Kourkounakis v. Dello Russo: Should a Trial Judge Be Permitted to Independently Google an Expert Witness to Determine Credibility?

Katrina Hall*

I. Introduction

While justice is contemporarily depicted by a blindfolded goddess carrying scales and holding a sword,[1] earlier versions of this image portray the woman without a blindfold, which was added only within the last four hundred years.[2] The blindfold represents a safeguard against "information that could bias or corrupt her."[3] The scales signify evenhandedness; while the sword represents an uncompromising character.[4]

This Comment calls to mind the iconography just described. Should a judge be blindfolded in weighing arguments between adversaries? A blindfolded judge means that the judge could consider *only* those arguments raised by the parties. On the other hand, should a judge weigh arguments with eyes wide open? A judge with eyes wide open means that the judge could consider, and even seek, facts or arguments beyond those raised by the parties.

This Comment analyzes the propriety of the trial judge's conduct in

* J.D. Candidate 2008, The Dickinson School of Law of the Pennsylvania State University. I would like to thank the following individuals: Mr. Victor Serby, Esq. for the court documents and for quickly responding to a law student's call for help; Dean Victor Romero and Professor Mary Kaye Polacheck for all their help and support, and; Corey Hall, my husband, fellow law student, and confidante for all his love and support throughout writing this Comment and throughout law school in general.

1. For a discussion of the history of this iconography, *see* Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 YALE L.J. 1727,1727-29 (1987); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 446-48 (1982); Penny J. White, *A Matter of Perspective*, 3 FIRST AMENDMENT L. REV. 5, 87 nn.1-2 (2004).
2. Resnik, *supra* note 1, at 382-83.
3. *Id.* at 383.
4. *Id.*

Kourkounakis v. Dello Russo.[5] More specifically, this Comment addresses the issue of whether a judge should be permitted to conduct *sua sponte* Internet research on a party's expert witness.

II. Background

Judge Jed Rakoff, the trial court judge in *Kourkounakis*, stated the following facts in his Memorandum Order[6] that granted summary judgment for the defendant:

> On February 12, 2002, Kourkounakis . . . visited Dr. Dello Russo's offices for a consultation concerning the possibility of correcting his poor night vision. During the consultation, plaintiff completed a New Patient Intake Form, on which he listed his chief complaints as "poor vision," "poor night vision," "[trouble] reading phone book," and "night driving problems."
>
> After completing the forms, plaintiff was given some routine vision tests, and was then seen by [another doctor, William Kellogg, M.D.]. It is undisputed, however, that Dr. Kellogg talked to plaintiff about some of the potential complications of the surgery. According to plaintiff, the following exchange occurred between himself and Dr. Kellogg:
>
> > Q. Do you remember anything specific that [Dr. Kellogg] told you before you met Dr. Dello Russo?
> >
> > A. He mentioned to me that the surgery will improve my vision, and it will decrease the ability to read, but within hand distance I would be able to read. I said, you know, in that case, it's okay for me if I can read hand distance. . . .
>
> Following the consultation, plaintiff reviewed and executed an Informed Consent Form, initialing the bottom of each page and signing the signature page. In numerous places, the form warned of the risks and potential complications involved in the LASIK procedure.
>
> Later that same day, Dr. Dello Russo performed the LASIK procedure on both of plaintiff's eyes. Dissatisfied with the results,

5. Kourkounakis v. Dello Russo, 167 F. App'x 255 (2d Cir. 2006), *cert. denied*, No. 05-1669, 2006 U.S. LEXIS 5913 (U.S. Oct. 2, 2006).

6. Kourkounakis v. Dello Russo, No. 04-0586, 2005 U.S. Dist. LEXIS 8020 (S.D.N.Y. 2005).

plaintiff then brought this suit.[7]

The plaintiff's suit arose from his allegation that the procedure worsened his vision, to the point that he could no longer perform the daily tasks that he could perform prior to the surgery.[8]

Dr. Dello Russo filed a motion for summary judgment.[9] At the oral argument, Judge Rakoff informed the parties that his clerk conducted an Internet search on Dr. Bruce Tizes, the plaintiff's expert.[10] Judge Rakoff also stated at the oral argument that he would not use the information he had gleaned from this Internet search in ruling on the defendant's summary judgment motion.[11] Therefore, the plaintiff did not pursue the matter before the trial court level.[12]

In his Memorandum Order granting summary judgment to the defendant, Judge Rakoff determined that the plaintiff could not prevail on his claims for lack of informed consent and negligence.[13] Judge Rakoff further explained that under New York law, a claim that a surgery was negligently performed "must be supported by competent evidence from a qualified expert."[14] Judge Rakoff then discredited Dr. Tizes by stating that Dr. Tizes

> appears to have been occupied sin[c]e 2000 as a managing partner at Galt Capital, an investment advisory firm, and does not appear to have practiced medicine since the mid-1990's, does not appear to have a valid medical license, never specialized or trained in ophthalmology, never performed or was accredited in LASIK, and never examined the plaintiff.[15]

The opposing party never filed a motion to exclude testimony that called into doubt Dr. Tizes' qualifications.[16] As a matter of fact, the court suggested to opposing counsel that "if [the] case does go to trial . . . you will be free in a motion in limine to move for the exclusion of the

7. *Id.* at *2-*4.

8. Petition for Writ of Certiorari at *7-*8, Kourkounakis v. Dello Russo, 2006 WL 1794506 (U.S. May 15, 2006) (No. 05-1669).

9. *Kourkounakis*, 2005 U.S. Dist. LEXIS 8020, at *1.

10. Transcript of Oral Argument at 6, Kourkounakis, 2005 U.S. Dist. LEXIS 8020 (S.D.N.Y. 2005) (No. 586); Petition, *supra* note 8, at *8 (characterizing Judge Rakoff's Internet search as one using Google). A copy of the Transcript of Oral Argument was kindly provided by the plaintiff's counsel, Mr. Victor Serby, Esq., to the author of this Comment.

11. Transcript of Oral Argument, *supra* note 10, at 5.

12. *Kourkounakis*, 2006 WL 1794506, at *9.

13. *Kourkounakis*, 2005 U.S. Dist. LEXIS 8020, at *6.

14. *Id.* at *7.

15. *Id.*

16. *See* Transcript of Oral Argument, *supra* note 10, at 6-7.

expert testimony altogether."[17] The case did not go to trial because Judge Rakoff granted summary judgment in favor of the defendant.[18]

The plaintiff's Petition for Writ of Certiorari to the United States Supreme Court implied that the information used by the trial court to discredit Dr. Tizes was obtained as a result of the trial court's Google search.[19] While it is possible that Judge Rakoff obtained the information he used to discredit Dr. Tizes from Dr. Tizes' resumé attached to the expert report,[20] this Comment will proceed on the assumption that plaintiff's Petition for Writ of Certiorari to the Supreme Court is true for purposes of discussing the issues surrounding a judge's *sua sponte* Google search.

