NATIONAL FOUNDATION FOR JUDICIAL EXCELLENCE

PROMOTING EXCELLENCE
AFFIRMING JUSTICE

Judicial Excellence

06/06/2018 Volume 3, Issue 1

In This Issue

Annual Judicial Symposium
July 20–21, 2018

Leadership Notes

Message from the President

By Robert W. Shively

Welcome to this edition of *Judicial Excellence*, a newsletter for the judiciary published by the National Foundation for Judicial Excellence (NFJE). NFJE's mission is to provide high quality education to state court appellate judges on important and emerging issues in civil litigation. In order to accomplish this mission, NFJE hosts an annual judicial symposium, and through this newsletter, periodically publishes scholarly articles on topics of interest through state court appellate judges.

In this issue you will find two thought-provoking articles. One is an interesting discussion entitled "Rule 30(b)6) Deposition Reform," by NFJE Board Chair Mike Weston. The other, by appellate specialist Sarah Elizabeth Spencer, is entitled "Is the Record Really Complete? How Appellate Courts Consider New Evidence."

The 14th Annual NFJE Judicial Symposium, "Judicial Excellence in the 21st Century," will take place July 20–21, 2018, at the Loews Chicago Hotel. I am pleased to report that we already have 166 judges, from 39 states, registered for the symposium. There is still room for more!

This year's symposium addresses cutting edge changes in judicial process and administration. The topics include using technology to improve case preparation and docket management, best practices utilized in state and federal

courts toward the improvement of judicial administration, improving oral argument, and writing opinions in high interest cases with an eye to the public and press.

Under the leadership of NFJE Symposium Chair Scott Burnett Smith of Huntsville, Alabama, the NFJE Program Committee has assembled an outstanding group of speakers. The keynote speaker is renowned constitutional law scholar and author Randy Barnett, Professor of Legal Theory at the Georgetown University Law Center. For a complete list of topics and speakers, please click here.

A new NFJE initiative this year was the establishment of a Judicial Advisory Committee. This Committee is composed of appellate judges who provide direct input to the Program Committee. While we always obtain evaluations from the judges following each symposium, this Committee provides for ongoing discussions and direct feedback from the judges during the program planning process.

If you have not already registered for the 2018 Symposium, I encourage you to do so as soon as possible. If you are unable to attend this year, we hope you can attend future programs (please save the date for the 2019 program, which will be held July 19–20, 2019, in Chicago).

In further encouragement of your attendance at a future NFJE symposium, I offer the words of a symposium speaker and participant following a recent symposium:

> I want you to know how impressed I was with every aspect of the event. From content, to organization, to the high level of the discussions, to the location, to the many interesting, thoughtful judges with whom I conversed over lunch and during breaks, to really every last detail, the entire event was an absolute and qualified success.

It has been my honor and privilege to serve as NFJE President. I look forward to seeing many of you in Chicago at the 2018 symposium.

Robert W. Shively *is the founding member of Shively Law Group, PC, LLO, in Lincoln, Nebraska. He is the President of the NFJE, and is a past Director of DRI. Mr. Shively is a member of FDCC, ADTA, and IADC, and has held numerous leadership positions in defense organizations, bar associations, and community groups. His practice focuses on the defense of personal injury and wrongful death cases, including motor vehicle, premises liability, and product liability matters. Mr. Shively also has an active mediation practice, and is a member of the National Academy of Distinguished Neutrals.*

Feature Articles

Rule 30(b)(6) Deposition Reform

By Mike Weston

Discovery issues seldom reach appellate courts. As a result, these courts are not burdened with disputes, meritorious and not so, that occur during the life of a civil case. Most states have a rule of civil procedure similar to Federal Rule of Civil Procedure 30(b)(6), a rule that provides for the deposition of a corporate representative that will bind a corporate defendant as to particular facts. Because these rules appear on their face to efficiently commit the parties to facts, they theoretically reduce the amount of discovery otherwise necessary.

But Rule 30(b)(6) has become been increasingly problematic and expensive to navigate while preserving a party's position in a case. First, it is the only process in the civil law that allows for the discovery on a person who "learns the truth," but does not necessarily know it. Countless hours can be spent learning processes, facts, and data in the hopes that a witness can truthfully and accurately provide testimony binding a party. Some are successful, some less so.

