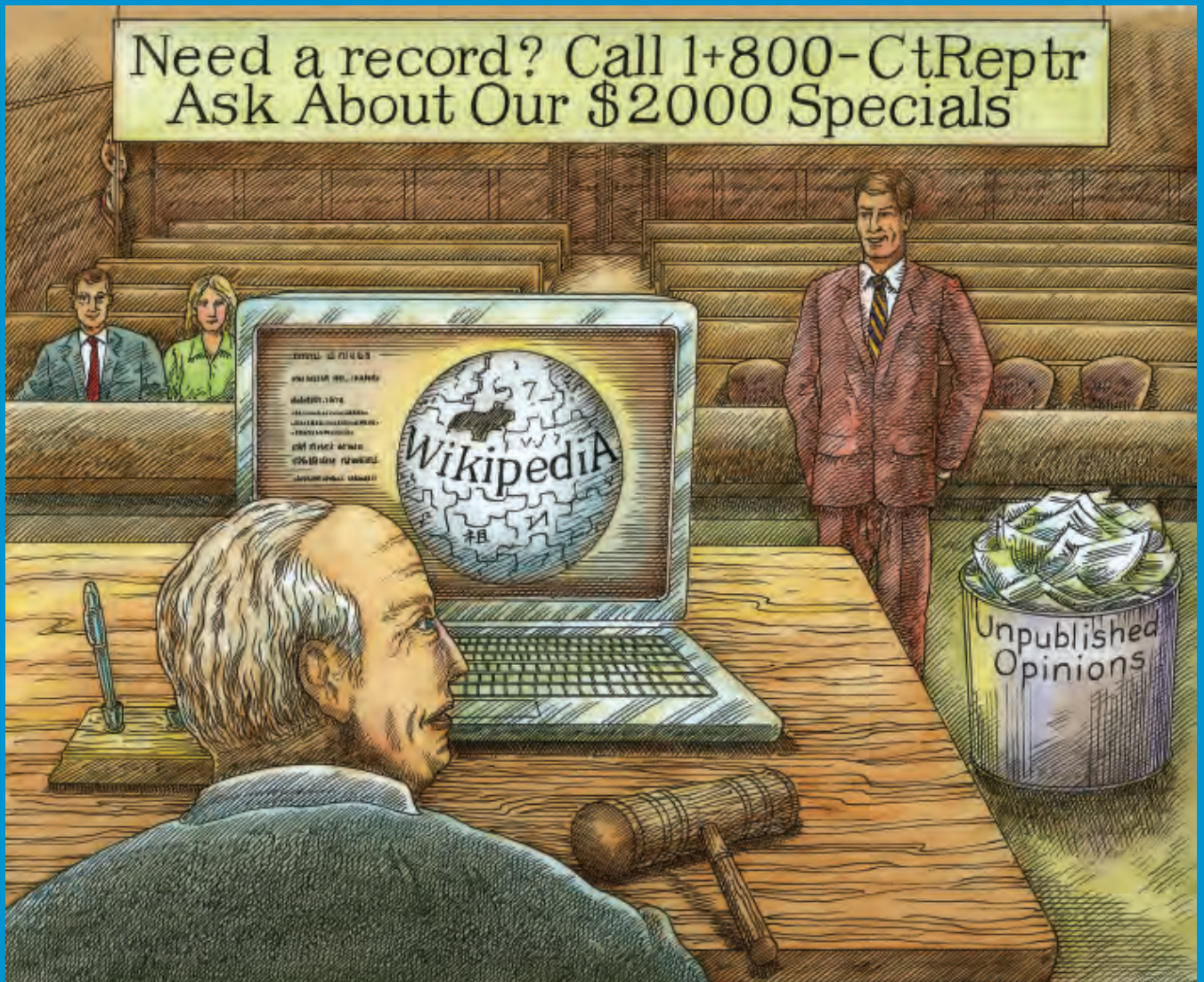


California Litigation

THE JOURNAL OF THE LITIGATION SECTION, STATE BAR OF CALIFORNIA



Warning:

The Internet May Contain Traces of Nuts (Or, When and How to Cite to Internet Sources)

By Paul J. Killion



Paul J. Killion

The Internet is so prevalent it is easy to forget that it only became accessible to the general public in 1995. Based on a Westlaw search for “http,” the first citation to the Internet found in any published appellate decision in the United States appeared the next year, in a dissenting decision by Justice Sandstrom of the North Dakota Supreme Court. (*Wishnatsky v.*

Bergquist (N.D. 1996) 550 N.W.2d 394, 404 [Sandstrom, J., dissenting].)

