

Independent factual research by the bench

A look at judges' use of the internet for independent research on non-legal information

By Gary Simms

As advocates for plaintiffs in the trial and appellate courts, we are accustomed to presenting evidence for our clients and to responding to evidence presented by our opponents. And it is only the evidence presented in court that can properly be considered. Indeed, as we know, the standard admonition to jurors is to reach "a verdict based on the evidence." (CACI No. 100.)

They are further instructed not to engage in any independent research and are told that "This prohibition extends to the use of the internet in any way." (*Ibid.*) That seems to be a wise admonition because, as the United States Supreme Court has observed, the internet is a "vast library including millions of readily available and indexed publications" with virtually unlimited scope and diversity. (*Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 853.)

But what about information obtained independently by judges, information of which we might not even be aware? Should judges in trial courts or appellate courts be able to independently research information sources that are not in evidence and, if so, in what circumstances and subject to what restrictions and procedures?

In particular, with the internet's rise and vast scope, the subject of independent factual research has been a matter of growing concern, scholarly commentary, and some attempts at regulation. (See, e.g., Edward K. Cheng, *Independent Judicial Research in the Daubert Age* (2007) 56 Duke L.J. 1263.)

The purpose of this article is not to advocate any particular approach but to note some of the ways in which questions and concerns arise and to note some of the ways in which the issue has been addressed thus far. The issue arises in both the trial and appellate courts.

Terminology

First, a word about terminology: One must distinguish between legal research and factual research. No one can seriously dispute that judges, especially appellate judges, are allowed to conduct their own legal research, i.e., they are not bound by the legal authorities cited by the parties in their briefs or at oral argument. As one court observed, "independent research is indispensable to an efficient appellate system." (*Giraldo v. Dept. of Corrections & Rehabilitation* (2008) 168 Cal.App.4th 231, 251, citing Witkin, Manual on Appellate Court Opinions (1977) § 64, p. 106.) Indeed, few of us would want precedent to be made solely on the basis of authorities cited in the parties' briefs. If that were the situation, inadequate briefs in a prior case would hamstring all of us.

Thus, as used in this article, "independent research" will mean research by a judge into non-legal information. This is commonly referred to as "independent factual research." But even that label can be misleading because not all information discovered by a judge may be "factual" in the sense of being true. Indeed, that is one of the problems posed by independent judicial research. The judge may discover something he or she believes to be

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true but which is entirely incorrect. Nonetheless, with this caveat in mind, this article will, for convenience, use the label "independent factual research" to describe research into non-legal matters outside the judicial record.

The procedural rules

A well-known cardinal rule of appellate procedure is that all factual assertions must be supported by citations to matters in the appellate record and that, conversely, matters not contained in the appellate record must not be cited in appellate briefs. (Cal. Rule of Court, rule 8.204(a)(2)(C); *Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 366; see generally, Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2015) § 9:131, p. 9-39.) This restriction obviously governs attorneys in appellate courts. But does it govern the court themselves or their opinions? The answer is unclear, at least in practice, if not in theory.

The issue is also far from new. An early example is *People v. Tedesco* (1934) 1 Cal.2d 211, in which the California Supreme Court affirmed a first-degree murder conviction of a man in Redondo Beach. Associate Justice William Langdon dissented, saying only, "I dissent. The evidence in this case was purely circumstantial, and in my opinion insufficient to justify the verdict of guilt of murder in the first degree." (*Id*., at p. 222.)

That was not the end of the matter. Justice Langdon went to Redondo Beach and personally investigated the case. He reported his findings to his Supreme Court colleagues. He persuaded three of them, including Chief Justice William Waste, that the Court had wrongly affirmed the conviction. Then, in what the Berkeley Daily Gazette described as a "precedent shattering appeal," the four Justices went to Sacramento and persuaded Governor Frank Merriam to commute the death sentence to life imprisonment.

People v. Tedesco is, of course, an extreme example of independent factual research, and it is now almost unfathomable that any appellate justice would do as Justice Langdon did. It appears to have transgressed every norm of appellate procedural and judicial ethics but it may well have prevented a wrongful execution. Each reader must decide for himself or herself whether Justice Langdon did the right thing.

