New York State Bar Association
Commercial and Federal Litigation Section

Report from the Appellate Practice Committee

TO WHAT EXTENT MAY JUDGES SEARCH THE INTERNET IN EVALUATING AND DECIDING A CASE?

Increasing attention is being paid to the practice of some judges to look to the Internet for factual information that may be useful in deciding a case. The CFLS Executive Committee believes several distinct concerns have been identified which warrant further discussion. The Executive Committee solicits input from Section members.

This discussion is timely in light of the American Bar Association's proposal to amend the ABA Code of Judicial Conduct to include a comment prohibiting judges from independently investigating the facts of a case through "electronic access" (i.e., via the Internet).[1] The ABA proposal is offered as an extension of the long-accepted ethical canon that "a judge shall not independently investigate facts in a case."[2] The ABA Model Code has been adopted in New York, which means the proposed amendment has the potential to impact state court judges in New York. The ABA will conduct a public hearing on August 5, 2005 at the ABA Annual Meeting in Chicago to discuss its various revisions to the Model Code.

The Association of the Bar for the City of New York has favorably commented on the ABA's proposal. The CFLS Executive Committee wants to know what Section members think about the proposed amendment to the ABA Model Code of Judicial Conduct. We want to determine if our Section should take a position and

we also seek to stimulate a broader discussion about the potential problems of judges using the Internet to discover facts outside the record.

Background

The United States Supreme Court has described the Internet as "a vast library including millions of readily available and indexed publications"[3] with content as "'diverse as human thought.'"[4] Accessing this vast library has become simple for anyone owning a computer, thanks to the development of search engines, such as Google and Yahoo. To the curious individual, these search engines provide alluring doorways to swift answers, offering a wealth of easily obtainable information.[5] Given the enormous popularity of the Internet as a "library at-your-fingertips," it may not be surprising to see references to search engines and web pages popping up more and more in judicial opinions. As these references increase, however, a number of concerns have been voiced about judicial use of the Internet in deciding cases.[6]

I. Courts and Judges Turn to the Internet

In 2002, the California Supreme Court decided a case involving the use of stun belts in the courtroom on criminal defendants.[7] The court reversed the conviction of a defendant who had been compelled to wear a stun belt while testifying.[8] In its opinion, the court reviewed various features of stun belts, including how they operate and what types of injury they might inflict, with citations to magazine articles, newspaper articles and a student comment.[9] The decision was countered by a forceful dissent, which upbraided the court for using

the Internet to delve into unnecessary factual inquiries: "[W]e could have waited for a case that raised these questions on an adequate record. Instead, the majority . . . rush[ed] to judgment after conducting an embarrassing Google.com search for information outside the record . . . ."[10]

In 2001, the Seventh Circuit Court of Appeals affirmed the conviction of a drug dealer who was caught in a sting operation.[11] The drug dealer allegedly used code lingo to convey the prices for given amounts of cocaine, and the prosecution had asserted that the dealer's references to "Eighteenth Street" constituted a demand for $1,800.[12] The prosecution's assertion was supported by, among other things, the fact that no Eighteenth Street existed in the city.[13] One dissenting judge attacked the majority's decision after having conducted her own search on the Internet for maps. She noted that although "someone consulting the Internet map source MapQuest" would not find an Eighteenth Street in the city, someone consulting MapBlast!, an alternative Internet map source, would succeed in finding an Eighteenth Street.[14]

These cases illustrate the apparent willingness of judges to consult the Internet and do some independent fact-finding when evaluating a case. This willingness is manifest in opinions being issued from courts across the nation, including courts in New York. In 2000, federal district and state courts in New York issued approximately 45 opinions referencing Internet sites. In 2004, those same courts have issued approximately 110 opinions referencing Internet sites,[15] and the number will likely continue to increase.[16]

Two recent opinions, one from a federal court in New York and one from a New York civil court, demonstrate how the Internet is influencing the decisions of judges in this state. In the first case, Rodriguez v. Schriver, a magistrate judge reviewed the conviction of a Hispanic defendant to see whether the prosecutor had unlawfully exercised peremptory challenges to exclude Hispanic jurors.[17] The prosecutor testified that of the Hispanic prospective jurors, one was seated as a regular juror.[18] The judge conducted a Google search on the Internet to examine the construction and origin of the seated juror's name, ultimately producing doubt as to whether the seated juror was indeed Hispanic.[19] In the end, the judge vacated the defendant's conviction on other grounds.[20]

