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SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF PORT ANGELES, Respondent,

v.

OUR WATER-OUR CHOICE, and PROTECT OUR WATERS,
Petitioners,

v.

WASHINGTON DENTAL SERVICE FOUNDATION, LLC,
Respondent.

Corrected
RESPONSE OF

AMICI CURIAE INTERNATIONAL ACADEMY OF ORAL
MEDICINE AND TOXICOLOGY,
FLUORIDE ACTION NETWORK,
WASHINGTON ACTION FOR SAFE WATER, WHIDBEY
ENVIRONMENTAL ACTION NETWORK, AUDREY ADAMS,
LINDA MARTIN, BILL OSMUNSON DDS, MPH,
GERALD H. SMITH MD, AND FLUORIDE CLASS ACTION
TO RESPONDENTS' MOTION TO STRIKE THEIR BRIEF

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- 3 Condominium Ass'n v. Apartment Sales, 101 Wn. App.
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7 Houser v. State, 85 Wn.2d 803, 540 P.2d 412 at 807 (1975)
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4 Hughes v. City of Lincoln, 232 Cal.App.2d 741, 746-47, 43
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5 Kaul v Chehalis, 45 Wn.2d 616, 277 P.2d 352 (1954) at
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8 State v. Way, 88 Wn.App. 830, 946 pP.2d 1209 (1997)
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- 9 IAOMT Brief Appendix D-2
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Web Sites

- 11 <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4841a1.htm>
- 12 <http://www.pauapress.com/fluoride/files/1418.pdf>
- 7 [http://www.wiggin.com/pubs/articles_template.asp?
ID=8141012172003](http://www.wiggin.com/pubs/articles_template.asp?ID=8141012172003)
- 11 <http://www.whocollab.od.nih.se/euro.html>

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- 7 ER 201(f) Judicial notice may be taken at any stage of the
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- 7 Federal Rules of Evidence ER 202

Scholarly Writings, Books

- 12 Dr. Bruce Spittle, M.D., entitled "Fluoride Poisoning: is fluoride in your drinking water—and from other sources—making you sick?" 2008, ISBN 978-0-473-12991-0, can be downloaded from <http://www.pauapress.com/fluoride/files/1418.pdf>.

Scholarly Writings, Journals

- 7 Aaron S. Bayer, "Judicial Notice on Appeal," by National Law Journal, Dec. 8, 2003. Appendix B.
- 7 Evidence Project of Washington College of Law at American University
- 12 Carol Clinch, "Fluoride and Kidneys," which cites to page 140 of the 2006 NCR Report.
- 12 Featherstone, John, M.Sc., Ph.D, "The Science and Practice of Caries Prevention," Journal of the American Dental Association, Vol. 131, July, 2000
- 14 Feltman R. Prenatal and postnatal ingestion of fluorides: a progress report. Dent Digest 1956; 62:353-7
- 14 Feltman R, Kosel G. Prenatal and postnatal ingestion of fluoride: fourteen years of investigation; final report. J Dent Med 1961;16:190-8
- 11 Morbidity and Mortality Weekly Report, Oct 22, 1999/48(41), 933-940 at paragraph 14
- 13 Christopher Neurath, Fluoride 40(4) 253–254, October-December 2007

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I. PRELIMINARY REMARKS

Note that Oregon Citizens for Safe Drinking Water has terminated its status as amicus for this brief.¹

II. STRIKING WOULD DISSERVE JUSTICE

Respondents have filed a motion to strike practically all of the IAOMT Brief along with practically all of its appendices. That brief is in large part made up of scientific books and articles and discussion of them, including some books and articles to which the Respondents have cited. The Court needs to be informed regarding scientific issues as they relate to this case. No part of the IAOMT Brief should be stricken.

The case before the Court does not pose strictly legal issues. It poses legal-scientific issues. In some sense the Court is being asked to make a scientific decision.² The IAOMT Brief was written to inform the

¹ Therefore, the corrected name of this brief will be: "Amici Curiae Brief of International Academy of Oral Medicine and Toxicology (IAOMT), Fluoride Action Network, Washington Action for Safe Water, Whidbey Environmental Action Network, Audrey Adams, Linda Martin, Bill Osmunson DDS, MPH, Gerald H. Smith MD, and Fluoride Class Action, These Amici will be referred to as the "Nine Amici." The brief will be referred to herein as the "IAOMT Brief." All references to appendices will be to the IAOMT Brief appendices, unless otherwise labeled.

² Should we start down the road of adding chemicals and drugs to drinking water? Is the chemical in question a drug? Yes in the case of fluoride, as noted elsewhere because it is "... intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animal." 21 U.S.C. 321 (g)(1)(B). Dental caries is a disease, and fluoride is added to water to prevent caries. Being a drug, is it harmful to any part of the population, and is it in fact helpful to some or all of the population? How do you control the size of the dose if you are distributing the drug to people who drink varying amounts of water which is at the same concentration level for all? Do some people drink more water than others? Who has the burden of proof? Do those who favor adding it have to prove it causes no harm to anyone? Or do those who oppose adding it have to prove it causes harm to some? What if it takes many years for the harm to set in? Because the

court of the relevant science and how the relevant science connects up with the relevant law. It covers The IAOMT Brief covers primarily scientific and legal-scientific issues. Thus, striking any part of it would be a disservice to justice.

The Trial Court made an error in not looking at science and the scientific issues the Initiatives raised. How could the Trial Court possibly have made a decision that the Initiatives were attempting to modify mere administrative matters and not important legislative matters without even considering what was in the Initiatives? It was not an informed decision. Even if counsel chose to avoid these questions, the judge should have requested information on this point. Trial judges too have a duty to protect the rights of citizens.

In asking this Court to strike the IAOMT Brief, the Respondents are asking the Court not to look at the contents of the Initiatives and the relevant science. They are asking the Court to make the same mistake that the Trial Court made.

