THEODORE ROOSEVELT AMERICAN INN OF COURT

A JUDICIAL PERSPECTIVE

December 16, 2019 Program

Presenters: Hon. Norman St. George, Hon. Leonard D. Steinman; Hon. Denise L. Sher; Hon. Randy Sue Marber; Hon. Elizabeth Fox-McDonough; Hon. Tricia M. Ferrell; Hon. Andrea Phoenix

A panel of six judges from Nassau County courts shall provide their perspectives on various topics concerning litigating in the courts today, including best practices for attorneys, settlement, mediation, trials, procedure and judicial decision making and discretion. In addition, The District Administrative Judge shall provide an update relating to current issues before the Nassau courts.

Agenda

Overview of Program/Introductions -- 10 minutes

Lectures:

Administrative Judge St. George	10 minutes
Justice Sher	15 minutes
Justice Marber	15 minutes
Justice Ferrell	10 minutes
Justice Fox- McDonough	10 minutes
Justice Phoenix .	10 minutes
Justice Steinman	10 minutes

Panel Discussion/Questions 20 minutes

Program Exhibits

Presenters' Biographies

Part Rules

Materials on Decision Making

Hypothetical Fact Patterns

Biography of Justice Denise L. Sher

Hon. Denise L. Sher was appointed June 21, 2006 to the New York State Court of Claims. She was Acting Supreme Court Justice in the Matrimonial Center of the Nassau County Supreme Court, Presiding Justice of the Integrated Domestic Violence Court, and is currently Acting Supreme Court Justice in the Nassau County Supreme Court .

Serving since 1995 as a Nassau County District Court Judge, Denise Sher presided over misdemeanor cases, arraignments, small claims actions, civil suits and landlord/tenant disputes. She was the Trial Assignment Judge, insuring the efficient handling of cases and was the first female Judge elected as President of the Board of Judges, Nassau County District Court in November, 2001. Known for her legal expertise and excellent courtroom management, she was appointed Supervising Judge of that court on January 1, 2006.

A practicing attorney since 1979, she served for over ten years as Hempstead Deputy Town Attorney specializing in litigation, was a member of the Supreme Court Appellate Division Law Agency, in private practice, and was a former Adjunct Professor at Marymount Manhattan College. Judge Sher is a graduate of Hofstra Law School and a Summa Cum Laude graduate of Queens College. She is listed in Who's Who in American College and Universities and is a Phi Beta Kappa.

A tireless worker for community and professional organizations, Judge Sher's actions have earned her numerous honors including "The Honorable Edward J. Hart, Jr. Memorial Award" from the New York State Fraternal Order of Court Officers, "Women of the Year" from the Court Officers Benevolent Association of Nassau County, the Public Justice Foundation Award, the "Achievers Award" from the L.I. Center for Business and Professional Women, the Martin Luther King Jr. "Living the Dream Award", the Nassau Bar Association "Volunteer Lawyer Award", and the Hempstead Town "Pathfinder" Award. Judge Sher was the recipient of the "Distinguished Alumni Award" of Hofstra University School of Law, "Woman of Distinction Award" Soroptimist of Nassau County, "L.I. Top 50 Women", Long Island Business News, Neil T. Shayne Distinguished Service Award of Jewish Lawyers, Woman of the Year Italian American Court Officers of Nassau County, the "Lifetime of Community Service Award" from UJA Federation of New York, the Stephen Gassman We Care Award of the Nassau County Bar Association, Yashar Hadassah Judges and Lawyers Distinguished Honoree Award, Judge of the Year Long Beach Lawyers' Association and Outstanding Women in the Law, Hofstra Law School.

Judge Sher served as director of the Nassau/Suffolk Women's Bar Association, chairing the Judicial Screening Committee, a director and lecturer for the Nassau County Bar Association Academy of Law, the chairperson of the Bar Association District Court Committee, and is former secretary to both the Nassau and NYS District Court Judges' Associations. As a result of her ability and professional activities, she was chosen chairperson of the Nassau County Judicial Committee on Women in the Courts, New York State Local Courts Advisory Committee, New York State Family Violence Task Force, and New York State Judicial Committee on Women in

the Courts. She is vice-president of the Jewish Lawyers Association of Nassau County, and past-president of the Theodore Roosevelt Inn of Court.

For over twenty-five years, Judge Sher has been an officer and member of numerous civic and charitable organizations focused on helping the residents of Nassau County. She has served as a director of the Family and Children's Association, Nassau Child Care Council, Center for Family Resources, the Central Council PTA Hewlett-Woodmere School District, Sisterhood of the Hewlett-East Rockaway Jewish Center, Friedberg JCC, and the Nassau Council Chambers of Commerce.

A life member of Hadassah, she is also a member of the Peninsula Counseling Center, Five Towns Community Chest, Kiwanis, American Cancer Society, Women Economic Developers of LI, Hewlett-East Rockaway ORT, and the National Council of Jewish Women.

6/13/17

HON. DENISE L. SHER
NEW YORK STATE SUPREME COURT

285 Bayberry Drive, Hewlett Harbor, New York 11557 • Telephone (516) 569-8770

EDUCATION

HOFSTRA LAW SCHOOL, Uniondale, N.Y.
J.D., 1978
QUEENS COLLEGE, N.Y.
B.A. Psychology, 1975
Phi Beta Kappa
Summa Cum Laude and WHO'S WHO IN AMERICAN COLLEGES AND UNIVERSITIES

ADMISSIONS

New York State Bar, Federal District Court, Eastern and Southern Districts
Circuit Court of Appeals, Tax Court, United States Supreme Court

PROFESSIONAL EXPERIENCE

NASSAU COUNTY SUPREME COURT
January 2010 to present

NEW YORK STATE COURT OF CLAIMS
Acting Supreme Court Justice, June 20, 2006 to December 31, 2009
Matrimonial Center and Presiding Justice of the Integrated Domestic Violence Court

NASSAU COUNTY DISTRICT COURT
Judge, January 1, 1995 to December 31, 2000
President of the Board of Judges May 7, 2001 to June 20, 2006
Supervising Judge January 2, 2006 to June 20, 2006

LAW OFFICES OF DENISE HARVEY SHER -114 OLD COUNTRY ROAD, MINEOLA, NY
General Practice and of Counsel, to December 31, 1994

ATTORNEY FOR THE TOWN OF HEMPSTEAD
September 1980 to December 31, 1994
Specializing in defense litigation and zoning matters

APPELLATE DIVISION OF THE SUPREME COURT LAW DEPARTMENT – MHIS
1979-1980

MARYMOUNT MANHATTAN COLLEGE
Adjunct Professor, 1979-1980
Business Law I, II

CONTINUING EDUCATION - ISLAND PARK SCHOOLS
1982
Law for the Layman

PROFESSIONAL AFFILIATIONS

Chair, District Court Committee
Nassau County Bar Association- Academy of Law (Director); Matrimonial Committee; Estates & Trusts Committee; Young Lawyers; Community Education and Public Relations Committee; Mentor Program; Mock Trial; Mock Jury Selection; Moot Court Competition
Nassau-Suffolk Women's Bar Association - Board of Directors; Judicial Screening Committee
New York State Women's Bar Association - Delegate
New York State Bar Association - Lecturer- CLE Programs
American Bar Association
Jewish Lawyer's Association of Nassau County, Inc.
New York State Trial Lawyers - member
American Trial Lawyers Association - former member
New York District Court Judge's Association - Former Recording Secretary
Nassau County District Court Judges Association - Former Recording Secretary
National Association of Women Judges- member
Hofstra Law School - Alumni Association Board of Directors, NITA Faculty
The Nassau Lawyers' Association of Long Island, Inc.
Columbian Lawyers Association - Associate Member
New York State Local Court Advisory Committee- Member
New York State Family Violence Task Force
New York State Judicial Committee on Women in the Courts
President, Theodore Roosevelt Inn of Court
Board Advisor, Center for Children, Families and the Law, Hofstra University School of Law

COMMUNITY AFFILIATIONS

Hewlett - E. Rockaway Jewish Centre- Board of Directors - Sisterhood
Peninsula Counseling Center - Member - Central Council PTA - Hewlett
Woodmere School District Board of Directors
Five Towns Community Chest - member
National Council of Jewish Women - member
Hewlett Hadassah - Life Member
Yashar - Board of Directors
Hewlett - E. Rockaway ORT - member
Village of Hewlett Harbor - Public Works Chairman
L.I. Committee for Soviet Jewry - Legislative Committee
WEDLI - Women Economic Developers of Long Island
Director - Family and Children's Association of Nassau County
Director - Center for Family Resources
Director - Child Care Council Nassau County
Counsel to Island Park Chamber of Commerce
Counsel to Nassau County Council of Chambers
Long Island Center for Business and Professional Women - member
Kiwanis - member
American Cancer Society - Planned Giving Committee
Friedberg JCC - Board of Directors

UJY's - Delegate
Tilles Center Community Committee
N'AMAT - Pioneer Women - Keynote Speaker

PUBLICATIONS

Trader Newspaper - Women and the Law
Nassau Lawyer - Legal Concerns of the Small Business Owner
New York Law Journal, Decision: People v. Rosa, 7/11/96, N. Y. Supplement
New York Law Journal, Decision: People v. Tumiinello, 6/26/97, N.Y. Supplement
New York Law Journal, Decision: Reyes v. Pistone, 9/29/11
New York Law Journal, Decision: Cruz v. Vuolo, 10/19/11

HONORS AND AWARDS

2017 "Judicial Excellence Award", Outstanding Women in the Law - Hofstra Law School
2016 Judge of the Year - Long Beach Lawyers' Association
2012 Distinguished Honoree - Yashar Hadassah - Judges and Lawyers
2010 The Stephen Gassman We Care Award - Nassau County Bar Association
2009 Honorable Edward J. Hart Memorial Award-Fraternal Order of Court Officers
2006 Neil T. Shayne Distinguished Service Award - Jewish Lawyers of Nassau County
2006 "Woman of the Year" Award - Italian American Court Officers of Nassau County
2002 "George M. Estabrook Distinguished Service Award
2002 "Long Island's Top 90 Women" - Girl Scouts of America
2002 "Long Island's Top 50 Women" - Long Island Business News
2001 "Woman of Distinction Award"- Soroptimist of Nassau County Inc.
2001 "Distinguished Alumnus" - Hofstra Law School
2000 "Public Service Award" - Indian Kerala Center
2000 Long Island Center Hall of Fame
1999 Court Officers Benevolent Association of Nassau County "Women of the Year Award"
1998 Phi Alpha Delta Law Fraternity Alumnus of the Year
1996 Chair, Nassau County Judicial Committee on Women in the Courts
1996 Achievers Award, Long Island Center for Business and Professional Women
1995 Who's Who of Professionals International
1994 Martin Luther King Jr. Living the Dream Award
1993 Nassau County Charter Revision Commission Appointment
1992 Town of Hempstead Pathfinder Award - Women's History Month
1991 Volunteer Lawyer - Nassau County Bar Association
1988 Woman of the Year - Island Park Jewish Center

- Married, Mother of three

Revised 4/4/2019

SUPREME COURT : COUNTY OF NASSAU

IAS PART 32 – PART RULES AND PROCEDURES

Justice: **HON. DENISE L. SHER**
Law Secretary: **CARA ANNE PATTON, ESQ.**
Secretary: **BARBARA CORNELL**
Part Clerk: **CHRISTINE FERGUSON**

Phone: **(516) 493-3239**
Courtroom: **(516) 493-3242**
Fax: **(516) 493-3389**

NOTICE OF POLICY AND RULES FOR IAS PART 32

TO: ATTORNEYS AND LITIGANTS

I. ADJOURNMENTS

A. **Motions and Conferences:**

1. Adjournments of **motions and conferences** may be granted if there is consent of all parties and **prior approval of the Court**. No adjournments will be granted without the approval of the Court. If all parties do not consent to the adjournment, an application shall be made by conference call, with all counsel, **no later than 3:00 p.m.** of the day preceding the scheduled motion or conference. No requests for an adjournment will be entertained without all parties participating in the conference call. Except for applications made in court, upon approval of the adjournment, a letter must immediately be submitted by fax, **only**, to Chambers confirming same with a copy to all counsel appearing in the matter.

2. Adjournments of **motions and conferences** may only be sought through **Chambers**. Potential dates, convenient to all parties must be available at the time the adjournment is sought.

3. Letters confirming adjournments **Must** immediately be faxed to Chambers and **Must** contain full names of both parties, index number, and shall specify if a motion and/or conference is being adjourned. Do not mail a copy to Chambers.

4. Adjournment requests which are left on the Chamber's Voice Mail shall be **disregarded**.

5. Adjournments requested because of engagement of counsel **on trial** must be accompanied by an Affirmation of Engagement in conformity with 22 NYCRR Part 125. Prior to submitting an Affirmation of Engagement, counsel must contact all other counsel in the case to obtain mutually convenient adjournment dates and then call Chambers to receive approval of the adjournment date.

6. All counsel are directed to appear for each and every conference. No individual's presence may be excused by anyone other than Chambers.

7. No adjournment of discovery deadlines set forth in the Preliminary Conference Stipulation and Order shall take place without prior Court permission. Counsel is advised to seek Court permission before adjourning any deposition date specified in the Preliminary Conference Stipulation and Order.

B. **Preliminary Conference**:

1. Preliminary Conference adjournments are to be addressed to the DCM Clerk's Office and not to Chambers.

II. MOTIONS

A. **Pre-Motion Conferences**:

1. Prior to the making or filing of any **Discovery Motion**, counsel for the moving party **shall** arrange for a conference call to be held with his/her adversary and the Court to discuss the issues involved and the possible resolution thereof. Counsel fully familiar with the matter and the authority to bind their client **must** be available to participate in the conference call. If a cross-motion is contemplated, like notice shall be given to the Court and counsel.

B. **Submission of the Motion**:

1. All motions are on submission with no appearance required unless the parties are notified to appear by the Court via a telephone call or a stamp on the Order to Show Cause.

2. In the event a case is already scheduled for a conference with the Court, counsel should endeavor to make the return date of a motion, if possible, on said date.

3. Courtesy or working copies should **not** be submitted, unless requested by the Court or the motion has been electronically filed. A working copy (hard copy) of the E-Filed motion papers, any Memorandum of Law, opposition and reply papers must be submitted with all exhibits properly tabbed.

4. Counsel must advise the Court, in writing, and as soon as practicable, if any submitted motions have been resolved, withdrawn, or if the motion is moot because the case has been settled.

5. Pursuant to CPLR § 3212(a), a motion for summary judgment shall be made no later than sixty (60) days after the filing of the Note of Issue, except with leave of court on good cause shown. Any physician affirmations, reports or other medical proof submitted in threshold motions shall contain the original signatures of the physician or medical provider.

6. **All exhibits must be clearly tabbed**; no exhibits shall be double sided; no mini-scripts are accepted; motions not consistent with this rule will be rejected and returned to counsel.

7. All submissions shall be fully and securely bound and shall have a litigation back attached thereto.

8. When submitting proposed orders or judgments in connection with a motion, the same shall be submitted as a separately bound document.

9. All papers must be submitted timely on the date the motion is heard. The Court will not consider late papers absent prior Court approval. No sur-reply affidavit, affirmation, memorandum of law or letter will be accepted or considered by the Court without leave of the Court.

10. Counsel are required to provide the Court with **SELF-ADDRESSED, STAMPED** envelopes with the submitted papers in order to facilitate delivery of the Court's decision.

11. Motions brought pursuant to CPLR §§ 3211, 3212 or 3213 shall not automatically stay disclosure.

C. **Application for a Stay or Temporary Restraining Order (TRO):**

1. If an Order to Show Cause seeking any injunctive relief, including a stay or TRO, is to be submitted, it must comply with Uniform Rule §202.7(f). The movant shall first consult with Chambers as to a

convenient date and time for counsel to appear with regard to the compliance with Uniform Rule § 202.7(f).

2. At any conference of the matter, if an Order to Show Cause seeking any injunctive relief including a stay or TRO is submitted or pending, counsel shall advise the Court of the pendency of such application, the return date of such Order to Show Cause, the relief sought and whether an immediate hearing is sought.

3. Requests to continue or vacate a stay or TRO beyond the return date of the motion shall be made on the call of the motion calendar. Failure to apply for such extension shall result in the automatic vacatur of the stay or TRO, unless the Order to Show Cause provides otherwise.

D. **Interim Partial or Full Settlement:**

1. If all or part of a submitted motion is settled, a proposed order with notice of settlement (on at least ten [10] days notice) or a signed waiver of settlement shall be submitted with a copy to be conformed and a self-addressed stamped envelope. Such order shall be accompanied by a letter setting forth the date the motion was submitted, what aspects of the Motion have been settled and what issues remain to be decided. A copy of the stipulation settling such issues shall be forwarded to the Court. If the motion is resolved, in whole or part, on the record, counsel shall obtain such transcript so that same can be "So Ordered", unless the Court otherwise directs.

III. COURT APPEARANCES

A. All conferences are scheduled at 9:30 a.m., except on Tuesdays when they begin at 9:00 a.m. Please be prompt. Once all parties and counsel are present, conferences may be held with the Court.

B. Upon arriving into the Courtroom, counsel and self-represented litigants shall check-in with the Courtroom Clerk and complete a sign-in sheet. If attending to other matters in the court complex, counsel shall advise the Clerk as to such other appearances. If counsel must also appear before another Judge, and the Courtroom is available, they must advise the Courtroom Clerk or Court Officer where they can be reached and provide a cell number to be reached. All Counsel and "Pro se" litigants are directed to appear for each and every conference (including preliminary, compliance and certification conferences). If a motion is currently pending submission or has been submitted, that fact and the submission date should be reported to the Courtroom Clerk.

C. All cases will be conferenced in the order in which **all** attorneys and/or self-represented litigants are checked in.

D. Counsel who appear in the Part must be fully familiar with the case in regard to which they appear and fully authorized to enter into agreements, both substantive and procedural, on behalf of their clients.

E. Failure to appear at the call of any calendar may result in an inquest or dismissal pursuant to 22 NYCRR § 202.27.

F. Counsel are advised to confirm all scheduled appearances with their adversary the day before the appearance date to confirm a prompt appearance.

IV. COMMUNICATION WITH CHAMBERS

A. In all communications with Chambers by letter, the title of the action, full names of the parties and index number shall be set forth, with copies simultaneously delivered to all counsel. ***Ex parte* communications will be disregarded, except as otherwise provided herein.**

B. Copies of correspondence between counsel shall **not** be sent to the Court. Such copies will be disregarded and not placed in the Court's file.

C. The Court will not accept telefax communications or submissions without prior permission.

D. The Court shall not accept ***ex parte*** telephone or telefax communications on substantive issues.

E. E-mail correspondence with Chambers staff is not permitted unless prior authorization is obtained.

F. Attorneys shall not call Chambers during the daily lunch hour which is from 12:45 p.m. to 2:00 p.m.

V. SETTLEMENTS

A. Pursuant to 22 NYCRR § 202.28(b), if an action is discontinued or wholly or partially settled by stipulation pursuant to CPLR § 2104, or a motion has become wholly or partially moot, or a party has died or become a debtor in bankruptcy, the parties promptly shall notify the Court, in writing, of such an event. No out of court settlement will be recognized or accepted unless counsel submits a letter, on notice to opposing counsel submitting the executed settlement agreement/stipulation or certifying that such agreement/stipulation has, in fact, been executed.

VI. TRIAL RULES

A. A Note of Issue is to be filed within ninety (90) days after certification, unless otherwise specified in the Certification Order. Counsel for plaintiff shall pay the requisite fee with the County Clerk and ensure that the Note of Issue is submitted to the Clerk who will then assign a calendar number.

B. At the first appearance of all cases assigned to this Part for trial, a pre-trial conference will be held. At the conference, the Court shall provide for the submission or scheduling of the following:

1. *In Limine* applications: Any party intending to make a motion *in limine* shall submit a brief written affirmation setting forth the nature of the application and any supporting statutory or case law. The party shall furnish the Court with an original and two (2) copies and provide counsel for all parties with a copy. There shall be a separate affirmation for each motion *in limine*;

2. Proof of filing of the Note of Issue;

3. Pre-trial memoranda providing the Court with cited case law to be considered by the Court;

4. A courtesy copy of each exhibit intended to be introduced into evidence at trial for the Court and each counsel. All exhibits shall be tabbed or included in a binder for easy reference;

5. All trial exhibits, whether the parties stipulate to admit them into evidence to the Court or not, shall be pre-marked by the Court Reporter. As to those exhibits marked for identification, the Court will address their admissibility *in limine* or during the trial, as may be appropriate;

6. A list of proposed witnesses for the Court's information;

7. A list of all expert witnesses with copies of their reports;

8. Marked pleadings, to be submitted before opening statements;

9. A statement of stipulated facts. [Parties are encouraged to stipulate to facts and/or exhibits];

10. Any written requests for jury instructions. Charges from the Pattern Jury Instructions may be identified by number without necessity of reproduction, unless a modification of the standard charge is requested, in which case the modification is to be highlighted;

11. Any proposed verdict sheets;

12. If deposition transcripts are to be utilized, a copy of the witness' deposition transcript should be available to the Court;

13. Objections should be stated without argument except to simply state the ground therefor, e.g., hearsay, relevance, etc. If further argument is appropriate, it will be invited by the Court;

14. Trial counsel are responsible for redactions of all evidence;

15. Trials will be conducted on a continual daily basis until conclusion. As such, no adjournments or delays during trial will be accepted unless exigent circumstances exist;

16. Counsel is required to have all proof in admissible form for inquests;

17. Trial counsel are responsible for taking back all exhibits, pleadings, transcripts, etc., at the end of a trial, unless, in the case of non-jury trials the Court reserves its decision. In all cases, exhibits, pleadings, transcripts, etc. not retrieved within thirty (30) days from the conclusion of a jury trial or within thirty (30) days after the Court renders a decision in a non-jury trial, shall be disposed of.

VII. MISCELLANEOUS

A. CONFERENCES/TRIAL — If there are any outstanding motions (submitted or pending) at the time of the conference/trial, the Law Secretary and/or the Judge must be so informed of same that day; the submission date must be provided by counsel. Counsel shall ensure that copies of such motions are made available to the Court at the time of such conference.

B. ATTORNEYS OF RECORD — Attorneys who have appeared in the matter are to make all appearances until they are relieved by the Court or a Consent to Change Attorney has been filed with Part 32 and with the Clerk of the Court.

C. STAFF — The Court functions through the aid and assistance of the courtroom and Chambers staff. They are expected to treat attorneys, litigants and others in a dignified and civil manner; as well they are to be treated in a civil and professional manner.

Dated: April 8, 2019
IAS Part 32
Mineola, New York

BIOGRAPHY OF JUSTICE RANDY SUE MARBER

Justice Randy Sue Marber was elected in November 2006 to the Supreme Court of the State of New York in the Tenth Judicial District which includes all of Nassau and Suffolk Counties. She currently presides in a civil part in the Supreme Court in Mineola. Prior to her election, she served from 2002 through 2006 as a Judge of the Nassau County District Court. In District Court she presided over a variety of matters including civil bench and jury trials, criminal cases and landlord-tenant disputes. She is a past President of the Nassau County District Court Judges Association.

Prior to taking the bench, from January 2000 until December 2001, Justice Marber was the Principal Law Clerk/Law Secretary to New York State Supreme Court Justice and Associate Appellate Term Justice Allan L. Winick in Mineola. Before joining the Unified Court System, Justice Marber was a Senior Associate and Trial Attorney at Curtis Zaklukiewicz Vasile Devine and McElhenny in Merrick where she served as outside counsel to various insurance carriers and self-insured corporations, primarily in the defense of personal injury litigation. She also worked as Staff Counsel to the Hanover Insurance Company at Huenke & Rodriguez in Melville in a similar capacity.

Justice Marber is a graduate of the Boston University School of Law and the University of Rochester. She is admitted to practice in the State and Federal Courts of NY and NJ as well as the United States Supreme Court.

Justice Marber has been involved in a number of community organizations, including her local civic association, the Syosset-Woodbury Chamber of Commerce and school PTA. She has participated in various autism awareness events. Justice Marber serves on the Board of Trustees of Temple Beth Torah in Westbury.

Justice Marber lectures for the New York State and the Nassau County Bar Associations, the NYS Office of Court Administration, the NYS Academy of Trial Lawyers and other organizations. She has served as a high school mock trial tournament judge and judges law school moot court competitions. She is a member of the Speakers Bureau of the Nassau County Court System. Justice Marber regularly participates in Career Day events for schools throughout Long Island and lectures as part of "The Law Squad," which teaches high school students how the law impacts their lives. She appeared on an episode of "The Law Squad" which aired on cable television.

Justice Marber is a member of the New York State Bar Association, Bar Association of Nassau County, Suffolk County Bar Association,, New York State Trial Lawyers Association (NYSTLA), Association of Trial Lawyers of America (ATLA), Women's Bar Association, and the Huntington Lawyers Club. She is on the Board of Directors of Nassau-Suffolk Trial Lawyers Association and the Theodore Roosevelt American Inn of Court.

Justice Marber is currently on the Civil Law Advisory Committee and the Operations

Committee of the New York State Office of Court Administration. She is also a member of the Judicial Hearing Officer Selection Advisory Committee for the Second Judicial Department, Tenth Judicial District and the Nassau County Judicial Committee on Women in the Courts.

Justice Marber is also a member of the National Association of Women Judges and has served on the District Court Committee, Women in the Courts Committee, Criminal Courts Committee and the Supreme Court Committee of the Nassau County Bar Association. She previously served as liaison between the Supreme Court Committee and the Law Secretaries Association in Nassau County. She is also a member of Yashar and the Jewish Lawyers Association.

Justice Marber is a past member of CSEA.

Justice Marber grew up on Long Island and now resides in Oyster Bay. She has two adult children.

10/17

HON. RANDY SUE MARBER, J.S.C.
Supreme Court – Nassau County
100 Supreme Court Drive
Mineola, New York 11501

IAS PART 8 – RULES & PROCEDURES

(effective as of August 2019)

Principal Law Clerk:	**Mili Makhijani, Esq.**
Assistant Law Clerk:	**Avani A. Shah, Esq.**
Courtroom Clerk:	**Edward McClean**
Chambers Phone:	**(516) 493-3219**
Courtroom:	**(516) 493-3222**
Fax:	**(516) 493-3205**

I. ADJOURNMENT REQUESTS

A. Requests to Adjourn Motions and Conferences:

1. Adjournment requests of **motions and/or conferences held before Justice Marber** may be granted by Chambers if the request is **on consent** of all parties and **sufficient cause exists for approving such request.** No adjournments will be granted without prior approval by Chambers. If all parties do not consent to the adjournment request, an application must be made by telephone conference with all parties/counsel **no later than 3:00 p.m.** the day **preceding the scheduled motion or conference**. No adjournment requests will be entertained without all parties/counsel participating in the telephone conference.

2. Adjournment requests of **motions and/or conferences (excluding PC/DCM/Central Jury appearances)** may only be sought through **Chambers**. Potential dates amenable to all parties must be provided at the time the adjournment is sought.

3. Except for applications made in court, and only upon approval of an adjournment request, letters confirming adjournments **MUST** immediately be faxed to Chambers and **MUST** contain full names of all parties; index number; refer to the original date and specify that a motion and/or conference is being adjourned to a date and time certain; and confirm whether an appearance is required on the new date. Letters confirming adjournments should **only be sent to Chambers by fax. Do not mail, email or e-file** the letter to Chambers (however, any method may be used to copy parties/counsel on such letter).