In the second case, N.Y.C. Medical and Neurodiagnostic, P.C. v. Republic Western Insurance Co., a civil court judge was asked to defend its extensive use of Internet resources by a defendant insurance company that had previously lost a motion to dismiss for lack of jurisdiction.[21] The defendant insured U-Haul vehicles, one of which was involved in an accident in New York.[22] In deciding that the court had jurisdiction over the defendant, the judge had independently gathered factual information from a state governmental web site (which reported that the defendant was licensed to do insurance business in the state), the defendant's company web site (which reported that the company operates in 49 states), and U-Haul's company web site (which reported a connection to the defendant as well as the existence of multiple U-Haul facilities in the specific county at issue).[23] The defendant attacked the court's reliance on factual information gleaned from the Internet, and the court

saw the matter as one of first impression: "[The defendant] appears to be the first in the nation to challenge a court's use of the internet to deflate the sails of a party's arguments."[24]

The court forcefully denied any impropriety in its actions and listed several justifications for its use of Internet resources. First, regarding the court's use of a governmental web site, the court praised at length the creation of web sites by governmental entities:

> Legislative bodies, courts, governmental agencies, and public entities have commendably made information available on web sites that have dramatically facilitated the quick location of information. Just as computerized research of Westlaw and Lexis have made resort to more time-consuming conventional research secondary, factual information and data that, in the past, would have taken days and hours to retrieve, are now available in a matter of seconds. Technological breakthroughs, including the immediate scanning of important documents and the tapping of a few strokes on a computer keyboard, speed fact-finding [sic], ensure that documents will not be lost, misplaced, or stolen, and are highly reliable. For a researcher not to employ information placed on a governmental web site, by a civil servant, for the benefit of the public would, indeed, be negligent and ridiculous. For a judge to ignore these new technological changes, made available by government and encouraged by court systems, would be to blind oneself.[25]

Second, regarding the court's use of company web sites, the court reasoned that information placed on those web sites constituted party admissions and thus were fair game for consideration.[26] Third, the court emphasized that it did not inappropriately conduct its own personal investigation because it did not send anyone out to inspect U-Haul facilities or inquire about insurance and because it did not obtain its information via random Internet searches.[27] Fourth, the court took comfort in the great number of other courts that have cited Internet materials,

noting that "federal and state courts, throughout the country, readily and without apology, will refer to a web site whenever necessary or helpful to make a point."[28] Fifth, the court offered a distinction between private and public computer use: "[T]he research on the web sites was done not on some private personal computer, but on Internet access provided by the Office of Court Administration to the undersigned and every other Judge of this State, reflecting a policy that courts utilize emerging technology in dispensing justice."[29] Finally, the court dismissed the defendant's argument that the court had acted as plaintiff's advocate, stating that its decision was not based solely on information obtained from the Internet.[30]

Despite the court's comprehensive defense of its use of the Internet, its decision was reversed on appeal.[31] The appellate court complained that the lower court made findings of fact "based not upon the submissions of counsel but rather upon its own Internet research."[32] The appellate court chided the lower court for "initiating its own investigation into the facts when, based upon the insufficient submissions of plaintiff, the court should have dismissed the complaint."[33] One appellate judge dissented, however, saying that the lower court's "use of the Web site of the New York State Department of Insurance . . . was proper" because it was akin to the court taking judicial notice of matters of public record.[34]

Collectively, these cases, and the increasing number of cases like them, raise questions about the proper role of the Internet in the judicial decision-making process. How freely should judges access Internet resources? As used in judicial opinions today, is the Internet a trusted library, a convenient expert witness, or a

troublesome intruder in the adversarial process? As discussed in the following paragraphs, critics have identified three discrete concerns with respect to judicial use of the Internet.

II. Concerns Raised by Judicial Use of the Internet

While the Internet is an invaluable research tool, it is not clear that it is a reliable or appropriate tool for bolstering judicial opinions. Three points to consider in evaluating judicial use of the Internet are (1) authoritativeness and accuracy; (2) fairness to the parties; and (3) permanency.