The Court should always be open to considering the law, and because science is natural law, the Court should always be open to considering that too. Science is the structure of our reality; it deals with

Court has to answer these question, it must become well-informed regarding the relevant science. And that is because it is the last protector of individuals' rights.

real situations. The Court's role is to apply law to real situations. So the Court should prefer to consider scholarly articles and not strike these sections.³

The Respondents are saying, in effect, that because the Trial Court chose not to examine the contents of the Initiatives and look at the relevant science, and because the parties did the same, the Supreme Court now is barred from considering the relevant science. Such is a bad rule of evidence. It is never too late for the Court to take a look at the relevant science.

The Respondents accuse the Nine Amici of bringing up new issues. Scientific facts can never be new issues. They were there all along, and the Nine Amici are just pointing them out.

III. OPPOSITION BRIEF HAS SCIENTIFIC INFORMATION TOO

Or should I say "unscientific information"? The Washington Dental Service Foundation (WDSF), Washington State Dental Association (WSDA), and Water Fluoridation Science Committee (WFSC) filed an answer to the LAOMT Brief. It includes page after page of scientific arguments, issues, and scientific documents not presented to the Trial Court, including fluoridation endorsements from numerous agencies, and a

³ In *Condominium Ass'n v. Apartment Sales*, 101 Wn. App. 923, 945, 6 P.3d 74 (2000), the Court refused to strike a law review article despite allegations that it was bringing up issues not raised in the trial court. This is analogous to the case at bar.

lengthy article entitled "Water Fluoridation and the Environment," by Howard F. Pollick. If the opposition is bringing forward scientific information, then the Nine Amici should be allowed to do so as well.

IV. ISSUES ARE LEGISLATIVE AND NOT ADMINISTRATIVE

The Respondents say that the only issue is whether the proposed initiatives were outside the local initiative power. Respondents' Motion to Strike, page 5. An issue is within the local initiative power if it is legislative and not administrative. The IAOMT Brief assists the Court with this issue. There are various ways of stating the rule for whether an issue is legislative or administrative. I have proposed not a new rule but a new way of stating the same rule: An initiative is legislative if its purpose is to halt or prevent a harmful or potentially harmful activity or to enforce currently unenforced laws. The words "illegal" and "legislative" derive from the same root, that is "law." Thus, utilization of the initiative process to prevent harmful or potentially harmful activity or to enforce currently unenforced laws, is by definition a legislative matter. This sounds like a new test, but it is really a restatement of a currently accepted test: An issue is legislative if it "prescribes a new policy or plan."⁴

⁴ See Supplemental Brief of Petitioners Our Water-Our Choice and Protect Our Waters at 14, Note 44 citing to Hughes v. City of Lincoln, 232 Cal.App.2d 741, 746-47, 43 Cal.Rptr. 306 (Cal.App.Dist.3 1965). The Hughes Court relied on a classical expression ("a declaration of public purpose, and making provision for ways and means of its accomplishment") of the current

A fundamental error made by the Respondents is their characterization of fluoride as a mere additive in the same category with chlorine. To the contrary, chlorine treats water and kills pathogens. It is common knowledge that chlorine evaporates out of water overnight if left in an open pitcher. But fluoride is added to treat those who drink the water, with intent to prevent disease⁵, thus making it fit both the federal and state definitions of a drug. It is common knowledge that a distiller or a reverse osmosis filter is required to remove fluoride. It is a drug which is administered to all who live in the service area, without regard to how much water they drink, their age, their health, whether their kidneys are failing and can no longer excrete fluoride, or other diseases they might have. Therefore it can be harmful to some, and therefore the issue is legislative.

Respondents say that this case is not about fluoride, and this is true. It is about adding drugs in general to drinking water. However, fluoride is currently the only drug which Port Angeles is adding to its water, and so we should not ignore it.

standard that a legislative action "prescribes a new policy or plan." See Appellants' Opening Brief at 24.

⁵ "[T]he addition of fluoride to the Chehalis water supply is intended solely for use in prevention of tooth decay primarily in children up to 14 years of age, and particularly between the ages of 6 and 14 and will prevent some tooth decay in some children. *Kaul v Chehalis*, 45 Wn.2d 616, 277 P.2d 352 (1954) at 618.

V. JUDICIAL NOTICE OF SCIENTIFIC FACTS

The IAOMT Brief discusses judicial notice as a method whereby the Court can admit evidence regarding the facts of fluoridation and its possible harms at the appeals court level. The Court can take judicial notice of well-known facts at any stage, even on appeal.⁶ Yet the respondents brush aside the request made by the Nine Amici that the Court take judicial notice of certain scientific facts.

The IAOMT Brief cited *Houser v. State*, which said this Court should look at science openly and take judicial notice of it.⁷ Respondents argue that *State v. Smith*, 93 Wn.2d 329, 610 P.2d 869 (1980) overturned *Houser v. State*. This is true, but it is also true that *State v. Smith* overturned *Houser* on a different point. Further, the Washington Supreme Court cited *Houser* favorably on the subject of judicial notice after it handed down *State v. Smith*. See *Wyman v. Wallace*, 94 Wn.2d 99, 615 P.2d 452 (1980). This shows that the Court continued to endorse its statement in *Houser* regarding judicial notice.

⁶ ER 201(f) Judicial notice may be taken at any stage of the proceeding.

⁷ That Court said that it was obligated to: "look beyond the case reports and statute books into a world that is rich with probability and conjecture and almost devoid of settled certainty. It must make the best assessment it can from the best information it can obtain. Reputable scientific studies are one source of such information, increasingly utilized by courts in constitutional decision making." 85 Wn.2d 803, 540 P.2d 412 at 807 (1975) at 807.

The Respondents argue second that Houser was not referring to judicial notice of adjudicative facts but to judicial notice of legislative facts, and because the IAOMT Brief cited ER 201, which only covers adjudicative facts, the court should not take judicial notice at all of any of the scientific facts presented in said brief. The Federal Rules of Evidence has an ER 202, which specifically covers judicial notice of legislative facts. Washington does not have an ER 202 that is complementary to the federal ER 202. However, such cases as those cited above make it clear that judicial notice of legislative facts is practiced by Washington Courts.