4. Adjournment requests which are left on the Chamber's Voice Mail shall be **disregarded.** An adjournment request is **not** granted until approved by Chambers **and** a faxed confirmation letter is received by Chambers.

5. Adjournments requested due to an attorney's actual engagement **on trial** must be accompanied by an Affirmation of Engagement in conformity with 22 NYCRR Part 125.

B. Requests to Adjourn Discovery Deadlines

1. No adjournments of discovery deadlines set forth in the Preliminary Conference Order shall be permitted without prior Court permission. Depositions are court-ordered pursuant to the PC Order. **Deposition dates** specified in the PC Order **may not be adjourned to any later date without prior court approval.**

   a. Requests for adjournments of deposition dates shall be made by telephone prior to the scheduled EBT date. Counsel requesting the adjournment must be prepared **at the time of the call** with a reasonable basis for the request, a proposed new deposition schedule with firm dates, and whether the request is on consent of all parties. Where a request is granted, counsel will be directed to fax a confirming letter to Chambers, copied to all counsel, setting forth the new approved EBT schedule with firm dates, times and location, and that "EBTs may not be adjourned to any later date without prior Court approval." Requests to adjourn EBTs **are not granted** until the Court's receipt of the confirming letter referenced herein.

   b. Any outstanding discovery issues that may potentially impact the holding of party depositions should be addressed sufficiently in advance of the Court-ordered EBT dates.

   c. Counsel must endeavor to complete depositions prior to the scheduled Compliance Conference.

C. Requests to Adjourn Preliminary Conferences:

1. Preliminary Conferences shall be held in accordance with the rules set forth in 22 NYCRR § 202.19 in the Preliminary Conference Part of this courthouse, not before Justice Marber. The PC will be scheduled by the Clerk of that part. Accordingly, PC adjournment requests are to be addressed to the DCM Clerk's office or Preliminary Conference Part (telephone no. 516-493-3120), **not** to Chambers.

D. Requests to Adjourn Pre-Trial (DCM/CCP) Conferences:

1. Requests to adjourn pretrial conferences are to be directed to the CCP/DCM Part (telephone no. 516-493-3113), **not** to Chambers.

II. DISCOVERY DISPUTES & DISCOVERY-RELATED MOTIONS

A. Pre-Motion Teleconferences:

1. Prior to the making or filing of any discovery-related motion (or other non-dispositive motion that may be resolved by a teleconference), counsel for the prospective movant(s) shall first discuss the issue(s) in question with his or her adversary. If the issue(s) in question cannot be resolved, counsel for the prospective moving party **MUST** arrange for a telephone conference to be held with all counsel and the Court to address the issue(s) and any possible resolution thereof. Counsel fully familiar with the matter and with authority to bind their client **MUST** be available to participate in the conference call.

2. If the matter can be resolved during the teleconference, the requesting party will be

directed to fax a confirming letter memorializing such resolution. Where the matter cannot be resolved during the teleconference, the prospective movant may request permission to file a discovery-related motion.

3. This rule does not apply to applications for counsel to be relieved or dispositive motions.

4. Any discovery motion must state that **Rule II A. 1.** above has been complied with. Failure to comply with **Rule II A. 1.** above may result in denial of the motion.

B. Telephone Conference Procedure:

1. A party that requests a teleconference shall first contact Chambers with the general nature of the discovery dispute and proposed dates and times amenable to all counsel. Telephone conferences are conducted by the Principal Law Clerk in the afternoon at 2:30, 3:00, 3:30 or 4:00 p.m. Where three or more parties are participating in the teleconference, the requesting party must arrange for a dial-in teleconference number.

2. Once all parties are on the line, Chambers must be contacted on the teleconference line at (516) 493-3220, which shall **only** be used for scheduled teleconferences.

III. MOTIONS

A. Submission of Motions & Motion Appearances

1. Motions brought pursuant to CPLR §§ 3211, 3212 or 3213 **shall not** automatically stay any discovery, unless otherwise ordered by the Court.

2. Generally, there are no appearances on motions for summary judgment made **after** the filing of a Note of Issue, pre-answer motions pursuant to CPLR § 3211, and for **unopposed** motions made pursuant to CPLR § 3215. Appearances of all counsel and pro se parties **are** required on all other motions and Orders to Show Cause, unless otherwise directed by the Court.

3. Pursuant to CPLR § 3212 (a), a motion for summary judgment shall be **filed** no later than sixty (60) days after the filing of the Note of Issue, except with leave of court on good cause shown.

4. On **e-filed cases**, upon the Court's receipt and processing of any e-filed motion, counsel and *pro se* litigants will receive an email from Chambers directing whether an appearance is required on the return date. The Court may, on occasion, administratively adjourn or advance motion return dates to coincide with previously scheduled conferences and/or with return dates of other motions filed in that matter.

5. On **e-filed cases**, the handling attorney(s) and *pro se* litigants, if any, are responsible for ensuring that a working email address is affiliated with the NYSECF system. Chambers is **not responsible** for adding or deleting any email addresses from the NYSECF system.

6. On **e-filed cases**, a "working hard copy" of any e-filed papers, **must** be submitted to Chambers with all exhibits properly tabbed. Working hard copies **must** be

received by the Court **prior to the return date or any adjourned date in order to be considered.** The E-filing confirmation notice must be annexed to the back of the litigation back of your working hard copy **facing out**.

7. On **non e-filed cases**, courtesy or working copies should **not** be submitted, unless requested by the Court. All motion papers **must** be received **no later than 9:30 a.m.** on the return date of the motion.

8. No sur-reply affidavits, affirmations, memoranda of law or letters will be accepted or considered by the Court after the return date of any motion or cross-motion without leave of the Court.

9. Reply papers are permitted on all motions, cross-motions, orders to show cause and petitions.

10. Failure to appear at a motion conference may result in denial of any motion made by the non-appearing party and/or the granting of any motion on default when the opposing party fails to appear.

11. In the event a case is already scheduled for a conference with this Part, counsel should endeavor to coincide the return date of a motion, where feasible, with the previously scheduled conference. Where a motion is previously filed, any subsequent movants shall endeavor to coincide the return date(s) of any such subsequently filed motions, where possible.

12. **All exhibits must be clearly tabbed;** no exhibits shall be double sided; and no mini-scripts are accepted. Motions not consistent with this rule will be rejected. Opposition papers need not duplicate deposition transcripts or voluminous medical records annexed to the moving papers and may refer to the relevant exhibit cited by the movant.

13. All submissions shall be fully and securely bound and shall have a litigation back attached thereto. All motion papers greater than two (2") inches thick must be split into multiple volumes and secured by heavy duty staples or ACCO fasteners and clearly marked with a copy of the Notice of Motion on each volume (e.g. 1 of 3, 2 of 3, 3 of 3). All Orders to Show Cause shall be ACCO fastened on the top and **not** the bottom of the papers

14. When submitting proposed orders or judgments in connection with a motion, the same shall be submitted as a separately bound document.

15. Counsel must advise the Court, in writing, and as soon as practicable, if any submitted or unsubmitted motion, or portion thereof, has been resolved, withdrawn, or rendered moot because the case is settled, or an issue is otherwise resolved.

IV. COURT APPEARANCES

A. General Procedure

1. All conferences and motion appearances are scheduled at 9:30 a.m. Please be prompt. Defaults in appearance will not be taken on the record until after 10:30 a.m.

2. Attorneys and *pro se* litigants must check in with the Court Officer or Part Clerk, if one is available. If the Courtroom is unavailable, counsel must call Chambers

from the Fourth Floor Security Desk **only when all parties are present**. All parties must fully and legibly complete a sign-in sheet and note thereon whether counsel is in another Part and provide a cell phone number to be reached.

3. All conferences will be held in the order in which **all** attorneys and/or *pro se* litigants have checked in with the Part Clerk and completed a sign-in sheet.

4. Counsel who appear in the Part must be fully familiar with the case and fully authorized to enter into agreements, both substantive and procedural, on behalf of their clients, including those appearing "of counsel" or "per diem".

5. Failure to appear at the call of any calendar may result in an inquest or dismissal pursuant to 22 NYCRR § 202.27.

B. Compliance Conferences

1. The Compliance Conference date will be set down in the PC Order and must be held no later than 60 days before the date scheduled for the completion of discovery pursuant to 22 NYCRR § 202.19(b)(3).

2. In no event shall the Compliance Conference be held later than the deadline set forth in the Standards & Goals timetable accompanying the PC Order (provided by DCM). Adjournments will only be granted for compelling reasons. No Compliance Conference may be adjourned without prior approval of the Court.

C. Certification Conferences

1. A Certification Conference will be held no later than 90 days prior to the deadline by which a Note of Issue must be filed. In no event shall the Certification Conference be held later than the deadline set forth in the Standards & Goals timetable accompanying the PC Order (provided by DCM).

2. Requests to change a discovery track fixed in the timetable will only be granted for compelling reasons and where counsel have endeavored to complete discovery in a timely fashion.

V. STAYS OR TEMPORARY RESTRAINING ORDERS (TRO)

1. If an Order to Show Cause seeking any injunctive relief, including a stay or TRO, is to be submitted, it must comply with Uniform Rule § 202.7 (f). The movant shall first consult with Chambers as to a convenient date and time for counsel to appear with regard to the compliance with Uniform Rule § 202.7 (f).

2. At any conference of the matter, if an Order to Show Cause seeking any injunctive relief, including a stay or TRO, is submitted or pending, counsel shall advise the Court of the pendency of such application, the return date of such Order to Show Cause, the relief sought and whether an immediate hearing is sought.

3. Requests to continue or vacate a stay or TRO beyond the return date of the motion shall be made on the call of the motion calendar. Failure to apply for such extension shall result in the automatic *vacatur* of the stay or TRO, unless the Order to Show Cause provides otherwise.

VI. NOTICE OF CHANGE IN CIRCUMSTANCES: COUNSEL'S RESPONSIBILITY

A. Pursuant to 22 NYCRR § 202.28 (b), if an action is discontinued, or wholly or partially settled by stipulation pursuant to CPLR § 2104, or a motion has become wholly or partially moot, or a party has died, become a debtor in bankruptcy or is in active military duty, the parties shall promptly notify the Court in writing of such an event, with appropriate documentation where necessary.

B. It is the responsibility of counsel to apprise the Court of an Appellate Division decision or a change in circumstance referenced in **Rule VI. A.** above that affects the status of any case assigned to this Part.

C. Any party or attorney who, without good cause shown, fails to promptly notify the Court consistent with the above requirements may be subject to the imposition of sanctions.

VII. COMMUNICATION WITH CHAMBERS

A. Inquiries:

1. In all communications with Chambers by letter or email, the title of the action, full names of the parties and index number shall be set forth, with copies simultaneously delivered to all counsel. ***Ex parte* communications will be disregarded.**
2. Copies of correspondence between counsel shall not be sent to the Court unless otherwise directed. Such correspondence shall be disregarded by the Court.
3. The Court will not accept telefax communications or submissions without prior permission.
4. The court shall not accept *ex parte* telephone communications on substantive issues.
5. E-mail correspondence with Chambers staff is not permitted unless prior authorization is obtained.
6. Chambers shall not be contacted during the daily lunch break which is from 12:45 p.m. to 2:00 p.m.

VIII. SANCTIONS

A. The Court will not consider a sanctions application unless the moving party first seeks withdrawal or discontinuation of the offending act or action or demands required or necessary action which is refused. Proof of such request must be made a part of the sanctions application.

IX. TRIAL RULES

A. A Note of Issue is to be filed within 90 days after certification, unless otherwise specified in the Certification Order. Counsel for plaintiff shall pay the requisite fee with the County Clerk and ensure that the Note of Issue is submitted to the Clerk who will then assign a calendar number.

B. At the first appearance of all cases assigned to this Part for trial, a pre-trial conference will be held. At the conference, the Court shall provide for the

submission or scheduling of the following:

1. *In Limine* applications: Any party intending to make a motion in limine shall submit a brief written affirmation setting forth the nature of the application and any supporting statutory or case law. The party shall furnish the Court with an original and two (2) copies and provide counsel for all parties with a copy. There shall be a separate affirmation for each motion in limine;

2. Pre-trial memoranda providing the Court with cited case law to be considered by the Court.

3. A courtesy copy of each exhibit intended to be introduced into evidence at trial for the Court and each counsel. All exhibits shall be tabbed or included in a binder for easy reference;

4. All trial exhibits, whether the parties stipulate to admit them into evidence to the Court or not, shall be pre-marked by the Court Reporter. As to those exhibits marked for identification, the Court will address their admissibility *In limine* or during the trial, as may be appropriate;

5. A list of proposed witnesses for the Court's information;

6. A list of all expert witnesses with copies of their reports;

7. Marked pleadings, to be submitted before opening statements;

8. A statement of stipulated facts. [Parties are encouraged to stipulate to facts and/or exhibits];

9. Any written requests for jury instructions. Charges from the Pattern Jury Instructions may be identified by number without necessity of reproduction, unless a modification of the standard charge is requested, in which case the modification is to be highlighted;

10. Any proposed verdict sheets;

11. If deposition transcripts are to be utilized, a copy of the witness' deposition transcript should be available to the Court. No mini-scripts are accepted;

12. Objections should be stated without argument except to simply state the ground therefor, e.g., hearsay, relevance, etc. If further argument is appropriate, it will be invited by the court;

13. Trial counsel are responsible for redactions of all evidence;

14. Trials will be conducted on a continual daily basis until conclusion. As such, no adjournments or delays during trial will be accepted unless exigent circumstances exist;

15. Counsel is required to have all proof in admissible form for inquests;

16. Trial counsel are responsible for taking back all exhibits, pleadings, transcripts, etc., 30 days after the end of a trial, unless, in the case of non-jury trials the Court reserves its decision. In all cases, exhibits, pleadings, transcripts, etc. not retrieved within sixty (60) days from the conclusion of a jury trial or within sixty (60) days after the Court renders a decision in a non-jury trial, shall be disposed of.

C. **Malpractice "Departures"** – in jury trials involving claims of professional negligence, no later than the next trial session after a party "rests", or such other time as the Court may direct, each party-plaintiff shall furnish the Court and all counsel with a list of proposed departures from the standards of applicable care which that party asserts were testified to by its expert(s) or other witnesses. Where such testimony has been transcribed, page references are required.

X. MISCELLANEOUS

A. **Conferences/Trial** – If there are any outstanding motions (submitted or pending) at the time of the conference/trial, the Principal Law Clerk and/or Judge must be so informed at the start of such conference/trial; the submission date must be provided by counsel.

B. **Proposed Stipulations** – Any stipulation to be "So-Ordered" by the Court must contain original signatures by all parties and/or counsel, which may be submitted in counterparts. Copies/faxes **shall not** be deemed originals.

C. **Infant's Compromise Orders**

1. All applications for Court approval of a proposed compromise of an infant's claim must be submitted through the Infant's Compromise Clerk ("ICC") (telephone no. 516-493-3049).

2. A proposed Infant's Compromise Order must include the full name of the infant-plaintiff and reference therein the following: **"Confidential personal information is included in this Order upon the Court's finding that good cause exists pursuant to 22 NYCRR § 202.5 [e][2], in that the inclusion of the full name and date of birth of the minor, as well as related information, is material and necessary to effectuate the terms of this Order".**

3. The infant's compromise paperwork submitted to the ICC must include, *inter alia*, (i) a medical report/affidavit indicating whether the injured infant plaintiff has fully recovered, and if not, the nature and extent of the injuries and anticipated future treatment, if any, and related medical records where applicable; (ii) proof of settlement of the infant's claim from defense counsel, in writing; and (iii) defense counsel's waiver of appearance at the Infant's Compromise Hearing, in writing. Such paperwork must also otherwise comply with all applicable rules concerning the compromise of an infant's claim.

D. **Sealing Orders** – pursuant to 22 NYCRR § 216.1, no case or portion thereof shall be sealed unless good cause has been adequately shown.

E. **Attorneys of Record** - Attorneys who have appeared in the matter are to make all appearances until they are relieved by Court Order or a fully executed Consent to Change Attorney form has been filed with Part 8 and with the Clerk of the Court.

F. **Staff** - The Court functions through the aid and assistance of the courtroom and Chambers staff. They are to be treated in a dignified, civil and professional manner.

G. **Professionalism** - All counsel are expected to treat each other and litigants in a civil and professional manner in accordance with 22 NYCRR § 700.4, the Rules of Professional Conduct, and the NYS Standards of Civility.

BIOGRAPHICAL-JUDGE TRICIA M. FERRELL

Tricia M. Ferrell was appointed as a Judge of the Nassau County District Court in March 2008. She was subsequently elected that same year to serve a six-year term and re-elected in 2014. The Judge adjudicates criminal matters and previously presided over the Driving While Intoxicated Court as well as the Domestic Violence Court. Presently, Judge Ferrell handles cases assigned to a criminal court part designated for defendants with privately retained counsel.

Prior to sitting on the bench, Judge Ferrell was employed in 2006, as the Director of Compliance for Nassau County, where she managed the internal controls for various departments countywide. The Judge also formerly held the position of Deputy Village Attorney, where she prosecuted cases for the Incorporated Village of Hempstead. Judge Ferrell's legal career began as an eager Nassau County Assistant District Attorney in 1998, under the Honorable Denis Dillon, where she prosecuted both misdemeanor and felony cases.

Judge Ferrell is actively involved in the legal arena and holds membership in the Nassau County Criminal Courts Bar Association where she was awarded the Norman F. Lent Memorial Award for Distinguished Jurist in March of this year. She's also a member of the Women's Bar Association of the State of New York and the Nassau County Women's Bar Association, where she presented for its *Chamber Chat Series.* As a Nassau County Bar Association member, she is a longtime and energetic youth mentor, serving the Uniondale middle school population and she was a Co-Chair of the Bar Association's Judicial Section. She is also a member of the Theodore Roosevelt Inn of Court, the Amistad Long Island Black Bar Association, the New York State Bar Association, the New York State District Court Judges Association and the Nassau County District Court Judges Association, where she formerly held the office of secretary.

LEONARD D. STEINMAN

181 Glen Avenue, Sea Cliff, New York 11579
(516) 637-0440 (cell)/lensteinman@gmail.com

CURRENT EMPLOYMENT

Justice, Supreme Court of the State of New York — 1/13 - Present
Nassau County Supreme Court
100 Supreme Court Drive, Mineola, NY 11501
(516) 493-3252; lsteinman@nycourts.gov

PRIOR EMPLOYMENT

Blank Rome LLP (formerly Tenzer Greenblatt LLP) — 9/91 - 12/12
New York, NY

Litigation partner. "New York Metro Super Lawyer" 2011, 2012.

Litigated commercial, real estate and trust and estate disputes, securities and consumer fraud class-actions, SEC and FTC investigations and intellectual property disputes.

Member of the firm's national litigation leadership team and co-managed 30 litigators in the firm's Manhattan office, with responsibilities for associate hiring, terminations, performance evaluations, assignments and leadership of biweekly department meetings.

Summit Rovins & Feldesman, Litigation Associate — 4/88 - 9/91
New York, NY

Rubin Baum Levin Constant & Friedman, Litigation Associate — 11/85 - 4/88
New York, NY

Montclare & Guay, Litigation Associate — 8/84 - 11/85
New York, NY

COMMUNITY SERVICE AND AFFILIATIONS

Theodore Roosevelt Inn of Court 7/16 - present
President, 9/18 – present.

Nassau County Bar Association 1/13 – present
Co-chair, Judicial Section, 9/13 – 9/15

Nassau County Interim Finance Authority (NIFA) 6/10 - 12/12
Board Member. Appointed by Governor to serve on the seven-member (then six) board of NIFA, a state control board that oversees Nassau County's budget of approximately $2.8 billion. NIFA exercises control over Nassau County's financial planning, spending and borrowing.

State University of New York, College at Old Westbury 2008 - 2012
Member of the College Council.

Nassau County Industrial Development Agency 2010
Chairman of the Board. Chairman of New York public benefit corporation that provides tax incentives and financial assistance to businesses to entice them to relocate or remain in Nassau County.

EDUCATION

Albany Law School of Union University 8/81 - 5/84
J.D., *cum laude*. Rank: 17/224
Member: Albany Law Review; Justinian Honor Society

Boston University, College of Liberal Arts 8/77 - 5/81
Bachelor of Arts

PUBLICATIONS

Note, Liberal Contribution Rules in New York: In The Plaintiffs' Best Interests, 49 Alb. L. Rev. 244 (1984)

"Foreign Sales Mean Increased Risk for Directors," Executive Counsel, Vol. 5 No. 3 (May/June 2008).

BAR ADMISSIONS

State of New York, 1985
United States District Court, Southern District of New York, 1985
United States District Court, Eastern District of New York, 1985
United States Court of Appeals, Second Circuit, 1989
United States Supreme Court, 1998
United States Tax Court, 2005

Andrea Phoenix is a Nassau County District Court Judge in Hempstead, New York. She is also an acting Nassau County Court Judge. She was re-elected to a third term in 2018. The judge presides over two problem-solving courts. These include the Drug Treatment Court and the Mental Health Court. She adjudicates both misdemeanor and felony cases. Prior to taking the bench, Judge Phoenix was an attorney in private practice, and concentrated in the area of Family Law. She was an active member of the New York State Law Guardian Panel.

Judge Phoenix received her undergraduate degree from Hampton University and her graduate degree from The Ohio State University. She earned her law degree from Maurice A. Deane School of Law at Hofstra University, where she was Editor-in-Chief of the *Environmental Law Digest* and at graduation she received the Service to the Law School Award.

Judge Phoenix is past president of the Women=s Bar Association of the State of New York, the Nassau County Women=s Bar Association, and the New York Chapter of the Association of Family and Conciliation Courts (AAFCC-NY@). Notably, she was the first African-American president of all three organizations. Her other professional affiliations include: the Nassau County Bar Association – We Care Advisory Board; the Theodore Roosevelt American Inn of Court – Executive Committee; the Nassau Lawyers' Association of Long Island – Board of Directors; Amistad Long Island Black Bar Association; Jewish Lawyers Association of Nassau County – Associate Member; Nassau County Criminal Courts Bar Association; the Long Island Hispanic Bar Association, and the Nassau Community College Paralegal Advisory Board. Judge Phoenix is appointed to the New York State Unified Court System Family Violence Task Force and most recently she became a member of the Nassau County Family Court Children's Center Advisory Committee. Over the years she has been active in many other community and public service organizations.

Judge Phoenix has devoted much time to mentoring women and youth in her community. Her other affiliations include: Antioch Baptist Church of Hempstead – Board of Trustees; The National Association for the Advancement of Colored People - Hempstead Branch, Nassau Alumnae Chapter of Delta Sigma Theta Sorority, Inc. and the Long Island Chapter of the Links, Incorporated, where she serves as Facet Chair of International Trends and Services.

Judge Phoenix has received various awards and accolades because of her organizational involvement. She is the first recipient of both the Nassau County Women's Bar Association's Bessie Ray Geffner, Esq. Memorial Award and the Virginia C. Duncombe Scholarship Award. She also received the organization's Rona Seider Award in 2009. Operation Get Ahead, Inc. of Hempstead, New York, presented her with their Trailblazer and Rosa Parks Awards, and its Martin Luther King, Jr. Beacon of Hope Award. In 2015, Judge Phoenix was honored by the County, receiving recognition at its Black History Month Celebration for Contributions of African Americans in Nassau County Government and in 2016 she was also honored by the East Nassau Chapter of the League of Women Voters. In March 2017, she received the Women on the Move Award from Faith Baptist Church of Hempstead, New York and the Trailblazing Woman Award from the Long Island Caribbean American Association, Inc. In July 2017, the Judge Received the Stephen Gassman Award from the Nassau County Bar Association – We CARE Advisory Board. Most recently, in 2018, Judge Phoenix was honored by Maurice A. Deane School of Law at Hofstra University and was one of the recipients of the Distinguished Alumni on the Bench Award. Judge Phoenix is listed in *Who=s Who in Black New York City.*

Judge Elizabeth Fox-McDonough
District Court Judge

On November 7, 2017, Judge Elizabeth Fox-McDonough was elected to the position of Nassau County District Court Judge. As the elected Judge for the First District of Nassau County, Judge Fox-McDonough is also the President of the Board of Judges in District Court. In January of 2019, Judge Fox-McDonough was elevated to the position of Supervising Judge of District Court. The District Court is comprised of both Criminal and Civil Courts with a total of twenty-six Judges and other non-judicial staff of three hundred individuals. Judge Fox-McDonough coordinates the daily operation of the District Court with the Court staff so that the District Court continues to serve the public and professionals who practice in the Court in an exemplary manner. Judge Fox-McDonough also presides over the Expedited Trial Part which coordinates the expeditious resolution of cases that have been pending in the criminal misdemeanor parts for over 300 days and has conducted pre-trial hearings and jury trials.

Judge Fox-McDonough was born in Queens County and grew up as the youngest of six children. Her father, now deceased, was a New York City Fire Department Captain. Her mother, now also deceased, was a parochial school librarian.Judge Fox-McDonough attended St John's University where she majored in Political Science and graduated Cum Laude with a Bachelor of Arts Degree in 1984. Judge Fox-McDonough then attended St. John's University Law School graduating with a Juris Doctor in 1987.

Judge Fox-McDonough began her legal career in the Queens County District Attorney's Office where she went on to have a ten-year career as a prosecutor. She took on the challenging role as a prosecutor in the Special Victim's Bureau where she was responsible for the prosecution of sex crimes, crimes against children and the elderly and domestic violence matters. Judge Fox-McDonough was also a Senior Assistant District Attorney in the Appeals Bureau where she handled a vast number of the appeals of serious felony convictions. As a talented appellate attorney, she argued an extensive number of cases before the New York State and Federal Appellate Courts including the New York State Court of Appeals. Judge Fox-McDonough was elevated to the position of Supervisor of the Domestic Violence Unit where she supervised the Assistant District Attorneys responsible for the prosecution of the domestic violence cases in the Queens Criminal Court. Judge Fox-McDonough developed a coordinated prosecution model that included victim advocate agencies and treatment programs. In addition, Judge Fox-McDonough gave lectures and training to the members of the New York City Police Department regarding the gathering of evidence in domestic violence matters.

In 1997, Judge Fox- McDonough became a Principal Law Clerk to Justice Arthur Cooperman in the Criminal Term of the Queens Supreme Court. Judge Fox-McDonough was involved in an extensive number of criminal trials involving complex legal issues and high-profile cases. Judge Fox-McDonough went on to work for Judge Barry Kron of the Queens Supreme Court as a Law Clerk. where she was responsible for the coordination and expediting of criminal cases in the Criminal Term of the Queens Supreme Court. including the assignment of motions and the prompt scheduling of litigation.

In 2014, Judge Fox-McDonough served as the Principal Law Clerk to Nassau County Administrative Judge, Justice Norman St. George, who was then the Supervising Judge of the Nassau County District Court. In that role, she gained significant knowledge of all the aspects of the operation of District Court.

HONORABLE ELIZABETH FOX-MCDONOUGH
DISTRICT COURT JUDGE
99 Main Street
Hempstead, New York 11550
(516)493-4285

EDUCATION

ST. JOHN'S UNIVERSITY SCHOOL OF LAW 1987, JURIS DOCTOR
ST JOHN'S UNIVERSITY 1984, BACHELOR OF ARTS, CUM LAUDE

PROFESSIONAL EXPERIENCE:

JANUARY 2018 TO PRESENT
SUPERVISING JUDGE, NASSAU COUNTY DISTRICT COURT
Coordinates the daily operation of District Court which is comprised of both Criminal and Civil courts with a total of twenty-six Judges and non-judicial staff of three hundred individuals. Facilitates the interaction of the District Court with outside agencies that work with the various Civil and Criminal Courts Parts. Presides over the Expedited Trial Part which seeks the expeditious resolution of misdemeanor cases that have been pending in the Criminal Parts.