A. Authoritativeness and Accuracy

There is a significant risk of misinformation when using the Internet. The Internet retains its popularity, in part, because the opportunity to publish and add to its content is largely unrestricted, yet this open invitation to publish also operates to discredit the authoritativeness and accuracy of Internet materials. "[A]nyone with an Internet service provider and a quarter to call it can set up a Web page that looks as official as a 1040 form, without the quality control that used to come from editors, fact checkers, and large publishing houses. There are few barriers to bad information on line."[35]

Internet search engines do not distinguish between material published by genuine experts and that published by high school students, leaving the searcher to sort fact from fiction. In addition, it may be difficult to locate impartial presentations of information on the Internet, as many publishers use the Internet as a vehicle for political or economic gain. Some of these publishers choose Internet

addresses that are confusingly similar to the addresses of other more official Internet sites.[36] In short, there is an undeniable element of unreliability to Internet research, and judges should perhaps be more reluctant to move away from more traditional, trusted sources. Even The Bluebook recognizes that "[m]any internet sources . . . do not consistently satisfy traditional criteria for cite-worthiness."[37]

Some courts have already declared distrust of Internet materials. In Teddy St. Clair v. Johnny's Oyster & Shrimp, Inc., a Texas federal judge refused to consider evidence offered by a plaintiff to demonstrate that the defendant owned a certain vessel.[38] The evidence consisted of data the plaintiff gathered off the United States Coast Guard's online vessel database, and the court rejected it as inherently untrustworthy:

> While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. . . . Anyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on any web-site from any location at any time. For these reasons, any evidence procured off the Internet is adequate for almost nothing . . . .[39]

Of course, not all Internet sites are created equal, and some naturally lend themselves to more credibility than others. Government-sponsored web sites, for example, reflect more trustworthiness than commercial or private sites, the assumption being that governmental entities are impartial reporters of likely accurate information. New York courts accordingly refer to federal and state

governmental sites more often than other types of sites,[40] as do appellate courts nationwide.[41]

At times, however, New York courts have found other Internet sources useful: information about alcoholism on the National Council on Alcoholism's web site aided a court in determining that a man was an alcoholic and therefore should not have custody of his son,[42] an article about learning disabilities on a university professor's web site aided a court in determining that a school did not respond properly to a student's misbehavior,[43] and a petsmart.com article provided another court with background information on the docking of dogs' tails.[44]

Given the potential for misinformation in Internet research, the New York Bar Association Committee on Professional Ethics has issued the following caution to attorneys: "To the extent that the attorney in performing legal research for clients relies on information obtained from searching of Internet sites, the attorney's duty under Canon 6 to represent the client competently requires that the attorney take care to assure that the information obtained is reliable."[45] No similar caution, however, has apparently been issued to judges.

B. Fairness to the Parties

A distinct concern relates to whether or not judicial reliance on the Internet for fact-finding is fair to the parties. Litigants, after all, cannot predict when a judge is going to independently use the Internet to gather supplemental information. Nor can parties predict what searches the judge might conduct on the Internet, what sites the judge might view, or how much deference the judge will

afford the retrieved information. Concerned attorneys might find themselves making preemptive perusals of Internet sources in an effort not to be caught off guard by the court.

Furthermore, parties typically do not receive notice of the court's intention to rely on Internet materials in making a decision and may have no opportunity to contest the accuracy or relevancy of those materials. This lack of notice and an opportunity to respond was viewed as problematic by the appellate court in N.Y.C. Med. & Neurodiagnostic, P.C.:

> In conducting its own independent factual research, the [lower] 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.[46]

A party against whom Internet materials have been used may feel that the court, as an uninvited advocate, has improperly championed the succeeding party's cause. Indeed, critics of judicial use of the Internet have urged the adoption of a "don't Google the defendant" rule to prevent such a result.[47]