Typical independent research

A more recent and more typical example of independent research arose in *People v. Mar* (2002) 28 Cal.4th 1201, in which the Supreme Court held that the trial court had erred by requiring the criminal defendant to wear an electric stun-belt in court. The court held this was prejudicial error and reversed the conviction. To justify its result, the Court cited, among other matters, articles and other information not in the appellate record.

Writing in dissent, Justice Janice Brown took the majority to task for its independent research. "The question in this case was not whether stun belts pose serious medical risks for persons with heart problems or other medical conditions, nor was it whether the current design of the stun belt could be improved upon. There is absolutely no evidence in the record bearing on these questions. In the absence of such evidence, we had two choices. We could have deferred to the Legislature, which can make law after hearing from distinguished experts on all sides of controversial issues. Or we could have waited for a case that raised these questions on an adequate record. Instead, the majority, *rushing to judgment after conducting an embarrassing Google.com search for information outside the record*, has tied the hands of the Legislature, to the likely peril of judges, bailiffs, and ordinary citizens called upon to do their civic duty." (*Id*., at p. 1233, italics added.) Regardless of whether one agrees with Justice Brown's view, it highlights the issues raised by independent research. Do we really want precedent, especially on constitutional questions, to be influenced, perhaps even created, based on a judge's or judicial staff attorney's wanderings in the Wikipedia bramble bushes?

The issue is directly addressed by Canon 3 of the California Code of Judicial Ethics. It states, "Unless otherwise authorized by law, a judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed. This prohibition extends to information available in all media, including electronic." (Canon 3B(7).) This would seem to put to rest any debate regarding whether a judge can independently investigate factual matters. And in some cases, appellate courts have made clear that independent research is impermissible. "[T]he judge cannot receive information outside the evidence in the case or conduct out-of-court experiments." (*Guadalupe A. v. Superior Court* (1991) 234 Cal.App.3d 100, 108-109.) One judge was formally admonished for violating this rule: "Petitioner's [the judge's] mistake was abandoning his adjudicative role for an investigatory one." (*Wenger v. Commission on Judicial Performance* (1981) 29 Cal.3d 615, 632.)

In another case, the trial judge was faulted for having done independent research to determine whether the weather had been rainy on a date relevant to the case. (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237.) For that reason and others, the Court of Appeal found the judge had been biased, requiring a reversal of the judgment. Pointing to the judge's weather research, the Court of Appeal noted that "The factual inquiry independently undertaken by the court in this case without notice is uncharacteristic of an impartial judge." (*Id*., at p. 259, fn. 9.)

But other instances of independent research have been viewed less harshly. For example, in *People v. Sikat* (2010) 2010 Cal. App. Unpub. LEXIS 360, the trial

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judge had referred to information that he had found on an internet site (a blog's comments). The Court of Appeal stated that it did not "condone" the judge's reference at trial to that information. (*Id*., at p. *35.) But the court also stated that independent research, i.e., reading the blog's comments, was not "tantamount to 'investigation'" because the comments reflected a "public sentiment well known to all judicial officers." (*Id*., at p. *36.) But of course, if that were true, the trial judge could simply have taken judicial notice of the alleged facts contained in the blog's comments. Moreover, Canon 3B(7) specially prohibits independent internet research. It is fortunate that *People v. Sikat* was not certified for publication and thus cannot be cited as precedent.

Criticism, or a free pass?

Perhaps the most that can be said is that, sometimes, an appellate court will criticize a trial court's independent factual research. But in other cases, the appellate court will be willing to give such independent research a free pass despite Canon 3B(7). Perhaps the bigger problem is that the attorneys may not even know if the judge has done any independent research. In the cases cited above, the judges, for better or worse, revealed what they had done. But it is entirely possible, even likely, that some, perhaps most, judges will not, "put their cards on the table" by disclosing that they have used the internet or other sources to do independent factual research.

Another consideration is what types of facts are subject to the proscription against independent research. More specifically, it is well understood that there are two types of facts: adjudicative and legislative. As the Supreme Court has put it, adjudicative facts are "facts concerning immediate parties and what happened to them." (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 139, fn. 6.) For example, the questions "Was the car speeding?" or "Was the pedestrian in the crosswalk when she was hit?" would be resolved by adjudicative facts.