A month later, the first Internet citation used in any federal appellate case appeared in a concurring opinion by United States Supreme Court Justice David Souter. (*Denver Area Educ. Telecomm. Corporation,*

.....
California Litigation Vol. 26 • No 1 • 2013

Inc. v. FCC (1996) 518 U.S. 727, 777, fn. 4 [Souter, J. concurring].) The first California decision to cite to the Internet was a 1998 decision authored by Justice Haller of the Fourth District, Division One. (*In re Marriage of Shelstead* (1998) 66 Cal.App.4th 893, 905.)

Of the Internet citations in those early decisions, only two of the sources remain available. Justice Sandstrom's citation is still available, though it takes several steps in navigating the site to find the information (it was a citation to the North Dakota State University bookstore to show that its hours were publicly available). (See *Wishnatsky*, *supra*, 550 N.W.2d at p. 404.) The first of Justice Souter's two Internet citations is still available (a USA Today article). (See *Denver Area*, *supra*, 518 U.S. at p. 777, n. 4.) But Justice Souter's second citation (to a technology news article) has morphed into an entirely new Web site. (*Ibid.*) And Justice Haller's citation (to a Department of Labor guideline) now results in a "page not found" message. (See *In Re Marriage of Shelstead*, *supra*, 66 Cal.App.4th at p. 905.)

These three cases illustrate both the problem and the challenge in citing to the Internet — it is an impermanent source of information. Web pages change frequently. In fact, Web designers stress the need for constant updating to attract search engines. Add to that the problems associated with community-edited sites like Wikipedia, and the reliability of information on the Internet can raise significant questions. As one comic quipped: "Information on the Internet is subject to the same rules and regulations as conversation at a bar."

Nonetheless, the Internet remains a predominant, if not *the* predominant, source of information for most Americans today and appellate courts do not ignore this reality. In fact, despite the imperfections, to date Internet sources have been cited over 630

times in California appellate decisions, and over 3,600 times in federal appellate ones (based on the same "http" search). While not all these cases actually *rely* on the Internet sources they cite, many do.

Given this reality, when is it appropriate to cite an Internet source in an appellate brief in California? And what form should the citation take?

When is it Appropriate — to Cite to Internet — Sources for Authority?

The answer is not "never." Under California Evidence Code section 452, subdivision (h), a court may take judicial notice of "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." Furthermore, a "reviewing court may take judicial notice of any matter specified in Section 452" (Evid. Code, § 459, subd. (a)), although under Rule 8.809 of the California Rules of Court, a party must file a formal motion in the appellate court to obtain judicial notice. Information from the Internet can satisfy the judicial notice requirements, as California courts have recognized. (See, e.g., *In re Crockett* (2008) 159 Cal.App.4th 751, 762, fn. 6.)

Under the Federal Rules of Evidence, a federal court can take judicial notice of an adjudicative 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. Rules Evid., rule 201(b).) As the Ninth Circuit bluntly stated, this rule has equal application to the Court of Appeals: "[I]t is nonsense to suppose that [the Court of Appeals is] so cabined and confined that [it] cannot

exercise the ordinary power of any court to take notice of facts that are beyond dispute...An...appeals court could not function if it had to depend on proof in the record” of such facts. (*Singh v. Ashcroft* (9th Cir. 2004) 393 F.3d 903, 905-06.)

A particular hurdle for taking judicial notice of Internet information is the requirement under both California and federal judicial notice rules that the fact or proposition be capable of immediate and accurate determination from sources of reasonably indisputable accuracy. (See Evid. Code, § 459, subd. (a); Fed. Rules Evid., rule 201(b).) As illustrated at the start of this article, Web sites can and do change, sometimes frequently, leaving the information no longer available.

Unavailability can be the result of any of a number of causes, including: (1) the Internet content has evolved into something different from that originally cited; (2) the content has migrated to a new location; (3) the content has vanished from the Internet; (4) the site now requires subscriptions or passwords for access; or (5) the original citation was simply incorrect because it contained spelling, typographical, transcription, or editing errors. (See Barger, *On the Internet Nobody Knows You’re A Judge: Appellate Courts’ Use of Internet Materials* (2002) 4 J. of App. Prac. & Process 417, 439-445.)