JANUARY 2018 TO DECEMBER 2018
NASSAU COUNTY DISTRICT COURT JUDGE, PRESIDENT OF THE BOARD OF JUDGES
Coordinates and Presides over the Expedited Trial Part for all misdemeanor cases that have been pending over 300 days. Presides in the Arraignment Parts, the Hearing part, the Town Court Part and the Smalls Claims Part. Conduct pre-trial hearings and jury trials of misdemeanor cases.

JULY 2014 TO DECEMBER 2017
PRINCIPAL LAW CLERK TO JUSTICE NORMAN ST. GEORGE, SUPERVISING JUDGE OF NASSAU COUNTY DISTRICT COURT
Responsible for facilitating the daily operations of the District Court including the assignment and coordination of litigation in all of the Civil and Criminal Court Parts. Manage the weekly scheduling of cases and litigation from the Expedited Trial Part. Researched legal issues for motions and trials pending before the Court. Responsible for writing decisions and memorandums of law for the Court that include legal issues that arise concerning the operation of the District Court.

APRIL 2006 TO JUNE 2014
COURT ATTORNEY TO JUSTICE BARRY KRON
QUEENS SUPREME COURT, CRIMINAL TERM
Responsible for the coordination and expediting of criminal cases in the TAP part of the Queens Supreme Court including the assignment of motions and the prompt scheduling of litigation. Research of complex legal issues for motions pending before the Court including high profile litigation. Responsible for writing decisions and memorandums of law for the Court.

SEPTEMBER 2004 TO MARCH 2006
PROSECUTOR IN THE NASSAU COUNTY TRAFFIC AND PARKING VIOLATIONS AGENCY
Responsible for the administration of traffic violations, tickets and trials of contested matters.

JUNE 1997 TO SEPTEMBER 2001
LAW SECRETARY TO JUSTICE ARTHUR COOPERMAN
QUEENS SUPREME COURT, CRIMINAL TERM
Research of legal issues for motions and trials pending before the court. Responsible for writing decisions and memorandums of law for the Court involving complex legal issues and high-profile matters. Coordinating and scheduling cases for the Court calendar.

AUGUST 1987 TO JUNE 1997
ASSISTANT DISTRICT ATTORNEY
QUEENS COUNTY DISTRICT ATTORNEY'S OFFICE
Supervisor of the Domestic Violence Unit- Supervising the Assistant District attorneys responsible for the prosecution of domestic violence cases in Criminal Court.
Senior Assistant District Attorney in the Appeals Bureau- Responsible for researching and writing responses for appeals of felony convictions and arguing before the New York State and Federal Appellate Courts including the New York State Court of Appeals. Special Legal Advisor to the Special Victims Bureau.
Prosecutor in the Special Victims Bureau- Responsible for the prosecution of sex crimes and crimes against children and the elderly.

<u>TEACHING POSITIONS:</u>
JANUARY 2013 TO JUNE 2014
ADJUNCT PROFESSOR, MOLLOY COLLEGE
Legal Research- Responsible for teaching students effective research methods by use of the library and computer research services and preparing a memorandum of law with the use of research.

JANUARY 2003 TO MAY 2004
ADJUNCT PROFESSOR, NASSAU COUNTY COMMUNITY COLLEGE
Legal Writing and Analysis- Responsible for teaching students the effective tools in how to draft letters, briefs, memorandums and motions used in the practice of law.
Legal Research and Writing- Responsible for teaching students effective research methods by the use of the library and computer legal research services and preparing a memorandum of law with use of the research.

SEPTEMBER 1999 TO MAY 2004
ADJUNCT PROFESSOR, QUEENS COLLEGE
Legal Writing Class- Responsible for the instruction in the drafting of legal documents used in legal practice.
Legal Research Class- Responsible for teaching effective research skills in the use of the library and legal research computer services.
Contracts Class- Responsible for teaching the legal concepts involved in the making of a contract, the enforcement of a contract and contract litigation.

ASSOCIATIONS:
Nassau County Bar Association
Nassau County Women's Bar Association
Nassau County Catholic Lawyers Guild
Nassau County Inns of Court
Queens County Catholic Lawyers Guild
Irish Americans in Government
Queens County District Attorneys Association
NAACP

THE NATURE OF THE JUDICIAL PROCESS

By Benjamin N. Cardozo (1921)

....The first thing [a judge] does is to compare the case before him with the precedents, whether stored in his mind or hidden in the books.....Almost invariably, the first step is to examine and compare them. If they are plain and to the point, there may be need of nothing more. Stare decisis is at least the everyday working rule of our law....[T]he work of deciding cases in accordance with precedents that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute. It is a process of search, comparison, and little more. Some judges seldom get beyond that process in any case. Their notion of duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins.

[T]he problem which confronts the judge is in reality a twofold one: he must first extract from the precedents the underlying principle, the *ratio decidendi*; he must then determine the path or direction along which the principle is to move and develop, if it is not to whither and die.

The first branch of the problem is the one to which we are accustomed to address ourselves more consciously than to the other. Cases do not unfold their principles for the asking. They yield up their kernel slowly and painfully. The instance cannot lead to a generalization till we know it as it is. That in itself is no easy task. For the thing adjudged comes to oftentimes swathed in obscuring dicta, which must be stripped off and cast aside....Let us assume...that the principle, latent within it, has been skillfully extracted and accurately stated. Only half or less than half of the work has yet been done. The problem

remains to fix the bounds and the tendencies of development and growth, to set the directive force in motion along the right path at the parting of the ways.

FAIRNESS_____**CONSISTENCY**

The law is often in conflict between the principles of fairness and consistency and where on the line between the two a case will fall.

December 08, 2017

ABA issues ethical guidance on when judges should use the internet for independent factual research

CHICAGO, Dec. 8, 2017 — The American Bar Association Standing Committee on Ethics and Professional Responsibility has issued Formal Opinion 478 that provides the nation's judicial branch guidance related to the ethical boundaries of independent factual research on the internet.

The guidance is consistent with the ABA Model Code of Judicial Conduct, but notes that judicial notice is governed by the law of evidence in each jurisdiction. The opinion draws a bright-line distinction between independent investigation of "adjudicative facts" and research of "legislative facts" of law and policy. Formal Opinion 478 also provides guidance on internet research by judges of the lawyers and the parties involved in the case.

"Stated simply, a judge should not gather adjudicative facts from any source on the Internet unless the information is subject to proper judicial notice," Formal Opinion 478 said. "Further ... judges should not use the Internet for independent fact-gathering related to a pending or impending matter where the parties can easily be asked to research or provide the information. The same is true of the activities or characteristics of the litigants or other participants in the matter."

The opinion provides five hypothetical situations, and provides an analysis of each and how they might be handled by a judge.

The ABA Standing Committee on Ethics and Professional Responsibility periodically issues ethics opinions to advise lawyers, courts and the public in interpreting and applying ABA model ethics rules to specific issues of legal practice, client-lawyer relationships and judicial behavior.

Formal Opinion 478 and previous ABA ethics opinions are available on the ABA Center for Professional Responsibility website under "Latest Ethics Opinions."

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 478 **December 8, 2017**

Independent Factual Research by Judges Via the Internet

Easy access to a vast amount of information available on the Internet exposes judges to potential ethical problems. Judges risk violating the Model Code of Judicial Conduct by searching the Internet for information related to participants or facts in a proceeding. Independent investigation of adjudicative facts generally is prohibited unless the information is properly subject to judicial notice. The restriction on independent investigation includes individuals subject to the judge's direction and control. [1]

I. Introduction

The Internet provides immediate access to an unprecedented amount of information. Internet searches offer a vast array of information on endless topics. Social media sites provide extensive information that users share about themselves and others. Information discovered on the Internet may be highly educational and as useful to judges as judicial seminars and books. But information gathered from an Internet search may not be accurate. It may be biased, unreliable, or false. And, whether truthful or not, information discovered by a judge via the Internet that does not qualify for judicial notice and is not disclosed to the parties is untested by the adversary process.[2]

To help the judiciary navigate the hazards of Internet research, this opinion reviews the ethical parameters under the ABA Model Code of Judicial Conduct for conducting on-line independent fact-finding not tested by the adversary system.[3]

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[1] This opinion is based on the ABA Model Code of Judicial Conduct as amended by the ABA House of Delegates through August 2010. The laws, court rules, regulations, rules of professional and judicial conduct, opinions promulgated in individual jurisdictions and the Code of Conduct for United States Judges may be controlling. In addition, standards for judicial notice are beyond the scope of this opinion and discussed throughout only in general terms.

[2] As used in this opinion, the term "judge" refers to "anyone who is authorized to perform judicial functions, including an officer such as a justice of the peace, magistrate, court commissioner, special master, referee, or member of the administrative law judiciary." *See* MODEL CODE OF JUDICIAL CONDUCT, Application § I(B)(2011).

[3] Fact gathering over the Internet may occur, for example, via (i) search engines like Google, Yahoo, Bing, Duck Duck Go and others, or (ii) electronic social media that is interactive like Facebook, Twitter, or Instagram. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 (2013), *Judge's Use of Electronic Social Networking Media* (" 'electronic social media' . . . refer[s] to internet-based electronic social networking sites that require an individual to affirmatively join and accept or reject connection with particular persons") (footnote omitted). This opinion covers

II. The ABA Model Code Provisions

The Preamble to the ABA Model Code of Judicial Conduct emphasizes that "[T]he United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society."[4] This system requires that judges' decisions be based upon evidence presented on the record or in open court, and available to all parties. Except for evidence properly subject to judicial notice, a defining feature of the judge's role in an adversarial system is that the judge will "consider only the evidence presented by the parties."[5] Judges must be careful not to undermine this hallmark principle of judicial impartiality, or substitute for the time-honored role of the neutral and detached magistrate someone who combines the roles of advocate, witness, and judge.

A. *Ex Parte* Communications

Canon 2 of the Model Code states that a judge shall perform all duties of judicial office impartially, competently, and diligently.[6] An independent and impartial judiciary ensures the right of litigants to a fair trial. Impartiality is essential for the proper discharge of the judicial function.

Improper *ex parte* or "one-sided" communications undermine the independence and impartiality of the judiciary. Such communications create the appearance of bias or partiality on the part of the judge and, therefore, are precluded under the Model Code.

Model Rule 2.9(A) bars *ex parte* communications except in limited circumstances.[7] It provides: "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers,

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all types of Internet searching. In addition, while the opinion addresses independent research by judges on the Internet, some of the principles that are discussed also apply to more traditional research resources.

[4] MODEL CODE OF JUDICIAL CONDUCT, Preamble [1] (2011).

[5] CHARLES G. GEYH & W. WILLIAM HODES, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 40 (2009).

[6] MODEL CODE OF JUDICIAL CONDUCT, Canon 2, R. 2.2 (a judge shall "perform all duties of judicial office fairly and impartially"); Rule 2.5(A) ("a judge shall perform judicial and administrative duties, competently and diligently").

[7] Certain *ex parte* communications are permitted. The Model Code permits *ex parte* communications where they are permitted by law, such as in a settlement conference or certain applications for temporary equitable relief, or to address scheduling or administrative issues, or where the parties consent to permit *ex parte* communication, such as in an *in camera* review. A judge may discuss the case with court personnel. Judges may consult among or with other judges, court staff, and law clerks, *see* MODEL CODE OF JUDICIAL CONDUCT R. 2.9(A)(1)-(5) (2011); *id.* at cmt. [5], but as noted below, judges may not have others conduct research that the judge may not conduct.

concerning a pending or impending matter."[8] The ban on *ex parte* communication ensures that the judge will review and make rulings based only on the facts and evidence presented in the case.

B. Independent Fact Research Precluded

The Model Code's rule on *ex parte* communication includes a provision that specifically addresses independent investigation of facts. Model Rule 2.9(C) states: "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." Comment [6] to Rule 2.9 clarifies that the "prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic."[9]

Importantly, Rule 2.9(C) does not preclude legal research. Rule 2.9(C) carefully proscribes independent research of "facts." Judges may conduct legal research beyond the cases and authorities cited or provided by counsel.[10]

Rule 2.9(C) of the Model Code was adopted in 2007 and represents a significant clarification of the independent investigation proscription in the Internet age. Prior to 2007, the Model Code stated the general rule against *ex parte* communications and identified certain exceptions. The 1990 Model Code addressed independent investigation in a brief comment: "A judge must not independently investigate facts in a case and must consider only the evidence

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[8] The Model Code of Judicial Conduct defines "impending matter" as "a matter that is imminent or expected to occur in the near future." MODEL CODE OF JUDICIAL CONDUCT, Terminology (2011) (references omitted). A "pending matter" is "a matter that has commenced. A matter continues to be pending through any appellate process until final disposition." *Id.* (references omitted).

[9] Thirty-one states have adopted Model Rule 2.9(C) or language substantially similar in their judicial codes. There is no similar provision in the Code of Conduct for United States Judges. For a discussion of independent fact-finding by state and federal judges generally see Hon. David B. Saxe, *"Toxic" Judicial Research*, N.Y. ST. B.J. 36 (Sept. 2015); Elizabeth F. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LITIG. 131 (2008). For a discussion of whether federal judges may conduct independent research for purposes of obtaining what they consider to be "background" information if the information does not form the basis for a decision see Rowe v. Gibson, 798 F.3d 622 (7th Cir. 2015). For state-by-state adoption of Rule 2.9(C) see ABA, *CPR Policy Implementation Committee: Comparison of ABA Model Judicial Code and State Variations, Rule 2.9: Ex Parte Communication* (2016), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_9.authcheckdam.pdf (last visited Nov. 21, 2017).

[10] CHARLES G. GEYH, JAMES J. ALFINI, STEVEN LUBET & JEFFREY M. SHAMAN, JUDICIAL CONDUCT AND ETHICS, §5.04 at 5-25 (5th ed. 2013) ("independent investigation of *the law* has always been permitted" (emphasis in original); judges are "experts on matters of law who are charged with the duty of declaring what the law is"); *see also id.* at 5-24 to 5-25 (further discussion of independent research by judges).

presented."[11] The 2007 change, moving the proscription from a comment to the text of the rule, was explained as follows:

> In the Commission's view . . . the judge's duty to consider only the evidence presented is a defining feature of the judge's role in an adversarial system and warrants explicit mention in the black letter Rules.[12]

C. Judicial Notice of Facts

Rule 2.9(C) of the Model Code permits a judge to consider facts "that may properly be judicially noticed. . . . [U]nlike most provisions of the Code of Judicial Conduct, Rule 2.9(C) incorporates a section of the law extrinsic to the Code; specifically, the law relating to judicial notice."[13]

For purposes of this opinion, Fed. R. Evid. 201(b)(1) and (2) contain an appropriate standard; they permit judicial notice of facts which are "not subject to reasonable dispute" because the facts are "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[14] Judicial notice is "founded on the assumption that certain factual determinations are not subject to reasonable dispute and thus may be appropriately resolved other than by the production of evidence before the trier of fact at trial."[15]

Fed. R. Evid. 201(a) governs judicial notice of "adjudicative facts," not "legislative facts."[16] As the 1972 Advisory Committee Note to Rule 201(a) explains, this "terminology was coined by Professor Kenneth Davis in his article *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404–407 (1942)." The Advisory Committee Note explains that "adjudicative facts" are those "which relate to the parties" or, more fully:

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[11] *See* MODEL CODE OF JUDICIAL CONDUCT, Canon 3B(7), cmt. (1990).
[12] ANNOTATED MODEL CODE OF JUDICIAL CONDUCT, 194 (3d ed. 2016) (citing Charles G. Geyh & W. William Hodes, REPORTERS' NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT, *supra* note 5).
[13] Minn. Bd. on Jud. Standards Advisory Op. 2016-2 (2016).
[14] A judge should be familiar with the jurisdiction's authority on judicial notice. The rules and process, even the definition of judicial notice, vary from jurisdiction to jurisdiction. Many state evidence codes track the language of Federal Rule of Evidence 201. *See* CAL. EVID. CODE ANN. § 452; FLA. ST. ANN. § 90.202; ILL. R. EVID. 201; PA. R. EVID. 201; TEX. R. EVID. R. 201. For a discussion of various state standards for judicial notice see O'Quinn v. Hall, 77 S.W.3d 438 (Tex. App. 2003); People v. Davis, 357 N.E.2d 792 (Ill. 1976); *In re* Cervera, 16 P.3d 176 n. 3 (2001); Maradie v. Maradie, 680 So. 2d 538 (Fla. Dist. Ct. App. 1996); Kinley v. Bierly, 876 A.2d 419 (Pa. Super. Ct. 2005).
[15] MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 201:1 (7th ed. 2015) [hereinafter "GRAHAM"].
[16] *See Federal Rules of Evidence Rule 201: Judicial Notice of Adjudicative Facts*, CORNELL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/rules/fre/rule_201 (last visited Nov. 27, 2017).

> 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 are conveniently called adjudicative facts. . . . . Stated in other terms, the adjudicative 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.[17]

"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."[18] Research of legislative facts does not raise the same due process concerns as research of adjudicative facts.

Procedural protections generally are built into taking judicial notice. Federal Rule of Evidence 201(e) provides that a party is entitled to be heard, either before or after a court takes judicial notice of a fact. If the court takes judicial notice of adjudicative facts, "[o]n timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard."[19]

D. Judge's Duty to Supervise

Model Rule 2.9(D) requires that judges take steps to prevent court staff and officials from performing improper independent investigations. The Rule provides: "A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control."[20]

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[17] KENNETH CULP DAVIS, 2 ADMINISTRATIVE LAW TREATISE 353 § 15.03 *Legislative and Adjudicative Facts* (West 1958).

[18] Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 245, n. 52 (5th Cir. 1976) (*quoting* Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-416 (1942)).

[19] FED. R. EVID. 201(e). *See also* Garner v. Louisiana, 368 U.S. 157, 173 (1961) (citation omitted) ("[U]nless an accused is informed at trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon. Moreover, there is no way by which an appellate court may review the facts and law of a case and intelligently decide whether the findings of the lower court are supported by the evidence where that evidence is unknown. Such an assumption would be a denial of due process.")

[20] MODEL CODE OF JUDICIAL CONDUCT R. 2.9(D) (2011).

III. Guidelines for Independent Factual Research by Judges Via the Internet

When deciding whether to independently investigate facts on the Internet, the judge should consider:

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.

III. Hypotheticals

The following hypotheticals are offered to provide guidance in determining whether independent research is permissible under the Model Code of Judicial Conduct.

Hypothetical #1: In a proceeding before the judge in a case involving overtime pay, defendant's counsel explains that the plaintiff could not have worked more than 40 hours per week because defendant's restaurant is in an "industrial area" and only open for breaks and lunch during the work-week and not on weekends. The judge is familiar with the area and skeptical of counsel's claims. The judge checks websites like Yelp and Google Maps, which list the restaurant as being open from 7 am to 10 pm, seven days each week. Does this search violate Rule 2.9(C) of the Model Code of Judicial Conduct?

Analysis #1: This search violates Rule 2.9(C) of the Model Code of Judicial Conduct because the restaurant's hours of operation are key to whether the plaintiff could prevail on a claim of unpaid overtime. The judge should ask the parties and their counsel to provide admissible evidence as to the restaurant's hours of operation.

Hypothetical #2: The judicial district in which the judge is assigned has many environmental contamination cases involving allegations that toxic chemicals have been released and have contaminated soil and groundwater. The judge is unfamiliar with this area of environmental law. Before a case is assigned to the judge, the judge reads online background information including articles. Does this action violate Rule 2.9(C) of the Model Code of Judicial Conduct?

Analysis #2: Judges may educate themselves by independent research about general topics of interest, even on topics that may come before the judge. General background learning on the Internet may be analogized to attending judicial seminars or reading books, so long as there is reason to believe the source is reliable. Even general subject-area research is not permissible, however, if the judge is acquiring information to make an adjudicative decision of material fact.[21]

Hypothetical #3: A social media-savvy lawyer just has been appointed to the bench. Before being appointed, this lawyer used social media to conduct extensive background research on potential jurors and opposing parties. The judge has been assigned to hear a complex, multi-party case involving lawyers from out of state. The judge wants to review the social media and websites of each of the parties and of the out-of-state lawyers to learn background information about the parties, to read the lawyers' writings, and to review a list of the lawyers' current and former clients. Does this action violate Rule 2.9(C) of the Model Code of Judicial Conduct?

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[21] *See, e.g.*, Cal. Judges Ass'n Jud. Ethics Comm. Advisory Op. 68 (2013) (judge may research basic principles of medicine or other disciplines prior to being assigned a matter; judge may not investigate relevant facts that are germane to the case); Minn. Bd. on Jud. Standards Advisory Op. 2016-2 at 2 (2016) (a judge is permitted to investigate non-adjudicative facts, including research on the general subject areas of cases coming before the judge, without informing the parties); N.Y. Advisory Comm. on Jud. Eth. Op. 13-32 (2013) (a judge may "consult a disinterested expert on the law with respect to a legal issue that is not currently before the judge, and is not the subject of a pending or impending proceeding with identifiable parties"). *Cf.* Model Rule 2.9(A) ("a judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter," except as permitted under the rules); Model Rule 2.9(A)(2) (exception permitting a judge to "obtain the written advice of a disinterested expert on the law applicable to a proceeding before the judge, if the judge gives advance notice to the parties of the person to be consulted and the subject matter of the advice to be solicited, and affords the parties a reasonable opportunity to object and respond to the notice and to the advice received").

Analysis #3: While the Model Code of Judicial Conduct does not prohibit a judge from personally participating in electronic social media ("ESM"),[22] a "judge must . . . avoid using any ESM site to obtain information regarding a matter before the judge in violation of Rule 2.9(C)."[23] On-line research to gather information about a juror or party in a pending or impending case is independent fact research that is prohibited by Model Rule 2.9(C).[24]

Gathering information about a lawyer is a closer question. The judge's information-gathering about a lawyer may be permissible if it is done merely to become familiar with counsel who appear before the court similar to how a judge may have, in the past reviewed a legal directory like Martindale Hubbell, or to determine whether the lawyer is authorized to practice in the jurisdiction. However, the judge's independent research about a lawyer is not permitted if it is done to affect the judge's weighing or considering adjudicative facts. If an otherwise permissible review results in a judge obtaining information about the existence or veracity of adjudicative facts in the matter, the judge should ask the parties to address the facts in the proceeding through evidentiary submissions.[25]

Hypothetical #4: A trial judge presiding over an owner's claim for insurance coverage heard testimony from competing experts about their investigation and opinions about the cause of a fire that destroyed plaintiff's property. While preparing findings of fact and conclusions of law the judge received summaries her law clerk created from journals and articles on the proper techniques and analysis for investigating fires of unknown origin. Does this action violate Rule 2.9(C) of the Model Code of Judicial Conduct?

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[22] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462 at 2 (2013).

[23] *Id.*

[24] A judge may perform independent research to determine if a lawyer is authorized to practice in the jurisdiction, however, as this is not an adjudicative fact.

[25] Two examples should suffice to make the point. The California Judges Association Judicial Ethics Committee Opinion 68 (2013) explained that a judge may not independently examine a state bar website to determine whether a potential juror is a lawyer to satisfy the judge's concern about that potential juror's veracity in responding to a question at *voir dire*. Instead the judge should "raise the concerns with counsel and ask them to engage in follow-up factual research with respect to this potential juror." In NYC Medical and Neurodiagnostic, P.C. v. Republic Western Insurance Co., 798 N.Y.S.2d 309 (Appellate Term 2nd and 11th Dist. 2004), the New York Appellate Term reversed the trial court's order denying the defendant insurer's motion to dismiss, in part because the trial judge conducted independent factual research on the Internet. The judge used the Internet to access websites, including the New York State Department of Insurance website, to investigate whether the defendant was licensed to do business in the state because the plaintiff did not provide adequate proof on this issue.

Analysis #4: By searching the Internet for journals and articles on investigating fires, the law clerk engaged in an improper independent factual investigation. The method and extent of the expert's investigation is an issue in dispute, *i.e.*, an adjudicative fact. The respective experts' investigative methods related directly to the weight and credibility given to testimony concerning an adjudicative fact, and fall within the prohibition in Rule 2.9(C). The trial court, therefore, could not properly take judicial notice of these facts as being "not subject to reasonable dispute" because they are neither "generally known within the trial court's jurisdiction" nor can they be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). If the summaries addressed material facts in dispute and the judge used the summaries to make findings of fact without allowing the parties to test the factual content of the summaries through evidentiary submissions, the judge violated Model Rule of Judicial Conduct 2.9(A) by considering *ex parte* information, and violated Rule 2.9(D) by failing to require that the law clerk act in a manner consistent with the judge's obligations under the Code.[26]

Hypothetical #5: To render an accurate decision in a pending matter, a judge needs to know whether a party is or was the subject of other judicial proceedings. The judge searches the court's electronic files of the other cases and the facts of each case, including sealed information. The search reveals several other cases, some pending and some concluded and some within and some outside the judge's jurisdiction. Does the judge's search violate Rule 2.9(C) of the Model Code of Judicial Conduct?

Analysis #5: Model Rule 2.9(C) does not prohibit consideration of "facts that may properly be judicial noticed." For example, a judge may take judicial notice of a guilty plea entered

[26] As noted previously, Model Rule 2.9(A) provides that "[a] judge shall not initiate, permit, or consider ex parte communications . . . ." Model Rule 2.9(D) provides, "A judge shall make reasonable efforts, including providing appropriate supervision, to ensure that this Rule is not violated by court staff, court officials, and others subject to the judge's direction and control."

Disqualification is an additional risk that may arise from independent research in a pending case. Model Rule 2.11(A)(1) states that a "judge shall disqualify" him or herself when the judge has "personal knowledge of facts that are in dispute in the proceeding." Knowledge is "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." MODEL RULES OF PROF'L CONDUCT, Terminology (2017). A judge likely has "personal knowledge" of facts that the judge has independently researched and found reliable. *See also* ANNOTATED MODEL CODE OF JUDICIAL CONDUCT (2d ed. 2011) ("Independent investigations by a judge . . . may provide a judge with personal knowledge of disputed facts, which is a special ground for judicial disqualification") (citations omitted).

before the judge in a previous case[27] and of other court records maintained by the clerk of the court in which the judge sits.[28] Court records can be judicially noticed for their factual existence, and the occurrence and timing of matters like hearings held and pleadings filed, but not for the truth of allegations or findings therein.[29] "[T]he law treats different portions of the files and records differently."[30] Standards of judicial notice require the judge to give notice and an opportunity to be heard either before or after taking judicial notice. Again, each judge should determine the law of judicial notice in the applicable jurisdiction.

Even when reviewing court records, however, a judge should be mindful of the following caution, from Illinois Judicial Ethics Opinion 2016-02:

> the particular judge's competence to navigate the computerized court records is essential . . . only facts which are 'not subject to reasonable dispute' are the proper subject of judicial notice. The judge must be confident that his or her review will lead to *accurate* information. For example, indexes of computerized court records are likely to contain individuals with the same name; is the inquiring judge capable of finding the appropriate records and accurately matching them to the party in question? Judges must be aware of their own skills and, more importantly, their limitations . . . .

Documents that are sealed may not be reviewed. That would be independent research disclosing information about a party to which both sides do not have access or even know exist. Reviewing sealed documents is improper under Rule 2.9(C) of the Model Code of Judicial Conduct.[31]

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[27] *See* People v. Davis, 357 N.E.2d 792, 793-94 (Ill. 1976) (judicial notice of a conviction based upon a guilty plea in the same court before the same judge "falls squarely within the judicially noticeable category of facts 'capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy'").

