

# Internet (Re)Search by Judges, Jurors, and Lawyers

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## ABSTRACT

*How can Internet research be used properly and reliably in law? This paper analyzes several key and very different issues affecting judges, jurors, and lawyers. With respect to judges, this paper discusses the rules of judicial conduct and how they guide the appropriate use of the Internet for research; the standards for judicial notice; and whether judges can consider a third category of non-adversarially presented, non-judicially noticed factual evidence. With respect to jurors, this paper discusses causes of and deterrents to jurors conducting Internet research during trials; and the recourse available to parties who are adversely impacted by such behavior. With respect to lawyers, this paper discusses reliance on and potential pitfalls of using free Internet resources to conduct legal research; the dangers of rotten Internet links; and evidentiary considerations in citing to Internet evidence.*

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“Don’t believe everything you read on the Internet.”<sup>1</sup>

The Internet, the world’s most accessible research tool, provides the public with a sea of information that is increasing every day.<sup>2</sup> But along with its conveniences, it also introduces new and sometimes unwanted influences on the American system of litigation.<sup>3</sup> This paper analyzes frequently encountered issues relating to the conduct of research on the Internet.

Legal research once required physically making a trip to the law library and perusing reporters and hardbound treatises. Similarly, factual research involved reviewing entries in encyclopedias, news articles, and other physical publications. These activities have been rendered archaic with the proliferation of the Internet in the past three decades,<sup>4</sup> which now conveniently allows for legal and factual research to be performed in the comfort of a person’s own office or home, or even in transit.<sup>5</sup>

But advances in technology do not exist in a vacuum; they raise new challenges as well.<sup>6</sup> As the amount of information published on the Internet has increased, has its reliability and

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<sup>1</sup> [Remarks by President Obama at YSEALI Town Hall](#) (May 25, 2016), available at 2016 WL 2997085, at \*14; William D. Toronto, [Fake News and Kill-Switches: The U.S. Government’s Fight to Respond to and Prevent Fake News](#), 79 A.F. L. REV. 167, 169, 169 n.2 (2018) (sarcastically quoting President Abraham Lincoln). The running joke, especially in light of the proliferation of “fake news,” is that people nowadays believe everything they read on the Internet.

<sup>2</sup> E.g., [Reno v. Am. Civil Liberties Union](#), 521 U.S. 844, 844 (1997) (recognizing the Internet as “an international network of interconnected computers that enables millions of people to communicate with one another in ‘cyberspace’ and to access vast amounts of information from around the world.”); Jonathan H. Blavin & I. Glenn Cohen, [Gore, Gibson, and Goldsmith: The Evolution of Internet Metaphors in Law and Commentary](#), 16 HARV. J.L. & TECH. 265, 269, 269 n.22 (2002) (crediting Al Gore for coining the term “information superhighway” in the early 1990s to introduce the Internet to the public); Al Gore, [Infrastructure for the Global Village](#), 265 SCI. AM. 150, 150–53 (1991) (viewing the Internet as a technology “that enhance[s] the ability to create and understand information”); see also Anupam Chander, [How Law Made Silicon Valley](#), 63 EMORY L.J. 639, 643 (2014) (“Internet innovations . . . rely fundamentally on empowering individuals to share with each other.”). Nevertheless, people were skeptical of the Internet in its early days. For instance, Judge Easterbrook initially viewed cyberlaw (Internet law) as “law of the horse.” Frank H. Easterbrook, [Cyberspace and the Law of the Horse](#), 1996 U. CHI. LEGAL. F. 207, 207–08, 211, 214 (“Most behavior in cyberspace is easy to classify under current property principles. . . . [L]et the world of cyberspace evolve as it will.”). But see Lawrence Lessig, [The Law of the Horse: What Cyberlaw Might Teach](#), 113 HARV. L. REV. 501 (1999) (defending cyberlaw in response to Judge Easterbrook).

<sup>3</sup> See, e.g., Orna Rabinovich-Einy, [Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape](#), 6 YALE J.L. & TECH. 1, 2 (2004) (“[V]irtual courts are the clearest manifestation of the Internet’s influence on dispute resolution, but its influence extends beyond the immediate online environment.”).

<sup>4</sup> See, e.g., Janet Abbate, [Privatizing the Internet: Competing Visions and Chaotic Events, 1987–1995](#), 32 IEEE ANNALS HIST. COMPUTING 10, 11, 15 (2010) (citing The High Performance Computing Act of 1991, *codified at* 15 U.S.C. § 5501 *et seq.*) (discussing the Internet’s history, including how its infrastructure was financed by the High Performance Computing Act of 1991).

<sup>5</sup> See also Mark A. Lemley, [IP in a World Without Scarcity](#), 90 N.Y.U. L. REV. 460, 473 (2015) (discussing what “the computer industry did in 1976—a set of large, expensive machines used by businesses and a fringe of cheap, homemade computers used primarily by hobbyists. But computers rapidly joined the mainstream in the 1980s as processing power increased and size and cost decreased, making a personal computer a plausible investment.”).

<sup>6</sup> See Gore, *supra* note 2 at 150–53 (analyzing “changes in the traditional legal concepts of property, ownership, originality, privacy, and intellectual freedom” in light of the arrival of the Internet). But see Brad A. Greenberg, [Rethinking Technology Neutrality](#), 100 MINN. L. REV. 1495, 1501 (2016) (“Skeptics . . . argued that the Internet is merely a focal point for the study of numerous already established areas of law (e.g., tort, contract, criminal procedure).”).

accuracy decreased?<sup>7</sup> Can too much access to information have negative consequences in the law? A federal judge once stated:

While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. So as to not mince words, the Court reiterates that this so-called Web provides no way of verifying the authenticity of the alleged contentions that Plaintiff wishes to rely upon in his [brief]. There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. Anyone can put anything on the Internet. No web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on *any* web-site from *any* location at any time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules found in FED. R. EVID. 807.<sup>8</sup>

Twenty years have passed since that “famous skepticism.”<sup>9</sup> The Internet is no longer viewed as an unknown frontier to be conquered, but is now relied upon as a staple resource necessary for everyday living.<sup>10</sup> Many judges and attorneys routinely consult, rely on, and cite to Internet sources in their professions.<sup>11</sup> Jurors will typically have unfettered access to the Internet before

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<sup>7</sup> See, e.g., [Commonwealth v. Pon](#), 469 Mass. 296, 304 (2014) (recognizing the “reliance on potentially inaccurate sources of criminal history information made possible by technological advances . . . [w]here criminal records are increasingly available on the Internet.”); Sofia Grafanaki, [Drowning in Big Data: Abundance of Choice, Scarcity of Attention and the Personalization Trap, a Case for Regulation](#), 24 RICH. J.L. & TECH. 1, 1, 1 n.5 (2017) (“Today’s Internet is Optimized for Noise.” (citation omitted)).

<sup>8</sup> [Lorraine v. Markel Am. Ins. Co.](#), 241 F.R.D. 534, 555 n.30 (D. Md. 2007) (quoting “the famous skepticism expressed in *St. Clair v. Johnny’s Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 773 (S.D. Tex. 1999)” (citing FED. R. EVID. 807)); see also [Philip Morris USA, Inc. v. Pollari](#), 228 So. 3d 115, 128 (Fla. Dist. Ct. App. 2017) (“The internet . . . lack[s] effective formal mechanisms of authentication. Despite advances in technology and the ability to fact-check more readily, separating fact from fiction nonetheless remains a daunting task for the average consumer of internet information. With that comes the inherent risk that inaccurate information can appear legitimate, and may inadvertently be perpetuated despite the best of intentions. Understanding that reality, holding a purveyor of web content accountable for providing its viewers access to a broad range of information would open a ‘Pandora’s Box’ where they could be legally bound by almost any statement or content found on a linked webpage or document—including unfiltered visitor comments, third-party advertising, or additional links to other sources—all without regard to whether that content is disputed, controversial, or conflicting. This would serve no purpose other than to chill the dissemination of information by deterring website owners or operators from incorporating any third-party content for fear of tying themselves to the yoke of those sources.”); [Nordstrom, Inc. v. NoMoreRack Retail Grp., Inc.](#), No. 12-cv-1853, 2013 WL 1196948, at \*13 (W.D. Wash. Mar. 25, 2013) (“The majority of complaints are from anonymous Internet users that have posted on various blogs and forums online . . . designed to facilitate negative feedback from disgruntled customers or even competitors, who can write multiple reviews across multiple forums. The evidence is not persuasive.”); [In re Easysaver Rewards Litig.](#), 737 F. Supp. 2d 1159, 1168 (S.D. Cal. 2010) (“Information from the internet does not necessarily bear an indicia of reliability and therefore must be properly authenticated by affidavit.”); [Trademark Properties, Inc. v. A & E Television Networks](#), No. 06-cv-2195, 2008 WL 4811461, at \*2 n.2 (D.S.C. Oct. 28, 2008) (“The accuracy and reliability of information from the Internet is highly questionable.”).

<sup>9</sup> [Lorraine](#), 241 F.R.D. at 555.

<sup>10</sup> See also discussion, *supra* note 5.