These rules typically have no limits on the number of categories in play. Even in "Iowa" civil cases, it is not unusual to receive a 30(b)(6) deposition notice with 50 or more categories of inquiry. There are also no provisions that set the minimum time before a noticed 30(b)(6) deposition is conducted. These depositions can take much time and preparation. Therefore, the typical ten days to two weeks' notice is just not sufficient.

Additionally, there is no special provision for supplementing responses given at a 30(b)(6) deposition if deponents become aware of changes that should be made to their testimony.

While these problems abound, litigants are slow to seek court intervention in advance of a deposition because no record has been developed. Trial courts would have a steep learning curve to meaningfully rule on protective orders aimed at limiting topics or categories that are sought to be raised at a 30(b)(6) deposition. Similarly, an attack on the record made following the deposition requires trial courts to review a significant amount of testimony, measuring it against a request or inquiry and trying to judge whether a deponent has in good faith complied with the notice. And the list goes on.

The Advisory Committee on the Federal Civil Rules recently voted to consider changes to Federal Rule of Civil Procedure 30(b)(6). Their 30(b)(6) subcommittee has recommended at a minimum a meet and confer requirement before a 30(b)(6) deposition can take place. But many believe the rules committee should go farther.

Lawyers for Civil Justice is a group of businesses, defense bar and defense bar organizations committed to restoring and maintaining the balance between parties in civil litigation. Their thoughtful submission to the rules committee in the fall of 2017 can be found here. Their suggestions would cure many of the problems inherent in the corporate representative deposition process. I heartily commend it to your attention and use as your state civil rules making bodies consider changes to this troublesome rule.

J. Michael (Mike) Weston *is a founding member of Lederer Weston Craig, PLC, Des Moines and Cedar Rapids, Iowa. He is a Past President of DRI. Mike is a Fellow of the American College of Trial Lawyers, a Member of the Federation of Defense and Corporate Counsel, the International Association of Defense and Corporate Counsel, the Association of Defense Trial Attorneys, ABOTA and as a Fellow of the Iowa Academy of Trial Lawyers. Mike currently serves as chair of the board of the NFJE. He previously served as a Governor on the board of the Iowa State Bar Association, a member of the board of Lawyers for Civil Justice, and has lead several other business, bar and civic groups. Mike received his Juris Doctor from the University of Iowa College of Law. He practices primarily in the areas of commercial litigation, product liability, toxic torts, bad faith and insurance coverage and tort defense.*

Is the Record Really Complete?

How Appellate Courts Consider New Evidence on Appeal

By Sarah Elizabeth Spencer

It is basic hornbook law that appellate courts consider only the evidence and arguments submitted to the trial court. This rule largely exists because of the different functions of trial and appellate courts in the American judicial system. Trial courts and juries function in the fact-finding capacity; they rely on the parties to present the necessary evidence to resolve disputed factual issues. They do not "make law" or consider policy questions about what the law should be. Appellate courts, in contrast, focus on evaluating legal issues; they do not take evidence, make factual findings, or resolve the merits of factual disputes. In addition to the inherent structure of the court system, principles of judicial economy, fairness, and finality support the rule that appellate courts should not consider new evidence for the first time on appeal. *See* Jeffrey C. Dobbins, *New Evidence on Appeal*, 96 Minn. L. Rev. 2016, 2022 (2012).

There are significant exceptions to this rule, however. In certain circumstances, appellate courts allow new or additional evidence via a motion to supplement the record on appeal. Supplementation of the record on appeal is proper when the omission of the evidence from the record was an oversight or when the evidence came into being for the first time while the case was on appeal. An appellate court may also take judicial notice of new facts that the lower court did not consider as long as the proponent of the evidence satisfies the applicable evidentiary requirements. Some appellate judges endorse factual research regarding evidence that the trial court did not consider and the parties did not argue on appeal. And, appellate courts can rely on new facts and not previously argued issues by considering social science research, statistics, and other academic studies addressed in amicus curiae briefs.

This article briefly discusses the ways in which appellate courts consider new evidence for the first time. It also makes recommendations regarding how courts should

respond to efforts to introduce new evidence for the first time on appeal.