[28] Ill. Jud. Ethics Comm. Op. 2016-02 (2016) (at sentencing, court may access county court files to review convicted criminal defendant's criminal case history "so long as the established procedural safeguards for taking judicial notice are adhered to"); Minn. Bd. of Jud. Standards, Advisory Op. 2016-2 (2016) (judge hearing *ex parte* order for protection may, under certain circumstances, take judicial notice of facts in Minnesota State Court Information Service).

[29] Professional Engineers v. Department of Transportation, 936 P.2d 473, 496 (Cal. S. Ct. 1997) (construing a state Constitution's civil service provision that was later superseded by constitutional amendment; Ardaiz, J. dissenting, "judicial notice of findings of fact does not mean that those findings of fact are true, but, rather, only means that those findings of fact were made") (citations omitted); Doyle v. People, 343 P.3d 961, 963 (Colo. S. Ct. 2015) ("Because the resolution of a factual matter at issue in a prior judicial proceeding, unlike the occurrence of the legal proceeding or other court action itself, does not become an indisputable fact within the contemplation of CRE 201 merely as a result of being reflected in a court record, the trial court erred in taking judicial notice that the defendant failed to appear in court on a particular day"); *see also* GRAHAM, *supra* note 15 § 201:3 for a full discussion of judicial notice of court records.

[30] Minn. Bd. of Jud. Standards Advisory Op. 2016-2 (2016) *citing In re* Welfare of D.J.N., 568 N.W.2d 170, 175 (Minn. Ct. App. 1997).

[31] Wash. Ethics Advisory Comm. Op. 13-07 (2013) ("a judicial officer in a juvenile matter may not *sua sponte* review public and/or sealed records [maintained by the courts] unless such review is authorized by law"; "[i]f a party to a proceeding requests the court to review [the records] but such review is not expressly allowed by law, then the court should allow the other party or parties to be heard").

IV. Conclusion

The Internet provides useful tools for discovering vast amounts of information. Searching reliable sources on the Internet may reveal information that educates, informs, and enlightens the judiciary, not unlike judicial seminars and printed materials.

Information properly subject to judicial notice is well within the judge's discretion to search and use according to the applicable law. On the other hand, adjudicative facts that are needed to determine an issue in a case, but which are not properly subject to judicial notice, may not be researched without violating Rule 2.9(C). Stated simply, a judge should not gather adjudicative facts from any source on the Internet unless the information is subject to proper judicial notice. Further, and within the guidelines set forth in this opinion, judges should not use the Internet for independent fact-gathering related to a pending or impending matter where the parties can easily be asked to research or provide the information. The same is true of the activities or characteristics of the litigants or other participants in the matter.

McKinney's CPLR Rule 4511

Rule 4511. Judicial notice of law

(a) When judicial notice shall be taken without request. Every court shall take judicial notice without request of the common law, constitutions and public statutes of the United States and of every state, territory and jurisdiction of the United States and of the official compilation of codes, rules and regulations of the state except those that relate solely to the organization or internal management of an agency of the state and of all local laws and county acts.

(b) When judicial notice may be taken without request; when it shall be taken on request. Every court may take judicial notice without request of private acts and resolutions of the congress of the United States and of the legislature of the state; ordinances and regulations of officers, agencies or governmental subdivisions of the state or of the United States; and the laws of foreign countries or their political subdivisions. Judicial notice shall be taken of matters specified in this subdivision if a party requests it, furnishes the court sufficient information to enable it to comply with the request, and has given each adverse party notice of his intention to request it. Notice shall be given in the pleadings or prior to the presentation of any evidence at the trial, but a court may require or permit other notice.

(c) Determination by court; review as matter of law. Whether a matter is judicially noticed or proof is taken, every matter specified in this section shall be determined by the judge or referee, and included in his or her findings or charged to the jury. Such findings or charge shall be subject to review on appeal as a finding or charge on a matter of law.

(d) Evidence to be received on matter to be judicially noticed. In considering whether a matter of law should be judicially noticed and in determining the matter of law to be judicially noticed, the court may consider any testimony, document, information or argument on the subject, whether offered by a party or discovered through its own research. Whether or not judicial notice is taken, a printed copy of a statute or other written law or a proclamation, edict, decree or ordinance by an executive contained in a book or publication, purporting to have been published by a government or commonly admitted as evidence of the existing law in the judicial tribunals of the jurisdiction where it is in force, is prima facie evidence of such law and the unwritten or common law of a jurisdiction may be proved by witnesses or printed reports of cases of the courts of the jurisdiction.

McKinney's CPLR § 4532-b

§ 4532-b. [Admissibility of web mapping services, a global satellite imaging sites, or an internet mapping tools][1]

An image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, is admissible in evidence if such image, map, location, distance, calculation, or other information indicates the date such material was created and subject to a challenge that the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool does not fairly and accurately portray that which it is being offered to prove. A party intending to offer such image or information in evidence at a trial or hearing shall, at least thirty days before the trial or hearing, give notice of such intent, providing a copy or specifying the internet address at which such image or information may be inspected. No later than ten days before the trial or hearing, or later for good cause shown, a party upon whom such notice is served may object to the request to admit into evidence such image or information, stating the grounds for the objection. Unless objection is made pursuant to this subdivision, the court shall take judicial notice and admit into evidence such image, map, location, distance, calculation or other information.

In the

United States Court of Appeals

For the Seventh Circuit

No. 14-3316

JEFFREY ALLEN ROWE,

Plaintiff-Appellant,

v.

MONICA GIBSON, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:11-cv-00975-SEB-DKL — **Sarah Evans Barker**, *Judge*.

SUBMITTED MAY 26, 2015 — DECIDED AUGUST 19, 2015

Before POSNER, ROVNER, and HAMILTON, *Circuit Judges*.

POSNER, *Circuit Judge*. An Indiana prison inmate named Jeffrey Rowe, the plaintiff in this suit under 42 U.S.C. § 1983, charges administrators and prison staff (actually employees of Corizon, Inc., which provides medical services to the inmates at Pendleton Correctional Facility, Rowe's prison) with deliberate indifference to a serious medical need—that is, with *knowing* of a serious risk to inmate health or safety but responding ineffectually (as by departing substantially

from accepted professional judgment) or not at all. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 837 (1994); *Sain v. Wood*, 512 F.3d 886, 894–95 (7th Cir. 2008). Such conduct was held in *Farmer* to violate the cruel and unusual punishments clause of the Eighth Amendment, deemed applicable to state action by interpretation of the due process clause of the Fourteenth Amendment. Rowe charges gratuitous infliction of physical pain and potentially very serious medical harm—cogent examples of cruel and unusual punishment. He has a subsidiary claim of having been retaliated against for filing this lawsuit, a claim we discuss briefly toward the end of our opinion. The district judge granted summary judgment in favor of the defendants on both claims, dismissing Rowe's suit and precipitating this appeal.

In 2009, already an inmate at Pendleton, Rowe was diagnosed with reflux esophagitis, also known as gastroesophageal reflux disease (GERD). See National Institutes of Health, "Gastroesophageal reflux disease," www.nlm.nih.gov/medlineplus/ency/article/000265.htm (visited August 17, 2015, as were the other websites cited in this opinion). The Mayo Clinic explains that "a valve-like structure called the lower esophageal sphincter usually keeps the acidic contents of the stomach out of the esophagus. If this valve opens when it shouldn't or doesn't close properly, the contents of the stomach may back up into the esophagus (gastroesophageal reflux). ... [GERD] is a condition in which this backflow of acid is a frequent or ongoing problem. A complication of GERD is chronic inflammation and tissue damage in the esophagus." *Mayo Clinic*, "Diseases and Conditions, Esophagitis: Reflux Esophagitis," www.mayoclinic.org/diseases-conditions/esophagitis/basics/causes/con-20034313. As we explained in a recent case in which, as in this case, a prison

inmate complained of failure to treat his GERD (and we reversed the grant of summary judgment in favor of the prison staff), "GERD can ... produce persistent, agonizing pain and discomfort. It can also produce 'serious complications. Esophagitis can occur as a result of too much stomach acid in the esophagus. Esophagitis may cause esophageal bleeding or ulcers. In addition, a narrowing or stricture of the esophagus may occur from chronic scarring. Some people develop a condition known as Barrett's esophagus. This condition can increase the risk of esophageal cancer.' *WebMD, Heartburn/GERD Health Center*, "What Are the Complications of Long–Term GERD?" www.webmd.com/heartburn–gerd/guide/reflux–disease–gerd–1?page=4." *Miller v. Campanella*, 2015 WL 4523799, at *2 (7th Cir. July 27, 2015). Rowe complains of pain based on neglect of his need for symptomatic relief; continued neglect will endanger him more profoundly.

The prison physician who diagnosed Rowe with GERD told him to take a 150-milligram Zantac pill twice a day. Zantac inhibits the production of stomach acid and is commonly used to treat esophagitis (as we'll abbreviate the name of Rowe's disease). Although technically "Zantac" is merely the trade name for ranitidine manufactured by GlaxoSmithKline (in prescription strengths) and Boehringer Ingelheim (in over-the-counter strengths), it is often used as a synonym for ranitidine, see *Wikipedia*, "Ranitidine," http://en.wikipedia.org/wiki/Ranitidine, because Glaxo was the first, and remains the best-known, manufacturer. "Zantac" is the only word for the drug that appears in the briefs, and so we too will call the drug that Rowe received "Zantac."

After the diagnosis Rowe was given Zantac pills and was permitted to keep them in his cell and take them when he felt the need to. This regimen continued for more than a year. But in January 2011 his pills were confiscated and he was told that he would be allowed to take a Zantac pill only when a prison nurse gave it to him, and that would be at 9:30 a.m. and then at 9:30 p.m. He complained that he needed to take Zantac with his meals, which were, oddly enough, scheduled by the prison for 4 a.m. and 4 p.m. (why these times, we are not told). The prison had decided that inmates such as Rowe who take psychiatric medications should not be allowed to keep any pills in their cells—yet the head of health care at the prison told Rowe that he could keep in his cell (and thus take whenever he wanted) any Zantac pills that he bought at the prison commissary—which, however, as we're about to see, he couldn't afford. No reason has been articulated for forbidding him to keep Zantac given him by prison staff while permitting him to keep Zantac that he bought at the commissary and take it whenever he needs to in order to prevent or alleviate pain. There is no suggestion that Zantac is a narcotic or otherwise consumed for nonmedical as well as medical reasons.

The defendants question Rowe's inability to pay for the pills. They point out that in one 13-month period he spent approximately $60 at the commissary. But the prison commissary charges $3.28 for just four 75-mg Zantac pills (and recall that Rowe was to take two 150-mg pills daily), meaning that he would have to pay almost $1300 for a 13-month supply. And he was forbidden to buy more than eight days' worth of Zantac a month from the commissary, which was only about a quarter of the amount that he needed.

To continue the narrative of what seems a senseless series of decisions by the prison's medical staff, as well as heartless given what the staff knew about the disease and Rowe's continuous claims of severe pain: at the beginning of July 2011, a month after he filed suit, he ceased receiving Zantac because his "prescription" (that is, his authorization to receive over-the-counter Zantac free of charge on a continuing basis) had lapsed. He made a series of requests for the drug beginning on July 3, but the nurse defendants denied all of them because he had no prescription. When he complained he was told by the administrative director of the medical staff: "Your chronic care condition does not warrant the continued use of Zantac. The continual use of over-the-counter medications can create further health problems in many instances. You will have to purchase this off of commissary if you wish to continue taking it." Notice the contradiction (illustrating the run around to which Rowe was continually subjected) in denying Rowe free Zantac because it could create "further health problems" but permitting him to buy and use it at will, though he couldn't afford to buy it. Nor is there any suggestion that Zantac is one of the over-the-counter medications that can create health problems if taken daily for a protracted period of time. And finally, if over-the-counter medicines are to be barred, why wasn't Rowe given a prescription for 300-mg Zantac pills; these are not only prescription rather than over-the-counter drugs but one such pill a day may be sufficient to control one's GERD, compared to two or more when an over-the-counter strength Zantac is prescribed.

On July 13, 2011, in response to Rowe's continued requests for a renewed prescription for Zantac, a physician who works at the prison (though employed by Corizon)

named William H. Wolfe, whose professional specialty is preventive medicine, about which see *American College of Preventive Medicine: Physicians Dedicated to Prevention*, www.acpm.org/, rather than gastroenterology, see *healthgrades*, "Dr. William H. Wolfe, MD.," www.healthgrades.com/physician/dr-william-wolfe-2fgkl/background-check, and who is a frequent defendant in prisoner civil rights suits, reviewed Rowe's medical records and opined that his condition didn't require Zantac at all—this despite the fact that Rowe had been continuously prescribed Zantac for almost two years and that Wolfe himself had been the prescribing doctor for a quarter of that period. But though initially refusing to provide a new prescription for Zantac, Wolfe later relented and on August 2 prescribed it though he later stated in an affidavit that he had done so as a "courtesy" to Rowe and not out of medical necessity. (Prescribing drugs for prison inmates as a "courtesy" seems very odd; it is not explained.) The upshot was that Rowe had no access to Zantac for more than a month (between July 1 and August 3)—a significant deprivation. Even after Zantac was restored to him, he continued to be allowed to take it only at 9:30 a.m. and 9:30 p.m., both times being many hours distant from his meals.

In another affidavit Wolfe stated that "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." However, according to Boehringer Ingelheim, the manufacturer of over-the-counter Zantac, while Zantac can be taken at any time "to relieve symptoms," in order "to prevent symptoms" it should be taken "30 to 60 minutes before eating food or drinking beverages that cause heart-

burn." *Zantac*, "Maximum Strength Zantac 150," www.zantacotc.com/zantac-maximum-strength.html#faqs, and this advice is repeated on the labels of the boxes in which over-the-counter Zantac is sold. Were Zantac equipotent whenever taken, the manufacturer would not tell consumers to take it 30 to 60 minutes before eating, for having to remember when to take a pill adds a complication that the consumer would rather do without. There is thus no reason for the manufacturer to be lying, and it would be absurd to think that Dr. Wolfe, a defendant who is not a gastroenterologist, knows more about treatment of esophagitis with Zantac than the manufacturer does.

Rowe's aim was pain prevention, so having to take Zantac six and a half hours before a meal did not do the trick. It left him in pain for five and a half hours during and after the meal, until he got his next Zantac pill. Wolfe's statement that "each Zantac pill is fully effective for twelve hour increments" is also contradicted by the Zantac website, which states that one 150-mg pill "lasts *up to* 12 hours" (emphasis added). Thus a pill taken six and half hours before a meal might not be effective in alleviating the pain caused by acid secretions stimulated by the meal.

It might be thought that a corporate website, such as that of the Zantac manufacturer, would be a suspect source of information. Not so; the manufacturer would be taking grave risks if it misrepresented the properties of its product. In any event, the Mayo Clinic's website, as we'll see in a moment, confirms the manufacturer's claims.

Wolfe's affidavit states that Rowe was complaining just of "alleged heartburn [that] was not a serious medical condition warranting a prescription for Zantac"—but if so why

did he prescribe Zantac for Rowe during the very period in which, according to the affidavit, Rowe's condition was not serious? (The affidavit fails to mention that it was Wolfe who had prescribed Zantac for Rowe, but that's conceded.)

It's true that the Mayo Clinic's website, at "Drugs and Supplements: Histamine H2 Antagonist (Oral Route, Injection Route, Intravenous Route)," www.mayoclinic.org/drugs-supplements/histamine-h2-antagonist-oral-route-injection-route-intravenous-route/proper-use/drg-20068584, after listing various drugs (including ranitidine) for treatment of the cluster of ailments that includes esophagitis, states that "for this class of drugs ... patients taking two doses a day are instructed: 'Take one in the morning and one before bedtime.'" But this dosing, Mayo goes on to state, is appropriate "only for patients taking the prescription strengths of these medicines." The 150-mg pills that Rowe was taking are available over the counter; a prescription is required only for the 300-mg version. Both the Boehringer Ingelheim and Mayo websites also say that the patient shouldn't take Zantac for more than two weeks unless directed by a doctor—but Rowe was of course directed by Wolfe, as well as by other doctors earlier, to take Zantac on a continuing basis.

Not only wasn't Rowe allowed to take Zantac with his meals; he was not, as the Mayo website recommends, allowed to take it with water a half hour or an hour before eating a meal or drinking beverages that might cause him esophageal pain. As the Mayo website explains, for "adults and teenagers—150 mg with water taken *thirty to sixty minutes before eating a meal* or drinking beverages you expect

to cause symptoms. Do not take more than 300 mg in twenty-four hours" (emphasis added).

Stomach acid is of course integral to the digestion of food, and indeed thirty percent of total gastric acid secretion is stimulated by the anticipation, smell, and taste of food, before the food ever reaches the stomach. Thomas A. Miller, *Modern Surgical Care: Physiologic Foundations and Clinical Applications* 344-45 (2006). "The foods you eat affect the amount of acid your stomach produces," and "many people with GERD find that certain foods trigger their symptoms." *Healthline*, "Diet and Nutrition for GERD," www.healthline.com/health/gerd/diet-nutrition#Overview1. So it is no surprise that Rowe experiences painful symptoms when he eats without having been allowed to take a Zantac pill shortly before the meal.

The *Physicians' Desk Reference*, "PDR Search: Full Prescribing Information: Zantac 150 and 300 Tablets," www.pdr.net/full-prescribing-information/zantac-150-and-300-tablets?druglabelid=241, states that a 150-mg dose of Zantac inhibits 79 percent of food-stimulated acid secretion for up to three hours after it's taken. This implies that the drug's efficacy decreases over time and so supports Rowe's claim that a 150-mg dose does not suppress his food-stimulated acid secretions when taken six and a half hours before a meal. The *Physicians' Desk Reference* also says that "symptomatic relief commonly occurs within 24 hours after starting therapy with ZANTAC 150 mg twice daily," which could be misread to mean that it does not matter what time of day the pills are taken, but which actually means that it takes a day for the body to recognize Zantac as a source of relief from esophageal distress. This interpretation is confirmed by

Mayo, which states (at the website cited earlier): "It may take several days before this medicine begins to relieve stomach pain."

The evidence that Rowe was in pain for five and a half hours after eating is his repeated attestation—in his verified federal complaint and his declarations—that he experienced pain for that length of time when he was not allowed to take Zantac with or shortly before his meals. For purposes of summary judgment his attestations of extreme pain must be credited. See 28 U.S.C. § 1746; Fed. R. Civ. P. 56(c). There was no plausible contrary evidence. The affidavits of the only expert witness on the proper times at which to take Zantac, defendants' witness Wolfe, were highly vulnerable. Wolfe is not a gastroenterologist. He says that Rowe didn't need Zantac yet prescribed Zantac for him. He opined with confidence about what Rowe needed or didn't need—yet never examined him—and offered no basis for his off-the-cuff medical opinion. A court should not "admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997); see also *Finn v. Warren County*, 768 F.3d 441, 452 (6th Cir. 2014) ("the 'knowledge' requirement of Rule 702 requires the expert to provide more than a subjective belief or unsupported speculation"); *Guile v. United States*, 422 F.3d 221, 227 (5th Cir. 2005) ("we look to the basis of the expert's opinion, and not the bare opinion alone. A claim cannot stand or fall on the mere ipse dixit of a credentialed witness"); *McClain v. Metabolife International Inc.*, 401 F.3d 1233, 1242 (11th Cir. 2005).

Remember that Rowe had been diagnosed with esophagitis back in 2009 and that for the ensuing two years physi-

cians had prescribed Zantac to treat his condition. Furthermore, the Indiana Department of Correction permits such continuous treatment only to treat a *serious* health condition, so presumably the prescribing physicians thought Rowe's condition serious. None of this evidence or inference is undermined by Dr. Wolfe's evidence.

A member of a prison's staff is deliberately indifferent and thus potentially liable to an inmate if he "knows of and disregards an excessive risk to inmate health," *Williams v. O'Leary*, 55 F.3d 320, 324 (7th Cir. 1995), quoting *Farmer v. Brennan*, *supra*, 511 U.S. at 837; see also *Miller v. Campanella*, *supra*, at *2. Rowe makes two distinct claims of deliberate indifference; the evidence that we've reviewed tends to substantiate both. There is both evidence that defendants Wolfe, Deborah Dotson, Melissa Bagienski, Chris Deeds, and Lisa Gibson were deliberately indifferent to his pain when they denied him access to free Zantac for thirty-three days, and that defendants Mary Mansfield, Gibson, and Dr. Michael Mitcheff were deliberately indifferent to his pain when they insisted—for many months—on giving him Zantac only at 9:30 a.m. and 9:30 p.m., instead of at his prescribed mealtimes. Regarding the first claim, if the nurse defendants to whom Rowe complained about reflux pain were not authorized to give him the free Zantac they should have promptly referred the matter to a doctor.

The evidence of Wolfe's deliberate indifference to Rowe's pain and resulting need for Zantac is, as we've shown, substantial, and likewise the evidence that limiting Rowe's taking Zantac to 9:30 a.m. and 9:30 p.m. for a protracted period exhibited deliberate indifference to a serious medical need. Wolfe never told anyone, so far as appears, when would be

the best times for administering Zantac to Rowe. In very large doses Zantac will remain in your blood stream long enough to affect the stomach acid produced by meals eaten many hours later, but the Mayo and Boehringer Ingelheim timing recommendations suggest that this isn't true for 150-mg doses. Wolfe's assertion that "it does not matter what time of day Mr. Rowe receives his Zantac prescription" is implausible as well as vigorously contested. Rowe's pain and the Mayo Clinic's timing recommendations suggest that giving 150-mg doses of Zantac five and a half hours after one meal and six and a half hours before the next (and only other) meal of the day may be a substantial departure from accepted professional practice, preventing summary judgment for defendants regarding Rowe's claim of deliberate indifference to avoidable pain caused by the timing of his medication. See *Sain v. Wood*, *supra*, 512 F.3d at 894–95. Since Rowe's pain strongly indicated that he was experiencing reflux, the reflux could have had serious medical consequences (up to and including cancer) in addition to inflicting chronic pain on him. Prisoners aren't supposed to be tortured.

In citing even highly reputable medical websites in support of our conclusion that summary judgment was premature we may be thought to be "going outside the record" in an improper sense. It may be said that judges should confine their role to choosing between the evidentiary presentations of the opposing parties, much like referees of athletic events. But judges and their law clerks often conduct research on cases, and it is not always research confined to pure issues of law, without disclosure to the parties. We are not like the English judges of yore, who under the rule of "orality" were not permitted to have law clerks or other staff, or libraries, or

even to deliberate—at the end of the oral argument in an appeal the judges would state their views *seriatim* as to the proper outcome of the appeal.

We don't insulate judges like that, but we must observe proper limitations on judicial research. We must acknowledge the need to distinguish between judicial web searches for mere background information that will help the judges and the readers of their opinions understand the case, web searches for facts or other information that judges can properly take judicial notice of (such as when it became dark on a specific night, a question we answered on the basis of an Internet search in *Owens v. Duncan*, 781 F.3d 360, 362 (7th Cir. 2015), citing *WeatherSpark*, "Average Weather On September 22 For Chicago, Illinois, USA: Sun," https://weatherspark.com/averages/30851/9/22/Chicago-Illinois-United-States), and web searches for facts normally determined by the factfinder after an adversary procedure that produces a district court or administrative record. 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.

Rule 201 of the Federal Rules of Evidence makes facts of which judicial notice is properly taken conclusive, and therefore requires that their accuracy be indisputable for judicial

notice to be taken of them. We are not deeming the Internet evidence cited in this opinion conclusive or even certifying it as being probably correct, though it may well be correct since it is drawn from reputable medical websites. We use it only to underscore the existence of a genuine dispute of material fact created in the district court proceedings by entirely conventional evidence, namely Rowe's reported pain.

There is a high standard for taking judicial notice of a fact, and a low standard for allowing evidence to be presented in the conventional way, by testimony subject to cross-examination, but is there no room for anything in between? Must judges abjure visits to Internet web sites of premier hospitals and drug companies, not in order to take judicial notice but to assure the existence of a genuine issue of material fact that precludes summary judgment? Are we to forbear lest we be accused of having "entered unknown territory"? This year the bar associations are busy celebrating the eight hundredth anniversary of Magna Carta. The barons who forced King John to sign that notable document were certainly entering unknown territory, and risking their lives to boot. Shall the unreliability of the unalloyed adversary process in a case of such dramatic inequality of resources and capabilities of the parties as this case be an unalterable bar to justice? Must our system of justice allow the muddled affidavit of a defendant who may well be unqualified to be an expert witness in this case to carry the day against a pro se plaintiff helpless to contest the affidavit?

This is not the case in which to fetishize adversary procedure in a pure eighteenth-century form, given the inadequacy of the key defense witness, Dr. Wolfe. Let's review: Wolfe refused to continue Rowe's Zantac prescription in July 2011

while Rowe was being kept waiting for three weeks before being seen by a doctor. Wolfe knew Rowe had esophagitis: he reviewed Rowe's medical records, which contained the 2009 diagnosis and revealed nearly two years of physicians' having prescribed Zantac for him continuously. Wolfe had *personally* prescribed Zantac for Rowe for six months of those two years and must have known that the Department of Correction authorizes such treatment only for a *serious* health condition. Rowe was complaining of continuing reflux pain; and while Wolfe denied a prescription renewal on July 13, he demonstrated his awareness that Rowe might need treatment by scheduling him for a later appointment (the August 2 appointment) to evaluate his request to resume taking Zantac.

Against this background, to credit Wolfe's evidence that it doesn't matter when you take Zantac for relief of GERD symptoms (evidence that may well have failed to satisfy the criteria for the admissibility of expert evidence that are set forth in Fed. R. Evid. 702) just because Rowe didn't present his own expert witness would make no sense—for how could Rowe find such an expert and persuade him to testify? He could not afford to pay an expert witness. He had no lawyer in the district court and has no lawyer in this court; and so throughout this litigation (now in its fourth year) he has been at a decided litigating disadvantage. He requested the appointment of counsel and of an expert witness to assist him in the litigation, pointing out sensibly that he needed "verifying medical evidence" to support his claim. The district judge denied both requests, leaving Rowe unable to offer evidence beyond his own testimony that he was in extreme pain when forbidden to take his medication with his meals.

The web sites give credence to Rowe's assertion that he was in pain. But the information gleaned from them did not *create* a dispute of fact that was not already in the record. Rowe presented enough evidence to call Dr. Wolfe's assessment into question—Rowe claims that after his medication was switched to the 12-hour schedule he was in extreme pain and Dr. Wolfe, without examining Rowe or disclosing the basis for his opinion (as we require experts to do), stated cursorily that the medicine would be effective for 12 hours. It will be up to the factfinder to decide, on a better developed record, who is right.

Nor is pain the only concern. Esophageal reflux disease can lead to serious damage of the stomach or esophagus, and even to cancer.

It is heartless to make a fetish of adversary procedure if by doing so feeble evidence is credited because the opponent has no practical access to offsetting evidence. To say for example that however implausible Dr. Wolfe's evidence is, it must be accepted because not contested, is to doom the plaintiff's case regardless of the merits simply because the plaintiff lacks the wherewithal to obtain and present conflicting evidence. Rowe did not move to exclude Wolfe as an expert witness on the ground that Wolfe neither qualified to give expert evidence in this case (because he is not a gastroenterologist) nor, as a defendant, was likely to be even minimally impartial. But Rowe does not have the legal knowledge that would enable him to file such a motion.

