Off The Record. Or Not?

By Sylvia H. Walbolt and Nicholas A. Brown[1]

In November 2007, an article titled "Off the Record," which was co-authored by one of this article's authors, was published in this Journal.[2] It began by saying "[e]very good appellate lawyer knows that an appeal is constrained by the record formed below."[3] It quoted a 1988 decision of the First District reprimanding a lawyer who sought to "amend" the record to include matters not before the trial court, and declaring in this regard that the fact "an appellate court may not consider matters outside the record is so elemental there is no excuse for an attorney to attempt to bring such matters before the court."[4]

It is a new world today, however, and we appellate lawyers had better recognize that. Appellate courts not only are not sanctioning lawyers for seeking to supplement the record with matters not in the record below, appellate courts are granting such motions and adding such materials to the appellate record.[5]

Even more, appellate courts themselves are raising matters not presented to the trial court. We recently watched an appellate argument in a child custody dispute where the panel directly questioned the father's counsel about his failure to pay support or try to see his child during the pendency of his appeal. That is intuitively important to an appeal seeking visitation rights, but it was not a matter before the trial court when it made the ruling at issue on appeal.

This is not an issue unique to family law appeals. Circuit Judge Richard A. Posner complained in his *Reflections on Judging*[6] that "[a]ll too often, the facts that are important to a sensible decision are missing from … the judicial record."[7] Recognizing that reality, the entire September 2015 edition of *Appellate Issues*, published by the ABA's Council of Appellate Lawyers, was devoted to various aspects of the inquiry in "The Appellate Record: Adequate or Not?"[8] That excellent resource includes articles on "Appellate Judicial Notice in a 'Google

Earth' World," "Judges and the Internet: Does the Record Still Matter?," and a wonderful war story about the "Red Tie Guy."[9]

This article addresses some of the same general issues and discusses some developments in the law in this regard. But it also focuses more specifically on what is happening with regard to the appellate record in Florida appellate courts today. Agreeing with the authors of "Appellate Judicial Notice in a 'Google Earth' World," we urge adoption of their recommendations for rule changes that would provide appellate lawyers and appellate judges with more clarity and certainty regarding appropriate reliance on facts that are "off the record." Hopefully such changes also would enhance the ability of appellate courts to make "a sensible decision" based on all of the "important facts" for such a decision.

1. The Information Superhighway, AKA the Internet.

Opinions issued in the last few weeks of the 2015-2016 term of the United States Supreme Court were replete with citations to facts derived from the internet. In *Utah v. Strieff*,[10] the Supreme Court upheld the use of evidence obtained in a search without a warrant to do so, based on an outstanding warrant on an unrelated matter the officer relied upon. In dissent, Justice Sotomayor cited repeatedly to various statistics obtained from the internet with respect to outstanding warrants, including numbers and geographic data.[11] Justices Kagan and Ginsburg cited some of her citations in their separate dissent.[12]

In a passionate discourse on the "disproportionate" impact on persons of color of "the humiliations of . . . unconstitutional searches," Justice Sotomayor also cited a number of books dating back to 1903 showing that "[f]or generations, black and brown parents have given their children the 'talk' . . . all out of fear of how an officer with a gun will react to them."[13] No justice questioned this fact, or any of the other facts she recited based on extrarecord sources.

Extrarecord materials were the subject of a back-and-forth exchange between Justice Kennedy and Justice Alito in the Supreme Court's June 23, 2016, decision in *Fisher v. University of Texas at Austin.*[14] In his opinion for the divided 4-3 Court, Justice Kennedy wrote the following:

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

In dissent, Justice Alito vehemently disagreed with that observation, asserting that the report was "highly relevant" and had been discussed by the respondent university both at the certiorari and the merits stage. He said "the Court's purported concern about reliance on 'extrarecord materials,' *ante*, at 14, rings especially hollow in light of its willingness to affirm the decision below, which relied heavily on the Fifth Circuit's own extrarecord Internet research."[16] Sure enough, the Fifth Circuit had relied on demographics developed from its internet searches of both governmental statistics and scholarly research.[17]

Just one week later, Justice Alito complained in his dissenting opinion in *Whole Woman's Health v. Hellerstedt*, joined by Chief Justice Roberts and Justice Thomas, that the Court had "brushe(d) off" statistical evidence as " 'outside the record,' " even though "it was filed with this Court by the same petitioners in litigation closely related to this case."[18] Justice Alito pointed to decisions holding that the Court " 'may properly take judicial notice of the record in that litigation between the same parties who are now before us.' "[19] A few footnotes later, he snidely observed as follows:

> The Court also gives weight to supposed reductions in "individualized attention, serious conversation, and emotional support" in its undue-burden

> analysis. *Ante*, at 36. But those "facts" are not in the record, so I have no way of addressing them.[20]

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

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

The dissenting judge begged to disagree, saying

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

He went on to proclaim that adherence to the trial record was not a " 'fetish' " but rather a central foundation for "the proper role of an appellate court," and that extrarecord factual research by appellate judges "will cause problems in our judicial system more serious than those it is trying to solve in this case."[24]

In a concurring opinion, the second judge in the majority lamented that the "disagreement over the outcome of this relatively simple case has morphed into a debate over the propriety of appellate courts supplementing the record with Internet research."[25] She wrote to give her view that the case was resolved properly on the trial record itself, by simply adhering to "the

fundamental and unremarkable rule that we give [the appellant] the benefit of all conflicts [in the evidence] and draw all reasonable inferences in his favor as the nominating party."[26] So even the members of that 3-judge panel could not agree on propriety of Judge Posner's internet research on the medical facts at issue in the case!

Without engaging in any such debate, Florida appellate courts have relied on facts from websites in rendering their decisions. In *Estate of McCall v. United States*, for example, the Florida Supreme Court cited a variety of governmental and non-governmental websites in its opinion.[27] One cite addressing the malpractice insurance industry showcases a fundamental problem with website citations: it purports to link to a document on a private website, but the link no longer works.[28]

In rejecting an argument that a conversion claim against a towing company, which had sold a towed vehicle despite the owner's efforts to reclaim it, was preempted by federal law governing a "service" of motor carriers, the Second District cited an internet news story about the inventor of the tow truck.[29] The court relied on facts from that article to make the temporal point that Florida law permitted claims for conversion of property before there were tow trucks. Accordingly, "[a]ny connection between Florida's common law prohibition on conversion" and "services of motor carriers" regulated by subsequent federal law was too remote to require preemption of Florida's conversion law.[30]

In *Trejo v. Arry's Roofing*,[31] the First District cited Wikipedia for the number of languages used in the United States, and also for the proposition that "Florida's language diversity is equally impressive." It included no discussion of the reliability of Wikipedia.

In *U.S. v. Lawson*, on the other hand, the federal Fourth Circuit addressed at length the reliability concerns presented by reliance on Wikipedia.[32] The issue arose when, despite the trial

court's explicit instruction not to conduct research on the internet or otherwise, a juror reviewed, during deliberations, a Wikipedia definition of an element of the crime with which the defendant was charged.[33] The juror no longer had the original Wikipedia entry but obtained a printout two weeks later in anticipation of his appearance before the court on complaints of juror misconduct. There was evidence, however, that the definition on the website had changed from the entry the juror had consulted during deliberation.

The Fourth Circuit reversed the jury's guilty verdict, noting it was "greatly concerned about the use of Wikipedia in this context."[34] Although the court cited Wikipedia as claiming it " 'retains a history of all edits and changes,' " the court said that, even assuming the previous entry could be retrieved, "we would be unable to consider this fact on appeal in the absence of a firm basis in the record for concluding that the Wikipedia archives themselves are accurate and trustworthy."[35] The court did acknowledge, however, that it had cited Wikipedia as a resource in three prior cases dating back to 2007.[36]

In the end, the court concluded that the very format of Wikipedia and its "open-access nature" presented an "obvious and real" "danger in relying on a Wikipedia entry."[37] It cited Wikipedia itself as to how it is "openly editable," as well as a number of federal court decisions "troubled by Wikipedia's lack of reliability" and ultimately concluded the government could not show there was "no reasonable possibility" that the jury's verdict was not impacted by the internet research.[38] At least one federal court has followed *Lawson* to set aside another jury verdict based on a juror's research on the IRS website, which, although equally beyond the scope of the evidence at trial, is undoubtedly more reliable than a website like Wikipedia.[39]

Though disdaining Wikipedia, the *Lawson* court itself relied on a private internet website as of 2011, noting it had been "updated June 2010," for a factual foundation for its legal holding

of a rational basis for the federal statute on animal fighting activities.[40] Likewise, in the body of its opinion in *State v. D.C.*,[41] the Fifth District cited various websites addressing how HIV can be transmitted. One website is the CDC's, but the opinion also cites to www.aids.org and the Mayo Clinic's website, both private websites.[42] Manifestly, those private websites do not carry the same reliability as a governmental website, such as the IRS's, does.