In an unpublished opinion, the Second Circuit affirmed the trial court's order. The Second Circuit did not address the plaintiff's allegation that the trial court should not have "Googled" Dr. Tizes' credentials.[21]

This Comment will argue that judges should avoid independently "googling" facts of a case, including credentials of a party's expert witness. However, there must be some exceptions. Such exceptions must be narrowly applied in limited, necessary circumstances, and applied only to obtain a just result. Moreover, if an exception is to be applied by a judge, the party whom the judge's independent research will negatively impact must be given an opportunity to be heard.

This Comment will not attempt to enumerate the exceptions under which a judge should be able to independently conduct a research on the Internet. However, it does acknowledge that when a judge notices something unusual in the record, as Judge Rakoff did in this case, a judge *might* apply an exception so long as the judge applies this exception with prudence and in the interest of justice. This Comment also will not speculate the reasons why the Supreme Court denied the plaintiff's Petition for Writ of Certiorari.[22] The focus of this Comment is narrow:

17. *See id.* at 20.

18. *Kourkounakis*, 2005 U.S. Dist. LEXIS 8020, at *7-*8.

19. *Kourkounakis*, 2006 WL 1794506, at *8 ("[T]he court informed the parties that it had '[G]oogled' Dr. Tizes. . . . The court's discussion of the 'googling' occupied a significant part of the transcript on oral argument. The court made it clear that it was privy to information concerning Dr. Tizes, and used this information to discredit the good doctor's opinion. . . .").

20. *See* Bruce Randolph Tizes Expert Report, Kourkounakis v. Dello Russo, No. 04 CV 00586 (S.D.N.Y. Dec. 9, 2004). A copy of the expert report and attached resume was kindly provided by the plaintiff's counsel, Mr. Victor Serby, Esq., to the author of this Comment.

21. *Supreme Court Asked to Review Propriety of Trial Court's 'Googling'*, 24 No. 6 Andrews Computer & Internet Litig. Rep. (West) at 9 (Aug. 23, 2006).

22. The author stresses that the Supreme Court's denial of the plaintiff's petition does not mean that the Supreme Court agreed with the decisions of the Second Circuit

Whether a judge should be permitted to do an independent search on the Internet concerning facts of a case, including an expert's credentials.

Part III of this Comment contains the analysis. It is divided into four subparts. Subpart A will discuss the reasons why judges should avoid independently investigating facts outside the record using the Internet, including the problems posed by Google, the issues of hearsay and authentication, and the values of the adversarial legal system in America. Subpart B will discuss how judicial notice under the Federal Rules of Evidence is implicated when a judge independently investigates facts on the Internet. Subpart C will discuss when a judge's *sua sponte* investigation of the facts on the Internet might be appropriate. Subpart D will discuss the unfairness that would result when a judge denies a party the opportunity to be heard after the judge independently investigated the facts of a case on the Internet. Lastly, Part IV contains the conclusion of this Comment.

III. Analysis

A. Why Judges Should Avoid Independently Investigating Facts Outside the Record Using the Internet

1. The Problem with "Googling" and the Internet

Google is a search engine invented by two graduate students in the 1990s.[23] Its popularity seems to be unquestioned today.[24] In fact, Merriam-Webster Online Dictionary and Oxford English Dictionary Online have both recognized the word "Google" as a transitive verb.[25] Among lawyers, using Google has become indispensable.[26]

The situation is different when it comes to judges using Google in deciding cases. While some judges have openly used this technology in

and the trial court. *See* United States v. Carver, 260 U.S. 482, 490 (1923) ("The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times."); Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916) ("[T]he refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed.").

23. Google Corporate Information, http://www.google.com/corporate/history.html (last visited Oct. 13, 2007).

24. Still Googling in 2006/2007, http://www.lib.berkeley.edu/TeachingLib/Guides/Internet/Google.html (last visited Oct. 13, 2007) ("Google is still recognized as the best general web search engine.").

25. *See* MERRIAM-WEBSTER ONLINE, http://www.m-w.com/dictionary/Google (last visited Oct. 13, 2007); OXFORD ENGLISH DICTIONARY ONLINE, http://dictionary.oed.com/cgi/findword?query_type=word&queryword=google (last visited Oct. 13, 2007).

26. Molly McDonough, *In Google We Trust? Critics Question How Much Judges, Lawyers Should Rely on Internet Search Results*, 90 A.B.A.J. 30, 30 (Oct. 2004).

the process of decision-making,[27] others have equally and openly opposed such practice.[28]

In *Reno v. ACLU*, the Supreme Court characterized the Internet from two different perspectives.[29] From a user's perspective, the Court likened the Internet to "a vast library including millions of readily available and indexed publications."[30] On the other hand, the Court also described the Internet from a publisher's perspective as "a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers."[31] Google allows users to easily access the vast library that the Supreme Court described.[32] Following this logic, Google also serves the interests of web publishers; it allows web publishers to disseminate information more easily by providing access routes to users who seek information on the Internet.

Because Google is merely a tool for Internet searching, the problem is not in Googling *per se*, but in the websites that are returned by a Google search. These websites become the source of information upon which court decisions could be premised.[33] Therefore, when one

27. *E.g.*, U.S. v. Khan, No. 06-cr-255 (DLI), 2007 U.S. Dist. LEXIS 52373, at *13 (E.D.N.Y. July, 19, 2007) (using Google to determine how much online publicity was caused by defense counsel's statements made in a foreign country so that the jury pool could be influenced and tainted, eliminating the possibility of a fair trial); Brown v. Peterson, No. 7:03-cv-0205, 2006 U.S. Dist. LEXIS 4311, at *5 n.1 (N.D. Tex. Feb. 3, 2006) (acknowledging the use of Google in taking judicial notice of the derogatory meaning of the term "jungle music"); Globalaw Ltd. v. Carmon & Carmon Law Office, 452 F. Supp. 2d 1, 31 (D.D.C. 2006) (acknowledging the use of Google in determining that the term "globalaw" is generic); Goldschmidt v. N.Y. State Affordable Hous. Corp., 380 F. Supp. 2d 303, 316 n.12 (S.D.N.Y. 2005) (acknowledging the use of Google in determining whether the terms "shred" and "Jew" have a negative connotation when paired together); Strange Music, Inc. v. Strange Music, Inc., 326 F. Supp. 2d 481, 491 (S.D.N.Y. 2004) (acknowledging the use of Google in assessing the "proximity" factor in a trademarks case); Rodriguez v. Schriver, No. 99-8660, 2003 U.S. Dist. LEXIS 20285, at *22 n.12 (S.D.N.Y. Nov. 12, 2003), *vacated*, 392 F.3d 505 (2d Cir. 2004) (acknowledging a judge's use of Google in verifying juror's full name); People v. Mar, 52 P.3d 95, 116 (Cal. 2002) (Brown, J., dissenting) (revealing and criticizing the majority's use of Google by the dissenting judge).