We have decided to reverse the judgment. We base this 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 we have conducted in default of the parties' having done so. We add that the judge erred not only by giving undue weight to Wolfe's internally contradictory affidavit but also by relying on a defendant (Wolfe) as the expert witness. There are expert witnesses offered by parties and neutral (court-appointed) expert witnesses, but *defendants* serving as expert witnesses?—and in cases in which the plaintiff doesn't have an expert witness because he doesn't know how to find such a witness and anyway couldn't afford to pay the witness? And how could an unrepresented prisoner be expected to challenge the affidavit of a hostile medical doctor (in this case *really* hostile since he's a defendant in the plaintiff's suit) effectively? Is *this* adversary procedure?

Esophagitis is a common disease for which Zantac is a common treatment, and it makes common sense as well as medical sense that a drug for treating symptoms of stomach acid backing up into the esophagus would be administered shortly before or shortly after meals unless the massive 300-mg pill was being administered to the patient, and it was not in this case. Rowe claimed that the Zantac he took became ineffective in treating his esophagitis pain symptoms when the prison staff decided to give it to him only long before his meals. His pain and the timing recommendation of the Mayo Clinic that we mentioned earlier suggest that giving 150-mg doses of Zantac six and a half hours before and five and a half hours after meals may be a substantial departure from accepted professional practice. But without his own expert, Rowe couldn't counter Wolfe's assertion that Zantac does not need to be taken shortly before, or with or shortly after, a meal in order to be effective. As Rowe explained in his brief, while he "provided evidence that Zantac does not 'prevent' reflux during its 12 hours of effectiveness, and that it was

not effective at relieving Rowe's symptoms, the district court accepted the word of a defendant [i.e., Dr. Wolfe], who was speaking as an 'expert,' that the treatment Rowe received was adequate and effective. Had an expert been appointed, the expert would have confirmed Rowe's factual representations, and would have supported Rowe's objection that the defendant lacks personal knowledge about the condition(s) Rowe had because Wolfe never physically examined Rowe or had diagnostic testing done on Rowe" (citations omitted).

Rowe's allegations alone were sufficient to preclude summary judgment, and were enhanced by the defendants' own evidence, which included both Wolfe's contradictory evidence (among other things, he asserted that Rowe does not need Zantac and yet prescribed it for him) and the absurd opinion by the medical director that over-the-counter medications should not be provided to prisoners. Allowing Wolfe to be an expert witness in the case despite his being a defendant and not practicing the medical specialty at issue was another boost to the plaintiff's case, though again not one that an unrepresented, indigent prisoner could exploit.

We are coming to the end of this long opinion but we need to change gears for a moment: Besides arguing deliberate indifference to a serious medical need, Rowe accuses several of the defendants, in particular Dr. Wolfe and Nurse Bagienski, of retaliating against him for filing a lawsuit. He says they told him that going without Zantac for a month would make him "think twice about bringing lawsuits about inadequate medical care." If indeed they said this—an issue that cannot be determined without a trial—Rowe has a solid claim of retaliation. The retaliation claims against the other defendants were properly dismissed, however, and likewise

the deliberate-indifference claims against the following defendants, who the district court correctly found were not responsible for the failure to treat Rowe's medical condition competently—Rose Vaisvilas, Wayne Scaife, and Kenneth Hysell. But we reverse with regard to the remaining defendants and remand the case for further proceedings consistent with this opinion.

Although reversing, we are not ordering that judgment be entered in Rowe's favor. As we've explained, we are not invoking Fed. R. Evid. 201 and thus not taking judicial notice of any facts outside the district court record. The remaining defendants are entitled to try to rebut any evidence whether or not presented in the district court, including any evidence found on the Internet. Like the conventional forms of evidentiary inquiry, Internet research must be conducted with circumspection. In particular it must not be allowed to extinguish reasonable opportunities for rebuttal.

Pure adversary procedure works best when there is at least approximate parity between the adversaries. That condition is missing in this case, in which a pro se prison inmate, incapable of retaining an expert witness (expert witnesses usually demand to be paid—and how would this inmate even *find* an expert witness?), confronts both a private law firm and the state attorney general.

Because of the profound handicaps under which the plaintiff is litigating and the fact that his claim is far from frivolous, we urge the district judge to give serious consideration to recruiting a lawyer to represent Rowe, see *Miller v. Campanella, supra*, at *2; *Perez v. Fenoglio*, 2015 WL 4092294, at *11 (7th Cir. July 7, 2015); appointing a neutral expert witness, authorized by Fed. R. Evid. 706, to address the medical

issues in the case; or doing both. We are mindful that district courts don't have budgets for paying expert witnesses. But the medical issues in the case are not complex; there should be no difficulty in the judge's persuading a reputable gastroenterologist to speak to Rowe and some of the prison medical personnel (Rowe's prison is only 30 miles from Indianapolis, and there are 128 gastroenterologists in or near Indianapolis, *healthgrades*, www.healthgrades.com/gastroenterology-directory/in-indiana/indianapolis), to sit for a deposition, and, if necessary, to testify. Rule 706(c)(2) states that a court-appointed expert "is entitled to a reasonable compensation, as set by the court," and that "the compensation is payable ... in any ... civil case [not involving just compensation under the Fifth Amendment] by the parties in the proportion and at the time that the court directs—and the compensation is then charged like other costs." In light of Rowe's indigency, the court if it appoints its own expert witness will have to order the defendants to pay the expert a reasonable fee if the expert is unwilling to work for nothing. Most prisons are strapped for cash, and this is something for the district court to bear in mind in deciding on whether and how large a fee to order the defendants to pay a court-appointed expert witness in a case (such as this case) that has sufficient merit to warrant such an appointment.

A substantial academic literature identifies serious deficiencies in the provision of health care in American prisons and jails. See, e.g., Andrew P. Wilper et al., "The Health and Health Care of US Prisoners: Results of a Nationwide Survey," 99 *Am. J. Public Health* 666 (2009), and the studies posted by the *Academic Consortium on Criminal Justice Health*, www.accjh.org/. On the quality of treatment problems of Corizon, the employer of Dr. Wolfe and the other medical

staff members sued by Rowe, see David Royse, "Medical Battle Behind Bars: Big Prison Healthcare Firm Corizon Struggles to Win Contracts," April 11, 2015, www.modernhealthcare.com/article/20150411/MAGAZINE/304119981; also Human Rights Defense Center, *Prison Legal News*, "Corizon Needs a Checkup: Problems with Privatized Correctional Healthcare," March 2014, www.prisonlegalnews.org/news/2014/mar/15/corizon-needs-a-checkup-problems-with-privatized-correctional-healthcare/. The present case illustrates the problems that this literature has identified.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

APPENDIX

We respectfully suggest that the dissenting opinion is misleading in certain respects that require a response; page references are to pages in the dissent.

Page 29: The dissenting opinion states that "the reversal is unprecedented, clearly based on 'evidence' this appellate court has found by its own internet research. ... When the opinion is read as a whole, the decisive role of the majority's internet research is plain." No, the majority opinion endeavors to make clear that Rowe's allegations alone, coupled with the affidavit of Dr. Wolfe and other defense evidence, would be enough without any reference to the Internet to preclude summary judgment for the defendants, and doubtless would have precluded summary judgment had Rowe been represented. The dissent ignores this part of the majority opinion.

Page 29: The reader is told that "the majority writes that adherence to rules of evidence and precedent makes a 'heart-

less ... fetish of adversary procedure.'" That is not what the majority opinion says; it says: "It is heartless to make a fetish of adversary procedure *if* by doing so feeble evidence is credited because the opponent has no practical access to offsetting evidence" (emphasis added). Nowhere does the majority opinion deny the validity of the federal rules of evidence or of procedure.

Page 32: The proposition in the dissent that the prison's response was adequate as long as it "provided at least some treatment for pain" overlooks the fact that a 150-mg Zantac pill given six and a half hours before one's next meal provides, according to Rowe, no alleviation of pain caused by stomach acid backing up into the esophagus, which is the pain of which Rowe complains. Also, it can't be correct that providing "some" treatment of pain always gets a prison doctor off the hook. Suppose Rowe were in agony from a slipped disk; would it be enough for Dr. Wolfe to give him an aspirin? To tell him, if he broke his leg, that it would heal by itself, in time?

Page 35: The statement that the majority opinion "holds in essence that the district judge erred by *not* doing such independent factual research" is mistaken. There is no such holding or suggestion in the opinion. The opinion merely suggests that the district judge should have appointed, and on remand should appoint, an expert witness who is a gastroenterologist (as Dr. Wolfe, the defendants' principal witness, is not) and who also is not a defendant.

Pages 35-36: The dissent's citation of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as a celebration of traditional adversary procedure misses the significance of *Daubert*, which is that it enlarged the role of the judge in po-

licing expert testimony. The district judge in this case failed to play the role envisaged in *Daubert* by treating Dr. Wolfe as an expert on GERD despite his being a defendant accused of neglecting Rowe's GERD and also his not being a gastroenterologist. A *Daubert* hearing would doubtless have led to his exclusion from an expert-witness role.

Page 39: The dissent says that "when a prisoner brings a pro se suit about medical care, the adversary process that is the foundation of our judicial system is at its least reliable. Few prisoners have access to lawyers or to expert witnesses needed to address medical issues." Right on! (And Rowe is not one of the few who does have the necessary access.) But affirmance of a quite possibly incorrect decision cannot be the correct solution to the problem thus correctly stated by the dissent. The majority opinion offers a modest solution—a remand to enable a competent, impartial evidentiary exploration of Rowe's claim.

Page 40: On this page the dissent repeats its contention that the majority is insisting that district judges conduct Internet research: "The majority clearly implies, while denying it is doing so, that the district judge herself should have done the independent factual research the majority has done on appeal, questioning an unchallenged expert affidavit ... ." No; the district judge should have recognized the existence of a substantial issue of material fact, barring summary judgment. Rowe's evidence of pain contradicted Dr. Wolfe's affidavit.

Page 41: The dissent expresses concern that the defendants may have to pay most or all of an expert witness's fee in a case brought by an indigent prisoner, such as Rowe. But it seems unlikely that a gastroenterologist would charge more

than a nominal fee merely to testify that—what appears to be obvious—in order to prevent serious esophageal pain (and the even more serious consequences that can ensue from untreated GERD) a 150-mg Zantac pill should be taken no more than an hour before eating—not six and a half hours. One has only to read the label on a box of 150-mg Zantac pills to learn when the pill should be taken to prevent pain—30 to 60 minutes before eating. In addition, an expert's fee, if any, would in a case such as this, with its numerous defendants, be split many ways or, more likely, be paid for by the Indiana Department of Correction, the State of Indiana, Corizon or its liability insurer, or individual defendants' malpractice insurance (depending on the contractual arrangements between Corizon and the state, as well as the parties' insurance arrangements), or some combination of these well-heeled entities.

Page 42: The dissent states: "Without an expert witness qualified to present the facts and opinions the majority finds persuasive, that information does not come into evidence." This implies that without an expert witness, a party cannot defeat a motion for summary judgment. That isn't true. If a jury believed Rowe, he would win. It would be more likely to believe him than to believe Dr. Wolfe.

Page 42: The parade of horribles on this and other pages of the dissent (such as page 35, discussed earlier in this Appendix) is based on a belief that the majority is ordering that the district judge on remand do her own Internet research. Not so. It is unlikely that *any* Internet research by anyone will be necessary. All that should be necessary is testimony by a qualified, impartial expert witness who is a gastroenterologist and is not a defendant in this litigation.

Page 43: The dissent again states that we are requiring judges to conduct their own factual research. No. We are even accused by the dissent of trying to turn judges into substitutes for physicians. Again no.

Page 45: The dissent appears to misunderstand the Mayo Clinic's advice to "take one [Zantac pill] in the morning and one before bedtime." As pointed out in the majority opinion, this advice is intended "only for patients taking the prescription strengths," whereas Rowe was taking the 150-mg strength that is available over the counter. The Mayo Clinic provides different advice for the 150-mg pill: that it should be taken 30 to 60 minutes before meals to prevent heartburn symptoms (the mildest GERD symptoms). The dissent does not mention Boehringer Ingelheim's advice, also quoted in the majority opinion, that while Zantac can be taken at any time "to relieve symptoms," in order "to prevent symptoms" it should be taken "30 to 60 minutes before eating food or drinking beverages that cause heartburn." That is, if you have pain, you take a pill right away to alleviate the pain; if you foresee pain as a result of eating or drinking, you take the pill before you eat or drink—but not six and a half hours before.

Page 45: The dissent's reference to taking Zantac for more than "two weeks" without a doctor's permission is irrelevant to the case because Rowe had a doctor's permission—indeed Dr. Wolfe's permission—to take Zantac and had begun taking it long ago, always with permission.

Page 45: The reference to symptomatic relief beginning "24 hours" after taking Zantac could be understood to mean that Zantac can prevent pain that far in advance. Not so. As explained in the majority opinion, "24 hours" is the time it

takes for Zantac *when first taken* to begin to have a therapeutic effect.

ROVNER, *Circuit Judge*, concurring.

A disagreement about the outcome of this relatively simple case has morphed into a debate over the propriety of appellate courts supplementing the record with Internet research. To be clear, I do not believe that the resolution of this case requires *any* departure from the record: as the majority opinion makes patently clear, Rowe has consistently maintained that he experiences hours of severe pain if he does not take Zantac with his meals, and at this stage of the proceedings his assertions of extreme pain must be credited. See *Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 696 (7th Cir. 2011). Given that, I think this case can be decided on the fundamental and unremarkable rule that we give Rowe the benefit of all conflicts and draw all reasonable inferences in his favor as the nonmoving party. *E.g.*, *Keller v. United States*, 771 F.3d 1021, 1022 (7th Cir. 2014). Dr. Wolfe, himself a defendant, cursorily asserted that the timing ought not to matter. But Dr. Wolfe's self-interested "expert" opinion on this fact is disputed by Rowe's own personal experience with the timing of the medication, as the majority makes clear. If he informed prison officials that he was in severe pain because he could not take his medication at particular times and they did nothing about it because they did not care about his pain, that is the very definition of deliberate indifference. *See Greeno v. Daley*, 414 F.3d 645, 653-54 (7th Cir. 2005); *Walker v. Benjamin*, 293 F.3d 1030, 1039-40 (7th Cir. 2002).

Treating the competing claims of Dr. Wolfe and Rowe as disputed at the summary judgment stage is *hardly* holding that a prisoner's dissatisfaction with his treatment is always enough to require a jury trial on whether the prison's medical staff were deliberately indifferent to his pain (dissent at 32). Instead, I believe it falls more comfortably into the category the dissent

itself recognizes (dissent at 32-33)—those cases in which prisoners have shown that medical staff persisted in an obviously inadequate course of treatment. *E.g.*, *Arnette v. Webster*, 658 F.3d 742, 754 (7th Cir. 2011) (prescribing inadequate pain medication for condition causing pain and swelling in joints); *Berry v. Peterman*, 604 F.3d 435, 441-42 (7th Cir. 2010) (prescribing over-the-counter medications that did not relieve pain of severe toothache ultimately necessitating root canal); *see also Greeno*, 414 F.3d at 649-54 (continuing to provide ineffective antacid treatment for severe heartburn). Rowe argued in the district court that he needed an expert precisely because his medical condition is "complicated" and "can appear to be non-serious to a lay person." The district court denied Rowe's motion to appoint an expert, which left Rowe with only his own testimony to counter Dr. Wolfe. That the manufacturer's website and other reputable medical web sites support the plausibility of his testimony merely illuminates the factual dispute that exists within the record as we received it; they are not necessary to the outcome. Although the standard for deliberate indifference is high, I have no trouble at this stage of the litigation giving Rowe the benefit of the doubt.

HAMILTON, *Circuit Judge*, concurring in part and dissenting in part.

I agree with the majority's disposition of most claims and issues: affirming summary judgment for defendants on several claims and reversing on Rowe's retaliation claim and his claim for complete denial of his Zantac medicine for 33 days in July and August 2011.

I must dissent, however, from the reversal of summary judgment on Rowe's claim regarding the timing for administering his medicine between January and July 2011 and after August 2011. On that claim, 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. With that information, the majority finds a genuine issue of material fact on whether the timing of Rowe's Zantac doses amounted to deliberate indifference to a serious health need, and reverses summary judgment. (The majority denies at a couple of points that its internet research actually makes a difference to the outcome of the case, see ante at 14, 16, but when the opinion is read as a whole, the decisive role of the majority's internet research is plain.)

The majority writes that adherence to rules of evidence and precedent makes a "heartless ... fetish of adversary procedure." Yet the majority's decision is an unprecedented departure from the proper role of an appellate court. It runs contrary to long-established law and raises a host of practical problems the majority fails to address.

To explain my disagreement, Part I reviews the facts in the record before us and shows that the majority has actually based its decision on its internet research. Part II explains why the majority's reliance on its own factual research is contrary to law. Part III addresses the practical problems posed by the majority's decision to do its own factual research. Finally, Part IV points out problems with the reliability of the majority's factual research and shows that the enterprise of judicial factual research is unreliable when it loses the moorings to the law of judicial notice.

I. *The Facts in the Record*

On Rowe's claim that the timing of his Zantac doses showed deliberate indifference to his health, the evidence *in the record* consists of two items. First, plaintiff Rowe asserts in his verified complaint and in several affidavits that he believes the prison's schedule for giving him two 150 mg Zantac pills each day left him in unnecessary and avoidable pain for hours every day after meals. Second, defendants filed an affidavit from defendant Dr. William Wolfe, who was a career physician in the United States Air Force and is now a contract physician for the Indiana Department of Correction. Dr. Wolfe testified: "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. Providing Mr. Rowe with Zantac twice daily as the nursing staff makes their medication rounds, whatever time that may be, is sufficient and appropriate to treat his heart burn symptoms."

The record thus shows a prisoner's diagnosed disease and complaints of pain that prison staff treated with an ap-

propriate medicine. The prisoner is not satisfied with details of the treatment's timing, but a physician testified that the timing change the prisoner wanted was not called for because the medicine was equally effective as long as he was receiving two doses per day. This evidence does not support a reasonable inference of deliberate indifference.

Proof of deliberate indifference is much more demanding than proof of even medical malpractice. E.g. *Petties v. Carter*, — F.3d —, 2015 WL 4567899 (7th Cir. July 30, 2015); *Ray v. Wexford Health Sources, Inc.*, 706 F.3d 864, 866 (7th Cir. 2013); *Duckworth v. Ahmad*, 532 F.3d 675, 679 (7th Cir. 2008); see generally *Estelle v. Gamble*, 429 U.S. 97 (1976). This record evidence would not let a reasonable jury find that the prison's schedule for giving Rowe his medicine departed so far from professional standards to find that any prison staff acted with deliberate indifference to his health. The district court therefore properly granted summary judgment for defendants on this claim. See, e.g., *Norfleet v. Webster*, 439 F.3d 392, 396 (7th Cir. 2006) (reversing denial of summary judgment), citing *Estate of Cole v. Fromm*, 94 F.3d 254, 262 (7th Cir. 1996) (affirming summary judgment); see also, e.g., *Pyles v. Fahim*, 771 F.3d 403, 409 (7th Cir. 2014) (affirming summary judgment; physician's refusal to order MRI for prisoner's back pain did not show deliberate indifference).

As noted above, the majority claims twice that its decision does not actually depend on its independent factual research, at pages 14 and 16. See also ante at 27–28 (Rovner, J., concurring). These denials contradict the rest of the majority opinion. If they were accurate, the majority's long discussion of its research and its justifications for it would amount to a long essay not necessary to the court's decision. If the denials

were accurate, moreover, the majority decision would amount to a significant rewriting of the Eighth Amendment law governing health care for prisoners.

Where prison medical staff just refuse to treat serious pain or disease, a prisoner may well have a viable claim that should go to trial. E.g., *Miller v. Campanella*, No. 14-1990,— F.3d —, 2015 WL 4523799 (7th Cir. July 27, 2015) (no treatment of prisoner's GERD); *Hayes v. Snyder*, 546 F.3d 516, 524–26 (7th Cir. 2014). Where the evidence shows, however, that medical staff have provided at least some treatment for pain we almost always hold that the prisoner is not entitled to a jury trial on a claim for deliberate indifference based on a claim that the pain treatment was not adequate. E.g., *Pyles v. Fahim*, 771 F.3d 403, 409, 411 (7th Cir. 2014); *Holloway v. Delaware County Sheriff*, 700 F.3d 1063, 1073–76 (7th Cir. 2012).

If the majority decision did not depend on its own factual research, then the majority would be holding that the prisoner's dissatisfaction with pain treatment is enough to require a jury trial on whether the prison's medical staff were deliberately indifferent to his pain. We have not found before this case that such evidence is sufficient to infer deliberate indifference. But we will see a lot more cases like this one. As the average age of the prison population increases, so will the incidence of painful, chronic conditions that cannot be treated to the complete satisfaction of the prisoners. The fact that a treatment for pain is not as effective as the prisoner would like should not be enough to support an inference that the prison staff are deliberately indifferent to his pain.

In fact, the majority's reversal on this claim is based on a small but important category of cases in which prisoners

have shown that medical staff persisted in obviously inadequate courses of treatment. In those cases, we have found triable issues of deliberate indifference. E.g., *Arnett v. Webster*, 658 F.3d 742, 754 (7th Cir. 2011); *Berry v. Peterman*, 604 F.3d 435, 441–42 (7th Cir. 2010); *Greeno v. Daley*, 414 F.3d 645, 654 (7th Cir. 2005) (treatment prisoner received was "blatantly inappropriate"). As we explained in *Pyles*, these decisions were based on evidence showing that the need for specialized expertise or different treatment was either known by the treating physicians or would have been obvious to a lay person. 771 F.3d at 411.

The problem for the majority here is that Rowe himself has made no comparable showing. Only by relying on its independent factual research can the majority establish an arguable basis for applying this theory that the course of treatment was so clearly inadequate as to amount to deliberate indifference. The majority decision to reverse summary judgment on this claim thus depends on that independent factual research.

II. *The Law on Judicial Research into the Facts*

The ease of research on the internet has given new life to an old debate about the propriety of and limits to independent factual research by appellate courts.[1] To be clear, I do not

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[1] See, e.g., Layne S. Keele, *When the Mountain Goes to Mohammed: The Internet and Judicial Decision-Making*, 45 N.M. L. Rev. 125 (2014); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1757 (2014); Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's Views*, 51 Duq. L. Rev. 3 (2013); Frederick Schauer, *The Decline of "The Record": A Comment on Posner*, 51 Duq. L. Rev. 51 (2013); Elizabeth G. Thornburg, *The Lure of the Internet and the Limits on Judicial Fact Research*, Litig., Summer 2012, at 41; Brianne J. Gorod, *The*

oppose using careful research to provide context and background information to make court decisions more understandable. By any measure, however, using independent factual research to find a genuine issue of material, adjudicative fact, and thus to decide an appeal, falls outside permissible boundaries. Appellate courts simply do not have a warrant to decide cases based on their own research on adjudicative facts. This case will become Exhibit A in the debate. It provides, despite the majority's disclaimers, a nearly pristine example of an appellate court basing a decision on its own factual research.

The majority's factual research runs contrary to several lines of well-established case law holding that a decisionmaker errs by basing a decision on facts outside the record.

If a district judge bases a decision on such research, we reverse for a violation of Rule 201. E.g., *Pickett v. Sheridan Health Care Center*, 664 F.3d 632, 648–51 (7th Cir. 2011) (district court erred by relying on independent internet research on attorney fees without giving parties opportunity to address information).

If jurors start doing their own research during a trial, a new trial is likely. *United States v. Thomas*, 463 F.2d 1061, 1062–65 (7th Cir. 1972); see also *United States v. Blagojevich*, 612 F.3d 558, 564 (7th Cir. 2010) (noting concern that messag-

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Adversarial Myth: Appellate Court Extra-Record Factfinding, 61 Duke L.J. 1 (2011); Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 Rev. Litig. 131 (2008); Coleen M. Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. App. Prac. & Process 417 (2002).

es to jurors would tempt them to engage in "forbidden research and discussion").

If an immigration judge or administrative law judge bases a decision on facts without record support, we reverse it. See, e.g., *Huang v. Gonzales*, 403 F.3d 945, 948–50 (7th Cir. 2005) (reversing immigration decision based on alien's answers to questions based on judge's personal beliefs about alien's religion); *Nelson v. Apfel*, 131 F.3d 1228, 1236–37 (7th Cir. 1997) (ALJ's reliance on evidence outside record was erroneous but harmless).

We are in no better a position to go outside the record for decisive facts. Our job is to reverse in cases where the decision-maker has gone outside the record. The majority in this case, however, not only does what we treat as reversible error when others do it; it holds in essence that the district judge erred by *not* doing such independent factual research. What was forbidden is now required.

In addition to the case law holding that a decision-maker is not permitted to base a decision on evidence outside the record, another body of law is relevant to this issue: Federal Rule of Evidence 201 and the law of judicial notice. The majority opinion runs contrary to that law and misunderstands how Rule 201 and judicial notice fit together with the ordinary, adversarial presentation of facts.

The vast majority of facts that courts consider when deciding cases comes from the familiar, adversarial presentations of evidence by opposing parties. The foundation of our legal system is a confidence that the adversarial procedures will test shaky or questionable evidence: "Vigorous cross-examination, presentation of contrary evidence, and careful

instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993). Those protective procedures are not available when a court decides to do its own factual research and bases its decision on what it finds.

The law of evidence allows a narrow exception permitting some judicial research into relevant facts, under Federal Rule of Evidence 201 and the concept of judicial notice. Judicial notice "substitutes the acceptance of a universal truth for the conventional method of introducing evidence," and as a result, courts must use caution and "strictly adhere" to the rule before taking judicial notice of pertinent facts. *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1081 (7th Cir. 1997); see also *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1354 (7th Cir. 1995) ("In order for a fact to be judicially noticed, indisputability is a prerequisite.").

The majority says twice it is *not* taking judicial notice of all the cited medical information from the internet. Ante at 13–14, 19. I agree it could not properly take judicial notice of this information under Evidence Rule 201(b) and (e). The proper timing of a patient's doses of Zantac is not "generally known within the trial court's territorial jurisdiction" and is not beyond "reasonable dispute," nor can it be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned," as Rule 201(b) requires. And the majority has made no effort to comply with the procedural requirements of Rule 201(e), essential to basic fairness, of giving the parties an opportunity to be heard on the evidence.

If the majority is not taking judicial notice, what exactly is it doing? It seems to have created an entirely new, third category of evidence, neither presented by the parties nor properly subject to judicial notice. The majority writes:

> 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.

Ante at 13 (emphasis added). In other words, the majority acknowledges that its "evidence" neither comes from adversarial presentation by the parties nor meets the strict substantive and procedural standards for judicial notice under Rule 201.

Before this decision, American law has not recognized this category of evidence, which might be described as "non-adversarial evidence that the court believes is probably correct." Compare the comments of the authors of Rule 201, the Advisory Committee Notes from 1972:

> The usual method of establishing adjudicative facts is through the introduction of evidence, ordinarily consisting of the testimony of wit-

> nesses. If particular facts are outside the area of reasonable controversy, this process is dispensed with as unnecessary. *A high degree of indisputability is the essential prerequisite.*

In other words, the Federal Rules of Evidence allow no room for the majority's innovation. Adversarial evidence and judicial notice are not opposite poles on a wide spectrum, with a middle ground for the majority's evidence that has neither been subjected to adversarial testing nor a proper subject of judicial notice. These are two distinct categories. To be admissible, evidence must fall within one or the other. "Close" to judicial notice does not count.