Supplementing the Record

In the federal circuit courts, the record on appeal includes "(1) the original papers and exhibits filed in the district court; (2) the transcripts of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." Fed. R. App. P. 10(a). The federal circuit courts generally refuse to consider "material outside the record before the district court." *United States v. Kennedy*, 225 F. 3d 1187, 1191 (10th Cir. 2000).

Rule 10(e) of the Federal Rules of Civil Procedure permits correction or modification of the record on appeal. Under that rule, "[i]f anything material to either party is omitted from or misstated in the record by error or accident," the record may be supplemented based on a stipulation of the parties, or on an order of the district court or court of appeals. Fed. R. Civ. P. 10(e)(2). As the plain language provides, supplementation under Rule 10(e) is reserved for omissions or "error or accident." The "[o]missions in the record may result from the error or inadvertence of the parties, the court reporter, the district court clerk or the judge." *United States v. Barrow*, 118 F.3d 482, 488 (6th Cir. 1997) (quoting 9 Moore's Federal Practice ¶210.08[1], at 10-53).

While materials considered by the district court are subject to supplementation under Rule 10(e), "Rule 10(e) is not an appropriate vehicle for expanding the record on appeal with material not considered by the district court in the first instance." *United States v. Charles M. Davis*, ___ F.3d ___, 2016 U.S. App. Lexis 12881 (9th Cir. 2016) (unpublished); *see also Animal Legal Defense Fund v. U.S. Dept. of Agric.*, 789 F.3d 1206, 1221, n. 9 (11th Cir. 2015) (denying motion to supplement where "the parties never presented the letter to the district court, nor did they inadvertently omit the letter from the record."); *United States v. Murdock*, 398 F.3d 491, 500 (6th Cir. 2005) (internal quotation marks omitted) ("[T]he purpose of Rule 10(e)(2) is to permit the court to correct omissions from or misstatements in the record for appeal, not to introduce new evidence in the court of appeals[.]").

For example, in *Midwest Fence Corporation v. United States Dept. Of Trans.*, 840 F.3d 932 (7th Cir. 2016), the Seventh Circuit denied supplementation of the record under Rule 10(e) when the appellant tried to include evidence that was not before the district court. The plaintiff appellant, Midwest, claimed that the defendants, state and federal agencies, violated the plaintiff's equal protection rights by enacting "federal and state programs that offer advantages in highway construction contracting to disadvantaged business enterprises[.]" *Id.* at 935. The district court granted summary judgment to the defendants, concluding that there was no evidence of a constitutional violation.

On appeal, Midwest asked the appellate court to consider part of a "disparity study" regarding disadvantaged business enterprises that was not submitted to the district court and was not contained in the record on appeal. The study was in progress during the district court proceedings but was not complete at the time of final judgment. *Id.* at 946. In support of its motion for summary judgment, one of the state agencies, Tollway, had relied on the then-completed portion of the study to argue that it did not violate the plaintiff's equal protection rights. *Id.* The district court, too, cited certain portions of the study in its memorandum decision granting Tollway's motion for summary judgment. *Id.*

The study was ultimately completed "after the defendants had filed their briefs on appeal but before Midwest Fence filed its reply brief[.]" *Id.* On appeal, Midwest asked the Seventh Circuit to consider a portion of the study that was not before the district court, specifically, "a chart that lays out disparity ratios in the construction industry for each of several demographic groups." *Id.* The defendant appellees "moved to exclude that evidence from the appellate record." *Id.* The Seventh Circuit granted the motion to exclude the evidence. *Id.*

Insofar as the new portion of the study did not exist when the district court granted summary judgment, "nothing was 'omitted from or misstated in the record by error or accident[]'" that rendered Rule 10(e) inapplicable. *Id.* at 33 (citing Fed. R. App. P. 10(e)). Further, even if the study was in Tollway's "exclusive control" and Tollway had "cherry-pick[ed] portions of the... study that support[ed] its position," those circumstances were insufficient to justify supplementation of the record with new evidence. The court found that there was "no reason to permit a collateral attack on the district court's judgment based on data that the district court never considered and that were not even available to the Tollway when it began to defend this lawsuit and its DBE program." *Id.* at 947.

