New ABA Ethics Opinion Explores the Prohibition on Independent Fact Research by Judges

by Keith R. Fisher

Suppose you are a judge preparing for a complex piece of commercial litigation scheduled to go to trial before you next week. As a conscientious and hard-working jurist, you would like to familiarize yourself with the commercial setting in which the dispute has arisen, including information about the relevant industry, industry practices, and usages of trade. To that end, websites maintained by the parties to the dispute, together with websites from trade groups and other sources, can be expected to provide significant background. Though not always objective (*i.e.*, unbiased) or even necessarily reliable factually, the Internet is unquestionably a treasure trove of information for researchers. Ever more search engines provide gateways to resources that cannot as readily be found through books and other printed materials, no matter how well indexed they may be.

In addition, if some of the lawyers are out-of-town practitioners who have been admitted *pro hac vice* but have never appeared before you, no doubt you would like to learn something about them and their backgrounds. You have divided up these tasks and, with the able assistance of your law clerk, plan to be well-prepared when the parties show up for trial.

Before going any 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 some 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. Thence arises the Model Code's proscription of *ex parte* communications (Rule 2.9(A)). As a corollary to that prohibition, 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.*

This language originated as a comment to Canon 3B(7) in the 1990 version of the Model Code and was moved to the blackletter text of Rule 2.9(C) in the 2007 revision. A new comment 6 was contemporaneously added to clarify that "the prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic."

Of course, the Model Code, as its name suggests, is just a model for adoption (with or without modification) by the states and is not itself binding on anyone. Judges should consult their state codes of judicial conduct for appropriate guidance. As of this writing, 31 states have adopted the Model Code's Rule 2.9(C) either verbatim or with substantially similar language.

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

Interestingly, no provision dealing explicitly with independent fact research is contained in the ethics code applicable to the federal judiciary. Canon 3(A)(4) of the Code of Conduct for United States Judges does prohibit a federal judge from "initiat[ing], permit[ting], or consider[ing] *ex parte* communications or consider[ing] other communications concerning a pending or impending matter that are made outside the presence of the parties of their lawyers. . . ." A similar prohibition can be found in Canon 3(A)(4) of the Code of Conduct of Federal Administrative Law Judges.

Neither the Code of Conduct for United States Judges, nor for that matter, the Model Code, defines the term *ex parte*. The problem is that it's far from clear that independent research—which by definition involves none of the parties—constitutes an *ex parte* communication at all, since that term, as traditionally understood, entails the involvement of at least one, but less than all, parties to the proceeding. The Latin phrase means from or out of one side or part, and at common law referred to something done by, for, or on the application of one party alone. *See, e.g.*, Definition of ex parte at law.com. For example, the website of the Hawaii judiciary explains the concept for laypersons and *pro se* litigants:

> "*Ex parte*" is a Latin phrase meaning "on one side only; by or for one party." An *ex parte* communication occurs when a party to a case, or someone involved with a party, talks or writes to or otherwise communicates directly with the judge about the issues in the case without the other parties' knowledge.
> Hawaii State Judiciary, "Why Can't I Talk or Write to the Judge?"

Conceivably, independent factual research could lead to judicial disqualification, under the prevailing Model Code standard, as that research might cause a "judge's impartiality reasonably [to] be questioned." Rule 2.11(A). However, specific instantiations of that standard in the Model Code do not aid the analysis. For example, disqualification/recusal is appropriate where the judge has "*personal knowledge* of facts that are in dispute in the proceeding." Rule 2.11(A)(1) (emphasis supplied). The federal statute likewise provides that a judge should recuse "where he has a personal bias or prejudice concerning a party, or *personal knowledge* of disputed evidentiary facts concerning the proceeding. . . ." 28 U.S.C. § 455(b)(1) (emphasis supplied). (This was expressly adopted by Congress from the Model Code's standard.) But this adds little to the proscription on independent factual research. Even if the research involves disputed evidentiary facts, information gleaned from research is *hearsay* and not "personal knowledge," which means knowledge of a circumstance or fact gained through firsthand observation or experience. *See Black's Law Dictionary* 877 (7th ed. 1999) (defining "personal knowledge" as

knowledge "gained through firsthand observation or experience as distinguished from a belief based on what someone else has said").

Finally, judges should be aware that the strictures of the Model Code's Rule 2.9(C) apply to judicial clerks and other court personnel as well. In fact, judges are given primary responsibility to ensure their compliance. Rule 2.9(D) provides, "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

As noted, the Formal Op is predicated on the belief, axiomatic to our legal system, that, with limited exceptions, evidence is reliable only when tested by the crucible of cross-examination and other adversarial scrutiny. The opinion is a reasonably straightforward application of these principles and the Model Code provisions quoted above. The opinion is also extremely useful for its discussion of five hypothetical scenarios, which will repay repeated reading and thought.