The majority has not offered any precedent from the law of evidence to support its reliance on its own factual research. Instead, it tries to downplay the unprecedented step it takes, including its emphasis that it is "not ordering that judgment be entered in Rowe's favor" and that defendants will be entitled to rebut the majority's factual research on remand. Ante at 19. The majority's modest demurrer loses sight of the stakes. The issue on summary judgment is whether the evidence *in the record* would allow a reasonable jury to find in favor of the non-moving party. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 149–50 (2000); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). By reversing, the majority is necessarily finding that this record is sufficient to support a jury verdict for Rowe. I disagree.

The majority also points out that "judges and their law clerks often conduct research on cases without disclosure to the parties." Ante at 12. Such research has long been understood to involve only *legal research*. The majority's effort to compare long-accepted judicial research into case law and

statutes to its independent *factual* research shows the majority has entered unknown territory.

To justify this venture, the majority asks a number of rhetorical questions and invokes the courage of the barons at Runnymede in 1215. Ante at 14. With respect, we are an intermediate appellate court. The Federal Rules of Evidence and Federal Rules of Civil Procedure that we apply are adopted and amended through processes established by the Rules Enabling Act, 28 U.S.C. § 2071 et seq. We simply do not have authority on our own to take the law into this unknown territory.

III. *The Practical Problems*

The majority points out correctly that prisoners must depend entirely on the government for their health care. If they turn to the federal courts for help, the combination of the constitutional standard under the Eighth Amendment, deliberate indifference to a serious health need, and the system of personal liability under 42 U.S.C. § 1983 can make it very difficult for a prisoner to hold anyone accountable for serious wrongs. See, e.g., *Shields v. Illinois Dep't of Corrections*, 746 F.3d 782 (7th Cir. 2014). When a prisoner brings a pro se suit about medical care, the adversary process that is the foundation of our judicial system is at its least reliable. Few prisoners have access to lawyers or to expert witnesses needed to address medical issues.

These conditions pose important challenges to federal courts doing their best to decide these cases fairly. Yet the majority's solution—to research available medical information on its own and find a genuine issue of material fact

on that basis—raises problems much more serious than a possible error in the resolution of one prisoner's case.

The majority's approach turns the court from a neutral decision-maker into an advocate for one side. The majority also offers no meaningful guidance as to how it expects other judges to carry out such factual research and what standards should apply when they do so. Under the majority's approach, the factual record will never be truly closed. This invites endless expansion of the record and repetition in litigation as parties contend and decide that more and more information should have been considered.

In addition to the abandonment of neutrality, consider the problems from the district judge's point of view. The majority clearly implies, while denying it is doing so, that the district judge herself should have done the independent factual research the majority has done on appeal, questioning an unchallenged expert affidavit by looking to websites of the drug manufacturer, the Mayo Clinic, the Physician's Desk Reference, and Healthline.

The practical questions are obvious: When are district judges supposed to carry out this independent factual research? How much is enough? What standards of reliability should apply to the results? How does the majority's new category of evidence fit in with a district judge's gatekeeping responsibilities under Rule 702 and *Daubert*? The majority offers no answers.

The majority essentially orders the district judge on remand to find an expert witness on the medical issues, either for plaintiff or as a neutral expert under Rule 706. That might well be helpful, but as the majority concedes, district

courts do not have budgets for that purpose. Even if a few experts might be willing to volunteer in unusual cases, the demand of prisoners for free medical or other expert witnesses will far exceed the supply, especially in the rural areas where so many prisons are located and smaller towns where the nearest district courts are located.

The majority's solution for this problem is to have the district court use Federal Rule of Evidence 706 to order defendants, and only the defendants, to pay for an expert witness for the plaintiff or the court. See ante at 19–20. That approach is not foreclosed by the language of Rule 706, and there is some case law supporting it. See *Ledford v. Sullivan*, 105 F.3d 354, 360–61 (7th Cir. 1997). Nevertheless, the majority's reliance on this solution in this ordinary case further threatens the neutrality of the courts. It is worth recalling that damages under 42 U.S.C. § 1983 must be sought from state employees only in their individual capacities. *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989). Indemnification by their employer is a matter of state law and policy, and sometimes grace. See Ind. Code § 34-13-4-1; *Estate of Moreland v. Dieter*, 576 F.3d 691, 694–96 (7th Cir. 2009). Is it fair to impose on individual guards, prison administrators, staff, nurses, and doctors the cost of finding evidence to build a case against them? At the very least, such one-sided burdens should be imposed only in extraordinary cases.[2]

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[2] I share the concerns expressed by the district court in *Martin v. Cohn*, 1999 WL 325054, at *1 (N.D. Ind. April 5, 1999), about the fundamental fairness of imposing this financial burden on one side solely because the opposing party is indigent. The defendants will end up having to foot the bill for the expert even if they win the case. One partial but creative solution to this problem can be found in *Goodvine v. Ankarlo*,

Further, if the case goes to trial, how is the district judge supposed to present to a jury the information the majority has found? My colleagues and I agree it is not suitable for judicial notice because it is not indisputable, as required under Rule 201(b). Without an expert witness qualified to present the facts and opinions the majority finds persuasive, that information does not come into evidence. On appeal would the majority's approach lead us to remand for a new trial with instructions to look harder for the right evidence? Or what should we do if the district judge did not find or rely on the information that our research turns up? As long as the factual record remains open for judicial supplements, parties will try to use the quest for the perfect record to keep any loss in litigation from being final.

Then consider the problems parties and their lawyers will face. If we permit such independent factual research by district judges—even *expect* such research from them—parties will need to plan for it. Responding to the evidence actually offered by the other side is often the biggest challenge and expense in a lawsuit. Now parties need to anticipate the evidence the judge might turn up on her own and prepare to meet it. The time and expense devoted to such preventive measures will be substantial and should be unnecessary. And if the district judge does her own research and gives the parties an opportunity to respond to it, the majority's approach here is an open invitation for parties to add to the record on appeal. The parties will also need to anticipate on appeal that our court will undertake its own factual

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2013 WL 1192397, at *2 (W.D. Wis. March 22, 2013) (providing for long-term assessments of plaintiff's prison trust account to pay for court-appointed expert if plaintiff did not prevail).

research, opening up opportunities to save any losing case by offering new evidence on appeal.[3]

From the larger perspective of our judicial system, the independent factual research the majority endorses and even requires here is not something that federal courts can carry out reliably on a large scale. History is probably the academic field closest to the practice of law and judging. Yet historians regularly scoff at the phenomenon called "law-office history." See *Velasquez v. Frapwell*, 160 F.3d 389, 393 (7th Cir. 1998) (Posner, J.) ("[J]udges do not have either the leisure or the training to conduct *responsible* historical research or *competently* umpire historical controversies. The term 'law-office history' is properly derisory and the derision embraces the efforts of judges and law professors, as well as of legal advocates, to play historian. * * * Judges don't try to decide contested issues of science without the aid of expert testimony, and we fool ourselves if we think we can unaided resolve issues of historical truth."), *vacated in part*, 165 F.3d 593 (7th Cir. 1999).

Law-office or judicial-chambers medicine is surely an even less reliable venture. The internet is an extraordinary resource, but it cannot turn judges into competent substitutes for experts or scholars such as historians, engineers,

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[3] If parties on appeal try to supplement the record as the majority does here, they are rebuked and may even be sanctioned. E.g., *Hart v. Sheahan*, 396 F.3d 887, 894–95 (7th Cir. 2005) (stating general rule but finding no violation because appeal was from dismissal on pleadings); *Holmberg v. Baxter Healthcare Corp.*, 901 F.2d 1387, 1392 n.4 (7th Cir. 1990) (striking portions of appellee's brief). Under the majority's approach, we could not take such steps in response to parties' invitations to our court to repeat what the majority does here.

chemists, psychologists, or physicians. The majority's instruction to the contrary will cause problems in our judicial system more serious than those it is trying to solve in this case.

IV. *How Reliable is Our Research?*

Thus far I have avoided debating the details of the majority's research, but they deserve closer attention. The specific details highlight the more general criticisms I have directed at such factual research by judges.

First, on the websites the majority relies upon, we find important disclaimers that emphasize the need for filtering their information through qualified medical advice, which no member of this court is qualified to provide. The Physician's Desk Reference site says it is to be used "only as a reference aid. It is not intended to be a substitute for the exercise of professional judgment. You should confirm the information on the PDR.net site through independent sources and seek other professional guidance in all treatment and diagnosis decisions." www.pdr.net (last visited August 19, 2015, as were all websites cited here). The Mayo Clinic and Zantac websites have similar disclaimers advising readers to talk to a physician or other health care provider before acting on the information on the websites. See www.mayoclinic.org/about-this-site/terms-conditions-use-policy; www.zantacotc.com/zantac-maximum-strength.html#faqs.

Second, after we get past the disclaimers, the content of the majority's websites simply does not give clear support to the majority's views (a) that Dr. Wolfe was wrong in saying that the 150 mg pills Rowe was receiving twice a day could

be equally effective even if not given shortly before meals, let alone (b) that Dr. Wolfe was *so thoroughly and obviously* wrong that a jury could infer that prison staff were deliberately indifferent to Rowe's health needs. The majority's websites instead show that some degree of medical judgment is needed to decide when best to administer which size pills for patients with different needs, especially patients like Rowe with chronic conditions.

The Mayo Clinic site says that patients taking prescription strength Zantac twice a day should take one in the morning and one at bedtime. The majority discounts that advice because Rowe was taking an over-the-counter dosage of 150 mg pills rather than the prescription dosage of 300 mg pills. Ante at 8. Yet that explanation overlooks the advice from both the manufacturer and the Mayo Clinic that a patient should not take the over-the-counter pills for more than two weeks *unless directed by a doctor*. For patients like Rowe, taking Zantac long-term to treat GERD, the Mayo Clinic offers more specific guidance. It advises that adult patients with GERD take the 150 mg pill two times a day without specifying that the pills should be taken shortly before meals. www.mayoclinic.org/drugs-supplements/histamine-h2-antagonist-oral-route-injection-route-intravenous-route/proper-use/drg-20068584. That advice from the Mayo Clinic seems identical to Dr. Wolfe's view.

Similarly, the PDR advises that for treatment of GERD, "Symptomatic relief commonly occurs within 24 hours after starting therapy with ZANTAC 150 mg twice daily," again without indicating any need to take the pills before meals. www.pdr.net/full-prescribing-information/zantac-150-and-300-tablets?druglabelid=241#section-standard-1.

The "full prescribing information" on the Physician's Desk Reference website says that for treatment of GERD with the 150 mg and 300 mg pills, "Symptomatic relief commonly occurs within 24 hours after starting therapy with ZANTAC 150 mg twice daily," again without saying anything about taking pills before meals. www.pdr.net/full-prescribing-information/zantac-150-and-300-tablets?druglabelid=241. And again, that was Rowe's diagnosis and those were his pills in 2011.

The majority draws on the PDR website and "common sense" regarding how long the pills remain effective. Ante at 17. The PDR website, however, simply does not provide sufficient data on absorption and clearance rates for the medicine to allow us to exercise our own (non-expert) judgment about whether the timing of Rowe's pills was appropriate. It certainly does not allow us to conclude that the timing could have amounted to deliberate indifference to his serious health needs or to find that Dr. Wolfe's uncontradicted affidavit did not support the district court's entry of summary judgment on this claim.

Of course, the point of this discussion of the websites is not to debate the majority on the medical fine points. The websites the majority relies upon tell us themselves that their information needs to be interpreted by a qualified physician. None of this information is in the record. None was before the district court, nor is it properly before us.

The majority's interpretation of its internet research is not a reliable substitute for proper evidence subjected to adversarial scrutiny. And while Dr. Wolfe's affidavit is far less detailed than the information the majority has explored on the internet, I also see no basis for the majority's harsh criticism

of him, especially when Dr. Wolfe has not been given any opportunity to respond or explain.[4]

* * *

In the end, whether Dr. Wolfe's testimony about the timing for Rowe's doses was right or wrong in some pure and objective sense, or in a case tried with ample resources and talent on both sides, is not the question for us. For purposes of summary judgment, Dr. Wolfe's testimony was undisputed. We have no business reversing summary judgment based on our own, untested factual research. By doing so, the majority has gone well beyond the appropriate role of an appellate court. I respectfully dissent from the reversal of summary judgment on Rowe's claims based on the timing of his medication.

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[4] The majority criticizes Dr. Wolfe's affidavit for not providing an explanation for his opinion about the timing of the Zantac doses. The majority overlooks Federal Rule of Evidence 705, which permits conclusory expert testimony unless and until the conclusions are challenged, which Dr. Wolfe's affidavit was not in the district court. He has not yet been called upon to explain his opinion in this case. The fact that he is a defendant does not disqualify him from offering an affidavit; we often affirm summary judgment based on a moving party's testimony. The majority points out that Dr. Wolfe is "a frequent defendant in prisoner civil rights suits," ante at 6, as if that reflected poorly on his professionalism. Virtually any physician serving large numbers of prisoners will be "a frequent defendant in prisoner civil rights suits."

287 F.Supp.3d 213
United States District Court, E.D. New York.
COMMODITY FUTURES TRADING COMMISSION, Plaintiff,
v.
Patrick K. MCDONNELL, and CabbageTech, Corp. d/b/a Coin Drop Markets, Defendants.

18–CV–361
Signed 03/06/2018

Synopsis

Background: Commodity Futures Trading Commission (CFTC) brought action against trader of virtual currency and his company, alleging that defendants operated a deceptive and fraudulent virtual currency scheme for purported virtual currency trading advice, purchases, and trading, and that they misappropriated investor funds, in violation of the Commodity Exchange Act (CEA). Individual defendant, proceeding pro se, filed motion to dismiss for lack of jurisdiction.

Holdings: The District Court, Jack B. Weinstein, Senior District Judge, held that:
1 virtual currencies are "commodities" subject to the CFTC's regulatory protections;
2 the amendments to the CEA under the Dodd-Frank Act permit the CFTC to exercise its jurisdiction over fraud that does not directly involve the sale of futures or derivative contracts, including fraud related to virtual currencies sold in interstate commerce;
3 the CFTC made a prima facie showing of fraud committed by defendants; and
4 the CFTC was entitled to a preliminary injunction.

Motion denied; preliminary injunctive relief ordered.

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D. Appropriate Research by Court

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 appropriate.

The ABA has issued the following opinion related to individual research by the court:

> Easy access to a vast amount of information available on the Internet exposes judges to potential ethical problems. Judges risk violating the Model Code of Judicial Conduct by searching the *Internet for information related to participants or facts in a proceeding. Independent investigation of adjudicative facts generally is prohibited* unless the information is properly subject to judicial notice. The restriction on independent investigation includes unless the information is properly subject to judicial notice. The restriction on independent investigation includes individuals subject to the judge's direction and control.

Committee on Ethics and Responsibility, *Independent Factual Research by Judges Via Internet*, Formal Opinion 478, Dec. 8, 2017 (ABA) (emphasis added).
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. *See* Abrams, Brewer, Medwed, et al., *Evidence Cases and Materials* (10th Ed. 2017) (Ch. 9 "Judicial Notice"). It would be a misapprehension of the ABA rule to conclude otherwise.

Adjudicative facts involving defendants' alleged activities have not been the subject of investigation by the court, except at an evidentiary hearing. *See* Hr'g Tr., Mar. 6, 2018.

8 Misc.3d 33
Supreme Court, Appellate Term, New York.
2nd and 11th Judicial Districts.

NYC MEDICAL AND NEURODIAGNOSTIC, P.C., as Assignee of Carrie Williams, Respondent,
v.
REPUBLIC WESTERN INS. CO., Appellant.

Dec. 22, 2004.

Synopsis

Background: Medical provider brought action against insurer of rental vehicle to recover first-party no-fault benefits for medical services rendered to passenger in the vehicle following automobile accident. The Civil Court, Queens County, C. Markey, J., denied insurer's motion to dismiss for lack of personal jurisdiction, and insurer appealed.

Holdings: The Supreme Court, Appellate Term, held that:

[1] jurisdictional discovery was not required, and

[2] trial court could not conduct its own Internet research in determining whether out-of-state insurer transacted business in New York.

Reversed.

Pesce, P.J., filed dissenting opinion.

West Headnotes (6)

[1] **Pretrial Procedure**
⇐Presumptions and burden of proof

Generally, where a defendant moves to dismiss an action on jurisdictional grounds, and where such jurisdictional challenge appears to have merit, the plaintiff has the burden of proving that jurisdiction has been properly obtained.

3 Cases that cite this headnote

[2] **Courts**
⇐Determination of questions of jurisdiction in general

So long as plaintiff has made a discernible showing that some basis for jurisdiction exists, the court in which the action has been brought has the power to determine whether it has jurisdiction.

[3] **Pretrial Procedure**
⚭Discovery methods and procedure

Whenever a plaintiff makes a sufficient start, i.e., a non-frivolous showing that facts pertinent to an acceptable basis for jurisdiction may exist, a plaintiff is entitled to jurisdictional discovery, and thus need not make a prima facie showing of jurisdiction at the pre-discovery stage. McKinney's CPLR 3211.

[4] **Pretrial Procedure**
⚭Discovery methods and procedure

In order to require jurisdictional discovery in medical provider's action to recover no-fault benefits for medical services rendered to passenger in insured vehicle, provider needed to make more than conclusory allegations, and needed to submit some tangible evidence to substantiate its allegations that insurer, while unauthorized to do business in New York, was either issuing or delivering insurance contracts to state residents or corporations authorized to do business in the state, or was engaged in any other transaction of business and that action arose out of that transaction of business. McKinney's Insurance Law § 1213(b)(1)(A, D).

1 Cases that cite this headnote

[5] **Courts**
⚭Determination of questions of jurisdiction in general

Trial court could not conduct its own Internet research in determining whether out-of-state insurer transacted business in New York, as required for exercise of personal jurisdiction in medical provider's action to recover no-fault benefits for medical services rendered to passenger in insured vehicle; in conducting its own independent factual research, the court improperly went outside the record in order to arrive at its conclusions, and deprived the parties an opportunity to respond to its factual findings.

7 Cases that cite this headnote

[6] **Evidence**
⚭Mode of ascertaining facts required to be noticed; motions and notice of reliance

Even assuming trial court was taking **judicial notice** of the facts when it conducted independent **Internet**

research into whether insurer was transacting business in New York, showing that the Web sites consulted were of undisputed reliability, opportunity for parties to be heard as to the propriety of taking **judicial notice** in the particular instance was required.

4 Cases that cite this headnote

Attorneys and Law Firms

**310 Meiselman, Denlea, Packman & Eberz, P.C., White Plains (James G. Eberz of counsel), for appellant.

**311 Baker & Barshay LLP, Hauppauge (Gil McLean of counsel), for respondent.

Present: PESCE, P.J., ARONIN and PATTERSON, JJ.

Opinion

Appeal by defendant, as limited by its brief, from so much of an order of the Civil Court, Queens County (C. Markey, J.), entered July 8, 2003, as denied its motion to dismiss the complaint for lack of personal jurisdiction.

*34 Order, insofar as appealed from, reversed without costs and defendant's motion to dismiss the complaint granted.

Plaintiff medical provider commenced this action to recover first-party no-fault benefits in the sum of $4,126.89 for medical services rendered to plaintiff's assignor for injuries she allegedly sustained in an automobile accident which occurred in the Bronx on December 7, 2001. Plaintiff's assignor was a passenger in a U–Haul vehicle insured by defendant, an Arizona corporation. Service of the summons and complaint was made on the New York State Department of Insurance. An answer was interposed denying the allegations of the complaint which asserted that defendant was licensed and authorized to do business in the State of New York and that it transacted business in *35 the City of New York, and which included an affirmative defense that the court lacked jurisdiction over defendant. In support of a subsequent motion to dismiss for lack of jurisdiction, based on CCA 404(a), defendant's New York claims manager submitted an affidavit in which he averred that defendant was an Arizona corporation which neither wrote nor sold insurance in the State of New York, nor had any agent in the State of New York, that defendant was the sole insurer for U–Haul, Inc., an Arizona corporation, and that the policy was written and sold in Arizona. Defendant had a claims office in Westchester County. He further stated that defendant did not write, sell or solicit any insurance policies to any entities within New York City, did not provide goods or services within New York City, and did not transact business in New York City.

In its opposition papers, plaintiff's counsel argued that "upon information and belief," defendant actively engaged in the solicitation of business and the writing of insurance policies to residents of New York City, which activities constituted the

transaction of business as well as the contracting to supply goods and services in New York City. Documentation purported to be in support of its argument consisted of various police accident reports from other accidents where U–Haul vehicles were involved as well as several no-fault denial of claim forms where the "policy holder" was identified as defendant.

After the return date of the motion, the court requested that the parties send to it additional documentation which included the police report pertaining to the instant accident, the addresses of the assignee and its assignor, registration information for the U–Haul vehicle at issue, a copy of the insurance policy between defendant and U–Haul's parent company, Amerco, the insurance identification card for the U–Haul vehicle, and a copy of the U–Haul rental contract with a computerized printout regarding the lease transaction between U–Haul and the lessee. These materials showed that both plaintiff's assignor and the lessee were Bronx residents and that the accident occurred in the Bronx. U–Haul Co. of Arizona was listed in the police report as the registered owner of the vehicle. A business automobile insurance policy had been issued by defendant, an Arizona corporation, to its named insured, Amerco, also an Arizona corporation, indicating that there was a New York specific endorsement providing no-fault coverage. **312 The Arizona Automobile Insurance Card for the vehicle showed that defendant was its insurer and that the insured was "Amerco et al, including *36 U–Haul." The U–Haul rental contract stated that its customers were insured by a business auto policy providing the minimal limits of the state where the accident occurred.

In its decision and order denying the motion to dismiss, the court below made numerous findings of fact based not upon the submissions of counsel but rather upon its own Internet research. Among those findings, from defendant's own Web site, were that defendant was a wholly owned subsidiary of Amerco, whose other major subsidiaries included, inter alia, U–Haul, and that defendant was a "full service insurance company" which specialized, in part, in vehicular liability, operated in 49 states, and received approximately $170 million in premiums annually. From U–Haul's Web site, the court found, among other things, that U–Haul was the largest consumer truck and trailer rental operation in the world, and operated in all 50 states, that there were at least nine Queens U–Haul facilities, and that U–Haul promoted career opportunities for defendant, its sibling corporation. Finally, the court found, by going to the Web site of the New York State Department of Insurance, that, contrary to counsel's denial, defendant had been "licensed to do insurance business" in this state since April of 1980.

The court below did not make a specific finding as to whether defendant, under CCA 404(a)(1), either in person or through an agent "transacts any business within the City of New York or contracts anywhere to supply goods or services in the City of New York." Instead, it based its decision to deny the motion to dismiss on the policy considerations behind sections 1212 and 1213 of the Insurance Law, as well as the no-fault law.

In our opinion, the court below erred in denying defendant's motion to dismiss.

[1] [2] [3] Generally, where a defendant moves to dismiss an action on jurisdictional grounds, and where such jurisdictional challenge appears to have merit, the plaintiff has the burden of proving that jurisdiction has been properly obtained. So long as plaintiff has made a discernible showing that some basis for jurisdiction exists, the court in which the action has been brought has the power to determine whether it has jurisdiction. Whenever a plaintiff makes a "sufficient start," i.e., a non-frivolous showing that facts pertinent to an acceptable basis for jurisdiction may exist, a plaintiff is entitled to jurisdictional discovery, and thus need not make a prima facie showing of jurisdiction at the pre-discovery stage (*see* Weinstein–Korn–Miller, N.Y. Civ. Prac. ¶ 301.07; *see also* *37 *Peterson v. Spartan Ind.*, 33 N.Y.2d 463, 354 N.Y.S.2d 905, 310 N.E.2d 513 [1974]). Indeed, CPLR 3211(d) permits a court to deny a motion to dismiss made under CPLR 3211(a) or to order a continuance to enable a plaintiff to secure additional proof or to conduct further discovery, where "facts essential to justify opposition may exist" but are not available to it.

By serving process on the Superintendent of Insurance, plaintiff was aware that it was basing jurisdiction over defendant by virtue of either section 1212 or section 1213 of the Insurance Law, both of which provide that such service is deemed to have been made "within the territorial jurisdiction of any court in this state" (Insurance Law § 1212[b]; § 1213[b][2]). Indeed, in its complaint, plaintiff alleged that defendant was "licensed and authorized to do business in the State of New York," thereby implicitly alleging jurisdiction under Insurance Law § 1212. In addition, **313 the complaint alleged that defendant "transacts business in the City of New York," apparently claiming, in the alternative, that jurisdiction could be based on Insurance Law § 1213.

[4] In opposition to defendant's motion, plaintiff alleged that it needed to conduct jurisdictional discovery in order to obtain information about defendant's sale and underwriting of insurance policies to New York City residents in order to establish that defendant did in fact transact business and contract to sell goods and services within the City of New York. It thereby implicitly abandoned its claim of jurisdiction based upon defendant's status as an authorized insurer, since it could have demonstrated that status without the benefit of discovery, i.e., by submitting a certified document from the New York State Department of Insurance attesting to the fact that defendant was an authorized insurer. It chose not to do so, and instead proceeded to address the alternative jurisdictional basis of "transacting business" under Insurance Law § 1213. In order to demonstrate that "facts essential to justify opposition [to the motion to dismiss] may exist," plaintiff needed to make more than conclusory allegations, and needed to submit some tangible evidence to substantiate its allegations that defendant, while unauthorized to do business, was either issuing or delivering insurance contracts to state residents or corporations authorized to do business in the state (Insurance Law § 1213[b][1] [A]) or was engaged in "any other transaction of

business" (Insurance Law § 1213[b][1][D]) and that the cause of action arose out of that transaction of business (*see Farm Family Mut. Ins. Co. v. Nass,* 126 Misc.2d 329, 481 N.Y.S.2d 952 [1984], *affd.* **38** 121 A.D.2d 498, 503 N.Y.S.2d 820 [1986]). Plaintiff did not do so and thus did not make the "sufficient start" necessary to warrant further discovery (*see e.g. Mandel v. Busch Entertainment Corp.,* 215 A.D.2d 455, 626 N.Y.S.2d 270 [1995]; *see also Granat v. Bochner,* 268 A.D.2d 365, 702 N.Y.S.2d 262 [2000]; *Bissinger v. DiBella,* 141 A.D.2d 595, 529 N.Y.S.2d 516 [1988]; *Schumacher v. Sea Craft Inds.,* 101 A.D.2d 707, 475 N.Y.S.2d 690 [1984]). Accordingly, plaintiff's complaint should have been dismissed at that juncture, and it was error for the court below not to have done so.

[5] [6] This error was further exacerbated by the court's conduct in initiating its own investigation into the facts when, based upon the insufficient submissions of plaintiff, the court should have dismissed the complaint. In conducting its own independent factual research, the court improperly went outside the record in order to arrive at its conclusions, and deprived the parties an opportunity to respond to its factual findings. In effect, it usurped the role of counsel and went beyond its judicial mandate of impartiality. Even assuming the court was taking judicial notice of the facts, there was no showing that the Web sites consulted were of undisputed reliability, and the parties had no opportunity to be heard as to the propriety of taking judicial notice in the particular instance (*see* Prince, Richardson on Evidence § 2–202 [Farrell 11th ed.]).