The Evidence Project of Washington College of Law at American University goes into detail regarding judicial notice of legislative and adjudicative facts.⁸ The Evidence Projects considers adjudicative facts to be more “evidentiary” and legislative facts to be more “procedural,” and for this reason judicial notice of legislative facts is often not included in rules of evidence, although it is included in the Federal Rules of Evidence. See selected pages from the Evidence Project attached as Appendix A. See Aaron S. Bayer, “Judicial Notice on Appeal,” by National Law Journal, Dec. 8, 2003, labeled as Appendix B.

http://www.wiggin.com/pubs/articles_template.asp?ID=8141012172003

⁸ “[A]s with the distinction between adjudicative and legislative facts, a delineation between evidentiary and procedural matters is often unclear.” It also says, “Background facts are more difficult to distinguish because they are both adjudicative and legislative.”

If the scientific facts set forth in the IAOMT Brief are legislative and not adjudicative, then the Washington Supreme Court is more likely and not less likely to take judicial notice of them.

Respondents offer *State v. Way*, 88 Wn.App. 830, 946 P.2d 1209 (1997) as proof that Washington courts take judicial notice of only certain and incontrovertible facts which are buttressed by standard authorities. However, in *State v. Way* no standard authorities were cited at all. Respondents offer *State v. Karsunky*, 197 Wash. 87, 84 P.2d 3900 (1938) at page 98, on the same point, but in this case the authority offered was a pamphlet published by a manufacturer of insulin, which is hardly a standard or reliable authority. The 2006 NRC Report⁹ is in a different league. Thus, the Respondents' frontal attack against the Court taking judicial notice of certain highly credible documents fails.

VI. FACTS THE COURT SHOULD NOTICE JUDICIALLY

The IAOMT Brief asked that scientific facts coming from well-recognized sources be noticed. Some of those facts are repeated here to make for easy reading. For example, the 2006 NRC Report at page 25 makes it clear that people drink widely varying amounts of water.¹⁰ This is

⁹ "Fluoride in Drinking Water: A Scientific Review of EPA's Standards," a 2006 report prepared by the National Research Council, a branch of the National Academy of Sciences, the most prestigious and authoritative research institute in the country.

¹⁰ "[S]ome members of the U.S. population could have intakes from community water sources of as much as 4.5 – 5.0 L/day (as high as 80 mL/kg/day for adults). Some infants have intakes of

elucidated in the chart on page 381 of the 2006 NRC Report, in IAOMT Brief Appendix D-1. Thus, the average person drinks a quart and a half of water per day, around six 8-ounce glasses.¹¹ Many drink four times this much.¹² Some drink even more.

Regarding fluoride, the EPA set a 2% secondary maximum contaminant level, SMCL, which was calculated to hold the level of moderate enamel fluorosis down to 15% of exposed population.¹³ This is an admission that water at 2 ppm causes moderate fluorosis. As pointed out above, some drink double or quadruple the average amount of water and would consume 3 mg or 6 mg or more of fluoride per day or more.

community water exceeding 200 mL/kg/day.” See 2006 NRC Report p. 25. See IAOMT Brief Appendix D-2.

¹¹ Mean water consumption is 21 mL of water per kg of body weight, meaning that a 70 kg person would be getting 1,470 mL per day. A liter is around a quart. There are 32 fluid ounces in a quart, around four 8 ounce glasses. That’s around six glasses of water per day if you are a standard sedentary person. At the 95th percentile there is 5% of the general population who drink 50 mL of water per kg of body weight, that is 2.38 times the mean. A 70 kg person would thus be getting 3,500 mL per day, or 3.5 mg. At the 99th percentile there is 1% of the general population who drinks 87 mL per day of water per kg of body weight, 4.14 times the mean. A 70 kg person would be getting 6,090 mL of fluoride per day, or 6.09 mg. Thus, there is a very wide variation in water consumption, and dosing everyone with the same 1.0 mg/L is unwise.

¹² Soldiers in training guzzle water: “The Army’s planning factor for individual tap water consumption ranges from 1.5 gallons/day (5.7 L/day) for temperate conditions to 3.0 gallons/day (11.4 L/day) for hot conditions (U.S. Army 1983).” Diabetics sip continuously: Most patients with central diabetes insipidus have urine volumes of 6-12 L/day (Robinson and Verbalis 2002). Patients with primary polydipsia might ingest and excrete up to 6 L of fluid per day (Beers and Berkow 1999).” 2006 NRC Report page 26.

¹³ See 2006 NRC Report at page 8, attached as IAOMT Brief, Appendix D-32: “Since 1993, there have been no new studies of enamel fluorosis in U.S. communities with fluoride at 2 mg/L in drinking water. Earlier studies indicated that the prevalence of moderate enamel fluorosis at that concentration could be as high as 15%.”

Simple mathematical calculation would tell you that they are consuming enough water that their fluoride consumption at 1.0 ppm would equal and exceed what a person drinking the average 1.47 litres per day of 4 mg/L would get.

The 2006 NRC Report makes it clear that moderate dental fluorosis will afflict up to 15% of those who drink water fluoridated at 2.0 mg. (or who drink twice the average amount of water at 1.0 mg).¹⁴ Athletes, soldiers, and laborers should beware as well as parents of babies.¹⁵

Even a mother who drinks fluoridated water delivers very little fluoride to her nursing baby.¹⁶ There is a fluoride concentration of 9.8 ppb in milk from mothers who drink water fluoridated at 1,000 ppb and 4.4

¹⁴ "The committee finds that it is reasonable to assume that some individuals will find moderate enamel fluorosis on front teeth to be detrimental to their appearance and that it could affect their overall sense of well-being." 2006 NRC Report, page 4 and 8. See IAOMT Brief Appendix D-32:

¹⁵ "The prevalence of severe enamel fluorosis is very low (near zero) at fluoride concentrations below 2 mg/L. From a cosmetic standpoint, the SMCL [2 mg/L] does not completely prevent the occurrence of moderate enamel fluorosis. EPA has indicated that the SMCL was intended to reduce the severity and occurrence of the condition to 15% or less of the exposed population. The available data indicate that fewer than 15% of children will experience moderate enamel fluorosis of aesthetic concern (discoloration of the front teeth) at that concentration." Emphasis added. 2006 NRC Report p. 8. See IAOMB Brief Appendix D-34.

