When Judges Rely on Their Own Online Research

A recent Seventh Circuit ruling tests the use of information gathered from the Internet.

Aaron S. Bayer, The National Law Journal
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JUDGE RICHARD POSNER:
Online information about acid reflux informed his ruling in a civil rights case. Abel Uribe/TNS/ZUMA Wire

Courts and scholars have long debated the propriety of judges doing their own research and fact-finding, a debate that has intensified in recent years with the ease of internet research. The U.S. Court of Appeals for the Seventh Circuit has been at the epicenter of that debate.

The controversy boiled over last month in a split decision in which Judge Richard Posner cited his own, extensive Internet research in a prisoner's civil rights suit. As the dissent put it, "this case will become Exhibit A in the debate" over whether appellate courts can "decide cases based on their own research on adjudicative facts."

The suit, *Rowe v. Gibson*, involved an Eighth Amendment claim by a prisoner who suffered from gastroesophageal reflux. Prison officials had restricted the inmate's access to Zantac, allowing him to take the medication twice a day but not at mealtimes. The plaintiff claimed that, as a result, he suffered severe pain and risked serious long-term injury. The district court granted summary judgment to the prison officials based on an uncontested affidavit from the prison doctor attesting that taking Zantac twice a day was a sufficient treatment.

Whether limiting the prisoner's access to Zantac was medically acceptable or caused the prisoner harm was a disputed issue of fact that should have precluded summary judgment. In reaching that conclusion, Posner found that the district court erred by failing to credit the prisoner's
declarations about the pain he was suffering and by relying on the prison doctor's affidavit, which Posner viewed as self-interested (the doctor was a defendant in the suit) and internally inconsistent.

But Posner also cited his own extensive research on medical and pharmaceutical websites about reflux and the dosing and effectiveness of Zantac. And it's clear from his opinion that his independent research influenced his evaluation of the State's claims.

It's also clear that Posner seeks to expand the envelope of permissible fact-finding by appellate judges. He devoted much of his decision (and a detailed appendix) to defending his use of "highly reputable medical websites" that were outside of the record. As Posner recognized, under current law the court could not take judicial notice of the research he cited. That research did not involve judicially noticeable "legislative" facts — because it directly related to core factual issues in the suit.

Nor did his research meet the high standards for taking judicial notice of "adjudicative" facts under Rule 201 of the Federal Rules of Evidence, because it did not involve facts that were "generally known" or could be determined from "sources whose accuracy cannot reasonably be questioned."

Posner said that his factual research fell "somewhere between" facts that must be determined through the adversarial process and those that are subject to judicial notice, though he felt his research came closer to the latter category. He seemed to suggest the possibility of creating a new category of information to which a less rigorous standard for judicial notice might apply.

He contended that independent factual research was permissible in this case because he used it not as conclusive evidence, but only to show the existence of disputed issues of material fact. He also discounted the benefit of the adversarial process in a case like this, in which an indigent inmate was unable to hire and effectively present an expert witness to challenge the government's expert. Judge David Hamilton's dissent took Posner to task on every point, calling his opinion an "unprecedented departure from the proper role of an appellate court." The factual conclusions in the majority opinion about the timing and effectiveness of a patient's doses of Zantac were neither determined through the adversarial process, nor were they properly subject to judicial notice.

Hamilton rejected the notion that there is some kind of in-between category in which an appellate court can make its own factual findings. He noted that the Seventh Circuit would reverse a district court for basing a decision on its own research, would order a new trial if jurors
conducted their own research and would criticize a party for trying to supplement the factual record on appeal. He urged the court to adhere to the same standards.

Hamilton also recited a host of practical problems with allowing independent judicial fact-finding. It would interfere with the adversarial process, as parties would have to go beyond their opponent’s evidence and anticipate additional evidence a judge might find in his own research. He also questioned the reliability of independent research conducted by appellate judges. There is good reason to be skeptical about the accuracy of facts — untested by the adversarial process — that are lifted from medical or other scientific websites by judges with no expertise or training in the relevant discipline.

The rules of conduct for judges also bear on the issue of independent factual research. Rule 2.9 of the ABA Model Code of Judicial Conduct provides that "a judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." The comment to the rule makes it clear that the prohibition applies to electronic information.

Concerns about judges doing their own factual research are particularly acute at the appellate level, where the research is typically done after briefing and argument. As a result, the parties have no opportunity to challenge the factual conclusions the judges have reached. One alternative, proposed by Professor Elizabeth Thornburg, would address that concern by allowing appellate judges to engage in independent fact-finding, but only with advance notice and an opportunity for the parties to respond.

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