<sup>11</sup> See, e.g., Coleen M. Barger, [On the Internet, Nobody Knows You’re a Judge: Appellate Courts’ Use of Internet Materials](#), 4 J. APP. PRAC. & PROCESS 417, 418, 418 n.3 (2002) (collecting “the opinions written by Supreme Court

and after trial, and they sometimes even have access during trial. For most people, the Internet is the first place they turn to when they have a question about anything.<sup>12</sup>

How can Internet research be used properly and reliably in law? While this ethical issue is not new, its scholarship is rather dispersed and lacks one go-to reference for quick consultation. Legal scholars have previously examined *individual* topics on judges' independent Internet research,<sup>13</sup> jurors' Internet use during trial,<sup>14</sup> or lawyers' Internet search of potential jurors during jury selection for *voir dire*.<sup>15</sup> This paper contributes to the existing literature by serving as a single, consolidated study of numerous legal and practical issues encountered by lawyers, judges, and jurors with respect to Internet research in chambers, in the courtroom, or in the office. Moreover, recent guidance issued by the American Bar Association in Formal Opinion 478 on "Independent Factual Research by Judges via the Internet,"<sup>16</sup> has memorialized prior thinking and attempts to bring consistency to judges' conduct. This paper further contributes to the legal literature by analyzing ABA Opinion 478 (including the cases that have cited to ABA Opinion 478 with approval) and other recent developments from this broad area of law in depth.

This paper consists of three parts. *With respect to judges*, Part I discusses the rules of judicial conduct and how they guide the appropriate use of the Internet for research; the standards for judicial notice; and whether judges can consider a third category of non-adversarially presented, non-judicially noticed factual evidence. *With respect to jurors*, Part II discusses causes

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justices and federal circuit judges that cite sources found on the Internet[:] There are at least 361 distinct citations to web sites by federal appellate courts in their opinions from 1996 to 2001").

<sup>12</sup> See discussion, *supra* note 1; see also Allison Orr Larsen, [Confronting Supreme Court Fact Finding](#), 98 VA. L. REV. 1255, 1260–61 (2012) (discussing how "[s]ocial science studies, raw statistics, and other data are all just a Google search away" from the Justices and their law clerks and that such legislative facts are often cited in Court opinions or raised at oral argument).

<sup>13</sup> See, e.g., Carolyn A. Dubay, [Public Confidence in the Courts in the Internet Age: The Ethical Landscape for Judges in the Post-Watergate Era](#), 40 CAMPBELL L. REV. 531, 558–63 (2018) ("The use of social media in particular, is extremely useful because of the 'unprecedented need for judges to respond with educational efforts that will ameliorate the public's misconceptions about the justice system and strengthen its commitment to an independent judiciary.'" (quoting CYNTHIA GRAY, STATE JUSTICE INST., WHEN JUDGES SPEAK UP 1 (1998))); Arthur Selwyn Miller & Jerome A. Barron, [The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry](#), 61 VA. L. REV. 1187, 1215–16 (1975) ("[Justices] conduct . . . independent research; they send their law clerks scurrying through the libraries and elsewhere . . . to add to the totality of knowledge about the social issues that they must decide as lawyers.").

<sup>14</sup> See, e.g., Thaddeus Hoffmeister, [Preventing Juror Misconduct in a Digital World](#), 90 CHI.-KENT L. REV. 981 (2015); Robbie Manhas, [Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms](#), 112 MICH. L. REV. 809 (2014); Patrick M. Delaney, [Sorry Linus, I Need Your Security Blanket: How the Smartphone, Constant Connectivity with the Internet, and Social Networks Act as Catalysts for Juror Misconduct](#), 24 ST. THOMAS L. REV. 473 (2012).

<sup>15</sup> See, e.g., Michael Begovich, [Voir Dire in a Digital World: A Model for Ethical Internet Investigation of the Venire](#), 36 T. JEFFERSON L. REV. 227 (2014); Eric P. Robinson, [Virtual Voir Dire: The Law and Ethics of Investigating Jurors Online](#), 36 AM. J. TRIAL ADVOC. 597 (2013).

<sup>16</sup> [ABA Comm. on Ethics & Prof'l Resp., Formal Op. 478 \(2017\)](#) [hereinafter "ABA Opinion 478"]. Worth noting is the term "opinion" of the American Bar Association, which is simply *advisory*, not binding, on lawyers and judges because the ABA and its Committee on Professional Discipline, by their own admission, "have no regulatory authority over lawyers and judges." See Standing Committee on Professional Discipline, AM. BAR ASS'N, [https://web.archive.org/web/20141223171846/https://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/disciplinecommittee.html](https://web.archive.org/web/20141223171846/https://www.americanbar.org/groups/professional_responsibility/committees_commissions/disciplinecommittee.html) (captured on Dec. 23, 2014). Notwithstanding, at least three cases have cited ABA Opinion 478 with approval: [Commodity Futures Trading Comm'n v. McDonnell](#), 287 F. Supp. 3d 213, 230 (E.D.N.Y. 2018); [People for Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Maryland, Inc.](#), No. MJG-17-2148, 2018 WL 1083641, at \*2 (D. Md. Feb. 28, 2018); and [Commonwealth v. Hilaire](#), 95 N.E.3d 278, 283 n.7 (Mass. App. Ct. 2018).

of and deterrents to jurors conducting Internet research during trials; and the recourse available to parties who are adversely impacted by jurors conducting Internet research during trial. *With respect to lawyers*, Part III discusses reliance on and potential pitfalls of using free Internet resources to conduct legal research; the dangers of reliance on Internet links; and evidentiary considerations in citing to Internet evidence. The authors' conclusions follow.<sup>17</sup>

## I. INTERNET RESEARCH BY JUDGES

Judges have always been free to conduct independent legal research beyond the parties' submissions. "It is no revelation that courts look to cases, statutes, regulations, treatises, scholarly articles, legislative history, treaties and other legal materials in figuring out what the law is and resolving legal issues."<sup>18</sup> The conduct of factual research by judges, however, raises ethical questions involving the fairness of a court's decision making, potential bias, and judicial advocacy.

Both the Judicial Conference's Code of Judicial Conduct for United States Judges and the American Bar Association's *Model Code of Judicial Conduct* prescribe that a judge should perform the duties of her office impartially and diligently.<sup>19</sup> The burden is on the parties to a litigation, and not the judge (or her clerk), to put forth evidence supporting their respective cases and create a factual record sufficient for the judge to decide the case.<sup>20</sup> The judge's job is to judge, not to do the parties' jobs for them.<sup>21</sup> Else, the judge runs the risk of bias in favor of one side over the other, or giving the appearance of such.

### a. ABA Opinion on Internet Research by Judges

U.S. circuit judges, district judges, and magistrate judges must abide by the Code of Conduct for United States Judges.<sup>22</sup> Unlike Rule 2.9(C) of the *ABA Model Code*, however, the

<sup>17</sup> This paper primarily focuses on how federal law has interpreted these issues.

<sup>18</sup> *de Fontbrune v. Wofsy*, 838 F.3d 992, 999 (9th Cir. 2016).

<sup>19</sup> *MODEL CODE OF JUD. CONDUCT Canon 2 (AM. BAR ASS'N 2011)*; CODE OF CONDUCT FOR U.S. JUDGES Canon 3 (Judicial Conference 2019), <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges> [perma.cc/W3HC-BA6K].

<sup>20</sup> See *MODEL CODE OF JUD. CONDUCT r. 2.9(C)* ("A judge shall not investigate facts in a manner independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.").

<sup>21</sup> *Stephen Ellmann, Truth and Consequences*, 69 *FORDHAM L. REV.* 895, 918 (2000) (quoting ANTHONY G. AMSTERDAM, 1 *TRIAL MANUAL 4 FOR THE DEFENSE OF CRIMINAL CASES* § 80 (1984)); see also *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (*per curiam*) ("Judges are not like pigs, hunting for truffles buried in briefs."); *Nw. Nat. Ins. Co. v. Balthes*, 15 F.3d 660, 662–63 (7th Cir. 1994) ("[J]udges are not archaeologists. They need not excavate masses of papers in search of revealing tidbits—not only because the rules of procedure place the burden on the litigants, but also because their time is scarce.").

<sup>22</sup> *CODE OF CONDUCT FOR U.S. JUDGES intro.* (stating that judges have "a duty to follow the law"). *Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction*, 131 *HARV. L. REV.* 417, 451 (2017) (citing PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008)); see also *Richard A. Epstein, The Natural Law Influences on the First Generation of American Constitutional Law: Reflections on Philip Hamburger's Law and Judicial Duty*, 6 *J. L., PHIL. & CULTURE* 103, 122 n.71 (2011) (explaining that the holding in *Marbury v. Madison*, 5 U.S. 137 (1803), was "further evidence of how judges could do their duty"). *Vasina v. Grumman Corp.*, 644 F.2d 112, 121 (2d Cir. 1981) (showing that same goes for a sworn jury after the judge "instruct[s] the jury that it was their duty to follow the law as it was stated by him"); accord *United States v. Godwin*, 765 F.3d 1306, 1315 (11th Cir. 2014); *E.E.O.C. v. Boh Bros. Const. Co.*, 731 F.3d 444, 459 n.14 (5th Cir. 2013); *United States v. Holmes*, 409 F. App'x 545, 554 n.3 (3d Cir. 2010); *Ledbetter v. City of Topeka*, 318 F.3d 1183, 1190 (10th Cir. 2003); *United States v. Bruce*, 109 F.3d 323, 327 (7th Cir. 1997) (citing *Seventh Circuit Pattern Instruction No. 1.01*).