The Formal Op does leave open some significant questions. First, it is somewhat unclear whether the opinion confines itself to prohibiting independent research of "adjudicative facts." Second, while the Formal Op observes—quite correctly, as far it goes—that independent investigations of law are not proscribed, only independent investigations of fact, Formal Op at 3 and n.10, this leaves unclear how to deal with the not uncommon situation where the former encompasses the latter. Third, the opinion does not consider what happens when the adversary system's safeguards fail to function.

1. 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 language of 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." Formal Op at 1 (emphasis supplied). This formulation, limited to "adjudicative facts," is not used in the body of the opinion but is very clearly echoed in the first three sentences of the final paragraph of 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 supplied).

The conclusion paragraph 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 on the interpretation of the prohibition on independent fact research to encompass more than just "adjudicative facts." Such an interpretation is bolstered by the reference to two defined terms in the Model Code, "a pending or impending matter," for whereas a "pending" matter is one that has already commenced, an "impending" matter is one "that is imminent or expected to occur in the near future." Model Code, Terminology; *see also* Formal Op at 3, n. 8. In the latter case, an "adjudicative facts" limitation seems counterintuitive.

Still, the ambiguity is unfortunate and may have resulted inadvertently from that part of the discussion focusing on the distinction between "adjudicative facts" and "legislative facts" in connection with judicial notice. "Adjudicative facts" are those that concern the parties to the litigation and to which the court will apply the law in adjudicating the dispute; "legislative facts" are those that 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 latter is generally thought to be suitable for judicial notice.

While the rules of evidence differ somewhat from state to state, the concept of judicial notice is fairly uniform and well understood. As articulated in the Federal Rules of Evidence (which, in this respect at least, are a reasonable proxy for state evidence rules, *see id.* at 4, n.14 (collecting authorities)), judicial notice is permitted as to facts that are "not subject to reasonable dispute" because they are "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Federal Rules of Evidence, 201(b)(1)-(2).

The concept of judicial notice is somewhat distinct from independent factual research, not only because of the narrow categories of information that may properly 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, and the parties then have an opportunity to contest the propriety of taking judicial notice and the nature of the fact to be noticed.

2. Researching law by judges and their law clerks is both commonplace and uncontroversial. This can involve not merely an examination of case law but also treatises and articles. At times, however, any of these sources may discuss factual information that could be in dispute in a particular matter before the court, and the question then arises whether that impermissibly taints otherwise plain-vanilla legal research.

One case involved the use of a stun belt as a security device on a criminal defendant over his objection. Affirming the trial court, the intermediate appellate court did independent research and cited an out-of-state law-review student comment on the use of stun belts that discussed the technology of the stun belt in question, including information from the manufacturer's web site. This judicial reliance on the law-review comment was not at all central to the state high court's reversal of the two lower courts, although the technology of the stun belt and its potential psychological impact on the defendant were certainly factually at issue in the case. *People v. Mar*, 28 Cal. 4th 1201, 52 P.3d 95, 124 Cal. Rptr.2d 161 (Cal. 2002). Indeed, the California

Supreme Court actually noted that the student comment "cited by the Court of Appeal is a lengthy and well-researched article that has been cited in a number of prior judicial decisions," and "[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. . . ." *Id*. at 1215, n.1 (citations omitted).

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

3. Finally, the Formal Op's reliance on fundamental principles of our adversarial system is based on the presupposition that that system is operating properly—or at all. Where that presupposition fails, so too does the Formal Op's conclusion. Fortunately, such failure is rare, but it does happen, such as when counsel are incompetent or otherwise inadequate to the task or when a litigant is unrepresented by counsel (for whatever reason).

Recently retired Seventh Circuit U.S. Court of Appeals Judge Richard Posner had a reputation for doing independent internet research. Posner's factual research was taken to task by one of his colleagues in a relatively recent case—*Rowe v. Gilson*, 798 F.3d 622 (7th Cir. 2015), *reh'g denied,* 2015 U.S. App. LEXIS 23072 (7th Cir., Dec. 7, 2015)—that highlights the concerns surrounding adversarial system failure.

In that case, a prisoner who brought a civil-rights claim was alternatively denied treatment, and then given ineffective treatment, for gastrointestinal reflux disease. The district court granted summary judgment to state officials because "expert" evidence of the prison doctor (who was a named defendant and therefore not a disinterested expert at all) was not rebutted by the impecunious 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 factual material. Judge Rovner, concurring, agreed with Posner that this was permissible in the particular 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 his own expert.

Judge Posner's justification for his independent research was twofold. First, he emphasized the quality of the websites on which he relied: the medication's manufacturer and the Mayo Clinic. But this seems questionable: Even the most highly qualified expert witness is subject to cross-examination, and the inability to cross-examine a website (especially something as potentially self-serving as a manufacturer's website) is precisely the concern animating the prohibition against independent factual research. Posner's second rationale is more compelling, however. Arguing based 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 the existence of 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 of their essential purpose. In the real world of administering justice, judges are and should always be attuned to such possibilities. Such circumstances are, thankfully, relatively rare in our jurisprudence. As a matter of policy, we want to avoid a culture of "trial by search engine," and so in the vast majority of cases, in accordance with the Formal Op's guidance, judges and their staff should avoid the temptation to conduct independent factual research.