¹⁶ The 2006 NRC Report at pages 27, attached as IAOMT Brief Appendix 26 states: "Measured fluoride in samples of human breast milk is very low. Dabeka et al. (1986) found detectable concentrations in only 92 of 210 samples (44%) obtained in Canada, with fluoride ranging from <0.004 to 0.097 mg/L. The mean concentration in milk from mothers in fluoridated communities (1 mg/L in the water) was 0.0098 mg/L; in nonfluoridated communities, the mean was 0.0044 mg/L."

ppb in milk from mothers who drink water in nonfluoridated communities. A baby is a human being, the same species as children and adults. At what point in the aging and growth continuum does a baby go from needing 4.4 ppb fluoride to 1,000 ppb fluoride in his/her water? Did God or Nature make a mistake in our design?

Next we turn to the World Health Organization, which supports fluoridation. The WHO's Data Report of 2004 entitled "DMFT (Decayed, Missing & Filled teeth) Status for 12 year olds by Country" is of unquestionable reputation and credibility. See IAOMT Brief Appendix D-31. The full results appear at <http://www.whocollab.od.mah.se/euro.html>. That report makes it abundantly clear that tooth decay rates are just as low or lower in mostly unfluoridated continental Europe than in the United States. This is evidence that fluoride is at best ineffectual.

Next we turn to the CDC, Centers for Disease Control, which Respondents would regard as a highly credible source. The CDC supports water fluoridation, however, it is honest enough to admit in the fine print that fluoride's effect is primarily topical,¹⁷ meaning applied as toothpaste, mouthwash, and dental gels, not by eating or drinking it. The same is true

¹⁷ "[L]aboratory and epidemiologic research suggests that fluoride prevents dental caries predominately after eruption of the tooth into the mouth, and its actions primarily are topical for both adults and children. Morbidity and Mortality Weekly Report, Oct 22, 1999/48(41), 933-940 at paragraph 14. See IAOMT Brief Appendix D-21. See the full article at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm4841a1.htm>.

of the July, 2000, cover story in the prestigious Journal of the American Dental Association by Dr. John Featherstone. See IAOMT Brief Appendix D-3. Dr. Featherstone supports fluoridation but also points out that fluoride works primarily topically. Note that the Respondents did not move to strike the Featherstone article, and thus both parties recommend it as useful and authoritative.¹⁸

VII. DR. SPITTLE'S BOOK SHOULD NOT BE STRICKEN

The respondents' Motion to Strike demands that Dr. Bruce Spittle's book, "Fluoride Fatigue" be stricken as an appendix. See IAOMT Brief Appendix B. The Nine Amici vigorously dissent.¹⁹ I include Dr. Spittle's book for several reasons. At page 10 this medical doctor summarizes the findings of the 2006 NRC Report regarding the adverse gastrointestinal effects of fluoridated water as substantiated by double-blind studies. Such studies are the "gold standard" of scientific studies because "they rule out the possibility of psychosomaticism and bias." Spittle says:

[The 2006 NRC Report] ... notes that the primary symptoms of gastrointestinal injury are nausea, vomiting, and abdominal pain, and that these had been reported in case studies by Waldbott and Petraborgf as well as in a double-blind clinical study by Grimbergeng involving the research group of doctors in the Netherlands with Dr Hans Moolenburgh. The

¹⁸ It is my observation that all these agencies contain scientifically principled people who try to get the critical word out about fluoride. They can say critical things about water fluoridation, provided they also make the amazing simultaneous statement that they support it.

¹⁹ The book by Dr. Bruce Spittle, M.D., entitled "Fluoride Poisoning: is fluoride in your drinking water—and from other sources—making you sick?" 2008, ISBN 978-0-473-12991-0, can be downloaded from <http://www.pauapress.com/fluoride/files/1418.pdf>.

report noted that the case reports were well documented and that the authors could have been examining a group of patients whose gastrointestinal (GI) tracts were particularly hypersensitive. [The 2006 NRC Report, page 230] noted:

The possibility that a small percentage of the population reacts systematically to fluoride, perhaps through changes in the immune system, cannot be ruled out. ... "Perhaps it is safe to say that less than 1% of the population complains of GI symptoms after fluoridation is initiated (Feltman and Kosel 1961h).

Note that the 2006 NRC Report quotes the study done by Feltman and Kosel with approval. Feltman was a strong supporter of drinking water fluoridation. He was out to prove fluoride was effective at reducing tooth decay. Christopher Neurath, summarizes the study that Feltman did:²⁰

Dr Reuben Feltman, a dental researcher ... conducted a large study in the 1950s with over 1000 pregnant women and their children. The main goal of his investigation was to find out whether systemic fluoride, ingested in the form of daily tablets, reduced tooth decay. However, his study included clinical observations that revealed about 1% of his subjects were sensitive to fluoride at a dose of 1 mg of fluoride ion/day. Feltman described symptoms identical to those reported by Waldbott and others.

Feltman found that:

One percent of our cases reacted adversely to the fluoride. By the use of placebos, it was definitely established that the fluoride and not the binder was the causative agent. These reactions, occurring in gravid women and in children of all ages in the study group affected the dermatologic, gastrointestinal and neurological systems. Eczema, atopic dermatitis, urticaria, epigastric distress, emesis, and headache have all occurred with the use of

²⁰ Fluoride 40(4) 253-254, October-December 2007

fluoride and disappeared upon the use of placebo tablets, only to recur when the fluoride tablet was, unknowingly to the patient, given again.²¹

Dr. Spittle's book, beginning at page 11, contains dozens of case studies of people whose symptoms stopped when they were taken off fluoridated water. Starting at page 50 Spittle examines the cases of animals which developed illnesses as soon as they began drinking city water newly fluoridated at 1 ppm. Their maladies disappeared when they were given non-fluoridated water to drink. Animals do not malingering or suffer from psychosomatic illnesses. Dr. Spittle's book then is highly useful in informing the Court generally regarding the scientific issues pertaining to this case.

VIII. ALL SECTIONS OF IAOMT BRIEF SHOULD BE PRESERVED

"Judicial Notice of Well Known Scientific Facts" beginning at page 5 of the IAOMT Brief is valuable to the Court and has already been discussed. "The Standard to be Applied" section beginning at page 9 discusses the Safe Drinking Water Act, binding on water systems as small as 15 hookups. The SDWA Maximum Contaminant Level Goal, MCLG, is "the level at which no known or anticipated adverse effects on the health of persons occur and which allows an adequate margin of safety."