Code of Conduct for United States Judges, does not include any provisions directed specifically to the propriety of factual research by judges.<sup>23</sup> When the Code of Conduct for United States Judges was first created in 1973, it essentially adopted the ABA model at the time, although the two codes have diverged since.<sup>24</sup> Nevertheless, the *ABA Model Code* remains influential on federal judges, and it has been adopted in 36 states.<sup>25</sup>

On December 8, 2017, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association released Formal Opinion 478 on “Independent Factual Research by Judges via the Internet,” which set forth guidance on what constitutes proper and improper Internet factual research by judges.<sup>26</sup> The opinion cited heavily to the *ABA Model Code of Judicial Conduct*. The opinion made clear that “[j]udges *risk* violating the Model Code of Judicial Conduct by searching the Internet for information related to participants or facts in a proceeding.”<sup>27</sup>

The opinion analyzed the provisions of the *ABA Model Code* with respect to Internet research.<sup>28</sup> First, it noted that the ban on *ex parte* communication under Model Rule 2.9(A) ensures that judges review and rule based only on the facts and evidence presented in the case.<sup>29</sup> Next, it emphasized that Model Rule 2.9(C) precludes judges from engaging in independent *factual* research, although judges are permitted to conduct *legal* research beyond the cases and authorities cited by the parties.<sup>30</sup> Model Rule 2.9(C) permits judges to consider only the evidence presented to them or facts “that may properly be judicially noticed.”<sup>31</sup> As noted in the opinion, Federal Rule of Evidence 201(a) allows judicial notice of adjudicative facts (*i.e.*, factual issues), not legislative facts.<sup>32</sup> It explained that:

<sup>23</sup> Compare [MODEL CODE OF JUD. CONDUCT r. 2.9\(C\)](#), with [CODE OF CONDUCT FOR U.S. JUDGES](#).

<sup>24</sup> Andrew J. Lievens & Avern Cohn, [The Federal Judiciary and the ABA Model Code: The Parting of the Ways](#), 28 JUST. SYS. J. 3, 271 (2007).

<sup>25</sup> See [Jurisdictional Adoption of Revised Model Code of Judicial Conduct](#), AM. BAR ASS’N (October 17, 2018), [https://www.americanbar.org/groups/professional\\_responsibility/resources/judicial\\_ethics\\_regulation/map/](https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map/) [perma.cc/F53F-PSZV].

<sup>26</sup> See discussion in *supra* note 16.

<sup>27</sup> [ABA Opinion 478](#), see *supra* note 16, at 1, 1 n.1 (emphasis added). Nevertheless, “there are two opposing canons on almost every point.” [Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed](#), 3 VAND. L. REV. 395, 401 (1950); see also Bray, *supra* note 22, at 445 (“[T]here is always a principle on each side”). But see [Antonin Scalia, Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws](#), in A MATTER OF INTERPRETATION 3, 26–27 (Amy Gutmann ed., 1997) (responding to Llewellyn that “there really are not two opposite canons on ‘almost every point’—unless one enshrines as a canon whatever vapid statement has ever been made by a willful, law-bending judge. . . . Every canon is simply *one indication* of meaning; and if there are more contrary indications (perhaps supported by other canons) it must yield. But that does not render the entire enterprise a fraud—not, at least, unless the judge wishes to make it so.” (emphasis in original)).

<sup>28</sup> [ABA Opinion 478](#), see *supra* note 16, at 2–5.

<sup>29</sup> *Id.* at 2–3 (citing MODEL CODE OF JUD. CONDUCT r. 2.9(A)).

<sup>30</sup> [ABA Opinion 478](#), see *supra* note 16, at 3–4 (citing MODEL CODE OF JUD. CONDUCT r. 2.9(C)); see also [Hilaire](#), 95 N.E.3d at 284 n.7 (citing [ABA Opinion 478](#), see *supra* note 16) (stressing that “judges should use great caution before conducting independent research into factual matters, particularly on the [I]nternet.”).

<sup>31</sup> [ABA Opinion 478](#), see *supra* note 16, at 3–4 (citing MODEL CODE OF JUD. CONDUCT r. 2.9(C)).

<sup>32</sup> [ABA Opinion 478](#), see *supra* note 16, at 4 (citing FED. R. EVID. 201(a)). See also [Brianna J. Gorod, The Adversarial Myth: Appellate Court Extra-Record Factfinding](#), 61 DUKE L.J. 1, 39–40 (2011) (describing “adjudicative facts” as those specific and relevant to the parties and the issues to be decided, whereas legislative facts deal with general information, such as important background information, legislative history, or generalized data and studies); [Elizabeth G. Thornburg, The Curious Appellate Judge: Ethical Limits on Independent Research](#), 28 REV. LITIG. 131, 149–53 (2008) (describing the history of and meaning of adjudicative versus legislative facts). But see [RICHARD A. POSNER, REFLECTIONS ON JUDGING](#) 136–37 (2013) (describing four categories of “facts” in litigation: adjudicative facts, legislative facts, incontestable facts that can be judicially noticed, and background facts).

[A]djudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses. “Legislative facts,” on the other hand, “do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.”<sup>33</sup>

Finally, Model Rule 2.9(D) imposes upon a judges a duty to supervise and requires that judges take steps to prevent court staff and officials from performing improper independent investigations into facts.<sup>34</sup>

ABA Opinion 478 also provided the following guidelines for judges to follow when deciding whether independent judicial *factual* research via the Internet is appropriate:

1. 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.
2. 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.
3. 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.
4. 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.<sup>35</sup>

The opinion analyzes several hypotheticals. Some key takeaways from the hypotheticals are identified below:

*First*, judges may educate themselves about general topics of interest, even on topics that may come before the judge.<sup>36</sup> This is akin to attending judicial seminars or reading books, so long

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<sup>33</sup> [ABA Opinion 478](#), *see supra* note 16, at 5 (quoting KENNETH CULP DAVIS, 2 ADMINISTRATIVE LAW TREATISE 353 § 15.03 (West 1958) and *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 245 & n.52 (5th Cir. 1976)).

<sup>34</sup> [ABA Opinion 478](#), *see supra* note 16, at 5 (citing MODEL CODE OF JUD. CONDUCT r. 2.9(D)).

<sup>35</sup> ABA Opinion 478, *see supra* note 16, at 6; *see also People for Ethical Treatment of Animals, Inc. v. Tri-State Zoological Park of W. Maryland, Inc.*, No. MJG-17-2148, 2018 WL 1083641, at \*2 (D. Md. Feb. 28, 2018) (citing ABA Opinion 478, *supra* note 16, at 6) (“There is no prohibition against a federal judge’s access to the Internet to obtain background information regarding the subject of a case before the Court.”).

<sup>36</sup> *See Commodity Futures Trading Comm’n v. McDonnell*, 287 F. Supp. 3d 213, 230 (E.D.N.Y. 2018) (citing ABA Opinion 478, *see supra* note 16 (“In deciding jurisdictional, standing and other issues fundamental to the present litigation, the court has engaged in extensive background research, but not on the specific frauds charged. This is

as there is reason to believe the source is reliable. For example, in a judicial district where many environmental contamination cases are filed, a judge in that district may read online background information about environmental law before a case is assigned to that judge.<sup>37</sup> Judges cannot independently research information, or even conduct general subject-area searches, during a pending case to make an adjudicative decision of material fact.

*Second*, judges may not research factual issues that normally go to the jury or involve weighing the parties' respective expert testimony. For example, if a party asserts in a case involving overtime pay that the restaurant at issue does not open during weekends, checking websites like Yelp and Google for the restaurant's business hours would violate Model Rule 2.9(C) because such information is key to decide whether that party could prevail on the claim of unpaid overtime.<sup>38</sup> Similarly, where a judge has heard testimony from competing experts about their investigations and opinions as to the cause of a fire that destroyed a plaintiff's property in an insurance coverage dispute, a judge abiding by Model Rule 2.9(C) may not conduct independent reading on techniques for investigating fires of unknown origin.<sup>39</sup>

*Third*, a judge conducting online research to gather information about a juror or party in a pending or impending case would violate Model Rule 2.9(C).<sup>40</sup> For example, a judge may not review the social media and websites of each party in a pending case to learn background information about the parties. On the other hand, judges are not as restricted from researching attorneys appearing before the court. For example, a judge may gather information about an out-of-state lawyer simply to become familiar with counsel who appear before the court via a legal directory like Martindale Hubbell. Such information gathering about a lawyer becomes impermissible, however, if it would affect the judge's weighing or considering of adjudicative facts.<sup>41</sup>

#### *b. Judicial Notice: What Lawyers Should Know*

Courts may take judicial notice of facts that are not subject to reasonable dispute because they are generally known or can be accurately and readily determined from sources whose

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appropriate. . . . It is appropriate and necessary for the judge to do research required by a case in order to understand the context and background of the issues involved so long as the judge indicates to the parties the research and conclusions, by opinions and otherwise, so they may contest and clarify. It would be a misapprehension of the ABA rule to conclude otherwise." (internal citation omitted)). "Context always matters. Let us not forget, however, *why* context matters: It is a tool for understanding the terms of the law." *King v. Burwell*, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting); see also JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* 135 n.45 (1927) ("In actual fact, whenever it comes to defining a legal concept, or stating a legal rule, the difficulty of treating them as clean-cut independent entities at once becomes apparent. Almost every legal concept or principle is found to be but the terminal of a scale which shades at its opposite extremity into another of exactly contrary tendency, and the line between the two oscillates from specific case to case according to the context."); cf. *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (Holmes, J.) ("Law is a statement of the circumstances.").

<sup>37</sup> *ABA Opinion 478*, see *supra* note 16, at 7 (Hypothetical #2).

<sup>38</sup> See *id.* at 6–7 (citing MODEL CODE OF JUD. CONDUCT r. 2.9(C)) (Hypothetical #1).

