Advisory Opinion #2014-01

(adopted August 22, 2014)

Question: *When conducting independent research using the Internet, what research can be considered "judicial notice" and when does the research become improper factual investigation?*

Opinion: Judges understand the requirement of Canon 3 B (12): "Without prior notice to the parties and an opportunity to respond, a judge shall not engage in independent ex parte investigation of the facts of a case." However, the commentary to that Code provision acknowledges that this provision "does not prohibit a judge from exercising the judge's authority to independently call witnesses if the judge believes that these witnesses might shed light on the issues being litigated or to take judicial notice of certain facts. "

Evidence Rule 201 defines a judicially noticed fact as one **"**not subject to reasonable dispute in that it is either (1) generally known within this state or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The evidence rule, when applied to documents or sources of information accessed through the Internet, on its face, can raise question as to what is "generally known within this state" or the nature of "sources whose accuracy cannot reasonably be questioned." However, common sense and procedural safeguards can guide use of this research.

The rules that apply to facts obtained from the Internet are no different from the rules that apply to any other facts for which judicial notice might be taken. The problem that arises in this context is that facts are more readily accessed on the Internet, which can lead to a temptation to use the Internet when a judge otherwise would know better than to conduct the research. For example, while it is clear to judges that it is improper to drive to view a crime scene, it may appear less clear to bring up a view of the same scene on Google "street view" from the court computer on the bench. There are no unique rules for facts obtained through the ease of Internet accessibility. Judges should be diligent when using the Internet in court cases to ensure that the research is either purely legal research or judicial notice of public documents of which the judge may properly have taken judicial notice had those documents been obtained by the judge through more traditional means.

Where facts are available on the Internet that can aid in deciding a factual dispute relating to issues in a case before the judge, the best practice is for the judge to inform the parties of the information upon which the judge proposes to rely, as well as how and when that information was obtained, and to allow the parties an opportunity to respond. In addition, where a judge is clearly taking judicial notice, Evidence Rule 203 requires that the judge give proper notice and the opportunity for parties to object and be heard.

Because the difficult question arises in determining whether it is “factual” research, notice and a meaningful opportunity for parties to object remains a recommended safeguard.