Beyond the parameters of Fed. R. Civ. P. 10(e), federal circuits recognize the inherent equitable power to permit supplementation of the record on appeal, which includes information that the litigating parties did not submit to the district court. *See, e.g., Dickerson v. Alabama*, 667 F.2d 1364, 1367, 1368 (11th Cir. 1982)("...it is clear that the

authority to do so exists.... [and] is a matter left to discretion of the federal courts of appeals.") (citations omitted); *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986) (recognizing a "court's authority to supplement the record on appeal"); *Kennedy*, 225 F.3d at 1192 ("Although *Ross* is not controlling precedent in this circuit, we agree with the Eleventh Circuit that, under some circumstances, we have an inherent equitable power to supplement the record on appeal."); *Dakota Indus., Inc. v. Dakota Sportswear, Inc.*, 988 F.2d 61, 63 (8th Cir. 1993) (noting that courts rarely exercise narrow authority to enlarge the record in the interests of justice). As the Sixth Circuit remarked, "[c]ommentators have noticed this inherent equitable power as well, although they point out that the practice is only justified in rare instances." *Inland Bulk Transfer Co. v. Cummins Engine Co.*, 332 F.3d 1007, 1012 (6th Cir. 2003) (citing 16A Charles Alan Wright, *et al.*, Federal Practice & Procedure §3956.4 and 20 Moore's Federal Practice §310.10[5][f]).

As is expected with an equitable power, the circumstances in which courts have granted supplementation under this authority are varied. In evaluating whether to exercise the inherent equitable authority, "'[a] primary factor which [courts] consider... is whether acceptance of the proffered material into the record would establish beyond any doubt the proper resolution of the pending issues.'" *Animal Legal*, 789 F.3d at 1221, n.9 (quoting *CSX Transp., Inc. v. City of Garden City*, 235 F.3d 1325, 1330 (11th Cir. 2000)).

Courts also consider whether "remanding the case to the district court for consideration of the additional material would [be] 'contrary to both the interests of justice and the efficient use of judicial resources.'" *Ross*, 785 F.2d at 1475 (quoting *Dickerson*, 667 F.2d at 1367). Other factors pertaining to the inherent equitable authority to supplement the record include whether the law has changed since the district court's ruling and whether new facts have developed regarding the propriety of an injunction or the issue of subject matter jurisdiction, in which case supplementation under the equitable power is more likely available. *See* George C. Harris & Xiang Li, *Supplementing the Record in the Federal Courts of Appeals: What If the Evidence You Need Is Not in the Record?*, 14 J. Appellate Practice & Procedure 317, 325 (2013). Otherwise, without "these specific circumstances, the court evaluates every request for supplementation on a case-by-case basis and considers whether supplementation advances the principles of fairness, truth, or judicial efficiency." *Id.*

Courts considering a request to supplement the record should not allow litigants, without prior permission, to unilaterally submit new evidence as part of an addendum or an appendix to the party's brief on appeal. *See Jones v. White*, 992 F.2d 1548, 1567 (11th Cir. 1993) ("We have not allowed supplementation when a party has failed to request leave of this court to supplement a record on appeal or has appended material to an appellate brief without filing a motion requesting supplementation."). Instead, "[a] party seeking to supplement the appellate record should proceed by motion or formal request so that the court and opposing counsel are properly apprised of the status and contents of the evidence in question." *Harris*, *supra*, at 332.

Judicial Notice

Judicial notice is another way in which appellate courts consider evidence that is not contained in the record. Under Rule 201 of the Federal Rules of Evidence, "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). And "judicial notice may be taken at any stage of the proceedings, whether in the trial court or on appeal." Fed. R. Evid. 201 advisory committee's note.