We note that defendant moved for reargument of the subject motion, and the court below, in a subsequent decision/order dated April 12, 2004, and officially reported at 3 Misc.3d 925, 774 N.Y.S.2d 916 (2004), in effect, granted reargument and, upon reargument, adhered to its original determination. We have not reviewed that decision/order pursuant to CPLR 5517(b) because defendant did not include in the record on appeal the motion papers upon which the decision/order was based (*see Matter of Donato v. Board of Educ. of* **314** *Plainview—Old Bethpage Cent. School Dist.,* 286 A.D.2d 388, 729 N.Y.S.2d 187 [2001]; *Matter of Merendino v. Herman,* 15 A.D.2d 818, 225 N.Y.S.2d 473 [1962]). However, in light of the fact that the subsequent decision/order adhered to the original determination set forth in the order appealed from, which has now been reversed, to the extent that the decision/order of April 12, 2004 supports a result contrary to the result herein, it should not be followed.

ARONIN and PATTERSON, JJ., concur.

PESCE, P.J., dissents in a separate memorandum.

PESCE, P.J., dissents and votes to affirm the order in the following memorandum.

In my opinion, the motion court's use of the Web site of the New York State Department

of Insurance in order to verify that defendant insurer was in fact licensed to do ***39** business in the State of New York was proper. Accordingly, the court did not err in denying defendant's motion to dismiss based upon lack of jurisdiction.

Although New York cases do not clearly define the procedure for taking judicial notice of facts, in practice, sometimes judicial notice is taken at the request of a party, and sometimes it is taken sua sponte (*see* Prince, Richardson on Evidence § 2–202 [Farrell 11th ed.]). Courts frequently take judicial notice of matters which, at a given moment, may be personally unknown to them. In such cases, recourse may be had to "such documents, references and other repositories of information as are worthy of belief and confidence" even in the absence of a specific request of a party (*id.; see also People v. Langlois,* 122 Misc.2d 1018, 472 N.Y.S.2d 297 [1984]). The use of reference works such as calendars, dictionaries and encyclopedias has been found to be acceptable (*see* Fisch, Fisch on New York Evidence § 1068 [2d ed.]).

Moreover, it is well settled that a court may take judicial notice of matters of public record or other "reliable documents, the existence and accuracy of which are not disputed" (*see Brandes Meat Corp. v. Cromer,* 146 A.D.2d 666, 667, 537 N.Y.S.2d 177 [1989] [certificate of dissolution of corporation issued by Secretary of State]; *Associated Gen. Contrs. of America, N.Y. State Chapter v. Lapardo Bros. Excavating Contrs.,* 43 Misc.2d 825, 826, 252 N.Y.S.2d 486 [1964] ["indisputable public records of the Secretary of State" showed that plaintiff was a domestic membership corporation]) and of data culled from those public records (*see Siwek v. Mahoney,* 39 N.Y.2d 159, 383 N.Y.S.2d 238, 347 N.E.2d 599 [1976]; *see also Russian Socialist Federated Soviet Government v. Cibrario,* 198 App.Div. 869, 191 N.Y.S. 543 [1921], *affd.* 235 N.Y. 255, 139 N.E. 259 [1923] [in action brought by plaintiff in its alleged capacity of a sovereign state, said allegation was not conclusive upon the court, and it was appropriate for the court to call upon the State Department of the United States for information regarding the question of our recognition of that foreign government]).

Thus, in my opinion, it was a proper exercise of discretion for the court below to have sua sponte referred to a matter of public record, in order to ascertain the fact of defendant's status as an insurer. There is no logical reason not to include within the category of public records, such records when they are available from reliable sources on the Internet (*see e.g., Glorius v. Siegel,* 5 Misc.3d 1015(A), 2004 N.Y. Slip Op. 51378[U], 2004 WL 2609413 [Civ. Ct., N.Y. County] [court verified multiple dwelling registration of premises on Web ****315** site of Department of Housing Preservation ***40** and Development]; *see also Samson Moving & Storage Corp. v. Drake Business School,* 2000 N.Y. Slip Op. 40023[U], 2000 WL 33529056 [Civ. Ct., N.Y. County] [court verified defendant's corporate status by referring to Web site of Department of State's Division of Corporations]). The Web site of the New York State Department of Insurance provides an Insurer Search list of "our licensed, regulated companies," and, in an opinion letter, recommends its Web site in

order to find a "directory of licensed insurers" (*see* Ops. Gen. Counsel N.Y. Ins. Dept. 03–10–25). That same opinion letter indicates that the term "authorized insurer" includes an insurer that is licensed to do the business of insurance in New York State. The defendant insurer, "Republic Western Insurance Company," is included in the directory of licensed insurers.

Defendant was authorized to do insurance business in New York State by virtue of its having been issued a license to do such business. The question of whether defendant was an authorized insurer was important in determining whether there was jurisdiction over it. Insurance Law § 1212(a) provides that an insurer authorized to do business in the state must appoint the Superintendent of Insurance as its agent for service of process "in any proceeding against it on a contract delivered or issued for delivery, or on a cause of action arising, in the state." Inasmuch as the cause of action in the instant case clearly arose in New York, and since defendant was, according to the records of the New York State Department of Insurance, authorized to do business in New York, service of process upon the Superintendent of Insurance was proper, and constituted valid service within the territorial jurisdiction of the Civil Court of the City of New York (Insurance Law § 1212[b]), sufficient to confer personal jurisdiction over defendant.

All Citations

8 Misc.3d 33, 798 N.Y.S.2d 309, 2004 N.Y. Slip Op. 24526

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39 N.Y.2d 159
Court of Appeals of New York.

In the Matter of Donald J. SIWEK, Respondent,
v.
Edward J. MAHONEY et al., as Commissioners of Election in the County of Erie, Appellants,
and
New York State Board of Elections, Intervenor-Appellant.

April 1, 1976.

Synopsis

Registered voter brought Article 78 proceeding to enjoin election commissions from accepting applications for registration and enrollment by mail on theory that statute providing for registration by mail violated state constitutional provision. The Supreme Court, Special Term, Erie County, 85 Misc.2d 27, 379 N.Y.S.2d 1014, declared statute to be unconstitutional and granted injunction, and direct appeal was taken. The Court of Appeals, Fuchsberg, J., held that state constitutional provision directed toward establishment of system of annual voter registration became inoperative on legislature's exercise of its authority, under another constitutional provision, to mandate 'a system or systems' of permanent voter registration, that statute providing for registration of voters by mail does not deny equal protection and that such statute involves use of 'personal applications' and thus enactment of such statute was a valid exercise of authority conferred on legislature by constitutional provision.

Judgment reversed and matter remitted.

West Headnotes (5)

[1] **Evidence**
⇐Official proceedings and acts

Data culled from public records is a proper subject of judicial notice.

17 Cases that cite this headnote

[2] **Election Law**
⇐In general; power to regulate registration

State constitutional provision, which was directed toward establishment of system of annual voter registration and which required all voters living in cities and villages with populations over 5,000 to register "upon personal application only," became inoperative on legislature's exercise of authority, under another constitutional provision, to mandate "a system or systems" of permanent voter registration. Election Law §§ 153, 156 to 157–a, 350; Const. art. 2, §§ 5, 6.

[3] **Constitutional Law**
⇦Qualifications of Voters
Election Law
⇦Absentee registration

Statute providing for registration of voters by mail does not deny equal protection. Const. art. 2, § 6; Election Law § 153.

[4] **Constitutional Law**
⇦Meaning of Language in General
Statutes
⇦Particular Words and Phrases

Absent other and countervailing indicia of intent, words "personal application" in statute or constitutional provision need not be taken to mean "by physical appearance," but, rather, an equally tenable interpretation of the words "personal application" is that applicant himself must perform the steps necessary to complete and effect the application.

[5] **Election Law**
⇦Absentee registration

Words "personal application" within state constitutional provision, which pertains to system of permanent voter registration and which states that "legislature may provide by law for a system or systems of registration whereby upon personal application a voter may be registered," do not mean "physical appearance;" but, rather, statute, which provides that voters can register by completing and signing an application and mailing it to the appropriate registration office, involves use of "personal applications" and thus enactment of such statute was a valid exercise of authority conferred on legislature by such constitutional provision. Const. art. 2, § 6; Election Law § 153.

Attorneys and Law Firms

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Opinion

***240 FUCHSBERG, Judge.

We hold that New York State's recently enacted uniform mail registration statute (Election Law, s 153) is valid.

**601 Plaintiff, a registered voter in Erie County, challenges the validity of the statute under section 5 of article II of our State Constitution. The Supreme Court, Erie County, found the statute to be in contravention of that section. Pursuant to CPLR 5601 (subd. (b), par. 2), the case is now here on direct *163 appeal from the order and judgment of that court. For the reasons which follow, we reverse its determination.

Section 153 of the Election Law (L.1975, ch. 166) reads in pertinent part:

'Registration and enrollment and transfer of same upon application filed by mail
'1. In addition to central registration as provided in section three hundred fifty-five of this chapter, any qualified person may apply for registration and enrollment or to transfer his registration and enrollment by mail.'[1]

[1] By the enactment of the statute, the Legislature attempted to deal with New York's voting deficiencies, including the fact that not more than half of those eligible to vote have actually been exercising their franchise.[2] Indeed, in three counties, voter participation has slipped to such a degree that the State is now subject to the preclearance provisions of the Voting Rights Act of 1965 (U.S.Code, tit. 42, s 1973b, as re-enacted Aug. 6, 1975), which applies whenever voter turnout is substandard within its terms (see, also, New York v. United States, 419 U.S. 888, 95 S.Ct. 166, 42 L.Ed.2d 134; United Jewish Organizations of Williamsburgh v. Wilson, 2 Cir., 510 F.2d 512, cert. granted 423 U.S. 945, 96 S.Ct. 354, 46 L.Ed.2d 276). The Legislature, therefore, attempted to encourage voting by adding a simple, State-wide form of mail registration to the personal registration procedures already available (cf. Election Law, s 355).

Petitioner challenges this statute as violative of section 5 of article II of our Constitution. However, it is section 6 of article II, and not section 5, by which section 153 must be tested.

Section 5 of article II was adopted in virtually its present form in 1894.[3] It is directed toward the establishment of a system of Annual voter registration, under which each voter may be required to register anew prior to each year's general election. As a precaution against fraud, it requires all voters living in cities and villages with populations over 5,000 to *164 register 'upon personal application only', while it exempts voters living in smaller, more rural areas from the requirement of registering 'in person'. Moreover, it mandates that laws be

established for 'the registration of voters; which registration shall be completed at least ten days before Each election' (emphasis added). (See Problems Relating to Home Rule and Local Government: Documents Prepared for Delegates to the Constitutional Convention of 1938, vol. XI, pp. 195—200.)

Section 6 of article II, on the other hand, provides for a system of Permanent voter registration. Adopted at the Constitutional Convention of 1938, it states:

's 6. (Permanent registration)

'The legislature may provide by law for a system or systems of registration whereby upon personal application a voter may be ***241 registered and his registration continued so long as he shall remain qualified to vote **602 from the same address, or for such shorter period as the legislature may prescribe.'

Unlike section 5, section 6 was intended by its drafters to be 'experimental' and 'entirely permissive' (Revised Record, New York State Constitutional Convention of 1938, vol. III, pp. 2404, 2405). The chairwoman of the Convention's Committee on Suffrage, which drafted section 6, and its other proponents successfully defeated attempts to put into section 6 a constitutionally mandatory provision requiring Statewide registration. (At pp. 2410—2411.) They succeeded in securing the adoption of their preference that the Legislature, not the convention, be empowered to make that decision. (At pp. 2397, 2411.) The debates, moreover, are replete with citations to statistics which showed, even in 1938, that registration on an annual basis tended to depress voter participation and show concern as to how voter participation might best be encouraged. (At pp. 2396—2414.)

Indeed, in contrast to what the delegates considered the rigid and restrictive approach embodied in the specific provisions of section 5, the entire tenor of their discussion of section 6 indicates a desire to also leave to the Legislature's later judgment the choice of means by which it might seek to effectuate the expansive purposes of permanent registration. Thus, since section 6 was designed to be permissive in its grant of authority to the Legislature, section 5 was not repealed, but remained operative until rendered dormant by legislative implementation of section 6.

*165 In fact, the Legislature moved slowly with respect to the powers granted it in section 6. It was not until 1954 that it enacted section 350 of the Election Law, by which it put into effect a system of local option for permanent personal registration. Then, in 1965, it amended section 350 (L.1965, ch. 319) to provide a mandatory, State-wide system of permanent registration, under which both urban and rural voters were required to register in person initially and were then permitted to maintain that registration without further effort, so long as they did not change addresses or fail to vote in two successive general elections. In due course, it also repealed the statutory provisions which had governed the annual registration procedures covered by section 5 (Election Law, ss 156—157—a). The result

is that a uniform, permanent personal registration system, in substitution for annual registration, has been in effect throughout the State for nearly 10 years.

[2] In consequence of that exercise by the Legislature of its authority under section 6 of article II of the Constitution to mandate 'a system or systems' of permanent registration, section 6 then became fully operative, section 5 became inoperative and the differentiation of treatment between larger and smaller communities disappeared. Thereafter, the requirement for in-person registration under section 350 remained in effect until the Legislature, in the further exercise of its apparent authority under section 6, enacted present section 153 (L.1975, ch. 166). By that chapter, mail registration replaced in-person registration.

[3] As with section 350 of the Election Law, section 153 of the Election Law has, by its terms, been made applicable throughout the State. In conformity with the scope of section 6, neither of those statutes set up any geographical distinctions. Accordingly, all voters are accorded equal treatment. And, since all citizens are treated in precisely the same manner, there is no substance to the contention that there has been a denial of equal protection under constitutional limitations.

It now remains only to consider whether that mail registration system is interdicted by the words 'personal application' in section 6. We conclude that it is not.

[4] Absent other and countervailing indicia of intent, the words 'personal application' ****603** in a statute or constitutional provision *****242** need not be taken to mean 'by physical appearance'. A broader and at least equally tenable interpretation of 'personal application' is that the voter must himself perform the ***166** steps necessary to complete and effect the application. Unlike section 5, where the words 'personal application' appear in juxtaposition to the far more compelling phrases 'apply in person' and 'appear personally' and thus permit no other interpretation than personal, physical presence (cf. Matter of Fraser v. Brown, 203 N.Y. 136, 141, 96 N.E. 365, 367), the words 'personal application' stand alone in section 6.

[5] In sum, whatever, 'personal application' may have meant in section 5, and notwithstanding the fact that sections 5 and 6 were considered together at the Constitutional Convention of 1938, we are not constrained to ascribe to the use of 'personal application' in section 6 the inescapable interpretation that applies to section 5. The very language in which the advantages of the then proposed new section 6 of article II were listed at the 1938 Convention included '(2) Avoidance of loss of vote by a voter unable to register in person, and convenience in saving voters an additional trip to the polls' (Revised Record, New York State Constitutional Convention of 1938, vol. III, p. 2397). Interestingly, the Legislature, in the enactment of section 153 of the Election Law in order to encourage voting by facilitating registration, sought to achieve that very purpose.

The provisions of section 153 of the Election Law require a voter to complete an application and sign it personally, giving information about himself as an individual

before mailing it to the appropriate registration office. That is a 'personal application'. Section 153 of the Election Law, therefore, is a valid exercise of the authority conferred upon the Legislature by section 6 of article II of the New York State Constitution.

Accordingly, the judgment of the Supreme Court should be reversed and a judgment should be entered below containing a declaration in accordance with the views expressed herein and denying petitioner's prayers for relief.

BREITEL, C.J., and JASEN, GABRIELLI, JONES, WACHTLER and COOKE, JJ., concur.

Judgment reversed, without costs, and matter remitted to Supreme Court, Erie County, for the entry of judgment in accordance with the opinion herein.

All Citations

39 N.Y.2d 159, 347 N.E.2d 599, 383 N.Y.S.2d 238

Footnotes

1 The statute goes on to detail procedures governing its administration, including guidelines intended to guard against its abuse.

2 (See Kelley, Ayres and Bowen, Registration and Voting; Putting First Things First, 6 American Pol.Sci.Rev. 359.) Data culled from public records is, of course, a proper subject of judicial notice (Trustees of Union Coll. v. City of New York, 65 App.Div. 553, 73 N.Y.S. 51, affd. 173 N.Y. 38, 65 N.E. 853; Richardson, Evidence (10th ed.), s 50, p. 29).

3 Portions of section 5 of article II which were adopted after 1894, also list specific categories, not relevant here, of absentee voters who are granted exemptions from the requirement for personal registration.

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28 N.Y.3d 497
Court of Appeals of New York.

The PEOPLE of the State of New York,
Respondent,
v.
Jose AVILES, Appellant.

Nov. 22, 2016.

Synopsis

Background: In prosecution for driving while impaired and driving while intoxicated (DWI), defendant challenged city's policy of offering only in English physical coordination tests to motorists. The Criminal Court of the City of New York, Bronx County, Harold A. Adler, J., granted defendant's motion to dismiss the accusatory instrument. The People appealed. The Supreme Court, Appellate Division, 47 Misc.3d 126(A), 2015 WL 1295874, reversed and remanded. Leave to appeal was granted.

Holdings: The Court of Appeals, Garcia, J., held that:

[1] city's policy was supported by a rational basis, for equal protection purposes, and

[2] defendant did not have a due process right to an English language interpreter.

Appellate Division affirmed.

Rivera, J., filed a dissenting opinion, in which Fahey, J., concurred.

West Headnotes (12)

[1] **Constitutional Law**
⚖Strict scrutiny and compelling interest in general

Where governmental action disadvantages a suspect class or burdens a fundamental right, the conduct must be subjected to strict scrutiny for an equal protection violation, and will be upheld only if the government can establish a compelling justification for the action. U.S.C.A. Const.Amend. 14; McKinney's Const. Art. 1, § 11.

2 Cases that cite this headnote

[2] **Constitutional Law**
⚖Intentional or purposeful action requirement

While facially neutral conduct can constitute discrimination against a suspect class in violation of equal protection, such a claim requires that a plaintiff show an intent to discriminate against the suspect class. U.S.C.A. Const.Amend. 14;

McKinney's Const. Art. 1, § 11.

1 Cases that cite this headnote

[3] **Constitutional Law**
⇐Rational Basis Standard; Reasonableness

To survive an equal protection challenge where a suspect class or fundamental right is not implicated, the government action need only be rationally related to a legitimate governmental purpose. U.S.C.A. Const.Amend. 14; McKinney's Const. Art. 1, § 11.

2 Cases that cite this headnote

[4] **Constitutional Law**
⇐Motor vehicles

Rational basis review applied to motorist's equal protection claim alleging discrimination based on ethnicity or national origin, relating to city's policy of offering only in English physical coordination tests for motorists arrested for driving while intoxicated (DWI); policy was facially neutral and was not based on race, ethnicity, or national origin, and instead was based solely on a motorist's ability to speak and understand English, which, by itself, did not implicate a suspect class. U.S.C.A. Const.Amend. 14; McKinney's Const. Art. 1, § 11; McKinney's Vehicle and Traffic Law § 1192.

1 Cases that cite this headnote

[5] **Automobiles**
⇐Advice or warnings; presence of counsel or witness
Constitutional Law
⇐Motor vehicles

City's policy of offering only in English physical coordination tests to motorists arrested for driving while intoxicated (DWI) was supported by a rational basis, and thus, did not violate equal protection; police department and public had substantial interest in ensuring reliability of coordination tests, which tested both a motorist's skills and capacity to follow instructions, clarity of instructions was crucial to reliability of test results, and translation of instructions could not be delegated to a translator. U.S.C.A. Const.Amend. 14; McKinney's Const. Art. 1, § 11; McKinney's Vehicle and Traffic Law § 1192(1, 3).

3 Cases that cite this headnote

[6] **Constitutional Law**
⇐Factors considered; flexibility and balancing

Due process is a flexible concept that calls for such procedural protections as the particular situation demands. U.S.C.A. Const.Amend. 14; McKinney's Const. Art. 1, § 6.

1 Cases that cite this headnote

[7] **Constitutional Law**
⇐Factors considered; flexibility and balancing

Determining whether additional process is due in any particular proceeding requires balancing the interests of the State against the individual interest sought to be protected. U.S.C.A. Const.Amend. 14; McKinney's Const. Art. 1, § 6.

[8] **Constitutional Law**
⇐Rights to notice, hearing, and defense, in general
Constitutional Law
⇐Duty to collect, find, or obtain

The police have no duty, under due process principles, to assist a defendant in gathering evidence or establishing a defense. U.S.C.A. Const.Amend. 14; McKinney's Const. Art. 1, § 6.

[9] **Constitutional Law**
⇐Duty to collect, find, or obtain

A defendant does not have a due process right to have the police perform a certain investigative step simply because it may yield information that is helpful to him. U.S.C.A. Const.Amend. 14; McKinney's Const. Art. 1, § 6.

[10] **Constitutional Law**
⇐Alcohol and drug-related issues; testing

While defendants have a constitutional due process right to a qualified interpreter during judicial proceedings, the same right is not implicated during the pre-arrest investigation of suspected intoxicated driving. U.S.C.A. Const.Amend. 14; McKinney's Const. Art. 1, § 6.

[11] **Automobiles**
⇐Advice or warnings; presence of counsel or witness
Constitutional Law
⇐Alcohol and drug-related issues; testing

City did not violate the due process rights of a motorist who spoke only Spanish, and who was suspected of driving while intoxicated (DWI), by failing to offer him an English language interpreter so that a physical coordination test could be performed, which might yield information helpful to motorist; such testing was a discretionary, investigative technique designed to gather evidence of intoxication, rather than a judicial, quasi-judicial, or administrative proceeding. U.S.C.A. Const.Amend. 14; McKinney's Const. Art. 1, § 6; McKinney's Vehicle and Traffic Law § 1192(1, 3).

[12] **Automobiles**
⇐Advice or warnings; presence of counsel or witness
Constitutional Law
⇐Alcohol and drug-related issues; testing

City's failure to offer motorist, who was suspected of driving while intoxicated (DWI) and who spoke only Spanish, an English language interpreter, so that a physical coordination test could be performed, which might yield information helpful to motorist, did not violate due process; even assuming that motorist had due process right to a qualified language interpreter for a test that was a discretionary, city had substantial interests in avoiding cumbersome and prohibitively expensive administrative and fiscal burdens of providing translation services, and in maintaining reliability of testing. U.S.C.A. Const.Amend. 14; McKinney's Const. Art. 1, § 6; McKinney's Vehicle and Traffic Law § 1192(1, 3).

1 Cases that cite this headnote

Attorneys and Law Firms

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OPINION OF THE COURT

GARCIA, J.

***500 **1210** The New York City Police Department (NYPD) does not administer physical coordination tests when a language barrier prevents the administering officer from communicating the test instructions to a non-English speaking suspect. Defendant Jose Aviles challenges this policy, arguing that his equal protection and due process rights were violated because he was denied a coordination test on the basis of a language barrier. We disagree, and hold that the order of the Appellate Term should be affirmed.

***501** I.

Factual Background

Defendant was arrested after striking a marked New York City police vehicle that was entering traffic with its emergency lights on. According to the arresting officer, defendant had "a strong odor of alcohol on his breath," "slurred speech," and was "swaying and unsteady on his feet." At the scene of the accident, defendant made the following statement to the arresting officer: "I had a few Coronas about 15 minutes ago, about 3 Coronas."

After he was arrested, defendant was brought to an Intoxicated Driver Testing Unit (IDTU), where he consented to a breathalyzer test. The test, which was administered nearly three hours after the accident, resulted in a blood-alcohol content reading of .06—a reading below the .08 minimum required for a per se violation (Vehicle and Traffic Law § 1192[2]). Defendant was not given a physical coordination test. Instead, the IDTU Technician Test Report contains a handwritten line crossing out the "Coordination Test" portion of the report, as well as a handwritten entry that reads: "No coord test given," and "Language Barrier." Defendant was ultimately charged with driving while impaired and driving while intoxicated (Vehicle and Traffic Law § 1192[1], [3]).

Defendant moved to dismiss the misdemeanor information on the ground that the NYPD violated his rights under the Equal Protection and Due Process Clauses of the Federal and State Constitutions by failing to offer a physical coordination test on the basis of a language barrier. Specifically, defendant argued that, "while an English-speaking person arrested for

driving under the influence of alcohol would ordinarily receive" a coordination test, defendant "was summarily denied this opportunity because of the language he speaks."[1] The People opposed, contending that defendant was not denied equal protection, and that defendant's due process rights were not **1211 implicated by the NYPD's decision not to offer a coordination test based on defendant's inability to speak or understand English.

*502 Criminal Court granted defendant's motion, holding that the "failure to provide the defendant—merely because he speaks ***481 only Spanish—with access to ... potentially exculpatory evidence is a denial of his constitutional rights warranting dismissal." Specifically, the court determined that "the failure to administer the coordination test in this case constitutes a denial of due process and equal protection" under both the United States Constitution and the New York State Constitution. The Appellate Term reversed, holding that a similar constitutional challenge had recently been rejected by the Appellate Division (*People v. Aviles,* 47 Misc.3d 126[A], 2015 N.Y. Slip Op. 50347[U], 2015 WL 1295874 [App.Term, 1st Dept.2015], citing *People v. Salazar,* 112 A.D.3d 5, 973 N.Y.S.2d 140 [1st Dept.2013]).

A Judge of this Court granted defendant leave to appeal (25 N.Y.3d 1198, 16 N.Y.S.3d 520, 37 N.E.3d 1163 [2015]). We affirm.

II.

Equal Protection

Pursuant to the Fourteenth Amendment of the United States Constitution, "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws" (U.S. Const. Amend. XIV, § 1). The New York Constitution provides for equivalent equal protection safeguards (N.Y. Const. art. I, § 11; *see Hernandez v. Robles,* 7 N.Y.3d 338, 362, 821 N.Y.S.2d 770, 855 N.E.2d 1 [2006]).

[1] [2] [3] Alleged equal protection violations are primarily evaluated using either a "strict scrutiny" or a "rational basis" standard of review. Where governmental action disadvantages a suspect class or burdens a fundamental right, the conduct must be subjected to "strict scrutiny," and will be upheld only if the government can establish a compelling justification for the action (*Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 299–300, 98 S.Ct. 2733, 57 L.Ed.2d 750 [1978]). While "facially neutral conduct can constitute discrimination" against a suspect class in violation of equal protection, such a claim "requires that a plaintiff show an intent to discriminate against the suspect class" (*Soberal–Perez v. Heckler,* 717 F.2d 36, 41–42 [2d Cir.1983]). Where a suspect class or fundamental right is not implicated, the government action need only be rationally related to a legitimate governmental purpose (*id.* at 41).

[4] Here, defendant's equal protection claim is premised on the notion that the NYPD's policy of offering physical coordination tests only in English amounts to intentional discrimination *503 on the basis of ethnicity or national origin. But strict scrutiny is inapplicable to defendant's claim, as he has not demonstrated that the challenged policy singles out members of a suspect class, nor has he shown intentional discrimination. While Hispanics as an ethnic group constitute a suspect class (*Keyes v. School Dist. No. 1, Denver,* 413 U.S. 189, 197, 93 S.Ct. 2686, 37 L.Ed.2d 548 [1973]), the NYPD policy at issue is facially neutral and is not based on race, ethnicity, or national origin. Rather, the policy is based solely on a suspect's ability to speak and understand English, which, by itself, does not implicate a suspect class **1212 (*Soberal–Perez,* 717 F.2d at 41). Nor has defendant demonstrated intentional discrimination based on his ethnicity. To the contrary, the record demonstrates that the officer's decision not to conduct a coordination test was based solely on a determination that a language barrier—not defendant's ethnicity—prevented the officer from administering the test.