28. *E.g.*, Abiola v. Abubakar, No. 02 C. 6093, 2006 U.S. Dist. LEXIS 73051, at *15 (N.D. Ill. Sept. 20, 2006) ("It is true that Google has become so ubiquitous . . . , but it has not changed the Federal Rules of Evidence. Information that is supported by nothing more than a Google reference does not pass muster."); *Mar*, 52 P.3d at 116 (Brown, J., dissenting) (criticizing majority's use of Google); Robert L. Gottsfield, *To Google or Not to Google*, 42 ARIZ. ATT'Y 20 (Dec. 2005) (arguing against judges' use of Google).

29. *See* Reno v. ACLU, 521 U.S. 844, 853 (1997).

30. *Id.*

31. *Id.*

32. UNC University Libraries, Manuscripts Research Tutorial Glossary, http://www.lib.unc.edu/instruct/manuscripts/glossary (last visited Oct. 13, 2007) ("Google, a popular search engine, is a tool for finding resources on the World Wide Web.").

33. This situation arises particularly when courts cite to websites containing public

questions the propriety of using Google in judicial decisions, one must first question the use of Internet sites in the first place.[34]

Practically every researcher must exercise caution in using Internet websites as sources for his or her professional or scholarly work.[35] In the courtroom, this caution must be raised on red alert. The *Bluebook* itself speaks of the problems with using electronic media and "requires the use and citation of traditional printed sources" unless the material is unavailable in print or a copy of the printed material cannot be located.[36] While the Internet provides convenient and readily available sources, its nature presents inherent problems for legal researchers.[37]

First, Internet sites pose problems in terms of authority.[38] Because judges write binding opinions, one would expect judicial opinions to be based on authoritative material, or material that comes from credible sources.[39] Because the Internet has made a publisher out of anyone with a computer and an Internet connection,[40] many websites contain information that lacks the degree of authority traditionally required in legal writing.[41] While some websites are undeniably authoritative, it has become difficult to sift the good sources from the bad ones.[42] This difficulty seems to be at the heart of Judge Brown's criticism of the majority's opinion in *People v. Mar*, in which the majority relied on a student comment in a law journal and a magazine article entitled *Stunning Technology: Corrections Cowboys Get a Charge Out of Their*

records. *E.g.*, Stutzka v. McCarville, 420 F.3d 757, 761 n.2 (8th Cir. 2005); Star v. White, No. 2:06-CV014205, 2006 U.S. Dist. LEXIS 71785, at *4 n.2 (E.D. Mich. Sept. 29, 2006).

34. Indeed, although the plaintiff pointed to the trial court's use of Google in identifying his basis for appeal, *Kourkounakis*, 2006 WL 1794506, at *9 ("The trial court erred by *sua sponte* 'googling' plaintiff's expert witness. . . ."), the plaintiff ultimately argued: "There is a significant risk of misinformation [in using the Internet]," *id.* at *12.

35. *See* Coleen Barger, *On the Internet, Nobody Knows You're a Judge: Appellate Courts' Use of Internet Materials*, 4 J. APP. PRAC. & PROCESS 417, 427 (2002) ("[T]here are many instances in which using an Internet source for legal research may be entirely appropriate but only when the researcher carefully evaluates the information and its source.").

36. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 18, at 151 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

37. *See* David H. Tennant & Laurie M. Seal, *Judicial Ethics and the Internet: May Judges Search the Internet in Evaluating and Deciding a Case?*, 16 PROF. LAW. 2 (ABA), 2005, at 6, *available at* http://www.abanet.org/judicialethics/resources/TPL_jethics_internet.pdf ([T]here is an undeniable element of unreliability to Internet research. . . .").

38. *Id.* at 5-6.

39. For purposes of this Comment, "authority" in this paragraph does not refer to the type of legal authority that is usually binding in courts; instead it merely refers to the type of credibility that can be found both in "binding" and "persuasive" sources.

40. Tennant & Seal, *supra* note 37, at 5-6.

41. Barger, *supra* note 35, at 419-21.

42. Tennant & Seal, *supra* note 37, at 5-6.

New Sci-Fi Weaponry.[43] In that case, Judge Brown insinuated that the majority did not take courtroom security seriously[44] and described the majority's course of action as an "embarrassing Google.com search."[45]

A Google search on a topic often gives Wikipedia as an online source.[46] Wikipedia is a collaborative online encyclopedia which allows users to enter information about a topic and edit information already existing in the site.[47] Basically, anyone can post information on a topic without the controls exerted by a professional editor.[48] Astonishingly, many courts have cited to Wikipedia.[49] Although courts that have cited to Wikipedia have only done so to provide background information that has little or no bearing on the merits of a case, a significant matter to be noted is that these courts have been more open to using a non-traditional source with potentially questionable authority.[50] This trend is quite recent; a Lexis search using "wikipedia" as a search term and limiting results within the last two years would give 186 cases; a search within the last five years would give 203 cases; and a search within the last ten

43. *See Mar*, 52 P.3d at 111-12 (citing to the article in explaining the effect of a stun belt to a defendant in a criminal trial).

44. *Id.* at 115.

45. *Id.* at 116.

46. Some examples of words and phrases that, when searched using Google, would give a Wikipedia page at least within the first five results, are: science fiction, machine gun, encyclical, mangosteen, wii, imperialism, Brunei, hollandaise, amish, Garden of Eden, World Bank, Malta, Cyndi Lauper, betamax, nuclear fusion, Wonder Woman, Starbucks, tooth fairy, microprocessor, Alexander the Great, prada, french fries, fencing, dalai lama, cartel, socratic method. These words were last searched randomly by the author of this Comment on Oct. 13, 2007.

47. Wikipedia: Introduction, http://en.wikipedia.org/wiki/Wikipedia:Introduction (last visited Oct. 13, 2007).

48. *See* Barger, *supra* note 35, at 426.