<sup>39</sup> See *ABA Opinion 478*, see *supra* note 16, at 8–9 (Hypothetical #4).

<sup>40</sup> See *ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 at 2 (2013)* (citing MODEL CODE OF JUD. CONDUCT r. 2.9(C)) ("[A] judge must . . . avoid using any [electronic social media] site to obtain information regarding a matter before the judge.").

<sup>41</sup> See *ABA Opinion 478*, see *supra* note 16, at 7–8 (Hypothetical #3).



accuracy cannot reasonably be questioned.<sup>42</sup> Courts may take judicial notice on their own, or must take judicial notice if a party requests it and the court is supplied with the necessary information.<sup>43</sup> Upon request, however, any party is entitled to be heard on the propriety of the taking of the judicial notice.<sup>44</sup> “[I]t is not uncommon for courts to take judicial notice of factual information found on Internet websites.”<sup>45</sup> Prior examples of judicially noticed facts, as recognized by appellate courts, include:

- the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders;
- an online PDF of the Massachusetts Commercial Automobile Insurance Manual;
- historical retirement fund earnings of a corporation as shown on its website;
- a term defined on the website of the National Association of Securities Dealers, Inc.;
- a definition of “Adjustment Disorder” in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders; and
- Bushmaster Firearms International, LLC’s Bushmaster Operating and Safety Instruction Manual for All Bushmaster XM15 and C15 Models that is publicly available on Bushmaster’s official website.<sup>46</sup>

On the other hand, judges have refused to take judicial notice of “facts” taken from the Internet due to inaccuracy or the inability to confirm the accuracy. For example, a court refused to take judicial notice of a printout from a website that was captured in November 2015 where “the relevant time period for the claims [wa]s from roughly July 2014 through May 2015.”<sup>47</sup> Courts regularly deny requests to take judicial notice of information from Wikipedia.<sup>48</sup> Many courts have acknowledged the inherent unreliability of Wikipedia, with one court summarizing the flaws as follows:

A review of the Wikipedia website reveals a pervasive and, for our purposes, disturbing series of disclaimers, among them, that: (i) any given Wikipedia article may be, at any given moment, in a bad state: for example it could be in the middle of a large edit or it could have been recently vandalized; (ii) Wikipedia articles are also subject to remarkable oversights and omissions; (iii) Wikipedia articles (or series of related articles) are liable to be incomplete in ways that would be less usual in a more tightly controlled reference work; (iv) “[a]nother problem with a lot of content on Wikipedia is that many contributors do not cite their sources, something

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<sup>42</sup> [FED. R. EVID. 201\(b\)](#); see, e.g., [Zhang Jingrong v. Chinese Anti-Cult World All.](#), 314 F. Supp. 3d 420, 442 (E.D.N.Y. 2018) (“In the instant case, where the relationship between commerce and religion is observable through judicial notice, explicit congressional findings are unneeded.”).

<sup>43</sup> [FED. R. EVID. 201\(c\)](#); see also [Commonwealth v. Hilaire](#), 95 N.E.3d 278, 283 (Mass. App. Ct. 2018) (“Even in situations where judicial notice is appropriate, it should not be taken without notice to the parties and an opportunity to be heard.”).

<sup>44</sup> [FED. R. EVID. 201\(e\)](#).

<sup>45</sup> [Juniper Networks, Inc. v. Shipley](#), No. 2010-1327, 2010 WL 3591783, at \*1 (Fed. Cir. Sep. 10, 2010) (citing [O’Toole v. Northrop Grumman Corp.](#), 499 F.3d 1218, 1225 (10th Cir. 2007)).

<sup>46</sup> [United States v. Flores](#), No. 16-40622, 2018 WL 1864956, at \*2 (5th Cir. Apr. 18, 2018) (collecting cases).

<sup>47</sup> [Hsu v. Puma Biotechnology, Inc.](#), 213 F. Supp. 3d 1275, 1283 (C.D. Cal. 2016).

<sup>48</sup> See [Gerritsen v. Warner Bros. Entm’t Inc.](#), 112 F. Supp. 3d 1011, 1028 (C.D. Cal. 2015) (collecting cases).

that makes it hard for the reader to judge the credibility of what is written; and (v) “many articles commence their lives as partisan drafts” and may be caught up in a heavily unbalanced viewpoint.<sup>49</sup>

A court may refuse to take judicial notice of information on a webpage that has been taken down.<sup>50</sup> At the same time, some courts are willing to take judicial notice of archived webpages from the Internet Archive.<sup>51</sup> For example, in *Dzinesquare, Inc. v. Armano Luxury Alloys, Inc.*, the patentee, Dzinesquare, Inc. (d/b/a “2 Crave”), asserted a design patent covering a patented design for aftermarket wheels.<sup>52</sup> The defendant moved for summary judgment that 2 Crave’s patent was invalid and requested that the court take judicial notice of information submitted from various websites, including archived webpages from the Internet Archive, showing 2 Crave’s own wheels to be offered for sale and in public use.<sup>53</sup> The defendant submitted an affidavit of the office manager of the Internet Archive to attest to the date of the submitted webpages and the Internet Archive’s procedures for archiving webpages.<sup>54</sup> The court took judicial notice of the various webpage exhibits and relied on those exhibits to grant summary judgment due to 2 Crave’s products being on sale and in public use before the critical date of the patent.<sup>55</sup>

While a court may take judicial notice at any stage of the proceeding,<sup>56</sup> the ability of a court to do so can be particularly useful to lawyers filing a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss, where the case is decided on the pleadings.<sup>57</sup> Judicial notice can thus help a movant meet its burden of proof at a stage of the case where substantive discovery has not yet been taken. But “[b]ecause the effect of judicial notice is to deprive a party of the opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary evidence, caution must be used in determining that a fact is beyond controversy under Rule 201(b).”<sup>58</sup>

Finally, lawyers can appeal a judge’s decision on judicial notice. A district court’s decision to take, or refusal to take, judicial notice is reviewed for abuse of discretion.<sup>59</sup> In *American Prairie Construction Co. v. Hoich*, the Eighth Circuit held that the district court erred by taking judicial notice of certain business records of one defendant and a book written by another defendant, and relying on those facts to find that the defendants were bound to a \$2.5 million settlement

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<sup>49</sup> *Id.* at 1028–29 (citing *Campbell ex rel. Campbell v. Sec’y of Health & Human Servs.*, 69 Fed. Cl. 775, 781 (2006)).

<sup>50</sup> *See, e.g., Keithly v. Intelius Inc.*, 764 F. Supp. 2d 1257, 1261 (W.D. Wash. 2011) (“The Court’s inability to confirm the accuracy of the facts presented in these [screen shots] suggests that judicial notice is not appropriate.”).

<sup>51</sup> [In re Methyl Tertiary Butyl Ether \(MTBE\) Prods. Liab. Litig., No. 00-1898 MDL No. 1358 \(SAS\), 2013 WL 6869410, at \\*4 n.65 \(S.D.N.Y. Dec. 30, 2013\) \(collecting cases\)](#), *vacated in part*, For an example, see the link cited in *supra* note 16.

<sup>52</sup> [No. 14-cv-01918, 2014 WL 12597154, at \\*1 \(C.D. Cal. Dec. 22, 2014\)](#).

<sup>53</sup> *Id.* at \*3.

<sup>54</sup> *Id.* at \*3 n.4.

<sup>55</sup> *Id.* at \*3, \*6.

<sup>56</sup> [FED. R. EVID. 201\(d\)](#).

<sup>57</sup> *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (“[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.”).

<sup>58</sup> [Int’l Star Class Yacht Racing Ass’n v. Tommy Hilfiger U.S.A., Inc.](#), 146 F.3d 66, 70 (2d Cir. 1998) (citing [FED. R. EVID. 201\(b\)](#)).

<sup>59</sup> *See Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005, 1016 n.9 (9th Cir. 2012); [Taylor v. Charter Med. Corp.](#), 162 F.3d 827, 829 (5th Cir. 1998); [United States v. McCoy](#), No. 89-cv-5659, 1990 WL 190498, at \*13 (4th Cir. Dec 4, 1990).

agreement.<sup>60</sup> The district court had obtained defendant Tri-State Financial, LLC's (TSF) business records by asking TSF for them during trial.<sup>61</sup> The district court had also located defendant Hoich's book by conducting independent Internet research.<sup>62</sup> The Eighth Circuit concluded the district court had abused its discretion in the following ways:

- The court took judicial notice of statements Hoich made in his book about his success and friendships, despite these "facts" not being of the kind that are either generally known or can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned, under Federal Rule of Evidence 201(b);
- The court failed to give defendant Hoich advance notice that the court intended to take judicial notice of certain TSF business records and of Hoich's book, such that Hoich could object and have an opportunity to be heard, as permitted under Federal Rule of Evidence 201(e);
- The court took judicial notice of the TSF business records despite them containing hearsay evidence without any foundation that would make them admissible at trial; and
- The court went outside the record by conducting independent Internet research.<sup>63</sup>

Consequently, the Eighth Circuit reversed the judgment as to Hoich.<sup>64</sup>

Under the abuse-of-discretion standard of review, an appellate court "will affirm such decisions unless they are arbitrary or clearly unreasonable."<sup>65</sup> For example, the "district court by definition abuses its discretion when it makes an error of law."<sup>66</sup> Given that whether to take judicial notice is determined based upon a clear application of the law, an erroneous or improper taking of judicial notice could result in a straightforward appeal. As to evidence of proof, if a judicial opinion cited to a source that was not mentioned by either side's counsel, that citation should be analyzed as to its permissibility under the relevant judicial notice rule.