The Respondents did not challenge the McQuillan on Initiatives section on

²¹ Feltman R. Prenatal and postnatal ingestion of fluorides: a progress report. Dent Digest 1956; 62:353-7; Feltman R, Kosel G. Prenatal and postnatal ingestion of fluoride: fourteen years of investigation; final report. J Dent Med 1961;16:190-8.

page 9 nor the discussion of RCW 57.08.012 beginning on page 9.

Likewise valuable to the Court is the section on the Safe Drinking Water Act beginning on page 10. It discusses how the City is required to conform its water to NRC standards under WAC 246-290-220(3), how NRC is a sham regulatory organization which assures all that it does toxicological studies, when in fact there either are no toxicological studies or they are not published because they are proprietary information, and how even NRC's regulations are not public and must be bought for \$325. The "Fluoride and Fluoridated Water are Unapproved Drugs" section beginning on page 23 are valuable to the Court because they show fluoridated water meets federal and state definitions of a drug. The Sections entitled "Where does Fluoride Come From" and "Why Do We Fluoridate?" give the Court historical perspective.

IX. NO APPENDICES SHOULD BE STRICKEN

The Respondents challenge the letters of Adams and Martin in IAOMT Brief Appendix A. Their stories about hypersensitivity to fluoride were not to prove any scientific issue but to show their background and their reason for concern.

Respondents accept some Appendices such as the article by Dr. Featherstone, which says fluoride works primarily topically (D-3 – D-15).²² Thus both sides agree the Court should consider this document.

Respondents do not challenge the inter-agency treaty by which the FDA illegally transferred responsibility to regulate chemicals such as fluoride to the EPA, a responsibility the EPA was forbidden by law to impose on anyone (D-39 – D-42). Thus both sides agree the Court should consider this document.

Respondents do not challenge the letter from the Washington Department of Health. Thus both sides agree the Court should consider this document. It makes it clear that the fluoridation material which Port Angeles is using is fluorosilicic acid (D-71), nor the page from the CFR showing that the MCLG for lead and arsenic are both zero (D-72), which means none should be added to drinking water.

Respondents do not challenge RCWs (D-75 – D-76). Respondents challenge Appendices which come from the 2006 NRC Report (D-1, D-2, D-26 through D-30, D-32 through D-35, D-55), although the WDSF, WSTDA, and WFSC delivered a copy of the 2006 NRC Report on disk to the Court, thus endorsing it.

²² All references to appendices are to appendices to the IAOMT Brief, unless designated otherwise.

Respondents challenge common encyclopedia articles. (D-56 – D-58, D-68 – D-70, D-81 – D-85, D-97) The Court needs to be able to have access to encyclopedia articles in order to understand scientific reality so it can calculate how that reality links up with law.

Respondents challenge the chart (D-73) which shows the relative toxicity of lead, arsenic, and fluoride. This is taken from a recognized reference work and should not be stricken.

Respondents challenge documents from the CDC (D-37 – D-38) and the World Health Organization (D-31), RCWs (D-36), both of which support fluoridation and are considered credible by some.

Respondents challenge a document from the FDA about unapproved drugs. (D-74) The Court needs to be informed about such matters. Respondents challenge a letter from NSF (D-43 – D-52) and a publication by NSF (D-59 – D-66) which explain how NSF received its authority to regulate fluoride from the EPA, which had no such authority to assign, and how the regulations are written in part by the manufacturers which produce the fluoride. NSF is the trade organization and sham regulatory agency which promulgates the sham guidelines, available only by purchase for \$325, to which the City is required by law to conform (!) under WAC 246-290-220(3). These documents show that many shipments of fluoridation materials contain arsenic and lead. These documents are

valuable to the Court because it should have a full understanding as to how fluoridation came about and how it works in practice. They should not be stricken.

Respondents challenge an article which states that dried eggs contain up to 900 ppm. The Court needs to know that there are sources of fluoride other than drinking water. (D-54)

Respondents challenge an FDA article which explains how the City could get approval of the fluoridated water drug. (D-77 – D-80)

Respondents challenge photographs of gypsum piles and cooling ponds where scrubber liquor from fertilizer factory smokestacks is dumped, the same scrubber liquor that is shipped to Port Angeles in tankers. They challenge photos of the stadium size sinkhole which opened up and drained scrubber liquor into the Florida aquifer. They challenge an article about how destructive the phosphate fertilizer industry is. (D-86 – D-97). The Court should understand the environmental implications of fluoridation.

Respondents challenge the letter from the EPA which states that putting fluoride in drinking water is a way of disposing of toxic waste. To them this must be an “inconvenient” truth. (D-99)

The Respondents challenge the statement for \$6,214 for 12.5 tons of flurosilicic acid. (D-100) The Court should be aware of just how expensive this toxic waste is.

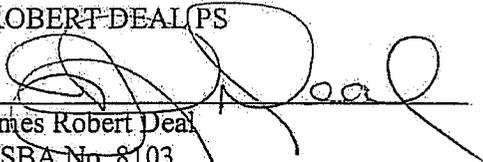
The Respondents challenge a letter from the Public Health Service which states that "fluoride, when used in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or animal, is a drug that is subject to ... FDA regulation." (D-101) The Court needs to know that the FDA does consider fluoridated water to be a drug.

Dated this 19th day of February, 2010.

Respectfully submitted,

JAMES ROBERT DEAL PS

By:


James Robert Deal
WSBA No. 8103
Attorneys for Amici

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CERTIFICATE OF SERVICE

~~_____~~ I certify that on the 19th day of February, 2010, I caused a true and correct copy of
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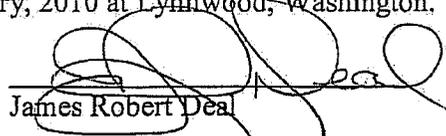
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Dated this 19th day of February, 2010 at Lynnwood, Washington.