49. *E.g.*, U.S. v. Bazaldua, No, 06-4094, 2007 U.S. App. LEXIS 23917, at *3 n.2 (8th Cir. Oct. 12, 2007); Lennon v. Metro. Life Ins. Co., No. 06-2234, 2007 U.S. App. LEXIS 23721, at *16 (6th Cir. Oct. 10, 2007); Zeiler v. Deitsch, 06-1893-cv, 06-5617-cv, 2007 U.S. App. LEXIS 20065, at *9 n.5 (2d Cir. Aug. 23, 2007); Boim v. Fulton County Sch. Dist., 494 F.3d 978, 983 (11th Cir. 2007); U.S. v. Calabrese, 490 F.3d 575, 577 (7th Cir. 2007); Phillips v. Pembroke Real Estate, Inc., 459 F.3d 128, 133 n.3, 140 n.9 (1st Cir. 2006); United States v. Yazzen, No. 05-2156, 2006 U.S. App. LEXIS 16648, at *6 n.1 (10th Cir. June 29, 2006); Raymond v. Ameritech Corp., 442 F.3d 600, 602 n.1 (7th Cir. 2006); N'Diom v. Gonzales, 442 F.3d 494, 496 (6th Cir. 2006); United States v. Zajanckauskas, 441 F.3d 32, 34 n.1 (1st Cir. 2006); Allegheny Def. Project, Inc. v. U.S. Forest Serv., 423 F.3d 215, 218 n.5 (3d Cir. 2005); Musarra v. Digital Dish, Inc., No. C2-05-545, 2006 U.S. Dist. LEXIS 70442, at *42 n.30 (S.D. Ohio Sept. 28, 2006); MGM Studios, Inc. v. Grokster, Ltd., 454 F. Supp. 2d 966, 988 n.14 (C.D. Cal. 2006); Simpleville Music v. Mizell, 451 F. Supp. 2d 1293, 1296 n.2 (M.D. Ala. 2006); Sacirbey v. Guccione, No. 05 Cv. 2949 (BSJ) (FM), 2006 U.S. Dist. LEXIS 64577, at *2 n.2 (S.D.N.Y. Sept. 7, 2006); Smith v. Crose, No. 06-3168 (FSH), 2006 U.S. Dist. LEXIS 64250, at *2 n.1 (D.N.J. Sept. 7, 2006).

50. The fact that some courts have been citing to Wikipedia, which can be altered by anyone with online capabilities, seems to demonstrate this proposition.

years would also give 203 cases.[51]

Second, Internet sources can be unreliable.[52] "Official" websites could be maintained by a biased source.[53] For example, many groups and organizations are formed to further specific objectives, whether political or economic.[54] The data that they provide could be partial or manipulated.[55]

Third, Internet sources are likely to be inaccurate.[56] As Judge Nottingham noted in *Fenner*: "I doubt that a web site can be said to provide an 'accurate' reference, at least in normal circumstances where the information can be modified at will by the web master and, perhaps, others."[57] A lawyer citing a website in his or her brief should worry that the judge to whom the lawyer submitted the brief would find that the website's content has changed.[58] A researcher reading a judge's opinion that cited a website should wonder whether the information on that website has changed. Therefore, reading sources with Internet citations could lead to an inaccurate understanding of the propositions in those sources.

Fourth, Internet sources are typically impermanent.[59] Perhaps due to the frequency of being unable to find a given URL,[60] this occurrence has been given a coined term: "link rot."[61] To demonstrate this problem, Professor Barger[62] conducted a study and published an article in 2002.[63]

51. The author conducted the search on Oct. 13, 2007. A prior search on Jan. 27, 2007 showed the following results: ninety-eight cases within the last two years; 102 cases within the last ten years; and 102 cases within the last ten years. The author notes that within ten months, the cases containing the term "wikipedia" in all time periods doubled or nearly doubled.

52. Tennant & Seal, *supra* note 37, at 5-6.

53. *Id.* at 6.

54. Tennant & Seal, *supra* note 37, at 6. *See* Fenner v. Suthers, 194 F. Supp. 2d 1146, 1148-49 (D. Colo. 2002) (The plaintiff accused Colorado Department of Corrections of violating 42 U.S.C. § 1983 for "deliberate indifference to his serious medical needs." The defendant's defense consisted of Internet websites related to National Institute of Health ("NIH"). The District Judge wrote: "Although the court has certainly heard of [NIH], I am unsure of what it is, what it does, and what connection, if any, it has to the federal government. [D]efendants and magistrate judge have wholly omitted to explain whether NIH sponsors, endorses, collects, or simply provides the information on the web sites.").

55. *See* Tennant & Seal, *supra* note 37, at 6 ("[I]t may be difficult to locate impartial presentation of information on the Internet.").

56. *Id.* at 5.

57. *Fenner*, 194 F. Supp. 2d at 1148.

58. *Id.* at 1149.

59. Barger, *supra* note 35, at 438.

60. "Uniform Resource Locator is the address of a resource available on the Internet." Library Skills Online, http://www.lib.latrobe.edu.au/libskills/main/webzglos.htm (last visited Oct. 13, 2007).

61. Barger, *supra* note 35, at 438; Tennant & Seal, *supra* note 37, at 9.

62. Associate Professor of Law at the William H. Bowen School of Law, University

Her study "found 84.6 per cent of the Internet citations in cases from 1997 to be inaccessible . . . 34.0 per cent of . . . the citations in 2001 were already inaccessible . . . [and] 70.0 per cent of [the Third Circuit's] Internet citations were inaccessible."[64] Since her study was published in 2002, one can only speculate that more of the Internet citations that she examined are no longer available.

Furthermore, Professor Barger also subdivided the types of problems that a researcher could encounter due to the impermanence of websites.[65] First, the evolving content of websites presents the problem that what a researcher is "viewing on the web is not the same thing the court looked at when it consulted the site."[66] This problem is related to the problem of inaccuracy because a researcher can be easily misled or confused when the content of the Internet citation has been modified. Second, the migrating content of a website can present problems when the given citation leads to a page that "offer[s] no more than a table of contents or an internal search window, thus forcing the researcher to guess at the location where the desired materials may now reside."[67] While some migrating web sites offer an automatic redirection or a new link for the citation, not all web pages offer such accommodations.[68]

Third, Professor Barger identified the problem of vanished content, which occurs when one can no longer access the web citation, and the site does not offer any clues on whether the content has migrated and to where it has migrated.[69] The fourth and the fifth problems, restricted access[70] and mis-cited content,[71] were also identified. These problems are self-explanatory and therefore will not be discussed further.

Of course, some websites are more credible than others,[72] although there is no guarantee that the problems previously discussed will not be encountered.[73] Government sites are usually more credible than commercial or personal sites.[74] In fact, some courts have accepted the

of Arkansas at Little Rock. Professor Coleen Brager's Website, http://www.ualr.edu/cmbarger/PERSONAL.HTML (last visited Oct. 13, 2007); Barger, *supra* note 35, at 448 n.1.

63. *See* Barger, *supra* note 35, at 417.
64. *Id.* at 438-39.
65. *Id.* at 439-45.
66. *Id.* at 439.
67. *Id.* at 441.
68. *See id.* at 441-42.
69. Barger, *supra* note 35, at 442.
70. *Id.* at 443-44.
71. *Id.* at 444-45.
72. Tennant & Seal, *supra* note 37, at 6.
73. *See, e.g.*, Barger, *supra* note 35, at 442-43 (citing a former INS [now USCIS] webpage as an example of content that is no longer available).
74. Tennant & Seal, *supra* note 37, at 6.

practice of citing to public records on Internet sites.[75]

In *Kourkounakis*, it is not clear which particular websites Judge Rakoff relied upon in discrediting Dr. Tizes. According to the transcript of the oral argument, Judge Rakoff's clerk performed "a quick Internet search" and learned that Dr. Tizes is now at an investment strategy firm.[76] It appears from the transcript that Judge Rakoff's clerk found the company websites associated with Dr. Tizes from which Judge Rakoff learned about Dr. Tizes' credentials.[77]

While firms typically would not lie about the identity of their leadership in their websites, and while firm websites are presumably updated regularly, such websites can still present the problem of unreliability. It is possible that a commercial website does not contain all the information relevant to the researcher.[78] Therefore, the information about Dr. Tizes may not include Dr. Tizes' record in its entirety.[79] It would seem, therefore, that fairness would require that a party be given an opportunity to be heard when a judge makes an independent Google search and then subsequently uses the results of that search to decide the merits of a case.[80] The opportunity to be heard will be further discussed in Subpart D.