*c. Independent Factual Research to Confirm a Genuine Issue of Fact: A Third Category of Evidence?*

Unless judicial notice of facts is taken in accordance with the substantive and procedural requirements of Federal Rule of Evidence 201, the factual record in a case is built from the presentation of facts by the parties in an adversarial manner.<sup>67</sup> Such facts can be then challenged by the opposing party through "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof."<sup>68</sup> Are courts permitted to consider facts presented in any other way?

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<sup>60</sup> [560 F.3d 780, 798 \(8th Cir. 2009\)](#).

<sup>61</sup> [Id.](#) at 796.

<sup>62</sup> [Id.](#)

<sup>63</sup> [Id.](#) at 797–98 (citing [FED. R. EVID. 201](#)).

<sup>64</sup> [Hoich](#), 560 F.3d at 798.

<sup>65</sup> [In re Deepwater Horizon](#), 824 F.3d 571, 580–81 (5th Cir. 2016) (citation omitted).

<sup>66</sup> [Koon v. United States](#), 518 U.S. 81, 100 (1996).

<sup>67</sup> [See FED. R. EVID. 201](#).

<sup>68</sup> [Daubert v. Merrell Dow Pharms., Inc.](#), 509 U.S. 579, 596 (1993).

The Seventh Circuit seemed to imply so in *Rowe v. Gibson*.<sup>69</sup> In *Rowe*, prison inmate Rowe filed a civil rights complaint against prison administrators, alleging that they had been deliberately indifferent to his digestive pain by giving him Zantac medication only at 9:30 am and 9:30 pm, instead of near his prescribed mealtimes.<sup>70</sup> The defendants moved for summary judgment, submitting an affidavit from the prison doctor (who was also a defendant in the lawsuit) that stated “it does not matter what time of day Mr. Rowe receives his Zantac prescription. Each Zantac pill is fully effective for twelve-hour increments. Zantac does not have to be taken before or with a meal to be effective.”<sup>71</sup> Rowe did not move to exclude the prison doctor as an expert witness.<sup>72</sup> The district court granted summary judgment for the defendants.<sup>73</sup>

The Seventh Circuit reversed, noting that Rowe’s allegations were sufficient to preclude summary judgment,<sup>74</sup> but in doing so, the court cited to Zantac’s website, the Mayo Clinic website, and various other health websites that advised users of the importance and benefits of taking Zantac thirty to sixty minutes before a meal.<sup>75</sup> The Seventh Circuit majority admitted that the accuracy of the facts from these websites was not indisputable, and thus could not be judicially noticed.<sup>76</sup> Nonetheless, the court noted:

When medical information can be gleaned from the websites of highly reputable medical centers, it is not imperative that it instead be presented by a testifying witness. Such information tends to fall somewhere between facts that require adversary procedure to determine and facts of which a court can take judicial notice, but it is closer to the second in a case like this in which the evidence presented by the defendants in the district court was sparse and the appellate court need only determine whether there is a factual dispute sufficient to preclude summary judgment.<sup>77</sup>

Over a strong dissent, the court reversed summary judgment, basing its 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 [it had] conducted in default of the parties’ having done so.”<sup>78</sup> In holding as it did, the Seventh Circuit majority appeared to recognize a category of evidence neither presented via an adversarial method nor taken by judicial notice, but instead as “non-adversarial evidence that the court believes is probably correct.”<sup>79</sup>

While the majority justified its use of Internet research by stating that the information was used merely to confirm that a genuine issue of fact existed, the dissent pointed out several complicated questions. Does this mean the district judge should have also performed the

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<sup>69</sup> [798 F.3d 622 \(7th Cir. 2015\) \(Posner, J.\)](#).

<sup>70</sup> [Id. at 623–27](#).

<sup>71</sup> [Id. at 625](#).

<sup>72</sup> [Id. at 630](#).

<sup>73</sup> [Id. at 623](#).

<sup>74</sup> [Id. at 631](#).

<sup>75</sup> [Id. at 625–26](#). When discussing the possible credibility of information found on corporate websites, Judge Richard Posner noted that “[i]t might be thought that a corporate website . . . would be a suspect source of information. Not so; the manufacturer would be taking grave risks if it misrepresented the properties of its product.” [Id. at 626](#).

<sup>76</sup> [Id. at 629](#).

<sup>77</sup> [Id. at 628–29](#).

<sup>78</sup> [Id. at 630](#).

<sup>79</sup> [Id. at 630 \(Hamilton, J., concurring in part, dissenting in part\)](#).

independent factual research? What are the standards that apply? How can parties plan for judges conducting independent factual research? And finally, how reliable is the research?<sup>80</sup> These questions remain, and it is left to be seen how many other courts, if any, will follow in the footsteps of the Seventh Circuit in endorsing engagement of this type of factual research by judges.

## II. INTERNET RESEARCH BY JURORS

A touchstone of the U.S. judicial system is a fair trial by an impartial trier of fact—“a jury capable and willing to decide the case solely on the evidence before it.”<sup>81</sup> During the course of a trial, jurors are susceptible to influence from a number of sources not constituting evidence, such as comments from attorneys or the judge, conversations with family members or friends, reports from television or newspapers, and, in the past couple of decades, information disseminated on the Internet. The convenience of modern-day smartphones and easy access to the Internet has made Internet research particularly tempting for jurors. Whereas in the past jurors could only access the Internet from a computer in their home or in a library, jurors can now use a smartphone during lunch, during a break, or even inside the jury room to quickly and easily access a nearly unlimited amount of information.<sup>82</sup>

Jurors typically do not defy court rules and conduct research on the Internet with nefarious intent. Rather, jurors often feel pressure to perform their civic duties and make the “right” decision, especially in cases where millions of dollars, or a person’s guilt or innocence, are on the line.<sup>83</sup> Jurors may also access the Internet for research because they are confused by the meaning of technical or legal terms that were not clearly explained to them by attorneys or the judge.<sup>84</sup> In any event, it is axiomatic that “extra-record influences pose a substantial threat to the fairness of [a] proceeding because the extraneous information completely evades the safeguards of the judicial process.”<sup>85</sup>

Judges have acknowledged that there is no such thing as a perfect trial.<sup>86</sup> Rather, judges can do no more than manage the trial, including minimizing outside influences, to the best of their abilities. Judges are equipped with numerous procedural devices and safeguards to deter and minimize improper exposure of jurors to the Internet. For example, judges can hold jurors in contempt, take away their electronic devices, dismiss and replace them with alternates, or sequester them.<sup>87</sup> Surveys, however, have shown that the best way to ensure a jury’s impartiality is through carefully crafted jury instructions.<sup>88</sup>

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<sup>80</sup> *Id.* at 641–44.

<sup>81</sup> *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (citation omitted).

<sup>82</sup> See Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 422–23 (2012).

<sup>83</sup> *Id.* at 419–20.

<sup>84</sup> *Id.* at 421.

<sup>85</sup> *United States v. Resko*, 3 F.3d 684, 690 (3d Cir. 1993).

<sup>86</sup> See *McDonough*, 464 U.S. at 553.

<sup>87</sup> Hoffmeister, *supra* note 82, at 437–41.

<sup>88</sup> Hon. Amy J. St. Eve, Hon. Charles P. Burns & Michael A. Zuckerman, *More from the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 1, 64, 86 (2014).

*a. Model Jury Instructions*

In 2009, the Judicial Conference Committee on Court Administration and Case Management released model jury instructions specifically targeted toward deterring the use of social media during trial.<sup>89</sup> The Model Instructions stated:

Before Trial:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom. Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

At the Close of the Case:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case *or to conduct any research about this case* until I accept your verdict.<sup>90</sup>

Through its chair Judge Julie A. Robinson, the Committee distributed the model jury instructions to all federal district court judges, stating that “more explicit mention in jury instructions of the various methods and modes of electronic communication and research would help jurors better understand and adhere to the scope of the prohibition against the use of [devices such as cellular

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<sup>89</sup> *Model Jury Instruction Recommended to Deter Juror Use of Electronic Communication Technologies During Trial*, FED. EVID. REV. (Feb. 9, 2010), [perma.cc/WNM8-8XEN](http://perma.cc/WNM8-8XEN).

<sup>90</sup> *Id.* (emphasis added).

telephones or computers to conduct research on the Internet or communicate with others about cases].”<sup>91</sup>

In June 2012, the Judicial Conference Committee on Court Administration and Case Management released revised model jury instructions, which added more detailed explanations of the consequences of social media or Internet use during a trial, along with instructions to jurors to report other jurors’ violations of the instructions.<sup>92</sup>

Most courts with pattern jury instructions have incorporated warnings regarding Internet usage in some form. For example, the Fifth Circuit’s Pattern Jury Instructions for Civil Cases recommends that the following instruction regarding Internet research be conveyed to jurors at the beginning of the trial:

[D]o not do any research—on the Internet, in libraries, in books, newspapers, magazines, or using any other source or method. Do not make any investigation about this case on your own. Do not visit or view any place discussed in this case and do not use Internet programs or other devices to search for or view any place discussed in the testimony. Do not in any way research any information about this case, the law, or the people involved, including the parties, the witnesses, the lawyers, or the judge, until after you have been excused as jurors. If you happen to see or hear anything touching on this case in the media, turn away and report it to me as soon as possible.