The distinction between adjudicative and legislative facts is important for judicial notice purposes because judicial notice under Rule 201 only applies to adjudicative facts, not legislative facts. *See* Fed. R. Evid. 201(a); Fed. R. Evid. 201 advisory committee's note (explaining that the rule "was deliberately drafted to cover only a small fraction of material usually subsumed under the concept of "judicial notice."). It is sometimes difficult to distinguish between adjudicative and legislative facts. Adjudicative facts are "'the facts of the particular case.'" *United States v. Iverson*, 818 F.3d 1015, 1030 (10th Cir. 2016) (O'Brien, J., concurring) (quoting *United States v. Wolny*, 133 F.3d 758, 764 (10th Cir. 1998)). They "'usually answer[] the questions of who did what, where, when, how, why, with what motive or intent'—the types of 'facts that go to a jury in a jury case,' or to the factfinder in a bench trial." *Perry v. Brown*, 671 F. 3d 1052, 1075 (9th Cir. 2012) (quoting *Marshall v. Sawyer*, 365 F.2d 105, 111 (9th Cir. 1966)).

Courts also take judicial notice of legislative facts, but judicial notice of legislative facts is not governed by Rule 201. Legislative facts "do not relate specifically to the activities or characteristics of the litigants." *Iverson*, 818

F.3d at 1030 (quoting *United States v. Gould*, 536 F.2d 216, 219–20 (8th Cir. 1976)). Rather, legislative facts have "'relevance to legal reasoning and the lawmaking process; they are established truths, facts or pronouncements that do not change from case to case but apply universally.'" *Iverson*, 818 F.3d at 1030 (quoting *United States v. Wolny*, 133 F.3d 758, 764 (10th Cir. 1998)). As for this category, "[a] court generally relies on legislative facts when it purports to develop a particular law or policy and thus considers material wholly unrelated to the activities of the parties." *Iverson*, 818 F.3d at 1030 (quoting *Gould*, 536 F.2d at 220).

Courts are generally reluctant to take judicial notice on appeal because "[f]act-finding is a trial court function," and "[r]outine-taking of judicial notice on appeal would interfere with the trial courts' role as fact-finders." *Iverson*, 818 F.3d at 1029, n.6. Nonetheless, appellate courts use judicial notice to accept indisputable facts regarding geography, census data, court records in other cases, information on government websites, and newspaper articles, among many other areas. *See, e.g., Government of the Canal Zone v. Burjan*, 596 F.2d 690, 694 (5th Cir. 1979) (geographic facts); *United States v. Esquivel*, 88 F.3d 722 (9th Cir. 1996) (census data); *In re Papatones*, 143 F.3d 623, 624 n.3 (1st Cir. 1998) (state court judgment); *Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 597 (3d Cir. 2000) (settlement of separate action); *Gent v. CUNA Mut. Ins. Society*, 611 F.3d 79 (1st Cir. 2010) (government website identifying cause of Lyme disease); *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (newspaper articles); *Iverson*, 818 F. 3d at 1032 (O'Brien, J., concurring) (FDIC-insured status of two banks).

As these authorities demonstrate, judicial notice is a viable mechanism appellate courts to consider new information and even to do so sua sponte. Given the basic rule that appellate courts should err on the side of not considering new information on appeal, when a party requests for the first time on appeal judicial notice of adjudicative facts regarding the parties' specific dispute, the Court should take special care to consider whether the evidence was available during the district court proceedings and whether it could have been raised and discussed in the lower court. If the evidence was available but simply was not raised below, a court should not consider the evidence.

Independent Judicial Research

In the modern legal system, the internet is an unprecedented source of evidence. Courts struggle with the question of whether and to what extent appellate judges, when deciding cases before them, may consider information derived from their own independent internet research.

Judge Richard Posner of the Seventh Circuit Court of Appeals advocates that judges conduct independent research. Explaining this theory, Judge Posner states that internet research is a "life-saver" for judges:

> Increasingly, cases involve statistical proof, advanced medical technology, environmental science, computer science, and... the application of mathematical techniques to investment and lending.... [A]nd online research can be a life saver in helping judges cope with technical issues, because the Internet contains a vast amount of technical information in all fields, much of it accessible to persons with limited technical background.

Richard A. Posner, *Judicial Opinions and Appellate Advocacy in Federal Courts—One Judge's Views*, 51 Duq. L. Rev. 3, 11 (2013).

Applying this view in *Rowe v. Gibson*, 798 F. 3d 622 (7th Cir 2015), Judge Posner went beyond the record evidence presented on appeal to adjudicate the merits of the case. He faced a fierce dissent in response.