2. Skinning the Cat by Taking Judicial Notice of Extrarecord Facts.

It has long been settled in Florida that, as a general matter, requests for judicial notice can be appropriate "even if . . . first made on appeal."[43] For this broad proposition, the Third District cited HANDBOOK OF FLORIDA EVIDENCE[44] ("Appellate courts can take judicial notice of sources both of applicable law and adjudicative facts."); FLORIDA EVIDENCE[45] ("The matters that can be noticed, which are set forth in Sections 90.201 and 90.202, should define the appropriate matters of judicial notice at both the trial and appellate levels."); and FLORIDA EVIDENCE[46] (Section 90.207 recognizes "the power of an appellate court to take judicial notice of vital facts relevant to review where notice was not taken in the court below.").

The last quotation, from the 1980 version of Florida Evidence, foreshadows Judge Posner's concern over the need to have all the significant facts before the appellate court in order for it to properly decide the case.

Consistent with this concern, Florida appellate courts have long taken judicial notice of their "own records," including issues raised in briefs filed in other cases before the court. In *Gulf Coast Home Health Services of Florida v. Department of Health & Rehabilitative Services*,[47] the First District stated the following:

> The general rule that we deduce from these opinions, and the one which we have applied in disposing of the motions before us, is that it is altogether appropriate for the appellate court to take judicial notice of the existence of other cases, either pending or closed, which bear a relationship to the case at bar. That notice may include, *at minimum*, the identity of the parties and their counsel, the

> lower tribunal from which an appeal was taken and the provisions of the order on appeal, *issues presented in the briefs*, the status of a file within the court, and the dates of orders of the trial and appellate courts. *To fail to do so would handicap the court with a tunnel vision that could lead to inconsistent results in some instances and would simply waste judicial resources in others*.

(Emphasis supplied.). Although the First District ultimately drew a bright line between judicial notice of a court's own records and the records of other courts, the stated policy considerations echo Judge Posner's desire to avoid judicial myopia.

To avoid such "tunnel vision," Florida appellate courts also have taken judicial notice of post-trial matters that moot the appeal.[48] That surely is a more sensible procedure than allowing a party to refuse to answer the court's inquiry as to whether the party has in fact died![49] And, as to *pro se* prisoner appeals, the court can review data from the Department of Corrections' website to determine whether the prisoner has been released from jail, thereby mooting the appeal.

But what about extrarecord matters that, instead of mooting the appeal, go directly to the merits of the appeal despite not having been presented to the lower court? Addressing the same concern as Judge Posner's lament that the record often is lacking in facts that bear significantly on reaching a "sensible decision," the First District did exactly that in addressing a challenge to the trial court's attorney's fee award in *Schneider v. Schneider*.[50]

Specifically, the court, on its own motion, took judicial notice in its opinion of a portion of the record filed in a prior appeal from the final judgment, "hoping that it would shed light on the trial court's decision."[51] The court explained that although the attorney's fee order "suggests" the lower court "unduly focused" on certain isolated facts rather than the "entire picture of each party's financial circumstances," there was no transcript of the evidentiary hearing itself.[52] Because it concluded the prior appeal record was not dispositive, the court

reluctantly affirmed the award, explaining that the appellant had failed to challenge below the lack of sufficient findings of fact by the trial court.

All this, it seems to us, confirms the need for the adoption of specific rules to meet the challenges of today's "information overload."[53] In their article "Appellate Judicial Notice in a 'Google Earth' World," the authors stress that courts have long taken judicial notice of "geographic, historical, and scientific facts" and "[a]ll that has changed is that appellate courts now have ready access to more information than ever before."[54] They propose adoption of certain procedures that would assure "transparency" to "protect parties from 'runaway' judicial notice."[55]

Agreeing with their thoughtful recommendations and advancing some friendly amendments to them, we urge the adoption by the Florida Supreme Court of procedures governing both "formal" and "informal" use by the court of the internet or other extrarecord sources with regard to adjudicative facts. Specifically, the rules of appellate procedure would benefit from the following changes:

1) standards should be established and required to be followed for an appellate court's consideration of an internet or other extrarecord source of facts not cited in the briefs or dealt with by judicial notice;
2) an appellate court should be required to expressly state facts it is judicially noticing; and
3) the court should be required to attach all such sources as appendices to any opinion citing them.

Of particular importance is the "Google Earth" authors' additional recommendation that "[a]ppellate courts should adopt procedures to allow parties to challenge the propriety of

judicially noticing facts."[56] They stress that, "[a]t a minimum," a rule should be adopted specifically authorizing requests for rehearing of the appellate court's reliance on judicially noticed facts without a prior order granting a request for judicial notice.[57] Better still would be a rule requiring notice to the parties that the appellate court is considering taking judicial notice of certain specified facts and allowing the parties to submit written memoranda on the appropriateness of doing so *before* a published decision is rendered in reliance on those facts.