Moreover, the ease with which information can be retrieved from the Internet may encourage courts to sidestep important evidentiary rules. Parties wishing to submit evidence to the court, including evidence obtained from the Internet, must satisfy longstanding rules of authentication and hearsay. Many courts have approached submissions of Internet evidence warily, and scholars have consequently produced treatises and articles explaining how parties with Internet materials can successfully conform to evidentiary rules.[48] A court displaces the

rules, however, by consulting sources outside of the record that have not been proven reliable by sworn affidavit or live testimony. Doubts arise when a court "substitutes its own questionable research results for evidence that should have been tested in the trial court for credibility, reliability, accuracy, and trustworthiness."[49]

This is not to say that courts are prohibited from taking judicial notice of certain facts when rendering a decision. The Internet, however, may not be an acceptable source of such facts. In New York, a "court may take judicial notice of facts which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy."[50] Under the Federal Rules of Evidence, a court may take judicial notice of facts that are "not subject to reasonable dispute" because they are "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[51] As discussed above, courts may be hard-pressed to cite the Internet as a source of indisputable accuracy, perhaps with the exception of governmental web sites.

In sum, judges who access the Internet to obtain supplemental factual information for a case may be viewed as overstepping their roles and skirting fairness to the parties (not to mention evidentiary safeguards).

C. Permanency

The Internet is by nature an unstable, ever-changing medium, which makes citation to specific web pages problematic.[52] The contents of web pages are easily

and frequently altered. In a short time, the content of a cited page may evolve into something very different from what the court originally cited. This may frustrate future legal researchers and mislead them as to what the court actually considered in deciding the case. In addition, some Internet pages require subscriptions or passwords for access, further complicating review by others.

Other Internet pages may be relocated or may disappear altogether, rendering the links provided in judicial opinions worthless. This troublesome phenomenon has been referred to as "link rot."[53] In 2002, one researcher found that a high percentage of court Internet citations referred to web pages that were no longer accessible.[54] Of all the citations made in 1997 cases, 84.6 percent contained invalid links, and of all the citations made in 2001 cases, 34 percent already contained invalid links.[55] The problem of outdated links may be ameliorated by judges taking care to preserve, either in hardcopy or PDF form, the information obtained from the Internet. Moreover, archives exist for some old web sites through www.archive.com (and other services) although the collections are incomplete and old web sites can be blocked at the request of the original site sponsor.

Given the impermanence of some Internet citations, courts may want to reevaluate their reliance on Internet materials. "[Courts should] strive to cite authority in its most permanent manifestation, even if that means resorting to a book or periodical in traditional print format, using the Internet source simply as a convenient parallel citation."[56]

III. Guidance from Codes of Judicial Conduct

Are judges prohibited under canons of judicial conduct from independently accessing the Internet? Not expressly. The Code of Conduct for United States Judges does not address Internet searches by judges, and neither does the American Bar Association's Model Code of Judicial Conduct, which has been adopted by New York. The Model Code does, however, contain a relevant comment in Canon 3 ("A judge shall perform the duties of judicial office impartially and diligently").[57] The commentary to that canon states, "A judge must not independently investigate facts in a case and must consider only evidence presented."[58] This comment suggests that judges who obtain information from the Internet and apply the information in resolving factual disputes may be acting inappropriately.

The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct has recently proposed a revision to the Model Code that more specifically restricts judges from accessing the Internet to conduct a factual investigation. The Commission's 2004 draft of the Model Code states within its rule 2.09 that "a judge shall not independently investigate facts in a case."[59] The commentary to that rule provides as follows: "The prohibition against a judge investigating the facts of a case independently or through a member of the judge's staff extends to information available in all mediums including electronic access."[60] The Association of the Bar of the City of New York Joint Subcommittee responded positively to the Joint Commission's draft: "Since facts obtained on the Internet and in other electronic

media are often incomplete or incorrect, the ABCONY Joint Subcommittee supports reference to electronic research methods in Rule 2.09."[61]

IV. What Are the Appropriate Limits?

The proposed revision to the Model Code would thus prohibit inquisitive judges from using the Internet to investigate the facts of a case. The revision, therefore, takes a major step towards addressing the concerns raised above. At the same time, however, the revision leaves some ambiguity as to whether judges are completely prohibited from searching the Internet. For example, may judges still use the Internet to find background information for an opinion? Is the factual information fair game so long as it is not applied directly to resolving the factual dispute at hand? Should there be some allowance for references to governmental web sites? Also, should the Model Code distinguish between trial and appellate judges, with the latter given more leeway to gather facts to make informed policy-based decisions? Does it make sense to think of a court's reliance on Internet materials as a form of ex parte communication? Applying that conceptual framework, a judge who intends to gather factual information from the Internet would be required to inform the parties of the intended search and offer the litigants an opportunity to contest the accuracy and relevancy of the materials collected by the court. Does that adequately address the problems associated with judicial use of the Internet to independently gather facts? Further debate (and further revisions to the Model Code) may be needed to fully address these questions.