The dissent contends that, where language "serve[s] as a proxy for national origin, ethnicity, and race," a defendant could establish intentional discrimination against a suspect class sufficient to invoke ***482 strict scrutiny (dissenting op. at 509–511, 46 N.Y.S.3d at 486–87, 68 N.E.3d at 1217–18). We agree. To be sure, upholding the facial validity of the NYPD policy does not preclude all challenges to the policy as applied to a particular defendant where, for instance, the defendant was denied a coordination test on the basis of his ethnicity, as opposed to any language barrier. But that is not the case before us. The instant case presents no evidence of such intentional discrimination or other similarly compelling circumstances. Nor is there any indication that defendant's language was "treated as a surrogate" for his ethnicity or was a mere "pretext for racial discrimination" (*Hernandez v. New York,* 500 U.S. 352, 371–372, 111 S.Ct. 1859, 114 L.Ed.2d 395 [1991]). Rather, defendant has consistently maintained that, as a non-English speaker, he "was summarily denied this opportunity because of *the language he speaks* " (emphasis added). The record supports the notion that the decision not to administer a coordination test was a purely language-based determination—not a determination based on race, ethnicity, or national origin. Accordingly, rational basis review, rather than strict scrutiny, applies to defendant's equal protection claim.

[5] The challenged policy withstands rational basis review. Both the NYPD and the public have a substantial interest in ensuring the reliability of coordination tests, and the clarity of *504 the instructions is crucial to the reliability of the results. Indeed, the record makes clear that coordination tests are designed not only to assess a suspect's "motor skills in completing the specific tasks," but also to evaluate the suspect's "capacity to ... follow instructions." But coordination tests are uniquely ill-suited for administration via translation; they are generally lengthy—containing 30 lines of instructions—and require contemporaneous demonstration and explanation of the tasks to be performed. The translation of instructions cannot be delegated to a

translator, as the administering officer must have the requisite training and experience, and must be able to understand the translated instructions in order to accurately analyze the suspect's responses. Moreover, given the time-sensitive nature of coordination tests, requiring an administering officer to seek out an appropriately trained translator could result in a delay that affects the results (*see Missouri v. McNeely*, 569 U.S. ——, ——, 133 S.Ct. 1552, 1560, 185 L.Ed.2d 696 [2013] [noting that, "as a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated"]). Indeed, the value of physical coordination tests diminishes with the passage of time, and test results eventually become entirely meaningless where they follow a prolonged delay. Nor can instructions "simply be recited through a video tape," as the tests require "specific clarity in instructions and interaction." The NYPD policy therefore rationally furthers the goals of avoiding delayed ****1213** or erroneous results due to a language barrier.

In addition, the NYPD undoubtedly has a substantial interest in avoiding the heavy financial and administrative burdens of employing translation services or multilingual officers qualified to administer coordination tests in the myriad languages spoken in this state. According to the record, New York State residents speak 168 distinct languages and countless dialects. Requiring the administration of translated instructions to all intoxicated driving suspects statewide would impose an exorbitant cost that would have a "crippling impact" on the State, as detailed in the record. The dissent's contention that *****483** "the NYPD has language access protocols in place and resources available to address the needs of New York City's linguistically diverse communities" (dissenting op. at 507, 46 N.Y.S.3d at 484, 68 N.E.3d at 1215) is unsupported by the record and ignores the realities of physical coordination tests, which require precise instructions and ***505** prompt administration.[2] Nor does the dissent identify which particular languages are "most often in demand" such that translation services should be required (dissenting op. at 513, 46 N.Y.S.3d at 489, 68 N.E.3d at 1219).

Each of the rationales established by the purportedly "thin" record (dissenting op. at 512 n. 5, 46 N.Y.S.3d at 488 n. 5, 68 N.E.3d at 1218 n. 5) independently supplies a legitimate government interest that is furthered by the NYPD policy. Of course, "New York City's commitment to access to justice regardless of language status" is a laudable and worthy goal (dissenting op. at 507, 46 N.Y.S.3d at 484, 68 N.E.3d at 1215). And the City's "recognition of the needs of its diverse communities" is undoubtedly embodied in the various executive branch letters, reports, and policies cited by the dissent (dissenting op. at 510–512, 46 N.Y.S.3d at 486–88, 68 N.E.3d at 1216–18). But we do not measure constitutional violations against these policies, nor do they somehow give rise to an equal protection violation. Under our established constitutional analysis, we conclude that the challenged NYPD policy is rationally related to a number of legitimate governmental purposes.[3]

Accordingly, because the NYPD policy withstands rational basis review, defendant's equal protection claim must be rejected.

III.

Due Process

[6] [7] Under the United States Constitution, "[n]o person shall be ... deprived of life, liberty, or property, without due process of law" (U.S. Const. Amend. V). The New York Constitution provides for similar protections (N.Y. Const. art. I, § 6) and "[w]e have at times found our Due Process Clause to be more protective of **1214 rights than its federal counterpart" (*Hernandez,* 7 N.Y.3d at 362, 821 N.Y.S.2d 770, 855 N.E.2d 1). Due process is, of course, a flexible concept that calls for such procedural protections as the particular situation demands (*Mathews v. Eldridge,* 424 U.S. 319, 334, 96 S.Ct. 893, 47 L.Ed.2d 18 [1976]). "Determining whether additional process is due in any *506 particular proceeding requires balancing the interests of the State against the individual interest sought to be protected" (*People v. Ramos,* 85 N.Y.2d 678, 684, 628 N.Y.S.2d 27, 651 N.E.2d 895 [1995], citing *Mathews,* 424 U.S. at 334, 96 S.Ct. 893).

[8] [9] [10] [11] Defendant contends that the NYPD's failure to offer him a coordination test based on a language barrier violated his due process rights under the federal and state constitutions. However, as an ***484** initial matter, the police have no duty to assist a defendant in gathering evidence or establishing a defense (*People v. Finnegan,* 85 N.Y.2d 53, 58, 623 N.Y.S.2d 546, 647 N.E.2d 758 [1995]). Nor does a defendant have a right to have the police perform a certain investigative step simply because it may yield information that is helpful to him (*Arizona v. Youngblood,* 488 U.S. 51, 58–59, 109 S.Ct. 333, 102 L.Ed.2d 281 [1988]; *People v. Hayes,* 17 N.Y.3d 46, 51–52, 926 N.Y.S.2d 382, 950 N.E.2d 118 [2011]). And, while defendants have a constitutional due process right to a qualified interpreter during judicial proceedings (*People v. Ramos,* 26 N.Y.2d 272, 274, 309 N.Y.S.2d 906, 258 N.E.2d 197 [1970]), the same right is not implicated during the pre-arrest investigation of suspected intoxicated driving; the administration of coordination tests—a discretionary, investigative technique designed to gather evidence of intoxication—is not a judicial, quasi-judicial, or administrative proceeding.

[12] In any event, as discussed above, the implicated state interests are substantial. The State has a clear interest in avoiding the cumbersome and prohibitively expensive administrative and fiscal burdens of providing the requested translation services. The State also has a strong interest in ensuring the accuracy of physical coordination tests, and the use of translated instructions—either through qualified interpreters or through multilingual officers—could compromise the test's reliability. Given the substantial state

interests involved, defendant's due process claim must be rejected.

IV.

Accordingly, the order of the Appellate Term should be affirmed.

RIVERA, J. (dissenting).

Defendant Jose Aviles claims the New York Police Department (NYPD) violated his federal and state equal protection and due process rights when it denied him a physical coordination test based solely on his language skills. The People defend the NYPD policy of offering the coordination test to everyone except those persons who are *507 perceived to be non-proficient in English[1] on the grounds that it ensures **1215 the reliability of the test and to do otherwise is administratively impracticable and burdensome. These representations are inadequate to overcome a policy that potentially places certain individuals in a better position than others to defend against criminal charges, especially when the NYPD has language access protocols in place and resources available to address the needs of New York City's linguistically diverse communities. Given New York City's commitment to access to justice regardless of language status, the NYPD's refusal to administer a coordination test equally to all violates defendant's federal and state equal protection rights. For these reasons, I dissent.

***485 I.

Defendant was charged with operating a motor vehicle while under the influence of alcohol or drugs in violation of Vehicle and Traffic Law § 1192(1) and (3). Defendant was arrested after he collided with a police vehicle pulling out of a precinct as defendant drove down the street. According to the arresting officer, defendant smelled of alcohol, his speech was slurred, and he was unsteady on his feet. Upon his arrest defendant was taken to the Intoxicated Driver Testing Unit (IDTU) at the 45th Precinct in the Bronx,[2] where he took a breathalyzer test which indicated a blood alcohol content (BAC) of .06, which was below the legal minimum for a per se violation.

Ordinarily, the IDTU would have offered defendant the opportunity to take a physical coordination test, as provided in *508 the NYPD DWI Patrol Guide (Guide). The coordination test requires an arrestee to complete a series of simple tasks: reciting the person's name and address, standing straight-up with eyes closed, walking heel-to-toe for nine steps and turning to walk back to the starting point, standing on one leg, pointing to the tip of the nose with an index finger, and writing their signature

or address. Pursuant to the Guide, an officer will typically demonstrate the tasks before asking the arrestee to complete them. Here, defendant was denied the test based on the basis of what the test administrator cursorily identified as a "language barrier."

Defendant moved to dismiss the accusatory instrument on the grounds that NYPD violated his federal and state equal protection and due process rights by failing to offer the test based on his language. The People opposed the motion, arguing both that NYPD has a legitimate interest in avoiding possible confusion by withholding the coordination test from non-English speakers and that defendant cannot have a due process interest in an investigatory procedure.

The nisi prius court stated that in the past it had addressed similar language-based claims by permitting defense counsel to cross-examine the People's witnesses **1216 on the failure to administer the test and providing an adverse inference charge regarding the police failure to administer the test. However, in this case, the court granted the motion, concluding that where defendant's BAC was "so very low," denial of the coordination test " merely because he speaks only Spanish" violated his constitutional rights by failing to provide him with access to potentially exculpatory evidence. The court noted that under these circumstances "the trier of fact ... is likely to have a heightened interest in seeing a video memorializing the defendant's abilities."

The Appellate Term, First Department, reversed on the basis of *People v. Salazar*, 112 A.D.3d 5, 973 N.Y.S.2d 140 (2013), decided after the nisi prius court granted defendant's motion and before the People appealed, and which rejected similar constitutional challenges to the NYPD's policy of administering the coordination test only in English (*People v. Aviles*, 47 Misc.3d 126[A], 2015 N.Y. Slip Op. 50347[U] [2015]). A Judge of this Court granted defendant leave to appeal (*People v.* ***486** *Aviles*, 25 N.Y.3d 1198, 16 N.Y.S.3d 520, 37 N.E.3d 1163 [2015]).

II.

Defendant renews his constitutional challenges to NYPD's policy, and the People reassert that the policy is nondiscriminatory *509 and that it would be burdensome and unfeasible to administer the test other than in English. Defendant's equal protection claim has merit because the People's basis for denying him the test has no rational basis on the facts of this case.

Under both federal and state equal protection guarantees, government action that disadvantages a suspect class or burdens a fundamental right is subject to strict scrutiny and upheld only if there is a compelling justification for the action (*Johnson v. California*, 543 U.S. 499, 505, 125 S.Ct. 1141, 160 L.Ed.2d 949 [2005]; *Matter of Aliessa v. Novello*, 96 N.Y.2d 418, 431, 730 N.Y.S.2d 1, 754 N.E.2d 1085 [2001]). A facially neutral policy is also subject to strict scrutiny if the government's

act has a disparate impact on a suspect class, so long as the discrimination is intentional (*Washington v. Davis,* 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597 [1976]). Otherwise, government action is subject to the rational basis standard of review, which requires that the action be rationally related to a legitimate governmental purpose (*Board of Trustees of Univ. of Ala. v. Garrett,* 531 U.S. 356, 367, 121 S.Ct. 955, 148 L.Ed.2d 866 [2001]; *see also Maresca v. Cuomo,* 64 N.Y.2d 242, 485 N.Y.S.2d 724, 475 N.E.2d 95 [1984]).

Here, defendant claims that he was discriminated against based on a suspect classification because the NYPD policy categorizes arrestees based on language, which defendant claims serves as a proxy for his national origin, a recognized suspect classification under both federal and state equal protection jurisprudence. In response, the People maintain that the test is neutral on its face because a person of any national origin who understands English may take the test.

In *Soberal–Perez v. Heckler,* 717 F.2d 36, 41 (2d Cir.1983), *cert. denied* 466 U.S. 929, 104 S.Ct. 1713, 80 L.Ed.2d 186 (1984), decided in 1983, the Second Circuit stated that "[l]anguage, by itself, does not identify members of a suspect class." That case involved a challenge to the Department of Health and Human Services policy of sending agency forms in English. The court applied rational basis review, holding that the Department had a legitimate interest **1217 in providing its forms only in English because the government conducts its affairs in English and "those who wish to become naturalized United States citizens must learn to read English" (*id.* at 42).

However, since the *Soberal–Perez* decision, our nation's understanding of the role language plays in our multiethnic society has evolved. In *Hernandez v. New York,* a case involving a prosecutor's peremptory challenges to Latino Spanish-speaking prospective jurors, the United States Supreme Court recognized that "[i]t may well be, for certain ethnic groups and **510 in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis" (500 U.S. 352, 371, 111 S.Ct. 1859, 114 L.Ed.2d 395 [1991] [citations omitted]). Indeed, a policy that affects all persons who speak a given language "without regard to the particular circumstances" of the surrounding events and individuals, may be found "to be a pretext for racial discrimination" (*id.* at 371–372, 111 S.Ct. 1859).

The judiciary is not alone in recognizing that language may serve as a proxy for national origin, ethnicity, and race. The executive branch has also acknowledged a link between language and discrimination ***487 and issued Executive Order (Clinton) No. 13166 on August 11, 2000 ("Improving Access to Services for Persons with Limited English Proficiency") to ensure compliance with Civil Rights Act title VI's statutory prohibition against discrimination based on national origin in federally funded programs (42 U.S.C. § 2000d). To achieve its goal "to improve access to federally conducted and federally assisted programs and activities for persons who, as a result of national origin, are limited in their English proficiency" (65

Fed. Reg. 50,121 [Aug. 16, 2000]), the Executive Order requires federal agencies to draft guidance documents on how those programs will operate in a manner that is consistent with both title VI and the Department of Justice's regulatory instructions.

The Department of Justice has provided guidance on Executive Order 13166, and helped municipalities to comply with title VI and its implementing regulations (*e.g.* Office of the Attorney General, Federal Government's Renewed Commitment to Language Access Obligations Under Executive Order 13166 [Feb. 17, 2011]; U.S. Department of Justice, Civil Rights Division, Language Access Assessment and Planning Tool for Federally Conducted and Federally Assisted Programs [May 2011]). The Department of Justice has made clear that criminal suspects and other persons in police custody are entitled to title VI protections during encounters with police (Department of Justice, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,459 [June 18, 2002]). It has further directed that recipients of federal funds subject to title VI must take "reasonable steps to ensure meaningful access to their ***511** programs and activities by [limited English proficient] persons" (*id.*).[3]

The limited view of the interrelationship of language, ethnicity, and national origin ****1218** as articulated in *Soberal–Perez* does not represent today's nuanced appreciation of how language historically affects access to justice for groups based on national origin. With an eye to this continued reality, the Court should safeguard against the use of English-only policies because "[t]he dominant cultural group can manipulate language as a device for exclusion of disfavored groups whose mother tongue is not English" (Kiyoko Kamio Knapp,*Language Minorities: Forgotten Victims of Discrimination?,* 11 Geo. Immigr. L.J. 747, 752–753 [1997]).

Notably, compliance with legal mandates as a means for equal treatment of all members of our multilingual society can be realized through the government's use of technological advances and increased human resources that address linguistic needs and simultaneously contain costs. This is especially true in New York City, where the population of limited English speakers is nearly two million people (New York City Mayor's Office of Immigrant *****488** Affairs, Constituent Facts & Maps). In recognition of the needs of its diverse communities and of its legal obligations, New York City has issued an executive order directing its agencies to provide language services in compliance with title VI (N.Y. City Executive Order No. 120 of 2008 [July 22, 2008] ["Citywide Policy on Language Access to Ensure the Effective Delivery of City Services"]; *see also* New York City Mayor's Office of Operations, Language Access Services Initiative, https://www1.nyc.gov/site/operations/projects/language-access-services.page). NYPD also developed a Language Access Plan and issued internal procedures that govern law enforcement service provision to persons who are not fluent in English ***512** New York Police Department, Language Access Plan [June 14, 2012],

http://www.nyc.gov/html/nypd/downloads/pdf/public_information/lap_June_2012.pdf, cached at http://www.nycourts.gov/reporter/webdocs/lap_June_2012.pdf; New York Police Department Patrol Guide, Procedure No. 212–90, Guidelines for Interaction with Limited English Proficient [LEP] Persons [Oct. 16, 2013]). NYPD's official Language Access Plan encourages officers either to use a multi-language telephonic service known as "Language Line"[4] to handle most of its interpretation needs, or to contact officers that are certified through NYPD's Language Initiative Program, which trains NYPD officers in critical languages (Language Access Plan at 4–5). Comparatively, NYPD's Patrol Guide prompts officers to rely on other officers who self-identify as bilingual (Guidelines for Interaction with Limited English Proficient [LEP] Persons at 1).[5]

This deliberate application of language services applies to the IDTU, where, for **1219 example, consent to administer the breathalyzer test is obtained by a video in Spanish (*see People v. Salazar,* 112 A.D.3d 5, 7–8, 973 N.Y.S.2d 140 [1st Dept.2013] [explaining how officers obtain consent to administer the breath test using an interpretive video]; *People v. Rosario,* 136 Misc.2d 445, 447–448, 518 N.Y.S.2d 906 [Crim.Ct., Bronx County 1987] [same]). Similarly, NYPD has previously relied on bilingual officers to deliver the instructions on how to take the breathalyzer test (*see Salazar,* 112 A.D.3d at 8, 973 N.Y.S.2d 140).

*513 Given New York City's commitment to language access and the resources available to the NYPD, the policy here does not survive even rational basis review. Furthermore, the NYPD policy is not rationally ***489 related to a legitimate governmental purpose for the separate reason that by denying defendant the test, NYPD forfeits an opportunity for the People to gather evidence of intoxication. If, as the People claim, the ultimate goal is to ensure the safety of our roadways, the policy falls short.[6]

Nevertheless, the People maintain that the policy is rationally related to its interest in ensuring the reliability of the coordination test. According to the People, the test can only be administered by a specially trained officer who cannot rely on any type of interpreter service to communicate the test instructions to the arrestee. The accuracy of this assertion is neither intuitive nor obvious, and the People failed to present evidence in support of their claim that there is no other way to maintain the integrity of the test, or that they are unable to deploy test administrators fluent in the languages most often in demand.[7] More troubling is that the only source of this information about the difficulty in administering **1220 the coordination test is contained in a prosecutor's affirmation, submitted to the nisi prius court in opposition to defendant's motion to dismiss. The People provided no evidence to support the contention that the *514 coordination test is difficult to administer, but instead ask this Court to credit their claims. Despite the majority's uncritical acceptance of the People's mantra that they cannot administer this test in a language other than English, we must decline the People's invitation to take them at their word. Indeed, where defendant's

constitutional rights are at stake, our review of the policy and the People's reasons should be especially punctilious.

The People's arguments are also unpersuasive because the NYPD's own Language Access Plan for serving LEP individuals provides for a different result, and a close examination of the coordination test belies the claim. The physical coordination test involves no mechanical or technical manipulation and depends only on telling the person to make certain physical movements. The People fail to explain why the same mechanisms available to instruct in a language other than English on the rights and the use related to the breathalyzer test cannot be employed or modified for purposes of the coordination test. Indeed, the instructions for the coordination test are far more simple than ***490** those required to obtain consent to perform the breathalyzer test. The coordination test is comprised of short, declarative statements that can easily be translated, e.g. "touch your nose with your forefinger" (toque su nariz con el dedo), "walk in a straight line" (camine en linea derecha), or "raise your right leg" (levante la pierna derecha). The People's argument contradicts common sense.[8]

The fact is that NYPD already does far more to address language barriers in the field, where access to a bilingual officer or an interpreter is less controlled. Despite the challenges, the official NYPD policy requires officers to make efforts to communicate with LEP individuals out of recognition of "the importance of effective and accurate communication between its employees and the community they serve" (Language Access *515 Plan at 2).[9] Accordingly, NYPD does not have a legitimate interest in maintaining its current policy and its denial of the test to defendant violated his rights to equal protection under the law.[10]

III.

It is beyond cavil that the criminal justice system cannot advance procedures **1221 that benefit certain individuals but disadvantage others. Yet, the majority approves a system of justice in which English speakers are given access to potentially exculpatory evidence in DWI cases, while the same beneficial process is denied to those whose English language skills are limited due to their national origin. Such diminished treatment under the law is unconstitutional and counter to our sensibilities of fairness. It is especially unacceptable where the means to ensure equality are within reach.

For the reasons I have explained, I would reverse the Appellate Term and dismiss the accusatory instrument. Therefore, I dissent.

Chief Judge DiFIORE and Judges PIGOTT, ABDUS–SALAAM and STEIN concur; Judge RIVERA dissents in an opinion in which Judge FAHEY concurs.

Order affirmed.

28 N.Y.3d 497, 68 N.E.3d 1208, 46 N.Y.S.3d 478, 2016 N.Y. Slip Op. 07836

All Citations

Footnotes

1 The dissent's discussion of persons who are "limited English proficient" or "LEP" was not raised before the trial court and, in any event, is inapplicable to this case. The trial court found—and defendant has consistently maintained—that he "speaks only Spanish, and not English."

2 The dissent exempts defendant from the preservation rule and opts to "take **judicial notice**" of "publicly-available documents" in order to bolster arguments that defendant asserts for the first time on appeal (dissenting op. at 512 n. 5, 46 N.Y.S.3d at 488 n. 5, 68 N.E.3d at 1218–19 n. 5). We decline to do the same.

3 The dissent limits its analysis to the context of New York City. But our constitutional pronouncements apply statewide, including to areas with dramatically different resources, law enforcement practices, populations, and "linguistic needs" (dissenting op. at 513 n. 7, 46 N.Y.S.3d at 489 n. 7, 68 N.E.3d at 1219 n. 7). The dissent's analysis would call into question investigatory tools employed by law enforcement statewide.

1 For purposes of clarity and uniformity, I have adopted the parties' description of persons denied the coordination test as "non-English proficient" or "limited English proficient" (LEP). The Equal Access to Human Services provision of New York City's Human Rights Law defines a LEP person as "an individual who identifies as being, or is evidently, unable to communicate meaningfully with agency or agency contractor personnel because English is not [the individual's] primary language" (Administrative Code of City of N.Y. § 8–1002[o]). Though the majority characterizes defendant as not being a LEP individual because of the nisi prius court's determination that he speaks "only Spanish, and not English" (majority op. at 501 n. 1, 46 N.Y.S.3d at 480 n. 1, 68 N.E.3d at 1211 n. 1), defendant clearly falls within New York City's understanding of a LEP individual.

2 The only issue before the Court is the constitutionality of the unofficial NYPD policy to withhold the coordination test from LEP individuals at New York City IDTUs. These IDTUs are unique to New York City, as the officers in all other municipalities in the state conduct sobriety tests roadside. Accordingly, the use of the IDTUs creates different expectations of NYPD, as NYPD officers have additional resources available to them for the processing of drunk drivers. Accordingly, I limit my analysis to the NYPD policy at IDTUs.

3 In the title VII context, the Equal Employment Opportunity Commission (EEOC) has acknowledged the interconnectedness of language and national origin, and that neutral language policies can mask discriminatory animus and disparate treatment. As such, the EEOC guidelines broadly define national origin discrimination to include "linguistic characteristics of a national origin group" for the purposes of title VII enforcement (29 C.F.R. 1606.1). The EEOC further advises employers that "[t]he primary language of an individual is often an essential national origin characteristic" (*Id.* § 1606.7[a]). Relatedly, the Southern District of New York has recently applied the EEOC's interpretation to hold that an English-only policy in the workplace violated title VII's prohibition on national origin discrimination (*Equal Empl. Opportunity Commn. v. Sephora USA, LLC,* 419 F.Supp.2d 408 [S.D.N.Y.2005]).

4 Language Line is a private company that provides on-demand interpretation through the telephone, 24 hours a day. People in need of interpretation call in to connect with an interpreter, who can immediately facilitate a conversation between two or more people who do not speak the same language (Language Line Solutions, Phone Interpreting, https://www.languageline.com/interpreting/phone [last accessed Nov. 10, 2016]).

5 The record on appeal is thin, and the People failed to submit any information about NYPD's language resources. Yet, defense counsel submitted NYPD's Language Access Plan, NYPD's field guide for serving LEP individuals, and other supporting documents, all of which the Court is permitted to take **judicial notice** (*see Affronti v. Crosson,* 95 N.Y.2d 713, 720, 723 N.Y.S.2d 757, 746 N.E.2d 1049 [2001]). Thus, the majority's contention that there is no record support for the claim that NYPD is equipped to interact with LEP individuals is false, as these publicly-available documents indicate that NYPD both intends to and is capable of doing so.
Contrary to the majority's assertion, defendant preserved his claim that NYPD's policy of denying the test based on language is

unconstitutional because NYPD is capable of providing interpretative services. Therefore, it is wholly proper and prudent to consider all public documents regarding both NYPD's and the City's linguistic resources (*see Affronti*, 95 N.Y.2d at 720, 723 N.Y.S.2d 757, 746 N.E.2d 1049).

6 The majority contends that NYPD's goal in withholding the test is "avoiding delayed or erroneous results due to a language barrier" (majority op. at 504, 46 N.Y.S.3d at 482, 68 N.E.3d at 1212–13). Contrary to this assertion, the NYPD policy does not rationally further any legitimate goal, as NYPD has the available means for immediate and accurate interpretive services that would eliminate both the delay in testing and the potential for error. The majority's claim that the NYPD goal is to avoid detrimental results is unsupported by the record because there is no factual or scientific basis propounded by the People for such a claim.

7 I need not define the most in demand languages, despite the majority's suggestion otherwise (majority op. at 505, 46 N.Y.S.3d at 483, 68 N.E.3d at 1213), because there is governmental consensus in New York City about its population's linguistic needs. NYPD's Language Access Plan identifies its "baseline languages" as Spanish, Chinese, Korean, Haitian Creole, Russian and Italian (New York Police Department, Language Access Plan at 10 [June 14, 2012]). The New York City Human Rights Law mandates that all city services and documents be provided in the same "covered languages" (Administrative Code §§ 8–1002[j]; 8–1003, 8–1004). Executive Order 120 also requires that all of New York City's services be provided in these six languages (N.Y. City Executive Order No. 120 of 2008 [July 22, 2008] ["Citywide Policy on Language Access to Ensure the Effective Delivery of City Services"]). Thus, the city government has identified those languages most spoken.

8 The majority's characterization of this test as difficult to administer is based on an affirmation of an Assistant District Attorney. However, the People failed to submit either evidence from an experienced administrator who has firsthand knowledge about the test's complexity or expert linguistic testimony concerning the need for instruction to be provided solely by the test administrator in English. Absent such evidence, the People's "proof" is but a shell. Yet, the majority adopts the People's argument while disregarding that NYPD has a variety of tools it can use to administer this test in a manner that does not violate defendant's constitutional rights.

9 The NYPD has long been on notice that failing to address language needs is a violation of title VI disparate impact regulations, based on national origin. In 2010, the Department of Justice issued a report in which it informed NYPD that it was not in full compliance with title VI. The report indicated that officers frequently departed from NYPD's internal policy when interacting with LEP individuals because NYPD did not provide sufficient translation services. NYPD responded by updating its Language Access Plan.

10 Since defendant has established a meritorious equal protection challenge, I have no occasion to address his due process claim.

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