James Robert Deal

Appendix A



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THE EVIDENCE PROJECT

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REVISED ARTICLE II RULES WITH COMMENTARY

Introduction

Revised Rule 201 addresses existing problems within Current Rule 201. Revised Rules 202 through 204 address issues not currently dealt with in the Federal Rules of Evidence. Revised Rule 202 covers judicial notice of legislative facts. Revised Rule 203 addresses judicial notice of law (both domestic and foreign). Revised Rule 204 sets forth how law should be proved when judicial notice is not taken.

Because of the long history and substantial case law interpreting the rule of judicial notice governing adjudicative facts, only a few significant changes have been suggested for Current Rule 201.

Aside from certain changes in the notice provision and the requirement that Judicial Notice of Adjudicative Facts be binding in criminal cases, the changes to Revised Rule 201 are largely for clarity.

The most significant changes to Article II involve the addition of Revised Rules 202, 203, and 204. Revised Rule 202 is the first attempt to establish some guidance for courts dealing with judicial notice of legislative facts. Current Rule 201 deals exclusively with Judicial Notice of Adjudicative Facts. The drafters of Current Rule 201 did not address judicial notice of legislative facts because that was perceived to be outside the traditional bounds of evidentiary procedure. Current Rule 201 does not address Judicial Notice of Law because the recognition of law has been perceived as a procedural, rather than an evidentiary, matter. The Revised Rules include judicial notice of both legislative facts and law, as with the distinction between adjudicative and legislative facts, a delineation between evidentiary and procedural matters is often unclear. Although legislative facts and law are not clearly evidentiary in nature, their treatment with adjudicative facts facilitates the ability of the courts to consider the issues involved with each. Judge Weinstein recognized the closely interrelated nature of the different branches of judicial notice by observing:

The Advisory Committee, recognizing that the doctrine transcends the boundaries of the Committee's concern, drafted Rule 201 so that its coverage would be limited to that aspect of judicial notice which most clearly lies within the province

of the law of evidence. . . . In the next [sections], however, the doctrine of judicial notice in its larger sense is discussed in some detail because the rationale, scope and limitations of Rule 201 stand out more clearly when viewed against this wider perspective.

- ✓ Judicial notice of facts can be broken down into three categories: adjudicative, legislative, and background. Although the distinction was perhaps first recognized by Professor Thayer, it was not until
- ✓ 1942 that Professor Davis coined the terms "legislative" and "adjudicative" facts:
- ✓ When a court or an agency finds facts concerning the immediate parties -- who did what, where, when, how, and with what motive or intent -- the court or agency is performing an adjudicative function, and the facts so determined are conveniently called adjudicative facts. When a court or an agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which inform the tribunal's legislative judgment are called legislative facts.
- ✓ Background facts are more difficult to distinguish because they are both adjudicative and legislative:

Courts notice without proof all, whether fact or law, that is necessarily or justly imputed to them, by way of general outfit for the proper discharge of the judicial function. . . . Among such things are the ordinary meaning, construction, and use of vernacular language; the ordinary rules and methods of human thinking and reasoning; the ordinary data of human experience, and judicial experience in the particular region; the ordinary habits of men.

Clearly, the courts could not function if proof was needed on the meaning of every word uttered by a witness that bore upon the outcome of a case. In a negligence case involving a motor vehicle, there is no need to offer proof as to the meaning of the word "car" or its dangerous nature if improperly handled, because both judge and jury assign meaning from their daily exposure as both drivers and pedestrians. Given the nature of such facts, it would be impossible to propose a rule that would govern them.

- ✓ At the other extreme, adjudicative facts deal with the dispositive facts of the case which are in controversy between the parties; as Professor Davis explained: "who did what, where, when, how, and with what motive or intent." Courts are extremely hesitant to take judicial notice of such facts because they bear directly on the rights of the parties. This is based on the belief that in an adversarial legal system it is best to allow the parties to establish the facts that are essential to their cases:

The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention.

Because parties are attempting to reconstruct a particular course of events that occurred in the past, a court will only take judicial notice of operative facts when an adjudicative fact is beyond dispute. Legislative facts, as has previously been observed, deal with the interpretation and development of the law. These facts do not have direct bearing on the course of events which occurred between the parties, but rather, deal more broadly with the social implication of a particular law. Judges, without explicitly recognizing what they are doing, will take judicial notice of these facts. Given the fact that legislative facts do not deal with a particular course of events which the parties are attempting to reconstruct, but rather, more loosely deal with social norms and the interpretation and intent of the legislature in passing a law, courts do not require that the facts which they notice be beyond dispute. In fact, as Professor Davis has stated:

My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are "clearly . . . within the domain of the indisputable." Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable. Indeed, necessary facts are often inseparably mixed with judgment, and whole bundles of such mixtures are judicially noticed, even though the mixtures are highly controversial.

The distinction between legislative facts and adjudicative facts, however, is often not clear. Because Current Rule 201 lacks a definition of legislative facts and provides no framework within which courts were forced to analyze the distinction between adjudicative and legislative facts, courts side-step Current Rule 201, even where a fact is clearly "adjudicative" in nature, by simply classifying that fact as legislative. For example, in *United States v. Harris*, the court took judicial notice of the fact that venue in the

Southern District of Ohio was established by proof that the crime occurred in Hamilton County, Ohio. The court never mentioned Current Rule 201 or the requirement that in a criminal trial the jury be given a permissive instruction on judicially noticed facts. Venue, however, clearly falls within the realm of adjudicative facts, i.e., proof of venue establishes an element of the crime, location; in Professor Davis' terms, venue answers the question "where" the event occurred:

Inclusion of legislative facts in [the rules of evidence] would effectuate full codification of the basic concept of judicial notice. Existing practice indicates that decisions on judicial notice involve three variables: the extent to which the facts noticed are adjudicative or legislative, the extent to which the facts noticed are disputable or indisputable, and the extent to which facts noticed are critical or peripheral to the controversy. . . . "A rule that leaves out of account one of the essential variables that [is] intrinsic to the problem and that the courts in fact use cannot be a sound solution of the basic problem of judicial notice."

The Project concluded that establishing a rule for each type of fact to be judicially noticed would properly force judges to address these issues.