These rules protect the parties’ right to have this case decided only on evidence they know about, that has been presented here in court. If you do any research, investigation or experiment that we do not know about, or gain any information through improper communications, then your verdict may be influenced by inaccurate, incomplete or misleading information that has not been tested by the trial process, which includes the oath to tell the truth and cross-examination. It could also be unfair to the parties’ right to know what information the jurors are relying on to decide the case. Each of the parties is entitled to a fair trial by an impartial jury, and you must conduct yourself so as to maintain the integrity of the trial process. If you decide the case based on information not presented in court, you will have denied the parties a fair trial in accordance with the rules of this country and you will have done an injustice. It is very important that you abide by these rules. Failure to follow these instructions could result in the case having to be retried.<sup>93</sup>

The Fifth Circuit’s Pattern Jury Instructions recommend a similar instruction to be given after the jurors are sworn in.<sup>94</sup>

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<sup>91</sup> Memorandum from Judge Julie A. Robinson, Chair of the Judicial Conference Comm. on Court Admin. and Case Mgmt. to the Judges of the United States District Courts (Jan. 28, 2010), [perma.cc/YV48-79ZG](http://perma.cc/YV48-79ZG).

<sup>92</sup> U.S. Courts, *Revised Jury Instructions Hope to Deter Juror Use of Social Media During Trial* (2012), available at <http://www.uscourts.gov/news/2012/08/21/revised-jury-instructions-hope-deter-juror-use-social-media-during-trial> [perma.cc/F9Y3-A4Z9] (Aug. 21, 2012) (last visited April 21, 2019).

<sup>93</sup> *Fifth Circuit Pattern Jury Instructions (Civil Cases)* (2014), <http://www.lb5.uscourts.gov/juryinstructions/fifth/2014civil.pdf> [perma.cc/F2Q2-V32X].

<sup>94</sup> *Id.* at 4–5.

Despite the efforts of the Judicial Conference Committee, a report released by the Federal Judicial Center in 2014 surveying nearly 500 federal district court judges revealed that jurors who used social media during trial or deliberations increased from 5.9% in 2011 to 6.7% in 2013.<sup>95</sup> Although the most common forms of social media accessed by jurors included Facebook, Twitter, and Internet chat rooms, several judges in the survey reported awareness of jurors performing case-related research on the Internet.<sup>96</sup>

Attorneys can also assist in the prevention of unauthorized juror research, such as by requesting specific instructions to the jury about Internet usage where standard instructions do not exist. Attorneys (or their delegates) can also monitor each juror's social media presence throughout the course of a trial, paying special attention to public postings or comments made by a juror indicating juror misconduct. Attorney ethics rules, however, prevent attorneys from engaging in *ex parte* communications with a juror or prospective juror during a trial unless authorized to do so by law or court order.<sup>97</sup> As such, attorneys engaging in social media monitoring should be careful not to interact directly with any jurors, such as by sending a Facebook friend request or following a juror on Twitter.<sup>98</sup>

### *b. Recourse for Juror Misconduct*

Parties may seek recourse for juror misconduct by making an objection, moving for a mistrial, and/or moving for a new trial.<sup>99</sup> Whether the court will agree to such measures depends on whether a party has been, or will potentially be, prejudiced by the misconduct.

<sup>95</sup> MEGHAN DUNN, *Jurors' and Attorneys' Use of Social Media During Voir Dire, Trials, and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management*, FED. JUD. CTR. (May 1, 2014), <https://www.fjc.gov/sites/default/files/2014/Jurors-Attorneys-Social-Media-Trial-Dunn-FJC-2014.pdf> [perma.cc/5FNU-WW7R].

<sup>96</sup> *Id.* at 5, 6, 11.

<sup>97</sup> MODEL RULES OF PROF'L CONDUCT R. 3.5(b) (2014).

<sup>98</sup> Jason H. Casell, *To Tweet or Not to Tweet: Juror Use of Electronic Communications and Social Networking Tools*, 15(5) J. INTERNET L. 1 (2011).

<sup>99</sup> Declaration of a mistrial or a new trial is generally an undesired result for all parties involved. "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried," the mistrial or new trial stalks our judicial system once again, frightening the parties, lawyers, and sometime judges (and their clerks). See *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). But see *Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting, concurred by Holmes, J.) ("In the search for truth through the slow process of inclusion and exclusion, involving trial and error, it behooves us to reject, as guides, the decisions upon such questions which prove to have been mistaken."); OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 37 (1881) ("[T]ruth [is] often suggested by error."); JOHN STUART MILL, *ON LIBERTY* 79 (1859) ("If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error."). So it is better to do the trial right the first time. See also *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting, joined by Cardozo, J.) ("[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right."). But see *Hyde v. United States*, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting) ("It is one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis."); HOLMES, *THE COMMON LAW*, ante at 5 ("[T]hen the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received."). As a side note, U.S. Supreme Court Justices Louis D. Brandeis and Oliver Wendell Holmes Jr. were ahead of their time, building their "reputation on writing dissents that later became the majority opinions." For instance, *Di Santo* (Brandeis, J., dissenting, concurred by Holmes, J.) was later overruled by *California v. Thompson*, 313 U.S. 109, 116 (1941); *Burnet*, 285 U.S. at 406 (Brandeis, J., dissenting, joined by Cardozo, J.) by *Helvering v. Mountain Producers Corp.*, 303 U.S. 376, 387 (1938); and *Hyde* (Holmes, J., dissenting) by *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 864 (2017).



For example, in *Bell v. Uribe*, finding lack of prejudice, the Ninth Circuit reversed a district court's grant of a habeas petition.<sup>100</sup> In the original trial, the trial judge had dismissed a juror (Juror No. 7) during jury deliberations, after another juror informed the court that Juror No. 7 worked in the mental health field and concluded that the defendants were suicidal and suffered from clinical depression. As such, Juror No. 7 became the lone holdout juror preventing the jury from reaching a unanimous verdict. Although the other jurors informed the judge that they prevented Juror No. 7 from offering her mental health opinion during the deliberation process, they also reported that Juror No. 7 had conducted research at home into the clinical definition of "depression" and brought in materials to show other jurors.<sup>101</sup> The trial court had instructed the jury to "not do any independent research, either on the internet or looking at legal books . . . or looking at a dictionary."<sup>102</sup> The Ninth Circuit found that the trial court's dismissal of Juror No. 7 was not improper, noting that "[e]ven assuming [Juror No. 7's] misconduct had not been prejudicial *yet*, the trial court could reasonably find that, if she remained on the jury, she was likely to indulge in further misconduct."<sup>103</sup>

Objections must be made timely, at the time of a party's discovery of the misconduct.<sup>104</sup> A party may not "take his chances on a favorable verdict and if unfavorable[,] get a second bite [at] the apple."<sup>105</sup>

#### *i. Mistrials*

During trial, in addition to making an objection, the aggrieved party can also move for a mistrial. A court's authority to declare mistrials is based on common law. "[T]rial judges may declare a mistrial whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for doing so. The decision to declare a mistrial is left to the sound discretion of the judge, but the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious cases."<sup>106</sup> The trial court has broad discretion in considering whether to grant a mistrial due to extrinsic or intrinsic influences on the jury, and the ultimate inquiry is: "Did the intrusion affect the jury's deliberations and thereby its verdict?"<sup>107</sup> A mistrial is warranted only if the extra-record information prejudiced the jury's impartiality.<sup>108</sup>

After deliberations have begun, however, many courts apply an objective test to decide whether a mistrial is warranted, focusing on (1) the nature of the information or contact at issue, and (2) its probable effect on a hypothetical average jury.<sup>109</sup> This is because the Federal Rules of Evidence, while allowing a juror to testify about whether extraneous prejudicial information was improperly brought to the jury's attention, prevents a court from eliciting testimony from a juror about *the effect* such information has upon the jurors during deliberations.<sup>110</sup>

<sup>100</sup> [748 F.3d 857, 865–66, 870 \(9th Cir. 2014\)](#).

<sup>101</sup> [Id. at 860–62](#).

<sup>102</sup> [Id. at 862](#).

<sup>103</sup> [Id. at 866](#).

<sup>104</sup> [FED. R. EVID. 103\(a\)](#).

<sup>105</sup> [Garcia v. Murphy Pac. Marine Salvaging Co., 476 F.2d 303, 306 n.2 \(5th Cir. 1973\)](#).

<sup>106</sup> [Renico v. Lett, 559 U.S. 766, 773–74 \(2010\) \(internal quotations and citations omitted\)](#).

<sup>107</sup> [Zamora v. City of Houston, 798 F.3d 326, 337 \(5th Cir. 2015\) \(internal citation omitted\)](#).

<sup>108</sup> [Waldorf v. Shuta, 3 F.3d 705, 709 \(3d Cir. 1993\)](#).

<sup>109</sup> [In re Methyl Tertiary Butyl Ether \(MTBE\) Prods. Liab. Litig., 739 F. Supp. 2d 576, 611 \(S.D.N.Y. 2010\)](#) [hereinafter "*In re MTBE*"].

<sup>110</sup> [Id.](#); [FED. R. EVID. 606\(b\)](#).