The emergence of new technology often correlates with the emergence of new legal issues. Learning about and discussing this new issue will help ensure that the Internet is not afforded too large a role in the judicial decision-making process.

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[1] Model Code of Jud. Conduct R. 2.09(b) (Proposed Official Draft May 2004). The commentary to that rule provides as follows: "The prohibition against a judge investigating the facts of a case independently or through a member of the judge's staff extends to information available in all mediums including electronic access." A complete preliminary draft of revisions to the ABA Model Code of Judicial Conduct is posted on the ABA website (www.aba.org) with an invitation for comment.

[2] ABA Model Code of Jud. Conduct, Canon 3.B.7 commentary, and R.2.09(b).

[3] Reno v. ACLU, 521 U.S. 844, 853 (1997).

[4] Id. at 852 (quoting ACLU v. Reno, 929 F. Supp. 824, 842 (E.D. Pa 1996)).

[5] See Molly McDonough, In Google We Trust?, A.B.A J. October 2004, at 30 (describing Google as "an irresistible and indispensable ultimate answer-finder").

[6] See id. 30-31; Google is Court's Favorite Search Engine, C-Net News, May 2004.

[7] People v. Mar, 52 P.3d 95 (Cal. 2002)

[8] Id. at 97.

[9] Id. at 103.

[10] Id. at 116.

[11] United States v. Harris, 271 F.3d 690 (7th Cir. 2001).

[12] Id. at 692-94.

[13] Id.

[14] Id. at 703. A search on the Lexis online legal database reveals that between 2000 and 2004, so far, 47 decisions nationwide have cited to MapQuest. (Search conducted May 4, 2005).

[15] Information obtained by conducting searches for "http" on the Lexis online legal database, May 4, 2004.

[16] See William H. Manz, The Citation Practices of the New York Court of Appeals: A Millenium Update, 49 Buff. L. Rev. 1273, 1296 (2001) (predicting that citations to Internet materials are certain to become more common).

[17] No. 99 Civ. 8660 (FM), 2003 U.S. Dist. LEXIS 20285 (S.D.N.Y. Nov. 12, 2003); rev'd on other grounds, 392 F.3d 505 (2d Cir. 2004).

[18] Id. at *22.

[19] Id. at *22 n.12.

[20] Id. at *48.

[21] No. 77578/2002, 2004 N.Y. Misc. LEXIS 337 (N.Y. Civ. Ct. Apr. 12, 2004).

[22] Id. at *2.

[23] N.Y.C. Med. and Neurodiagnostic, P.C. v. Republic West. Ins. Co., No. 77578/2002, 2003 N.Y. Misc. LEXIS 857 (N.Y. Civ. Ct. July 7, 2003).

[24] N.Y.C. Med. and Neurodiagnostic, P.C., 2004 N.Y. Misc. LEXIS 337 at *1-2.

[25] Id. at *6-7.

[26] Id. at *9.

[27] Id. at *9-10 ("The facts secured by this Court, furthermore, were not derived by framing term requests on any of the modern, popular search engines—such as Google, MSN Search, Yahoo Search, or Ask Jeeves—and, based on the information derived therefrom, used to fashion a factual argument to sandbag counsel. Rather, the Court, on its own initiative, explored the web site of a party to this litigation and that of its sibling corporation.").

[28] Id. at *11-12.

[29] Id. at *13.

[30] Id. at *14. An additional justification seems to be that the parties did not brief the case well, and the court was consequently dissatisfied with the parties' submissions. See NYC. Med. and Neurodiagnostic, P.C., 2003 N.Y. Misc. LEXIS 857 at *4.