2. Hearsay and Authentication

When a judge's independent research on the Internet leads to his or her basing a decision on a website, reliability issues that hearsay and authentication rules seek to avoid also arise. Indeed, hearsay and authentication issues have been raised in cases where parties have presented website content as evidence.[81] Those issues do not disappear

75. *E.g.*, Stutzka v. McCarville, 420 F.3d 757, 761 n.2 (8th Cir. 2005); Blanchard v. U.S., No. C06-0180-LRR, 2007 U.S. Dist. LEXIS 35628, at *13 n.7 (N.D. Iowa 2007); Star v. White, No. 2:06-CV014205, 2006 U.S. Dist. LEXIS 71785, at *4 n.2 (E.D. Mich. Sept. 29, 2006).

76. Transcript of Oral Argument, *supra* note 10, at 6.

77. Transcript of Oral Argument, *supra* note 10, at 6 (Judge Rakoff stated: "According to Gault [sic] Capital's web site listing, Gault [sic] Capital is a boutique St. Thomas U.S. Virgin Island based investment advisor founded by Bruce Tiz [sic] and Ed Sicota [sic]. . . . [The Sailrock website says] that they are a U.S. Virgin Islands strategic investment manager. . . .").

78. *See* Tennant & Seal, *supra* note 37, at 6 ("[I]t 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.").

79. This statement does not affect the reliability of Dr. Tizes' resumé from which Judge Rakoff could have discredited Dr. Tizes in granting summary judgment against the plaintiff.

80. *See* FED. R. EVID. 201(e) advisory committee's note ("Basic considerations of procedural fairness demand an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed.").

81. *E.g.*, Amesbury Group Inc. v. Caldwell Mfg. Co., No. 05-10020-DPW, 2006 WL

simply because a judge performed his or her own research.

There are of course websites that are self-authenticating, non-hearsay, or subject to a hearsay exception. For example, websites maintained by the government have been deemed by some courts to be self-authenticating.[82] Some courts have noted that a website is admissible despite the hearsay rule if it is considered an admission by the party-opponent under FRE 801(d)(2).[83] In *In re Polygraphex Systems, Inc.*, the court applied the FRE 803(8) hearsay exception for public records or reports to a webpage containing a county's annual budget.[84] An expert's testimony may not be automatically excluded merely because the expert relied on website content pursuant to FRE 703 (bases of opinion testimony by experts).[85] Lastly, website content, as with other evidence, is admissible if it is not offered for the truth of the matter asserted.[86]

3196747, at *5 (D. Mass. Nov. 2, 2006) ("[A printout of a website] lacks proper authentication and is hearsay not presented in an admissible fashion."); Uline Inc. v. JIT Packaging Inc., 437 F. Supp. 2d 793, 804 n.16 (N.D. Ill. 2006) ("The printouts from various box manufacturer websites which JIT argues show that the boxes are identical or substantially similar are inadmissible hearsay."); Border Collie Rescue Inc. v. Ryan, 418 F. Supp. 2d 1330, 1350 (M.D. Fla. 2006) (noting that the website needs to not only be authenticated, but also to be admissible as non-hearsay or admissible through a hearsay exception); Bauman v. DaimlerChrysler, No. C-04-00194 RMW, 2005 WL 3157472, at *5 (N.D. Cal. Nov. 22, 2005) ("Defendant also objects that the statements contained in the internet materials are offered for the truth of their contents and are thus hearsay."); Sun Prot. Factory v. Tender Corp., No. 604CV732ORL19KRS, 2005 WL 2484710, at *6 (M.D. Fla. Oct. 7, 2005) (stating that the disputed websites in an exhibit were not self-authenticating.); Jones v. Hirschfeld, No. 01 Civ. 7585(PKL), 2003 WL 21415323, at *4 n.12 (S.D.N.Y. June 19, 2003) (stating that a website printout of a settlement agreement is inadmissible hearsay and the plaintiff should have supplied the court with the actual agreement); *In re* Ameriserve Food Distrib., 267 B.R. 668, 672 (D. Del. 2001) ("[The expert's] opinion appears as a compilation of hearsay, ranging from internet research to sending an associate to the library. . . .").

82. U.S. Equal Employment Opportunity Comm'n v. E.I. Du Pont De Nemours & Co., No. Civ.A. 03-1605, 2004 WL 2347559, at *2 (E.D. La. Oct. 18, 2004); Hispanic Broad. Corp. v. Educ. Media Found., No. CV-02-7134 CAS (AJWx), 2003 U.S. Dist. LEXIS 24804, at *20 n.5 (C.D. Cal. Oct. 30, 2003).

83. *E.g.*, Telewizja Polska USA, Inc. v. Echostar Satellite Corp., No. 02 C 3293, 2004 WL 2367740, at *5 (N.D. Ill. Oct. 15, 2004); Van Westrienen v. Americontinental Collection Corp., 94 F. Supp. 2d 1087, 1109 (D. Or. 2000). The courts in both cases gave other grounds why they ruled against hearsay. In both cases, admission by party opponent was merely an additional ground upon which the courts justified exclusion. FRE 801(d) lists statements which are not hearsay. FED. R. EVID. 801(d). FRE 801(d)(2) lists the circumstances under which a statement is considered to have been made by party-opponent. FED. R. EVID. 801(d)(2).

84. *In re* Polygraphex Systems, Inc., 275 B.R. 408, 418 n.8 (M.D. Fla. 2002).

85. *See Vicknair*, 2005 WL 1400443, at *7.

86. *Hispanic Broad. Corp.*, 2003 U.S. Dist. LEXIS 24804, at *20 n.5. *See also* Glynn v. Bankers Life and Casualty Co., No. 3:02CV1802 (AVC), 2005 WL 2028698, at *3 (D. Conn. Aug. 23, 2005) ("The court concludes that in as much as Bankers Life includes the website references for the truth of the matter asserted therein, such website

In sum, websites seem to invite hearsay and authentication issues.[87] Therefore, when a judge independently researches the facts of a case on the Internet, the judge should be obligated to protect the reliability values of hearsay and authentication rules. However this obligation comes with a cost: the judge would take over not only the workload of the parties in investigating facts,[88] but also becomes responsible in ensuring that federal evidence rules are not offended by his or her research. The judge would be unnecessarily burdened by having to determine whether the evidence that he or she found on a website is hearsay or is authenticated. Instead of merely performing factfinding functions and deciding the admissibility of evidence raised by the parties, a judge who conducts independent research on the Internet would have to take on the added responsibilities that come with investigating facts.