Rowe was a Section 1983 case in which the plaintiff, a prison inmate, claimed that the defendants, a prison and prison officers, were deliberately indifferent to his serious medical needs. The plaintiff had reflux esophagitis and was prescribed a medication to treat the condition. He claimed that the defendants violated his constitutional rights by prohibiting him from taking the medication with his meals and instead requiring him to receive the medication at other times during the day. The district court granted summary judgment to the prison and the prison officer defendants, and the prisoner plaintiff appealed.

In the majority opinion, Judge Posner repeatedly cited various extra-record materials, including "highly reputable medical websites" as sources of factual medical information about the plaintiff's diagnosis of reflux esophagitis. *Id.* at 628. The cited websites were published by WebMD, the Mayo Clinic, the National Institutes of Health, and the Physician's Desk Reference. *Id.* at 623–27. He relied on those websites to describe the nature of reflux esophagitis, the symptoms, and potential complications of the condition. He also cited the websites to support factual assertions regarding the medication, including the dosage and recommended frequency of administration, that the medicine should be taken with a meal, that "it takes a day for the body to recognize [the medication] as a source of relief from esophageal distress," and that the "drug's efficacy decreases over time." *Id.* at 627.

The appellant prisoner had not introduced before the district court any of the cited evidence. Despite this, Judge Posner extensively relied on the new evidence to reverse the district court's grant of summary judgment in the defendants' favor. In so doing, Judge Posner ignored the defendants' medical expert testimony that "it does not matter what time of day" the medication is administered, "[e]ach [] pill is fully effective for twelve hour increments," and that "[the medication] does not have to be taken before or with a meal to be effective." *Id.* at 625.

Judge Posner justified his reliance on information not contained in the appellate record by noting that the plaintiff appellant was incarcerated, acting pro se, impoverished, and did not have his own expert witness. He also explained that in such a case, appellate judges must go beyond the cold record to decide a case fairly. According to Judge Posner, "[i]t 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." *Id.* at 630.

Judge Hamilton dissented in part, specifically from the reversal of summary judgment for the constitutional violation claim, which allegedly arose from the timing of medication administration, emphatically attacking Judge Posner's approach: "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." *Id.* at 636. Expanding, Judge Hamilton wrote, "By any measure,... using independent factual research to find a genuine issue of material, adjudicative fact, and thus to decide an appeal, falls outside permissible boundaries." *Id.* at 638.

Judge Hamilton pointed out that the majority's opinion relied on the new evidence as a basis for the outcome of the case. He felt that doing so was "contrary to several lines of well-established case law holding that a decision-maker errs by basing a decision on facts outside the record." *Id.* at 638. He also noted that many practical implications arise from "turn[ing] the court from a neutral decision-maker into an advocate for one side." *Id.* at 641. Those implications included placing an onerous burden on district court judges to themselves conduct research and obtain evidence that the litigating parties did not present:

> 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.

Id. at 641.

The dissent also questioned the reliability of the website evidence that was the product of Judge Posner's research, noting the presence of disclaimers on the websites and the need for a medical decision maker to exercise "some degree of medical judgment." *Id.* and 643–44. Based on all of these concerns, the dissent would have affirmed the grant of summary judgment on the claim of deliberate indifference towards serious medical needs: "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." *Id.* at 644 (Hamilton, J., dissenting).

The defendants in *Rowe* later sought en banc rehearing, which the Seventh Circuit denied. The vote on the en banc petition "was a tie." Order on Request for En Banc Review, *Rowe v. Gibson*, no. 14-3316 (Dec. 7, 2015). In its order, the Seventh Circuit court issued a limiting statement regarding the scope of the majority opinion: "The panel majority should not be read as holding that we expect district judges to do their own factual research or as suggesting anything at all about the propriety of Internet research." *Id.*

Some scholars agree with Judge Hamilton and conclude that "adjudicative fact research detracts from the reliability of our justice system and undermines due process of law." Layne S. Keele, *When the Mountain Goes to Mohammed: The Internet and Judicial Decision-Making*, 45 N.M. L. Rev. 125, 126–27 (2014). Other scholars suggest that state law makers should promulgate clear rules to guide judges regarding the permitted scope of independent judicial research. *See* Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 Rev. Litig. 131 (Fall 2008).