[31] NYC Med. & Neurodiagnostic, P.C. v. Republic W. Ins. Co., No. 2003-1472 QC, 2004 N.Y. Misc. LEXIS 2813 (N.Y. App. Div. Dec. 22, 2004).

[32] Id. at *4. The appellate court's reversal was based also on the lower court's failure to make specific findings under section 404(a) of the New York City Civil Court Act. Id. at *5.

[33] Id. at *9.

[34] Id. at *11 (Pesce, P.J., dissenting) ("[I]n 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.").

[35] Tina Kelley, Whales in the Minnesota River, N.Y. Times, March 4, 1999, at G1; see also Reno, 521 U.S. at 853 ("Any person or organization with a computer connected to the Internet can "publish"

information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals.").

[36] See Tina Kelley, Whales in the Minnesota River.

[37] The Bluebook: A Uniform System of Citation, 18.2.1 (Colom. L. Rev. Ass'n et al. eds., 17th ed. 2000).

[38] 76 F. Supp. 2d 773 (S.D.Tex. 1999).

[39] Id. at 774-75. The Seventh Circuit Court of Appeals expressed similar concerns in United States v. Jackson in which a defendant appealed her convictions of fraud. 208 F.3d 633 (7th Cir. 2000). The defendant argued that the trial court should have allowed into evidence various web site postings of white supremacist groups purportedly claiming responsibility for the acts leading to the defendant's conviction. The court approached the evidence warily, noting that the defendant, who was a skilled computer user, could have slipped the postings herself onto the groups' web sites.

[40] See, e.g., 64th Assoc., L.L.C. v. Manhattan Eye, Ear & Throat Hosp., 813 N.E.2d 887, 889 n.6 (N.Y. 2004); Local Gov't Assistance Corp. v. Sales Tax Asset Receivable Corp., 813 N.E.2d 587, 599 (N.Y. 2004); People v. Cahill, 809 N.E.2d 561, 608 nn.11-12 (N.Y. 2003); Reynolds v. Fraser, 781 N.Y.S.2d 885, 888-89 (N.Y. Sup. Ct. 2004); Nextel v. Assessor for Vill. Of Spring Valley, 771 N.Y.S.2d 853, 862 n.31.

[41] Coleen M. Barger, Accessing the Law: On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials, 4 U. Ark. Little Rock J. App. Prac. & Proc. 417, 428-29 (2002).

[42] In re Custody/Visitation Proceeding v. Mary M., 2003 N.Y. Slip Op. 51600U, 7-8 (N.Y. Fam. Ct. 2003).

[43] In re Doe, 753 N.Y.S.2d 656, 659 (N.Y. Fam. Ct. 2002).

[44] Hammer v. Am. Kennel Club, 758 N.Y.S.2d 276, 279 (N.Y. App. Div. 2003).

[45] NYSBA Comm. On Prof'l Ethics, Op. 709 (Aug. 16, 1998).

[46] 2004 N.Y. Misc. LEXIS 2813 at *9.

[47] Molly McDonough, In Google We Trust?, A.B.A J. October 2004, at 31.

[48] See, e.g., 5-2 MB Fed. R. Evid. Manual I § I (Internet Evidence); Daniel R. Murray & Timothy J. Chorvat, Stepping it Up to the Next Level: From the UETA to the URE and Beyond, 37 Idaho L. Rev. 415 (2001).

[49] Coleen M. Barger, 4 U. Ark. Little Rock J. App. Prac. & Proc. at 436.

[50] People v. Jones, 539 N.E.2d 96, 98 (N.Y. 1989).

[51] Fed. R. Evid. 201(b).

[52] See Coleen M. Barger, 4 U. Ark. Little Rock J. App. Prac. & Proc. at 438-45.

[53] Id. at 438.

[54] Id. at 438-39.

[55] Id.

[56] Id. at 441.

[57] Model Code of Jud. Conduct, Canon 3(B)(7) (1990) (amended 1999).

[58] Id. at cmt..

[59] Model Code of Jud. Conduct R. 2.09(b) (Proposed Official Draft May 2004).

[60] Id. at cmt. 8.

[61] ABCONY Joint Subcommittee comments, August 3, 2004, available through the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct's web site (http://www.abanet.org/judicialethics/home.html).