In *Kourkounakis*, Judge Rakoff's clerk Googled Dr. Tizes. Judge Rakoff may have found that the websites he used in discrediting Dr. Tizes did not raise hearsay and authentication issues, though it was not clear whether he considered those issues at all. The plaintiff claimed that he did not object to Judge Rakoff's Internet research because Judge Rakoff stated that it would not be used in determining the merits of the case.[89] Therefore, the plaintiff could not have raised hearsay or authentication issues with regard to the online research. Neither party had any role in making the information from the websites available to the court. Such a situation is absurd—Judge Rakoff, who was the decision-maker of the reliability of evidence, had become the gatherer of evidence as well. If a judge can gather his or her own evidence and admit such evidence at his or her will, the procedural safeguards put in place by the rules of evidence would erode.

3. Sacrificing Adversarial Values Versus Reaching the Right Decision

"The hallmark of American adjudication is the adversary system."[90] The key elements of the adversary system are: (a) a neutral and passive factfinder; (b) party presentation of evidence; and (c) highly-structured forensic procedure.[91]

references constitute inadmissible hearsay and are stricken from the memorandum.").

87. *See* cases cited *supra* note 81.

88. *See infra* text accompanying notes 92-97 (explaining that a neutral fact finder and party presentation of evidence are elements of the adversarial system).

89. *Kourkounakis*, 2006 WL 1794506, at *9.

90. Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 301 (1989).

91. Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 713-17 (1983).

The first key element, neutral and passive factfinder, refers to the decision-maker.[92] "He is expected to refrain from making any judgments until the conclusion of the contest and is *prohibited from becoming actively involved in the gathering of evidence* or in the parties' settlement of the case."[93] The decision-maker makes a decision based solely on the evidence presented by the parties.[94] This element aids fairness in an adversarial setting.[95]

The second element, party presentation of evidence, is related to the first element.[96] It is a "procedural principle that the parties are responsible for production of all the evidence upon which the decision will be based."[97]

The third element, highly structured forensic procedure, is characterized by various rules that govern the litigation.[98] These rules include rules of procedure, rules of evidence and rules of ethics.[99]

The American legal system, while traditionally adversarial, has incorporated features that are non-adversarial.[100] For example, the American legal system employs the use of discovery, which is contrary to adversarial practice.[101] Also, the adversarial system may be undermined in favor of less adversarial procedures due to the nature of some cases.[102]

According to Professor Edward Cheng,[103] a common objection to a judge's independent research is that "it does violence to the adversary system by requiring an active judicial role and undermining the importance of party-presented evidence."[104] Indeed, this argument can be raised in *Kourkounakis* because the judge gathered evidence that is contrary to the first and second elements of the adversarial system.

Professor Cheng argued for independent research, enumerating

92. *Id.* at 714.
93. *Id.* at 714-15 (emphasis added).
94. Sward, *supra* note 90, at 302.
95. Landsman, *supra* note 91, at 715.
96. *Id.* at 715.
97. *Id.*
98. *Id.* at 716.
99. *Id.*
100. Sward, *supra* note 90, at 326-27.
101. *Id.* at 328.
102. *Id.* at 326. Examples of such cases are complex litigation where the judge takes a managerial role, and family law cases. *Id.* at 327.
103. Professor Edward K. Cheng is an Associate Professor of Law at Brooklyn Law School. For further information about Professor Cheng, visit his faculty profile at http://www.brooklaw.edu/faculty/profile/?page=271 (last visited Oct. 13, 2007).
104. Edward K. Cheng, *Should Judges Do Independent Research on Scientific Issues?*, 90 JUDICATURE 58, 61 (2006), *available at* http://www.ajs.org/ajs/publications/Judicature_PDFs/902/Cheng_902.pdf.

"reasons to sacrifice adversarial values."[105] However, Professor Cheng argued for such a sacrifice in the context of a judge researching *scientific* evidence.[106] *Kourkounakis* is distinguishable because the Judge did not research any scientific or technical matter; instead, his research merely focused on the qualifications of the plaintiff's expert.[107] When the matter independently researched by a judge is not scientific or technical or is not a fact that requires specialized knowledge, there seems to be little reason why the judge would need assistance in understanding the facts of a case. Moreover, as in this case, if the fact independently researched by the judge is available to the party opponent, and therefore could have been easily raised by the party opponent, a judge's independent research would seem to indicate partiality. Therefore, sacrificing adversarial values in a non-scientific, non-technical context would seem unnecessary.

One can argue that if a judge's *sua sponte* research is accurate and complete, then using such research would allow him to reach the right decision. While this reasoning can be true in this case as well as other cases, another equally valid argument is that a judge's research could have been inaccurate and incomplete, and could lead to the wrong decision.[108] Ultimately, the resolution to these "ifs" and "could haves" is that the judge's role in an adversary system is primarily fact finding; investigating and presenting evidence are roles bestowed by the adversary system to the parties.[109]

B. Judicial Notice

The trial court seems to have taken judicial notice of Dr. Tizes' lack of qualifications.[110] Judicial notice is "[a] court's acceptance, for

105. *Id.*

106. *Id.* Professor Cheng's article itself is limited to the context of scientific evidence. *Id.*

107. *See* Transcript of Oral Argument, *supra* note 10, at 6. *But see supra* note 19-20 and accompanying text (presenting the possibility that Judge Rakoff may not have used the Google search to discredit Dr. Tizes because he may have used Dr. Tizes' resumé attached to the expert report).

108. *See* Tennant & Seal, *supra* note 37, at 5.

109. The author takes no position in this Comment as to the arguments presented by Professor Cheng, which, as earlier noted, were argued in the context of scientific evidence. Whether the adversarial system, including the roles of the judge and the parties, should be modified in the context of scientific evidence is not a topic discussed in this Comment.

110. The author notes that Judge Rakoff did not explicitly indicate that he has decided to take judicial notice of Dr. Tizes' lack of qualifications; instead, the record only *seems* to show that he did. The Advisory Committee Note on FRE 201(e) recognizes the "frequent failure to recognize judicial notice as such." FED. R. EVID. 201(e) advisory committee's note. This seems to be the case in *Kourkounakis*.

purposes of convenience and without requiring a party's proof, of a well known and indisputable fact. . . ."[111] By bringing up Dr. Tizes' credentials in the court's decision granting summary judgment for the defendant when the defendant never raised Dr. Tizes' qualifications as an issue, the trial court seems to have used its broad discretion pursuant to FRE 201(c)[112] to take judicial notice without the request of any party. Therefore, the next issue is: Did the court properly take judicial notice of Dr. Tizes' credentials?