The question then becomes, what about the member of an appellate panel who conducts a personal, informal internet search that never makes it into the ultimate written opinion of the court? Is that meaningfully different from a juror doing internet research during a trial or deliberations, something the jury is instructed most emphatically not to do?[58] Is that any different from a judge informally soliciting factual information relating to technical factual issues in a case without the knowledge of the parties' lawyers, something the Florida Supreme Court long ago held violates the canons of judicial conduct?[59]

In this day-and-age of instant access to information on the internet, this practice only will become more prevalent. We submit that Florida's rules should be specifically amended to assure that parties are afforded notice of any such independent factual research by appellate judges and the opportunity to address the proposed extrarecord facts and, if necessary, to supplement the record with *other* relevant extrarecord facts *before* oral argument if possible and at a minimum before issuance of the court's opinion.

It bears note that the adoption of these recommendations would serve much the same purpose as the proposals that have been urged for focus orders and tentative opinions.[60] In much the same way, this should help achieve the twin "goals of correctness and justice."[61]

3. <u>Skinning the Cat by Amicus Citation of Non-Record Facts.</u>

It is widely acknowledged that *Brown v. Board of Education*[62] would not have been unanimously rendered in 1954 had an amicus brief not been filed discussing the White doll–Black doll study. That non-record report was a foundational basis for the Court's determination that separate educational facilities for Black and White students are inherently unequal facilities. Decades later, in its sharply divided 2016 decision on abortion rights in *Whole Woman's Health*, the Court specifically relied on an "undisputed general fact" recited in an amicus brief, before "[r]eturning to the District Court record."[63]

The question still remains today, then, whether "friends of the court" can properly provide nonrecord facts to the appellate court with respect to the particular case.[64] As of January 1, 2003, Rule 9.370(b) affirmatively prohibits amici from including a statement of the case and facts in their brief.[65]

That rule does not, however, preclude amici from citing extrarecord facts as part of their legal argument, and indeed those facts may be true "legislative" facts having relevance to legal reasoning and the law-making process, not facts unique to the case at issue.[66] Are private industry websites—including the website of a party to the case—therefore fair game for an amicus brief? Stay tuned.

Conclusion

The very fact that an entire issue of an ABA publication has been devoted to the use by appellate courts of extrarecord evidence in reaching their decisions speaks for itself. This issue should be advertently addressed in Florida's appellate rules, and a consistent approach adopted. Courts, parties, and counsel should not be left to deal with it on a case-by-case basis, with inconsistent resort to extrarecord facts. We urge a dialogue be held and rule changes adopted.

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[2] *See* Sylvia H. Walbolt & Joseph H. Lang, Jr., *Off the Record*, 81 FLA. BAR J. 26 (Nov. 2007).

[3] *Id.*

[4] *Id.*

[5] *See e.g., Health Port Technologies, LLC v. Barbara Allen*, Case No. 2D14-5927, Order dated July 27, 2015 (granting appellant's request for judicial notice of agency report published on purposed new rule after lower court's decision interpreting existing rule).

[6] RICHARD A. POSNER, REFLECTIONS ON JUDGING 131 (Harvard University Press 2013).

[7] In one decision, Judge Posner recited various non-record facts the appellate court had relied on in reversing the lower court's order dismissing the action, while acknowledging that the defendant undoubtedly was "howling with rage."

[8] *Appellate Issues*, American Bar Association Council of Appellate Lawyers (Summer Edition, September 2015).

[9] *Id.*

[10] No. 14-1373, 579 U.S. ___, 2016 WL 3369419 (2016).

[11] *Id.* 2016 WL 3369419 at **11, 13.

[12] *Id.* 2016 WL 3369419 at *18.

[13] *Id.* 2016 WL 3369419 at *15 (citing W.E.B. DU BOIS, THE SOULS OF BLACK FOLK (1903); J. BALDWIN, THE FIRE NEXT TIME (1963); T. COATES, BETWEEN THE WORLD AND ME (2015)).

[14] No. 14-981, 579 U.S. ___, 2016 WL 3434399 (2016).

[15] *Id.* at *11.

[16] *Id.* 2016 WL 3434399 at *40 n.18.

[17] *See Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 651-53 nn.101-120 (5th Cir. 2014).

[18] No. 15-274, 579 U.S. ___, 2016 WL 3461560 at *56 n.24 (2016).

[19] *Id.*

[20] *Id.* 2016 WL 3461560 at *57 n.30.

