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Off The Record. Or Not?

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In November 2007, an article titled “Off the Record,” which was co-authored by one of this article’s authors, was published in this Journal.2 It began by saying “[e]very good appellate lawyer knows that an appeal is constrained by the record formed below.”3 It quoted a 1988 decision of the First District reprimanding a lawyer who sought to “amend” the record to include matters not before the trial court, and declaring in this regard that the fact “an appellate court may not consider matters outside the record is so elemental there is no excuse for an attorney to attempt to bring such matters before the court.”4 It is a new world today, however, and we appellate lawyers had better recognize that. Appellate courts not only are not sanctioning lawyers for seeking to supplement the record with matters not in the record below, appellate courts are granting such motions and adding such materials to the appellate record.5 Even more, appellate courts themselves are raising matters not presented to the trial court. We recently watched an appellate argument in a child custody dispute where the panel directly questioned the father’s counsel about his failure to pay support or try to see his child during the pendency of his appeal. That is intuitively important to an appeal seeking visitation rights, but it was not a matter before the trial court when it made the ruling at issue on appeal. This is not an issue unique to family law appeals. Circuit Judge Richard A. Posner complained in his *Reflections on Judging*6 that “[a]ll too often, the facts that are important to a sensible decision are missing from … the judicial record.”7 Recognizing that reality, the entire September 2015 edition of *Appellate Issues*, published by the ABA’s Council of Appellate Lawyers, was devoted to various aspects of the inquiry in “The Appellate Record: Adequate or Not?”8 That excellent resource includes articles on “Appellate Judicial Notice in a ‘Google Earth’ World,” “Judges and the Internet: Does the Record Still Matter?,” and a wonderful war story about the “Red Tie Guy.”9 This article addresses some of the same general issues and discusses some developments in the law in this regard. But it also focuses more specifically on what is happening with regard to the appellate record in Florida appellate courts today. Agreeing with the authors of “Appellate Judicial Notice in a ‘Google Earth’ World,” we urge adoption of their recommendations for rule changes that would provide appellate lawyers and appellate judges with more clarity and certainty regarding appropriate reliance on facts that are “off the record.” Hopefully such changes also would enhance the ability of appellate courts to make “a sensible decision” based on all of the “important facts” for such a decision.

1. The Information Superhighway, AKA the Internet.

Opinions issued in the last few weeks of the 2015-2016 term of the United States Supreme Court were replete with citations to facts derived from the internet. In *Utah v. Strieff*,10 the Supreme Court upheld the use of evidence obtained in a search without a warrant to do so, based on an outstanding warrant on an unrelated matter the officer relied upon. In dissent, Justice Sotomayor cited repeatedly to various statistics obtained from the internet with respect to outstanding warrants, including numbers and geographic data.11 Justices Kagan and Ginsburg cited some of her citations in their separate dissent.12 In a passionate discourse on the "disproportionate" impact on persons of color of "the humiliations of … unconstitutional searches," Justice Sotomayor also cited a number of books dating back to 1903 showing that "[f]or generations, black and brown parents have given their children the 'talk' … all out of fear of how an officer with a gun will react to them."13 No justice questioned this fact, or any of the other facts she recited based on extrarecord sources. Extrarecord materials were the subject of a back-and-forth exchange between Justice Kennedy and Justice Alito in the Supreme Court's June 23, 2016, decision in *Fisher v. University of Texas at Austin*.14 In his opinion for the divided 4-3 Court, Justice Kennedy wrote the following:

> At no stage in this litigation has petitioner challenged the University's good faith in conducting its studies, and the Court properly declines to consider the extrarecord materials the dissent relies upon, many of which are tangential to this case at best and none of which the University has had a full opportunity to respond to. *See, e.g., post*, at 45-46 (opinion of ALITO, J) (describing a 2015 report regarding the admission of applicants who are related to "politically connected individuals").15

In dissent, Justice Alito vehemently disagreed with that observation, asserting that the report was "highly relevant" and had been discussed by the respondent university both at the certiorari and the merits stage. He said "the Court's purported concern about reliance on 'extrarecord materials,' *ante*, at 14, rings especially hollow in light of its willingness to affirm the decision below, which relied heavily on the Fifth Circuit's own extrarecord Internet research."16 Sure enough, the Fifth Circuit had relied on demographics developed from its internet searches of both governmental statistics and scholarly research.17 Just one week later, Justice Alito complained in his dissenting opinion in *Whole Woman's Health v. Hellerstedt*, joined by Chief Justice Roberts and Justice Thomas, that the Court had "brushe(d) off" statistical evidence as " 'outside the record,' " even though "it was filed with this Court by the same petitioners in litigation closely related to this case."18 Justice Alito pointed to decisions holding that the Court " 'may properly take judicial notice of the record in that litigation between the same parties who are now before us.' "19 A few footnotes later, he snidely observed as follows:

> The Court also gives weight to supposed reductions in "individualized attention, serious conversation, and emotional support" in its undue-burden analysis. *Ante*, at 36. But those "facts" are not in the record, so I have no way of addressing them.20