The propriety of taking judicial notice depends, first and foremost, on the type of fact that was judicially noticed.[113] FRE 201(a) makes clear that FRE 201 is incited only if adjudicative facts are concerned.[114] The Advisory Committee's Note further clarifies that neither FRE 201 nor any other rule in the Federal Rules of Evidence speaks about legislative facts.[115]

"Adjudicative facts are simply the facts of the particular case. . . . They relate to the parties, their activities, their properties, their businesses."[116] On the other hand, "legislative facts are established truths, facts, or pronouncements that do not change from case to case but apply universally."[117] By merely looking at these definitions, Dr. Tizes' credentials undoubtedly seem to fall under the banner of "adjudicative facts." Therefore, FRE 201 may be invoked.

FRE 201(b) states: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[118]

The standards provided by FRE 201(b) must be met in order to properly take judicial notice of an adjudicative fact.[119] In this case, it is evident that Dr. Tizes' credentials are not a matter of general knowledge. The second requirement is trickier; this involves an analysis of whether the websites from which Judge Rakoff's clerk drew information about Dr. Tizes are "capable of accurate and ready determination by resort to

111. BLACK'S LAW DICTIONARY 863-64 (8th ed. 2004).

112. FED. R. EVID. 201(c) ("A court may take judicial notice, whether requested or not.").

113. *See* FED. R. EVID. 201(a) ("This rule governs only judicial notice of adjudicative facts.").

114. *Id.* ("This rule governs only judicial notice of adjudicative facts.").

115. FED. R. EVID. 201(a) advisory committee's note.

116. 1 HANDBOOK OF FEDERAL EVIDENCE § 201:1 (6th ed. 2006).

117. Kurtis A. Kemper, Annotation, *What Constitutes "Adjudicative Facts" within Meaning of Rule 201 of Federal Rules of Evidence Concerning Judicial Notice of Adjudicative Facts*, 150 A.L.R. FED. 543 (1998).

118. FED. R. EVID. 201(b).

119. *See id.*

sources whose accuracy cannot reasonably be questioned."[120] Because the websites used by the trial court are unknown, one cannot gauge whether this standard has been met. Even if the trial court's clerk provided the judge with the websites (whether by print or by URL) of the companies associated with Dr. Tizes, those websites are not immune from the problems presented in Subpart A(1) of this Comment, particularly from the problems of unreliability and inaccuracy. Indeed, some courts have ruled against taking judicial notice of websites because they failed to meet the standards of FRE 201(b)(2).[121]

As earlier noted, courts have generally ruled that judicial notice of public records on the Internet may be properly taken.[122] For example, in *Star*, the court relied on the Michigan Court of Appeals' website and a search on the Westlaw online database to determine whether the petitioner in that case filed any appeal.[123] The court noted that "[p]ublic records and government documents, including those available from reliable sources on the Internet, are subject to judicial notice."[124] Similarly, in *Deboom v. Raining Rose Inc.*,[125] the court gave the link to the Iowa state court civil docket to support its statement that the plaintiff in that case had a direct appeal pending in a state court.[126] In doing so, the court cited to an Eighth Circuit decision, *Stutzka v. McCarville*, which recognized the acceptable practice of taking judicial notice of public records.[127] And in *Access 4 All v. Oak Spring Inc.*,[128] the court took judicial notice of records available online from the Florida Department of State reflecting the position held by the plaintiff in a non-profit organization.[129] It can be concluded that these courts consider public records to generally meet the standard set by FRE 201—that public records are "capable of accurate and ready determination by resort

120. *Id.*

121. *E.g.*, Scanlan v. Texas A&M, 343 F.3d 533, 536-37 (5th Cir. 2003) (finding that the district court properly did not take judicial notice of a report that could be accessed through an Internet citation provided by the defendants partly because it is not "capable of accurate and ready determination"); Fenner v. Suthers, 194 F. Supp. 2d 1146, 1148 (D.Colo. 2002) ("Putting to one side the problem of access, I doubt that a web site can be said to prove an 'accurate' reference. . . ."). *But see* Caldwell v. Caldwell, No. C 05-4166 PJH, 2006 U.S. Dist. LEXIS 13688, at *9 (N.D. Cal. Mar. 13, 2006) ("The court agrees with the proposition that as a general matter, websites and their contents may be proper subjects for judicial notice.").

122. *E.g.*, *Stutzka*, 420 F.3d at 761 n.2; *Star*, 2006 U.S. Dist. LEXIS 71785, at *4 n.2.

123. *Star*, 2006 U.S. Dist. LEXIS 71785, at *4.

124. *Id.* at *4 n.2.

125. Deboom v. Raining Rose Inc., 456 F. Supp. 2d 1077 (N.D. Iowa 2006).

126. *Id.* at 1078 n.1.

127. *Stutzka*, 420 F.3d at 761 n.2.

128. Access 4 All v. Oak Spring Inc., No. 5:04-cv-75-Oc-GRJ, 2005 U.S. Dist. LEXIS 20218 (M.D. Fla. May 20, 2005).

129. *Id.* at *7 n.16.

to sources whose accuracy cannot reasonably be questioned."[130]

However, there is at least one case, *Kenton v. Foster*,[131] where a court refused to take judicial notice of online records from a county assessor and a county recorder for the purpose of determining ownership.[132] The court in that case merely noted that those records seemed to give light to the issue of ownership. Nonetheless, the court explicitly stated that it was not taking judicial notice and it was not relying on such records in determining the merits of the claim.[133]

Assuming that the trial court in *Kourkounakis* used the websites of the companies associated with Dr. Tizes, such websites do not fall under the generic definition of "public record." *Black's Law Dictionary* defines "public record" as "[a] record that a governmental unit is required by law to keep, such as land deeds kept at a county courthouse."[134] Since company websites are generally not kept by a governmental unit, the case here is distinguishable from the line of cases allowing judicial notice of online public records. This makes sense. If courts take judicial notice of online public records because public records meet the FRE 201 standard, courts are implying that public records are "sources whose accuracy cannot reasonably be questioned." Company websites which are not maintained by any governmental unit seem less official in this manner and more prone to the problems identified in Subpart A(1). Consequently, compared to public records, it is more difficult to conclude that company websites are sources whose accuracy cannot reasonably be questioned. Therefore, taking judicial notice of the information gleaned from the websites maintained by the companies associated with Dr. Tizes seems inappropriate under FRE 201.

C. Exceptions

"Our procedural system must resolve conflicts in such a way as to achieve a true characterization of the events out of which the conflict arose."[135] In other words, one of the goals of our procedural system is to learn the truth.[136] That being said, multiple problems seem to arise when a judge engages in independent research on Google and uses that

130. *See* Boone v. Menifee, 387 F. Supp. 2d 338 (S.D.N.Y. 2005) (stating that prisoner locator websites meet the "capable of accurate and ready determination" threshold).