[21] *Rowe v. Gibson*, 798 F.3d 622 (7th Cir. 2015).

[22] *Id.* at 630.

[23] *Id.* at 636.

[24] *Id.* at 643.

[25] *Id.* at 635.

[26] *Id.*

[27] 134 So. 3d 894, 910 (Fla. 2014).

[28] *Id.*; (http://www.weissratings.com/pdf/malpractice.pdf).

[29] *Joe Nagy Towing, Inc., v. Lawless*, 101 So. 3d 868, 876-77 n.3 (Fla. 2d DCA 2012).

[30] *Id.*.

[31] 141 So. 3d 220, 224 nn. 3, 4 (Fla. 1st DCA 2014).

[32] 677 F.3d 629 (4th Cir. 2012).

[33] The juror also consulted the Internet version of Webster's Dictionary, but the court did not address that in light of its holding with respect to Wikipedia. *Id.*, at 639 n.11.

[34] *Id.* at 648.

[35] *Id.* at 648 & n.26.

[36] *Id.* at 650 n.28.

[37] *Id.* at 650.

[38] *Id.*

[39] *See U.S. v. LaRoque*, No. 4:12-CR-88-1H, 2014 WL 683729 (E.D. N.C. Feb. 20, 2014) (setting aside ten guilty verdicts and granting a new trial where juror mentioned in passing to government attorney that another juror had conducted home Internet research relating to the filing of taxes and Subchapter S Corporations); *U.S. v. LaRoque*, No. 4:12-CR-88-1H, 2013 WL 3984131, at *2 (E.D. N.C. Aug. 1, 2013) (specifying that the research was conducted on the IRS website).

[40] *Id.* at 638 n.9.

[41] 114 So. 3d 440, 443 (Fla. 5th DCA 2013).

[42] *Id.*.

[43] *City of Miami v. F.O.P. Miami Lodge 20*, 571 So. 2d 1309, 1318-19 n.10 (Fla. 3d DCA 1989), *aff'd* 609 So. 2d 31 (Fla. 1992) (taking judicial notice of municipal resolution/collective bargaining agreement).

[44] M. Graham, § 207.1, at 80 (1987).

[45] 1 C. Ehrhardt, § 207.2, at 58 (2d ed. 1984).

[46] S. Gard, § 2:23, at 54 (2d ed. 1980).

[47] 503 So. 2d 415, 417 (Fla. 1st DCA 1987).

[48] *See, e.g.*, *A.R. v. Agency for Health Care Administration*, 2016 WL 3385050 (Fla. 3d DCA May 31, 2016) (granting appellee's motion for judicial notice of appellant's death and suggestion of mootness, and dismissing the appeal as moot); *Rivera v. Bank of America*, 190 So. 3d 267 (Fla. 5th DCA 2016) (dismissing appeal upon granting request for judicial notice that appellant filed bankruptcy during pendency of appeal and surrendered the property, thereby resolving appeal).

[49] *See Off the Record*, at 28.

[50] 189 So. 3d 276, 278 (Fla. 1st DCA 2016).

[51] *Id.* No motion for rehearing was filed and no suggestion made that the prior record did establish error.

[52] *Id.*

[53] Keith Schneider, *Alvin Toffler, Author of 'Future Shock,' Dies at 87*, N.Y. Times, June 29, 2016, at A24.

[54] *Appellate Issues*, at 28.

[55] *Id.*

[56] *Id.* at 30.

[57] *Id.* at 31.

[58] *See* Fla. Std. J. Instr. (Civil), § 700, Closing Instructions ("In reaching your decision, do not do any research on your own or as a group. Do not use dictionaries, the Internet, or any other reference materials. Do not investigate the case or conduct any experiments. Do not visit or view the scene of any event involved in this case or look at maps or pictures on the Internet. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. Do not read, listen to, or watch any news accounts of this trial.").

[59] *In re Baker*, 813 So. 2d 36 (Fla. 2002).

[60] *See* Susan L. Kelsey, *Improving Appellate Oral Arguments Through Tentative Opinions and Focus Orders*, Fla. Bar J., December 2014, Vol. 88, No. 10, at 28 (citing *Fla. Carry, Inc. v. Univ. of N. Fla.*, 133 So. 3d 966, 989-90 (Fla. 1st DCA 2013) (en banc) (Makar, J., concurring)).

[61] *Id.*

[62] 347 U.S. 483 (1954).

[63] 579 U.S. at 24.

[64] *Off the Record*, at 28.

[65] *See Amendments to Fla. Rules of Appellate Procedure*, 827 So. 2d 888 (Fla. 2002).

[66] *Off the Record*, at 28.