[Click here to return to Revised Rule 201.](#)



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Revised Rule 202. Judicial Notice of Legislative Facts [changes highlighted]

(a) Scope of rule. This rule governs only judicial notice of legislative facts. Legislative facts are those facts that are necessary to interpret the scope and meaning of the law. Legislative facts do not directly relate to the matters in dispute between the parties before the court.

- [Click here to see commentary on Revised Article 202\(a\).](#)

(b) Kinds of facts. A judicially noticed fact under this rule must be one that is of reasonable reliability.

- [Click here to see commentary on Revised Article 202\(b\).](#)

(c) When discretionary. Judicial notice under this rule is always discretionary.

- [Click here to see commentary on Revised Article 202\(c\).](#)

(d) Time of taking judicial notice. Judicial notice under this rule may be taken at any stage of the proceeding.

- [Click here to see commentary on Revised Article 202\(d\).](#)

(e) Opportunity to be heard. The court may afford the parties the opportunity to be heard as to the propriety of taking judicial notice under this rule if the interests of justice so require, or if the court deems assistance of the parties helpful.

- [Click here to see commentary on Revised Article 202\(e\).](#)

Revised Rule 202. Judicial Notice of Legislative Facts [clean copy]

(a) Scope of rule. This rule governs only judicial notice of legislative facts. Legislative facts are those facts that are necessary to interpret the scope and meaning of the law. Legislative facts do not directly relate to the matters in dispute between the parties before the court.

(b) Kinds of facts. A judicially noticed fact under this rule must be one that is of reasonable reliability.

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(e) Opportunity to be heard. The court may afford the parties the opportunity to be heard as to the propriety of taking judicial notice under this rule if the interests of justice so require, or if the court deems assistance of the parties helpful.

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Appendix B^B

WIGGIN AND DANA

INTRODUCTION ATTORNEYS PRACTICES RECRUITING PUBLICATIONS IN THE SPOTLIGHT

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December 17, 2003
 Judicial Notice on Appeal
 Source: National Law Journal, December 8, 2003
 Author: Aaron S. Bayer

The use of judicial notice spans a wide spectrum of cases, from the most historically significant—such as Chief Justice Earl Warren's reliance in *Brown v. Board of Ed.*, 347 U.S. 483, 494 n.11 [1954], on scholarly publications documenting the effect of segregated schools on minority children—to the most mundane, such as the 2d U.S. Circuit Court of Appeals' judicial notice of the "traditional features of a snowman." *Eden Toys Inc. v. Marshall Field & Co.*, 675 F.2d 498, 500 n.1 [2d Cir. 1982]. There are, however, some guidelines governing judicial notice, which can be of use to practitioners.

Courts free to take notice of legislative facts

✓ *Legislative v. Adjudicative Facts.* Courts distinguish between judicial notice of "adjudicative facts" and "legislative facts." Rule 201 of the Federal Rules of Evidence sets forth the basic standards for judicial notice of "adjudicative facts," which are facts relevant to the adjudication of the particular controversy and specific parties before the court. Rule 201[b] allows judicial notice of adjudicative facts that are "not subject to reasonable dispute" because they are "generally known" or are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Whether requesting or opposing judicial notice, litigants have a right to be heard on the issue under Rule 201[e].

✓ Rule 201, however, does not govern judicial notice of "legislative facts," which are facts of general "relevance to legal reasoning and the lawmaking process" [Fed. R. Evid. 201[a] Advisory Committee's note] or are "established truths, facts or pronouncements that do not change from case to case" and "do not relate specifically to the...litigants." [*United States v. Gould*, 536 F.2d 216, 220 [8th Cir. 1976]]. In general, courts are free to take notice of legislative facts, including research data and writings like those cited in the famous "Brandels briefs." Appellate courts are understandably more willing to take judicial notice of such legislative facts, because they help them develop reasonable rules of law that will apply in future cases, and more reluctant to take judicial notice of quasi-evidentiary facts, which the trial court usually should have the opportunity to consider in the first instance.

Legislative facts, while general in nature, often play a pivotal role in resolving the specific dispute before the court. In *Roe v. Wade*, 410 U.S. 113, 149 n.44, 163 [1973], for example, the "medical fact" that, during the first trimester, mortality from live birth is as great or greater than mortality from abortion, was critical in determining the constitutionality of abortion restrictions in that case. In obscenity cases, judicially noticed "contemporary community standards"—often based on the judge's personal experience in the community—are frequently dispositive. See, e.g., *United States v. Various Articles of Obscene Merchandise*, 709 F.2d 132, 137 [2d Cir. 1983].

Appellate Review of Judicial Notice Decisions. In reviewing trial court decisions taking or refusing to take judicial notice, appellate courts have used an "abuse of discretion" standard [see, e.g., *In re NAHC, Inc. Securities Litigation*, 306 F.3d 1314, 1323 [3d Cir. 2002]], rather than the more deferential "clearly erroneous" standard used to review findings of fact based on admissible evidence. An appellate court is free itself to take judicial notice of facts the trial court refused to notice or to take judicial notice of contrary facts [see, e.g., *Denius v. Dunlap*, 330 F.3d 919, 926 [7th Cir. 2003]], though in certain circumstances it may choose to remand—where, for example, there are inferences to be drawn by the jury from those facts.

Judicial Notice for the First Time on Appeal. Under Fed. R. Evid. 201[f], judicial notice of adjudicative facts may be taken at any stage of the proceedings,

B

including on appeal. In practice, appellate courts frequently take judicial notice of both adjudicative and legislative facts presented for the first time on appeal, whether requested by a party or on their own initiative. See, e.g., *Hotel Employees & Rest. Employees Union, Local 100 of New York, N.Y. & Vicinity, AFL-CIO v. City of New York Dep't of Parks & Recreation*, 311 F.3d 534, 540 n.1 [2d Cir. 2002]; *In re Indian Palms Assoc. Ltd.*, 61 F.3d 197, 205 [3d Cir. 1995].