For example, in one case a district court discovered that one juror had conducted Internet research to find out that the defendant in the trial was the only defendant left in the case, and that all other defendants had settled for a million dollars each.<sup>111</sup> Instead of inquiring as to whether such knowledge affected that juror's actual deliberations, the court reasoned that evidence at the trial indicating that there were other responsible companies and the court's instruction to the jury to apportion liability among the companies would have led a juror to "easily make the connection that these other defendants had settled without being informed that this was the case by another juror who claimed to have obtained the information from the Internet."<sup>112</sup> As such, the court concluded that the knowledge "would be highly unlikely to have prejudiced the average juror's deliberative process," and rejected the defendant's argument that the court had erred by not granting a mistrial.<sup>113</sup>

### ii. *Motion for a New Trial*

If juror misconduct is not discovered until after the verdict, then the aggrieved party may move for a new trial.<sup>114</sup> A party may also move for a new trial if the misconduct surfaced during trial, but the district court may refuse to order a mistrial.<sup>115</sup>

In a civil case, exposure of jurors to information outside of the record requires a showing that the information is prejudicial to the unsuccessful party.<sup>116</sup> Because a verdict has already been reached, Federal Rule of Evidence 606(b) limits the court's ability to inquire about the effect of such information upon the jury's deliberations.<sup>117</sup> Instead, the district court must analyze whether there is a "reasonable possibility" that the information altered the jury's verdict.<sup>118</sup>

## III. INTERNET RESEARCH BY LAWYERS

While lawyers are not as tightly bound as judges and jurors, they should abide by at least two relevant rules: the competence requirement under Model Rule 1.1 of the *ABA Model Rules of Professional Conduct* (hereinafter, "Model Rule 1.1") and the certification requirements for representations to the court under Federal Rule of Civil Procedure 11(b) (hereinafter, "FRCP 11(b)").<sup>119</sup> A form of Model Rule 1.1 has been adopted in forty-nine states.<sup>120</sup>

<sup>111</sup> [In re MTBE](#), 739 F. Supp. 2d at 611.

<sup>112</sup> [Id.](#) at 611–12.

<sup>113</sup> [Id.](#) at 612.

<sup>114</sup> See [FED. R. CIV. P. 59\(a\)](#).

<sup>115</sup> See [Atl. Research Mktg. Sys., Inc. v. Troy](#), 659 F.3d 1345, 1360 (Fed. Cir. 2011) (reversing the denial of defendant's motion for mistrial because the district court failed to conduct an adequate inquiry of the impact of the extraneous evidence on the other jurors).

<sup>116</sup> [Anderson v. Ford Motor Co.](#), 186 F.3d 918, 920 (8th Cir. 1999) (citing [Banghart v. Origovertken](#), A.B., 49 F.3d 1302, 1306 (8th Cir. 1995)).

<sup>117</sup> See [United States v. Sotelo](#), 97 F.3d 782, 797 (5th Cir. 1996).

<sup>118</sup> [Anderson](#), 186 F.3d at 921 (citing [Artis v. Hitachi Zosen Clearing, Inc.](#), 967 F.2d 1132, 1142 (7th Cir. 1992)); [Haugh v. Jones & Laughlin Steel Corp.](#), 949 F.2d 914, 917 (7th Cir. 1991).

<sup>119</sup> [MODEL CODE OF PROF'L. CONDUCT r. 1.1; FED. R. CIV. P. 11\(b\)](#).

<sup>120</sup> See ABA CPR Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct (last updated January 23, 2018), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mrpe\\_1\\_1.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpe_1_1.authcheckdam.pdf) [perma.cc/XGD2-Z6VG].

FRCP 11(b) requires an attorney to conduct an “inquiry *reasonable* under the circumstances” before submitting any pleading, motion, or paper to the courts.<sup>121</sup> Model Rule 1.1 requires attorneys to provide competent representation, meaning the attorney must engage in “thoroughness and preparation *reasonably* necessary for the representation.”<sup>122</sup> The comments to Model Rule 1.1 further state, “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”<sup>123</sup> Thus, to maintain his duty of competence, a lawyer should make reasonable efforts to stay abreast of changes in technology.

Under the guidance of these two rules, attorneys need to be thorough and prepared in their representations. The following sections discuss implications on frequently encountered issues pertaining to legal and factual research.

*a. Use of Free Internet Research Resources*

It goes without saying that clients paying for the services of an attorney will expect their attorneys to have thoroughly reviewed the relevant case law. Most lawyers would agree that using solely hard copy texts would be inadequate to research complex legal issues, especially when few lawyers have access to sufficiently large libraries for such purpose.<sup>124</sup> On the other hand, there are an increasing number of free online resources that are quite comprehensive in their coverage. For example, Google Scholar provides access to state supreme and appellate court cases since 1950; federal district, appellate, tax and bankruptcy court decisions since 1923; and U.S. Supreme Court cases since 1791.<sup>125</sup> Similar services such as Open Jurist and Find a Case offer free access to millions of published case opinions.

Lawyers may wonder if it is necessary for them to always use paid services such as Westlaw, LexisNexis, or Bloomberg Law to conduct case law research when the same cases are likely available for free elsewhere. A cautious attorney would answer in the affirmative, under most circumstances. If a lawyer conveys a case to her client or to cite it to the court, then she is representing that the case is good law, and the lawyer should have first made sure that it was still good law. Despite the advent of new and diverse legal research databases, most attorneys still turn to long-standing cite-checking tools like Shepard’s or KeyCite in determining whether a case is valid and citable.<sup>126</sup>

The authors of this paper were unable to find a published federal or state court decision where a party or attorney was sanctioned for failing to cite-check a cited case. In one case, however, a court somewhat empathized with the plaintiffs, a group of homeless individuals, and their attorney regarding the high expense of using a research platform with cite-checking capabilities, but nonetheless mildly chastised the plaintiffs’ attorney for relying upon an overturned case.<sup>127</sup> The court denied the plaintiffs’ motion for class certification, stating:

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<sup>121</sup> [FED. R. CIV. P. 11\(b\)](#) (emphasis added).

<sup>122</sup> [MODEL RULES OF PROF’L CONDUCT r. 1.1](#) (emphasis added).

<sup>123</sup> [MODEL RULES OF PROF’L CONDUCT r. 1.1 cmt. 8](#).

<sup>124</sup> See M. H. Hoeflich & Frank Siler, *New Technologies and Lawyer Competence*, 85 J. KAN. B. ASS’N 38, 41 (2016).

<sup>125</sup> Google Scholar Search Tips, <https://scholar.google.com/intl/en/scholar/help.html> [perma.cc/3YUG-J73Z] (last visited April 21, 2019) [hereinafter, “Google Scholar Search Tips”].

<sup>126</sup> Shepard’s® is available on LexisNexis, and KeyCite® is available on Thomson Reuters’ Westlaw.

<sup>127</sup> [Lyll v. City of Denver, 319 F.R.D. 558, 569 \(D. Colo. 2017\)](#).

This is the primary reason why the Court questions Mr. Flores–Williams’s financial resources. If he had been using a service such as Westlaw or LexisNexis, it would have been nearly impossible for him to miss the red flag or stop sign icons. These services are expensive, however, prompting the Court to wonder whether Mr. Flores–Williams has avoided paying that money and has instead relied on free online resources. The Court cannot fault such thrift, if that is indeed the motive, but it does raise questions generally about his ability to sustain a class-action lawsuit.<sup>128</sup>

However, just because a party or attorney is unlikely to face sanctions does not mean that the attorney has complied with his duty to his client. Attorneys should make sure they conduct research in a thorough manner, within reason given the applicable circumstances.

Aside from lacking robust cite-checking capabilities, free online resources may not be as accurate as paid services. For example, Google Scholar itself states that “[l]egal opinions in Google Scholar are provided for informational purposes only and should not be relied on as a substitute for legal advice from a licensed lawyer. Google does not warrant that the information is complete or accurate.”<sup>129</sup> In addition, updates to existing records on Google Scholar may take longer than a year.<sup>130</sup> Moreover, Google Scholar often publishes multiple versions of a single opinion. For example, a Google Scholar case law search for “*In re Cray, Inc.*” yields two versions—one containing the Federal Reporter citation (871 F.3d 1355 (2017)), and an earlier version of the opinion where a Federal Reporter citation had not yet been assigned.<sup>131</sup> If a lawyer fails to check carefully, she may accidentally cite an older version of an opinion when a newer one is available.

That is not to say the use of free legal resources is never acceptable. A lawyer who is simply retrieving a single case or doing background reading on an area of law may find free resources to be more convenient. However, until free resources are able to instill a level of confidence such that the information they provide is accurate and up-to-date, lawyers will generally need to consult paid resources to ensure they are meeting their duties to their clients and the courts.

### b. *Rotten Links*

An administrative issue frequently encountered by both lawyers and courts is rotten Internet links. The phenomenon known as “link rot” describes when an Internet hyperlink points to a webpage that has been taken down. “Reference rot” occurs when the linked webpage exists, but the information originally referenced is no longer present.<sup>132</sup> Link rot and reference rot are widespread, to the point where judges have questioned whether the abundance of nonworking links risks “destroying *stare decisis*.”<sup>133</sup>

<sup>128</sup> [Id. at 569 n.8.](#)

<sup>129</sup> Google Scholar About, <https://scholar.google.com/intl/en/scholar/about.html> [perma.cc/E7SZ-N7DN].

<sup>130</sup> Google Scholar Search Tips, *supra* note 125.

<sup>131</sup> [In re Cray, Inc., 871 F.3d 1355 \(Fed. Cir. 2017\).](#)

<sup>132</sup> L. Jay Jackson, ‘Link Rot’ Is Degrading Legal Research and Case Cites, ABA J. (Dec. 1, 2013, 9:40 AM), [http://www.abajournal.com/magazine/article/link\\_rot\\_is\\_degrading\\_legal\\_research\\_and\\_case\\_cites/](http://www.abajournal.com/magazine/article/link_rot_is_degrading_legal_research_and_case_cites/) [perma.cc/V6JS-ZDJL].

