills and, more importantly, their limitations . . . .
- Documents that are sealed may not be reviewed. That would be independent research disclosing information about a party to which both sides do not have access or even know exist. Reviewing sealed documents is improper under Rule 2.9(C) of the Model Code of Judicial Conduct.