There are, however, some limiting principles. Appellate courts are generally reluctant to take judicial notice of facts raised for the first time on appeal where they conclude it would be procedurally unfair to do so. See *In re Indian Palms Assoc.*, 61 F.3d at 205; *Colonial Leasing Co. of New England v. Logistics Control Group Int'l*, 762 F.2d 454, 461 [5th Cir. 1985]. They are particularly hesitant where the facts were available to the moving party and could have been introduced below. Judge Richard A. Posner criticized this practice as "sandbagging" in refusing to take judicial notice of an exhibit on appeal that "was available to [appellants] at the time of trial." *Tamari v. Bache & Co.*, 838 F.2d 904, 907 [7th Cir. 1988]. See also *Zell v. Jacoby-Bender Inc.*, 542 F.2d 34, 38 [7th Cir. 1976]. It is therefore generally safer for litigants to request judicial notice of facts, particularly adjudicative facts, in the trial court whenever possible. By introducing judicially noticed facts at the trial level, counsel can also reduce the risk of the appellate court looking outside the record for facts that might support a different outcome.

Consistent with this principle of fairness, appellate courts are far more likely to take judicial notice of facts that were not available to litigants at trial and events that occurred after judgment was entered. For example, courts have taken judicial notice of guilty pleas entered in a related criminal case after judgment in the civil case was entered. See, e.g., *Colonial Penn Ins. Co. v. Coll*, 887 F.2d 1236, 1239 [4th Cir. 1989]. Similarly, appellate courts have taken judicial notice of post-judgment changes in the conditions in a foreign country relevant to an immigration appeal, *Ivezaj v. INS*, 84 F.3d 215, 218-19 [6th Cir. 1996], as well as post-trial changes in the racial composition of a state's judiciary in a discrimination suit. *Southern Christian Leadership Conference of Alabama v. Sessions*, 56 F.3d 1281, 1288 n.13 [11th Cir. 1995]. Appellate courts are also likely to take judicial notice of facts that affect the court's jurisdiction, indicating, for example, that the appeal may have become moot. *ITT Rayonier Inc. v. U.S.*, 651 F.2d 343, 345 n.2 [5th Cir. 1981].

Certain categories of facts have long been the subject of judicial notice on appeal. Courts routinely take judicial notice of pleadings, records and judgments in other court cases [see, e.g., *Green v. Warden*, U.S. Penitentiary, 699 F.2d 364, 369 [7th Cir. 1983]; *E.I. du Pont de Nemours & Co. Inc. v. Cullen*, 791 F.2d 5, 7 [1st Cir. 1986]] and in administrative agency proceedings [see, e.g., *Opoka v. INS*, 194 F.3d 392, 394-95 [7th Cir. 1996]], but have declined to take judicial notice of other courts' factual findings, as these do not meet the criteria of Rule 201. See, e.g., *Taylor v. Charter Medical Corp.*, 162 F.3d 827, 829 [5th Cir. 1998]. Courts are generally willing to take judicial notice of data, pronouncements and publications issued by the government, such as Environmental Protection Agency research [*Nebraska v. EPA*, 331 F.3d 995, 998 n.3 [D.C. Cir. 2003]]; State Department travel warnings [*Parsons v. United Tech. Corp.*, 700 A.2d 655, 665 n.18 [Conn. 1997]]; and a federal fisheries management plan approved by formal rule [*City of Charleston v. A Fisherman's Best Inc.*, 310 F.3d 155, 172 [4th Cir. 2002], *cert. denied*, 123 S.Ct. 2573 [2003]]. Appellate courts are also likely to take judicial notice of relevant newspaper articles [see, e.g., *The Washington Post v. Robinson*, 935 F.2d 282, 291-92 [D.C. Cir. 1991]] and historical information contained in authoritative publications, such as a text on the history of Lincoln Center [see, e.g., *Hotel Employees*, 311 F.3d at 540 n.1].

Courts will take judicial notice of online information

Judicial Notice of Facts on the Internet. Appellate courts have increasingly cited information found on the Internet, often with less care than they should. As with hard-copy publications, courts are most willing to take judicial notice of information found on government Web sites, such as the time of sunrise found on the Web site of the U.S. Naval Observatory [*U.S. v. Bervaldi*, 226 F.3d 1256, 1266 n.9 [11th Cir. 2000]]; the prime interest rate on the Federal Reserve Board Web site [*Levan v. Capital Cities/ABC Inc.*, 190 F.3d 1230, 1235 n.12 [11th Cir. 1999]]; and records of retired military personnel on a federal Web site [*Denius*, 330 F.3d at 926].

Courts have, however, also been willing to take judicial notice of information on

arguably less reliable commercial Internet sites, including mileage information on Mapquest [*In re Extradition of Gonzalez*, 52 F. Supp. 2d 725, 731 n.12 [W.D. La. 1999]]; historical information on Liberia on the "Geocities" Web site [*Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276, 278 n.2 [S.D.N.Y. 1999]]; and information regarding a bank's ownership from the bank's Web site [see *Laborers' Pension Fund v. Blackmore Sewer Constr. Inc.*, 298 F.3d 600, 607 [7th Cir. 2002]].

Commentators have criticized this practice, questioning the accuracy and reliability of Internet information, as well as the impermanence of the Web addresses themselves and the content of those sites, which change continuously. See Barger, *On the Internet, Nobody Knows You're A Judge: Appellate Courts' Use of Internet Materials*, 4 J. Appellate Prac. & Process 417 [2002]; Smith, *Can Courts Take Judicial Notice of Internet Content?* 668 PLI/PAT 467 [2001].

Practitioners should be aware of these problems, recognizing that the Internet page they cite in their briefs may have changed even by the time the judges turn to that site to review it. They should also be prepared to challenge an opponent's references to adjudicative facts from the Internet that may not meet the requirements of accuracy and reliability in Rule 201.

By Aaron S. Bayer; [Aaron S. Bayer](mailto:abayer@wiggin.com) is the chairman of the [Appellate Practice Group](#) at Wiggin & Dana, based in New Haven, Conn. He can be reached at <mailto:abayer@wiggin.com>.



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2-19-10

Washington Supreme Court

I am re-sending my IAOMT Response to Respondent Motion to Strike IAOMT Brief 82225-5. This time I have included the appendices. Please excuse my mistake.

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IAOMT Response to Respondent Motion to Strike IAOMT Brief 82225-5

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