Many of the citation problems with changing Web sites can at least be contained by providing information in the citation as to the date the author accessed the Internet source. Both the Bluebook and California Style Manual require that citations provide the date the material was accessed. (See Cal. Style Manual (4th ed. 2000) § 3:15, p. 109; The Bluebook; A Uniform System of Citation (19th ed. 2010), § 18.2.2(c).) Older Internet pages can sometimes be accessed at sites such as archive.org, which has an Internet archive “Wayback Machine.”

In sum, those who use the Internet for

research (whether legal or nonlegal) should apply the same evaluation criteria to the sources they select as they would to more traditional media, satisfying themselves that (1) the material has been written or published by an authoritative entity or person; (2) the material has been subjected to some form of peer review or editorial oversight to ensure its accuracy and currency; and (3) the material is stable and likely to remain accessible using the same citation the author used in originally visiting the site.

— Use of Wikipedia —

Wikipedia deserves separate discussion because it is so broadly used. Wikipedia is a community-written Web site and, like many Internet resources, it contains an important general disclaimer: “Wikipedia makes no guarantee of validity.” Wikipedia further advises that “[t]he content of any given article may recently have been changed, vandalized, or altered by someone whose opinion does not correspond with the state of knowledge in the relevant fields.”

Perhaps due to its questionable reliability, neither the United States Supreme Court nor the California Supreme Court has ever cited to a Wikipedia article. (See Horvitz & Levy, *Like SCOTUS, the California Supreme Court eschews citations to Wikipedia*, At The Lectern Blog, (posted June 19, 2012) [hereafter *Like SCOTUS*].) Nonetheless, and despite Wikipedia’s disclaimer, as of August 2012, nine published and 31 unpublished opinions from the California Courts of Appeal had referenced Wikipedia, including many which cited Wikipedia as authority for a proposition. (See also *Like SCOTUS, supra*; Derrick, *On Citation to Wikipedia (& Other Things)* (2010) California Litigation, vol. 23, No. 2, pp. 5-7.) A recent search of federal cases referencing Wikipedia and judicial notice “reveals about five attempts by litigants to cite [Wikipedia] per year and about a

50 percent success rate.” (Stephanian, *Judicial Notice.Net* (Spring 2012) ABA Section of Litigation Magazine, at p.4.)

In a 2010 article examining the use of Wikipedia in federal appellate decisions, the author divided cases into the following categories based on how Wikipedia was used: (1) to support quips; (2) to fill non-controversial gaps in the record, such as in pro se civil rights cases, police investigation background in criminal evidence suppression hearings, and examiner findings in social security cases; and (3) to resolve disputed factual contentions. (Gerken, *How Courts Use Wikipedia* (2010) 11 J. of App. Prac. & Process 191, 193-201.) With regard to the last category, the author was very critical of courts that relied on Wikipedia to resolve dispositive factual disputes. (*Id.* at p. 201 [“When Wikipedia is adduced to decide the material facts..., the roles of the participants may be seriously compromised.”])

In California, some courts have treated Wikipedia as a reliable source. (See, e.g., *DVD Copy Control Assn. v. Kaleidescape, Inc.* (2009) 176 Cal.App.4th 697, 738 [citing Wikipedia as authoritative for the original meaning of the expression “a pig in a poke”]; *In re Carleisha P.* (2006) 144 Cal.App.4th 912, 920 & fn. 5 [citing Wikipedia and the related Wiktionary for definitions of “ammunition”]; see also *O’Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1433 [describing Wikipedia as “a well-known cooperative encyclopedia”]; *Patel v. Shah* (2004) 2004 WL 2930914, *5 [nonpub. opn.] [citing Wikipedia for meaning of “simple majority”]; but see *Gerken, supra*, at pp.201-02 [criticizing *Patel* decision for using Wikipedia as authority to resolve a contested contract issue in the case].)