By contrast, legislative facts are facts "utilized for informing a court's [or agency's] legislative judgment on questions of law and policy." (*Franz, supra,* 31 Cal.3d at p. 139, fn. 6.) Thus, for example, in deciding the legal question of whether a duty of care exists for a particular type of situation, a court must consider several factors including "the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Peterson v. San Francisco Community College Dist*. (1984) 36 Cal.3d 799, 806.) Many of these items will or should require a court to consider facts.

Consider, for example, the availability, cost, and prevalence of insurance for the risk involved. Should a court simply go with its hunch on this factor? Or should the court require the parties to submit evidence? Or should the court do its own research into insurance availability and cost? There appears to be very little California authority on these questions. As explained above, in *People v. Mar*, *supra*, 28 Cal.4th 1201, the majority did its own independent internet research to justify its public-policy determination regarding the forced wearing of a stun-belt. The dissent took the majority to task for that. But the practical reality is that nothing constrains an appellate court for doing as much independent research as it wishes to do.

Reversals rare on legislative facts

Indeed, there appears to be no case in which a trial or appellate court has been reversed by a higher court for having independently researched legislative facts. And notwithstanding California's Canon 3B(7) and similar canons elsewhere, the legal commentary is also relatively more forgiving of independent research into legislative facts than research into adjudicative facts. But this "legislative research" poses a problem greater than "adjudicative research." If a judge independently investigates an adjudicative fact –"Was the car speeding?"– his conclusion will affect only that case and those parties. But the purpose of legislative-fact research is much broader, e.g., to decide matters of public policy. And because appellate courts will have the last word on such questions, they can promulgate rules that are binding precedent.

Moreover, legislative-fact research may be more prone to error than case-specific research. For example, if a judge decides on her own to visit the scene of an automobile accident to obtain a first-hand view of the location, there may not be much that she can "get wrong." But legislative-fact research is rife with the potential for error. Very few judges or judicial staff attorneys on whom judges greatly rely have any expertise outside the law. Thus, when they wander into fields such as science, economics, or history, they are likely to reap inaccurate or misleading results. How, for example, is a judge supposed to evaluate the methodology used for an economic analysis or a study of current theories of brain development? Indeed, the sources themselves may be unreliable or even intentionally biased, e.g., "studies" by partisan think-tanks. And of course, they can be cherry picked for conclusions that support the judge's inclinations.

But although legislative-fact research can have a much greater effect than adjudicative-fact research on the law, judges are given much greater leeway to do legislative-fact research. Is this desirable, or should such research be subject to greater scrutiny and control, as suggested by Justice Brown's dissent in *People v. Mar*, *supra*, 28 Cal.4th 1201, 1233?

Does trial court disclose its research?

In another respect, the two types of independent research pose differing concerns. It seems likely that trial judges are far more likely than appellate justices to engage in adjudicative-fact research.

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This, of course, cannot be empirically proved, but the nature of the appellate process is such that it seems highly unlikely that an appellate justice would seek to interview a witness or to visit an accident site. Such factual determinations are the trial judge's province. But when a trial judge independently investigates the facts, this raises a question of fairness, even due process, and it goes to the heart of our adversarial system. This is especially true when the judge does not disclose his research. And this concern is, of course, the premise for Canon 3B(7)'s proscription against independent research, at least for adjudicative facts.

Independent research into legislative facts also raises a question of fairness, although perhaps more indirectly than does adjudicative-fact research. Assume, for example, that an appellate justice reads an internet "fact-based" article that he finds persuasive and that affects his decision. He does not have to cite the article. And if he does not do so, the parties will be unaware that it affected the decision, so they cannot respond to the independent research. Or as might be more likely, to bolster his conclusion, the judge can cite the article in the court's written opinion. At least he has disclosed what he has done. But what is the losing party to do? In reality, virtually nothing. In theory, he could petition for rehearing and explain why the article was incorrect or biased. But good luck with that. At best, the court might modify its decision by deleting the citation to the article. But the court would almost certainly deny rehearing.

In summary, independent judicial research, particularly at the appellate level, where legislative-fact research is most likely, raises concerns of accuracy and fairness. The question is whether such research should be more explicitly and closely regulated than it is now. In particular, should Canon 3B(7) be amended to make clear that it applies to legislative-fact research as well as to adjudicative-fact research? There may be no easy answer, but the question merits further study.


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