When an appellate court relies on evidence gathered from the court's own judicial research and the research occurred without notice and an opportunity to be heard, aggrieved parties can argue that their due process rights were violated. *See* Thornburg, *supra*, at 184–88;

198–200 (discussing due process concerns arising from judicial research). For that reason, if the court is inclined to consider evidence that is the product of the court's own judicial research, it makes sense to afford the parties an opportunity to provide supplemental briefs and legal argument on the issues raised by the court's own research.

Amicus Briefs

Amicus parties are another source of new factual information on appeal. Amicus briefs raise policy-related issues and legislative facts that usually go beyond the narrow concerns of the litigants. As support for factual propositions, amicus briefs usually cite social science research, academic research, statistics, and specialized industry or scientific publications.

The use of amicus briefs has risen 800 percent in the 50 years preceding 2014. *See* Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 Va. L. Rev. 1758, 1761 (2014). Amicus parties "play an important role in educating judges on potentially relevant technical matters, helping to make [judges] not experts but educated lay persons and thereby helping to improve the quality of [their] decisions." *Id.* at 1761 (quoting *Justice Breyer Calls for Experts to Aid Courts in Complex Cases*, N.Y. Times, Feb. 17, 1998, at A17). From one perspective, "'[e]ven when a party is very well represented, an amicus may provide important assistance to the court... [by] collect[ing] background or factual references that merit judicial notice.'" Larsen, *supra*, at 1761 (quoting *Neonatology Assocs., P.A. v. Comm'r*, 293 F.3d 128, 132 (3d Cir. 2002)).

In her research, Professor Larsen examined "every citation to an amicus brief in a Supreme Court opinion" from 2008 to 2013. *Larsen, supra*, at 1778. She concluded that the Supreme Court cited amicus briefs on 606 occasions in 417 opinions and that 20 percent of the citations were for assertions of legislative fact. *Id.* She also found that "relying on amicus expertise on factual matters is not a trend dominated by any particular Justice, any particular ideology, or any particular brand of fact." *Id.* To the contrary, in various majority, concurring and dissenting opinions, 11 justices cited legislative facts on a myriad of subject matters raised by amicus parties. *Id.* at 1778–79.

Why have the amicus citations in Court decisions exploded? "One explanation for the court's increased interest in amicus briefs is that judges now recognize the need for a broad perspective to discern good policy." Gaëtan Gerville-Réache & Conor B. Dugan, *Protecting the Appeal from "Truthy" Amici Facts: Strategies for Embattled Party Counsel*, Appellate Issues (ABA Council of Appellate Lawyers), Sept. 2015, at 18. Nonetheless, "[t]he true concern—for party counsel at least—is the amicus who provides specious information at the eleventh hour that is likely to resonate with the court and influence its rulemaking." *Id.* at 16.

Appellate courts should view with skepticism new facts and arguments raised by amicus parties for the first time on appeal. Because such evidence has generally not been tested by cross-examination or the mechanisms of the adversary system, courts must take care to ensure the reliability of factual assertions made in amicus briefs. Courts should also carefully verify the existence and objectivity of the references cited in amicus briefs. Finally, where a court intends to rely on a factual statement or evidence cited by an amicus party, courts should freely grant leave to the parties to respond specifically to the arguments raised in the amicus party's brief.

Conclusion

Similar to many areas of the law, the exceptions to the general rule are significant when it comes to introducing new evidence in appeals, yet the scope and contours of those exceptions are uncertain. Although appellate records are usually closed and constrained to the same evidence that the district court considered, there are many ways in which appellate courts will consider new evidence. Appellate judges should employ these exceptions where necessary to serve the interests of justice and properly adjudicate appeals.

Sarah Elizabeth Spencer *is a shareholder at Christensen & Jensen, P.C., in Salt Lake City. She is an experienced appellate advocate who has handled a variety of appeals in state and federal court. Ms. Spencer also defends high-stakes lawsuits involving commercial disputes, business torts, and product liability claims. She has been active in DRI since 2008. She currently serves as the marketing co-chair of the DRI Appellate Advocacy Committee and previously served on the DRI Young Lawyers Committee's steering committee.*