<sup>133</sup> [Id.](#) (quoting former Minnesota Supreme Court’s Chief Justice, Eric Magnuson); [Roger J. Traynor, Reasoning in a Circle of Law, 56 VA. L. REV. 739, 744 \(1970\)](#) (“*Stare decisis, to stand by decided cases, conjures up another phrase dear to Latin lovers—stare super antiquas vias, to stand on the old paths.*”); *see also* [Hilton v. S.C. Pub. Rys. Comm’n, 502 U.S. 197, 202 \(1991\)](#) (“Because of the strong considerations favoring adherence to *stare decisis* . . . we will not depart from the doctrine of *stare decisis* without some compelling justification.”); [Welch v. Tex. Dep’t of Highways & Pub. Transp., 483 U.S. 468, 494 \(1987\)](#) (“[S]tare decisis is of fundamental importance to the rule of law.”);

This problem is not new. As early as 1995, researchers documenting the impact of fleeting web content found dead links in one-third of scholarly e-journal articles from 1993 to 1995.<sup>134</sup> A similar study found 29% of the websites cited by the U.S. Supreme Court from 1996 to 2010 nonfunctioning, many of which linked to government or education domains.<sup>135</sup> Another study found that 70% of the links in three different Harvard law journals from 1999 to 2012 were dead.<sup>136</sup>

Rotten links in a court opinion detract from the substance of the opinion. “Citations provide both authorial verification of the original source material at the moment they are used and the needed information for readers to later find the cited source.”<sup>137</sup> For attorneys, citing to a broken link in a complaint or brief may be an embarrassing gaffe at best, and can substantively affect the outcome of the decision at worst. For example, in *Royer v. Federal Bureau of Prisons*, the Federal Bureau of Prisons failed to obtain dismissal of a prison inmate’s allegations of due process and free speech violations after the Bureau cited in its brief several links to websites no longer in existence; the Bureau had attempted to rely on these websites to allege that an organization with which the inmate had communicated was linked to international terrorism.<sup>138</sup>

Fortunately, the problem of rotten links is being actively addressed by services such as Perma.cc from the Harvard Library Innovation Lab, which creates archived records of webpages and a permanent web link to those records.<sup>139</sup> The difference between the Internet Archive (archive.org) and Perma.cc is that archive.org *automatically*, but “only occasionally[,]” trawls and stores any given corner of the Internet, meaning there is no guarantee that a given page would be archived to reflect what an author or editor saw at the moment of citation,” whereas Perma.cc requires authors and editors to generate a Perma.cc link from the original website, which they can then use as a citation (instead of the original website’s link).<sup>140</sup>

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[Helvering v. Hallock, 309 U.S. 106, 119 \(1940\) \(Frankfurter, J.\) \(emphasis added\) \(“\[S\]tare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations.”\); Thorstenn v. Barnard, 842 F.2d 1393, 1397 \(3d Cir. 1988\) \(Higginbotham, J., dissenting\) \(quoting Lord Mansfield in Jones v. Randell, 98 Eng.Rep. 954, 955 \(1774\)\) \(“Precedents only serve to illustrate principles, and to give them a fixed authority.”\); Dodge v. Cole, 97 Ill. 338, 364 \(1881\) \(“Precedents are useful as evidences of what the law is, and serve as guides in the application of those principles.”\); BENJAMIN N. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 29 \(1928\) \(“What has once been settled by a precedent will not be unsettled overnight, for certainty and uniformity are gains not lightly to be sacrificed.”\). But see \[Washington v. W.C. Dawson & Co., 264 U.S. 219, 237 \\(1924\\) \\(Brandeis, J., dissenting\\) \\(emphasis added\\) \\(“Stare decisis is ordinarily a wise rule of action. But it is not a universal, inexorable command.”\\); Hertz v. Woodman, 218 U.S. 205, 212 \\(1910\\) \\(emphasis added\\) \\(“The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible.”\\); cf. Di Santo v. Pennsylvania, 273 U.S. 34, 42 \\(1927\\) \\(Brandeis, J., dissenting\\) \\(“The human experience embodied in the doctrine of stare decisis teaches us, also, that often it is better to follow a precedent . . . . But the doctrine of stare decisis does not command that we err again.”\\); State v. Falkner, 182 N.C. 793, 807 \\(1921\\) \\(Clark, J., dissenting\\) \\(“There is no superstitious sanctity attaching to a precedent.”\\); ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 1 \\(1923\\) \\(“Law must be stable, and yet it cannot stand still.”\\).\]\(#\)](#)

<sup>134</sup> See Wallace Koehler, *A Longitudinal Study of Web Pages Continued: A Consideration of Document Persistence*, 9 INFO. RES. 2 (January 2004), <http://www.informationr.net/ir/9-2/paper174.html> [perma.cc/6CZX-BZDL].

<sup>135</sup> Raizel Liebler & June Liebert, *Something Rotten in the State of Legal Citation: The Life Span of a United States Supreme Court Citation Containing an Internet Link (1996-2010)*, 15 YALE J. L. & TECH. 273, 273 (2013).

<sup>136</sup> Jonathan Zittrain, Kendra Albert & Lawrence Lessig, *Perma: Scoping and Addressing the Problem of Link and Reference Rot in Legal Citations*, 127 HARV. L. REV. F. 176, 178 (2014).

<sup>137</sup> See *supra* note 135, at 275.

<sup>138</sup> [No. 10-cv-146, 2010 WL 4827727, at \\*3 \(E.D. Va. Nov. 19, 2010\)](#).

<sup>139</sup> Brett, *Link Rot for Lawyers: A Prodigious Problem*, PERMA.CC BLOG (Feb. 1, 2018), <https://blogs.harvard.edu/perma/2018/02/01/link-rot-for-lawyers-a-prodigious-problem> [perma.cc/4BVB-R5YL].

<sup>140</sup> See *supra* note 136, at 190. According to a January 2019 authors’ inquiry email with [info@perma.cc](mailto:info@perma.cc), Perma.cc offers three types of account: (1) a free account that allows users to create 10 links/month, (2) a subscription account

One drawback of using Perma.cc instead of a conventional hyperlink is that the Perma.cc link cannot immediately convey to the reader where the linked content originates. Nonetheless, with the proliferation of Perma.cc and other permanent web-linking services like it, attorneys may eventually simply link to a permanent web-linking service instead of printing and attaching webpages as exhibits to a brief. This, of course, assumes that the web-linking service itself is not susceptible to link rot.

### c. *Factual Evidence from the Internet – Evidentiary Issues*

For many, reliance on information from the Internet has become so commonplace that it can be easy to forget that its admission in court still requires that basic evidentiary requirements be met, such as compliance with Federal Rules of Evidence 802 and 901.<sup>141</sup> Non-governmental websites must be authenticated by the party offering the evidence in order to be admissible.<sup>142</sup> A webpage will be inadmissible if the proffering party cannot provide a sufficient basis for a court to conclude that the webpage is what the party claims it to be.<sup>143</sup> If admitted, however, webpages of the opposing party are usually excluded from the hearsay rule as admissions by a party-opponent.<sup>144</sup>

## IV. CONCLUSION

In the age of fake news and alternative facts,<sup>145</sup> one should be especially wary when conducting searches on the Internet. As to those in law whose decisions have legal consequences, judges, jurors, and lawyers face different issues and considerations in their uses of the Internet to conduct research. As jurors must avoid conducting any type of independent research during a trial, on the Internet or otherwise, lawyers should be aware of the procedural devices available to them if their client has been prejudiced by a juror conducting such research (*e.g.*, by filing a motion for a mistrial or for a new trial). Lawyers are generally free to use the Internet to conduct legal and factual research. In doing so, however, lawyers should be careful to make sure any information cited to a court or conveyed to a client is accurate and reliable. Finally, judges are free to conduct legal research on the Internet outside of a pending case, but in the adjudication of facts, they should adhere to the facts in the record or those that are judicially noticed in deciding cases.

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for \$20/month that allows *one user* to create unlimited links, and (3) institutional account for \$100/month that allows users to: (i) create unlimited links, (ii) access a foldering and collaboration interface that would allow team members to work on projects together and see what links having already been made, if desired, and (iii) create private folders that would not be visible to everyone.

<sup>141</sup> See FED. R. EVID. 802, 901.

<sup>142</sup> [Associated Indem. Corp. v. Small, No. 06-cv-187, 2008 WL 11338112, at \\*12 \(W.D. Mo. Feb. 20, 2008\) \(collecting cases\)](#).

<sup>143</sup> See [United States v. Vayner, 769 F.3d 125, 131–32 \(2d Cir. 2014\)](#) (district court erred by assuming information on defendant’s Facebook page was provided by him); [United States v. Jackson, 208 F.3d 633, 638 \(7th Cir. 2000\)](#) (web postings lacked authentication, as “Jackson needed to show that the web postings in which the white supremacist groups took responsibility for the racist mailings actually were posted by the groups, as opposed to being slipped onto the groups’ web sites by Jackson herself, who was a skilled computer user”).

<sup>144</sup> See [TIP Sys., LLC v. SBC Operations, Inc., 536 F. Supp. 2d 745, 756 n.5 \(S.D. Tex. 2008\)](#).

<sup>145</sup> See Zahr K. Said & Jessica Silbey, [Narrative Topoi in the Digital Age](#), 68 J. LEGAL EDUC. 103, 110 (2018); Lee K. Royster, [Fake News: Potential Solutions to the Online Epidemic](#), 96 N.C. L. REV. 270, 276–80 (2017); [Toronto, supra note 1, at 169–72](#).