But other California courts have raised serious reservations about Wikipedia’s reliability. (*In re Marriage of Lamoure* (2011) 198 Cal.App.4th 807, 826 [“We do not consid-

er Wikipedia a sufficiently reliable source”]; *People v. Moreno* (2009) 2007 WL 2998986, *2, fn. 2 [nonpub. opn.] [“Wikipedia, although useful in many other contexts, is not a recognized source for determining legislative intent”].) The Third District was especially critical in a 2009 unpublished case, *In re S.G.*: “Appellant’s only sources in support of her contention are Wikipedia articles on federally recognized tribes and the Apache. We are not persuaded. Articles in the online encyclopedia Wikipedia can be edited by anyone at any time. Unsurprisingly, any article at any time may contain factual errors, and can become very unbalanced. We conclude Wikipedia is not a sufficiently reliable source upon which a court can determine whether a tribe should be notified pursuant to the [Indian Child Welfare Act].” (*In re S.G.* (2009) 2009 WL 875510, *4 [citations omitted] [nonpub. opn.].) (See generally *Badasa v. Mukasey* (8th Cir. 2008) 540 F.3d 909, 910 [reversing decision of Board of Immigration Appeals for finding Immigration Judge’s reliance on Wikipedia to be only harmless error; very critical of Wikipedia as a reliable source].)

Given the controversy, before citing Wikipedia it is best to ask:

- How critical is the fact to the outcome? If the fact is critical, a simple citation to Wikipedia is probably insufficient and formal judicial notice is likely required. (See Cal. Rules of Ct., rule 8.809.)

- Is the fact disputed? If so, bear in mind that the reliability of Wikipedia can be easily attacked.

- How reliable is the Wikipedia article? For example, has it been edited frequently? Are the edits substantial? Are the edits controversial? Does the article contain mainly facts or mainly opinion? Does the article cite reputable sources?

Like any Internet resource, Wikipedia must be cited carefully and with full understanding that it may not be a reliable source.



How to Cite to Internet Sources

The most current edition of the California Style Manual (now 12 years old) provides only modest guidance regarding direct citation to Internet sources. (See Cal. Style Manual (4th ed. 2000) § 3:15, pp. 108-09.) The current Bluebook (2010 edition) provides substantially more guidance. (See Bluebook, *supra*, Rule 18, §§ 18.1-18.5, pp. 165-173.) The Bluebook explains that “[a]n internet source may be cited directly when it does not exist in a traditional printed format or when a traditional printed source...exists but cannot be found or is so obscure that it is practically unavailable.” (Bluebook, § 18.2.2, p. 166.) It cautions: “All efforts should be made to cite to the most stable electronic location available.” (*Ibid.*)

The California Style Manual does provide the following official directions for citation to Internet sources: “[P]rovide as much of the Uniform Resource Locator (URL), in angled brackets (< >), as is necessary to facilitate locating the material on the Web site, and the date the material was read or downloaded from the Internet site, which is signaled in parentheses (or brackets if the citation as a whole is parenthetical) by the phrase ‘as of’ in conjunction with the date.” (Cal. Style Manual, § 3:15, p. 109.) The Manual also gives a useful tip: “If necessary a URL may be divided between lines at any ‘/’ in the address.” (*Ibid.*) This avoids strange line breaks in the text created by lengthy URLs that word-processing programs read as one, long word.

In sum, the official California citation form for an Internet source requires the following attributes:

- The URL must be provided in angled brackets (< >).
- The date the material was read or downloaded must be provided, signaled in paren-

theses (or brackets where appropriate) by the phrase “as of.”

The Bluebook provides some additional tips in presenting direct citation to Internet sources:

- Look to see if the source has a certificate or logo indicating that a governmental entity has verified that the document is complete and unaltered (*e.g.*, official government Web sites containing regulations). (Bluebook, *supra*, § 18.2.1(a)(i).)
- When available, provide the author information. (*Id.* at § 18.2.2 (a).)
- If available, the date of the material cited should be provided (as it appears on the Internet site), not the date the site was visited. If the material is otherwise undated, the date the Web site was last visited should be placed in a parenthetical after the URL. (*Id.* at § 18.2.2 (c).)
- Blogs and other dynamic sites that are updated frequently should include a timestamp, in addition to the date, whenever possible. (*Id.* at § 18.2.2 (c).)
- The URL should point the reader directly to the source cited rather than intervening pages or links. (*Id.* at § 18.2.2 (d).)
- Where a document is available both in HTML format and in a widely used format that preserves pagination of the printed work (*e.g.*, Adobe’s PDF format), “the latter should always be cited in lieu of an HTML document.” (*Id.* at § 18.2.2 (e).) A pinpoint citation to the location cited within the PDF version should be included. (*Id.* at § 18.2.2 (f).)

Finally, Internet citations in a brief should be carefully reproduced and then confirmed. The easiest method is to simply cut and paste the citation into a Web browser.

.....

Paul J. Killion is a partner with Duane Morris LLP in the firm’s San Francisco office. He is a certified appellate specialist with the State Bar of California Board of Legal Specialization.