Those facts are, however, exactly like the "disproportionate" impact facts asserted in Justice Sotomayor's dissent in *Strieff*, based on matters outside the record in that case. The Supreme Court

is not the only court grappling with the propriety of judicial factual research on the internet. A sharply divided panel of the Seventh Circuit, led by Judge Posner, addressed the issue of such research in deciding an appeal by a pro se prisoner alleging his civil rights had been violated by inadequate medical treatment.21 Judge Posner's majority opinion reversing the judgment below cited facts from various extrarecord medical websites, including Wikipedia. He emphasized the pro se nature of the appeal, saying "[i]t is heartless to make a fetish of adversary procedure"—*i.e.*, limiting the review on appeal to the record formed below— "if by doing so feeble evidence is credited because the opponent has no practical access to offsetting evidence."22

> The dissenting judge begged to disagree, saying the reversal is unprecedented, clearly based on "evidence" this appellate court has found by its own internet research. The majority has pieced together information found on several medical websites that seems to contradict the only expert evidence actually in the summary judgment record.23

He went on to proclaim that adherence to the trial record was not a " 'fetish' " but rather a central foundation for "the proper role of an appellate court," and that extrarecord factual research by appellate judges "will cause problems in our judicial system more serious than those it is trying to solve in this case."24 In a concurring opinion, the second judge in the majority lamented that the "disagreement over the outcome of this relatively simple case has morphed into a debate over the propriety of appellate courts supplementing the record with Internet research."25 She wrote to give her view that the case was resolved properly on the trial record itself, by simply adhering to "the fundamental and unremarkable rule that we give [the appellant] the benefit of all conflicts [in the evidence] and draw all reasonable inferences in his favor as the nominating party."26 So even the members of that 3-judge panel could not agree on propriety of Judge Posner's internet research on the medical facts at issue in the case! Without engaging in any such debate, Florida appellate courts have relied on facts from websites in rendering their decisions. In *Estate of McCall v. United States*, for example, the Florida Supreme Court cited a variety of governmental and non-governmental websites in its opinion.27 One cite addressing the malpractice insurance industry showcases a fundamental problem with website citations: it purports to link to a document on a private website, but the link no longer works.28 In rejecting an argument that a conversion claim against a towing company, which had sold a towed vehicle despite the owner's efforts to reclaim it, was preempted by federal law governing a "service" of motor carriers, the Second District cited an internet news story about the inventor of the tow truck.29 The court relied on facts from that article to make the temporal point that Florida law permitted claims for conversion of property before there were tow trucks. Accordingly, "[a]ny connection between Florida's common law prohibition on conversion" and "services of motor carriers" regulated by subsequent federal law was too remote to require preemption of Florida's conversion law.30 In *Trejo v. Arry's Roofing*,31 the First District cited Wikipedia for the number of languages used in the United States, and also for the proposition that "Florida's language diversity is equally impressive." It included no discussion of the reliability of Wikipedia. In *U.S. v. Lawson*, on the other hand, the federal Fourth Circuit addressed at length the

reliability concerns presented by reliance on Wikipedia.32 The issue arose when, despite the trial court's explicit instruction not to conduct research on the internet or otherwise, a juror reviewed, during deliberations, a Wikipedia definition of an element of the crime with which the defendant was charged.33 The juror no longer had the original Wikipedia entry but obtained a printout two weeks later in anticipation of his appearance before the court on complaints of juror misconduct. There was evidence, however, that the definition on the website had changed from the entry the juror had consulted during deliberation. The Fourth Circuit reversed the jury's guilty verdict, noting it was "greatly concerned about the use of Wikipedia in this context."34 Although the court cited Wikipedia as claiming it " 'retains a history of all edits and changes,' " the court said that, even assuming the previous entry could be retrieved, "we would be unable to consider this fact on appeal in the absence of a firm basis in the record for concluding that the Wikipedia archives themselves are accurate and trustworthy."35 The court did acknowledge, however, that it had cited Wikipedia as a resource in three prior cases dating back to 2007.36 In the end, the court concluded that the very format of Wikipedia and its "open-access nature" presented an "obvious and real" "danger in relying on a Wikipedia entry."37 It cited Wikipedia itself as to how it is "openly editable," as well as a number of federal court decisions "troubled by Wikipedia's lack of reliability" and ultimately concluded the government could not show there was "no reasonable possibility" that the jury's verdict was not impacted by the internet research.38 At least one federal court has followed *Lawson* to set aside another jury verdict based on a juror's research on the IRS website, which, although equally beyond the scope of the evidence at trial, is undoubtedly more reliable than a website like Wikipedia.39 Though disdaining Wikipedia, the *Lawson* court itself relied on a private internet website as of 2011, noting it had been "updated June 2010," for a factual foundation for its legal holding of a rational basis for the federal statute on animal fighting activities.40 Likewise, in the body of its opinion in *State v. D.C.*,41 the Fifth District cited various websites addressing how HIV can be transmitted. One website is the CDC's, but the opinion also cites to www.aids.org and the Mayo Clinic's website, both private websites.42 Manifestly, those private websites do not carry the same reliability as a governmental website, such as the IRS's, does. *Republished with permission from the Florida Bar. Click to continue reading the PDF of the full article.*

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