131. Kenton v. Foster, No. CV 04-2005-PCT-PHX, 2006 U.S. Dist. LEXIS 65934 (D. Ariz. Sept. 13, 2006).

132. *Id.* at *12 n.8.

133. *Id.*

134. BLACK'S LAW DICTIONARY 1301 (8th ed. 2004).

135. Sward, *supra* note 90, at 304.

136. *See id.*

research to decide the merits of a case. However, since learning the truth is one of the goals of our procedural system, it is possible that an exception should be applied in order to learn the truth.

In *Kourkounakis*, Judge Rakoff indicated that Dr. Tizes' address caught his eye, which led to his clerk researching Dr. Tizes.[137] It would seem, therefore, that Judge Rakoff suspected that there may be some questions concerning Dr. Tizes' capacity to testify. The question then becomes: Is a judge's suspicion about the facts sufficient to warrant an independent research on Google?

As demonstrated in the earlier parts of this Comment, such an action by a judge has many pitfalls. Therefore, if an exception is to be applied, it must be applied with the utmost caution and prudence, and must be applied only if the interest of truth and justice would be served. Judge Rakoff's suspicion about Dr. Tizes and his decision to act on that suspicion by having his clerk Google Dr. Tizes could very well resolve this case in light of the truth. Whether he did so in a cautious manner is more problematic.

D. Opportunity to Be Heard

Perhaps, *Kourkounakis* could have been resolved more fairly by giving the plaintiff an opportunity to be heard.

One of the arguments made by the plaintiff in his Petition for Writ of Certiorari to the Supreme Court is that he did not seek an opportunity to be heard pursuant to FRE 201(e) because Judge Rakoff said that he would not use the information that his clerk obtained from the Internet search to reach a decision.[138] Therefore, the plaintiff implied that the trial court eliminated his means, through FRE 201(e), to request an opportunity to be heard.

FRE 201(e) states: "A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken."[139]

The Advisory Committee's Note to FRE 201(e) points to "considerations of procedural fairness" that demands such a rule.[140] It further states:

> An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of request by another party . . . or through an advance indication by the

137. Transcript of Oral Argument, *supra* note 10, at 5-6.
138. *Kourkounakis*, 2006 WL 1794506, at *9.
139. FED. R. EVID. 201(e).
140. FED. R. EVID. 201(e) advisory committee's note.

> judge. Or he may have no advance notice at all. The likelihood of the latter is enhanced by the frequent failure to recognize judicial notice as such. And in the absence of advance notice, a request made after the fact could not in fairness be considered untimely.[141]

The facts of this case do not entirely conform to the language of the rule. In this case, the trial court indicated that it would not use the "Googled" findings it made about Dr. Tizes.[142] Ideally, the language of the rule applies when the judge either has decided or is about to decide that he or she will take judicial notice of a fact. The plaintiff in this case was not aware that Judge Rakoff was about to take judicial notice of Dr. Tizes' credentials.[143] The plaintiff also did not have an opportunity to contest the taking of judicial notice after the fact because the plaintiff's only indication that the court took judicial notice was through the court's decision granting summary judgment for the defendant.[144] Therefore, from the outset, Judge Rakoff's use of the information gleaned from his clerk's Google search to discredit Dr. Tizes[145] already seems quite unfair. The plaintiff may have relied on Judge Rakoff's representation that the Google search would not be considered in the decision in electing not to make a request for an opportunity to be heard. Indeed, that is what the plaintiff alleged.[146]

In reality, Judge Rakoff's decision was based not solely on discrediting Dr. Tizes as an expert.[147] Judge Rakoff found no merit in the other substantive claims of the plaintiff.[148] However, one of the substantive claims raised by the plaintiff, negligence, was denied in part because the court ruled that Dr. Tizes was unqualified.[149] If Dr. Tizes' disqualification as an expert was based on the Google search and not on Dr. Tizes' resume attached to the expert report, then fairness would

141. *Id.*

142. Transcript of Oral Argument, *supra* note 10, at 5.

143. *See* Petition, *supra* note 8, at *9.

144. *See id.*

145. *See supra* notes 19-20 and accompanying text (presenting the possibility that Judge Rakoff may not have used the Google search to discredit Dr. Tizes because he may have used Dr. Tizes' resumé attached to the expert report).

146. *Kourkounakis*, 2006 WL 1794506, at *9.

147. *See Kourkounakis*, 2005 U.S. Dist. LEXIS 8020, at *4-*6.

148. *See id.* (discussing why the plaintiff's claims on lack of informed consent and negligence failed).

149. *See id.* at *6-*7 ("Additionally, [the plaintiff's negligence claim] must also fail because, under New York law, such claim must be supported by competent evidence from a qualified expert."). It must be noted that apart from Dr. Tizes' qualifications, the Judge also attacked the content of the expert report. *Id.* at *7 ("Here, the only 'expert report' submitted by plaintiff consists of a largely conclusory affidavit. . . ."). This Comment focuses only on the narrow issue of Googling Dr. Tizes' qualifications, and does not attempt to analyze the content of his expert report.

dictate, as recognized by the Advisory Committee Note on FRE 201(e), that the plaintiff should have at least been given an opportunity to be heard.[150]

IV. Conclusion

> The simple answer, it seems to me, is just don't Google under any circumstances. Although I don't know why any judge would do so concerning a pending case, if it is done, fairness dictates notice to all parties is required—as well as why you did it, and what you found out, with copies supplied of all material the court has read.[151]

In two sentences, Judge Gottsfield summarized the main ideas in this Comment. A judge should generally refrain from Googling the facts of a case. Although there might be an occasion when the pursuit of truth and the interest of justice would permit a judge to resort to Googling, fairness requires that the adversely affected party be given an opportunity to be heard.

Websites present many dangers as evidence. First, websites have inherent unreliability problems.[152] In lieu of these unreliability problems, issues of hearsay and authentication arise when website evidence is presented.[153] When a judge performs *sua sponte* factual research from websites, the danger extends farther than issues of unreliability; such judicial activity also threatens the American adversarial system.[154]

These problems are exacerbated when judges take judicial notice of website evidence gleaned from their independent Internet research.[155] While there may be instances when taking judicial notice of facts gleaned from Internet websites could be appropriate,[156] fairness necessitates that the adversely affected party be given an opportunity to be heard.[157]

Perhaps on rare occasions, the image of Lady Justice should be allowed to peek from under her blindfold. However, the scales must remain balanced. A judge's independent research on the Internet and his or her reliance on such research, without giving the adversely affected party an opportunity to be heard, would tilt the scale, heavily favoring one side over the other.

150. FED. R. EVID. 201(e) advisory committee's note.
151. Gottsfield, *supra* note 28.
152. *See supra* Part III.A(1).
153. *See supra* Part III.A(2).
154. *See supra* Part III.A(3).
155. *See supra* Part III.B.
156. *See supra* Part III.C.
157. *See supra* Part III.D.