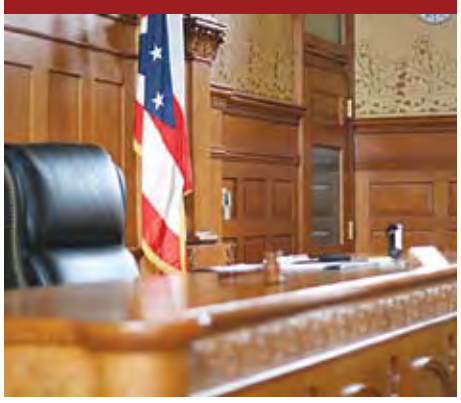
FOCUS: LITIGATION



He Said, She Said but What About What the Website Said?

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Hearsay has been the bane of law students and practitioners alike. Often easy to identify as an out-of-court statement offered to prove the truth of the matter asserted, there are so many exceptions and exclusions it can make one's head spin.[1] The ubiquity of online information and the ease with which it can be searched, especially using artificial intelligence, makes information posted on websites a prime target for this objection.

When most think of hearsay, they default to the common "so and so told me that" opener that inevitably draws the objection. But, what if the witness testifies about something he or she read on a website or, better yet, the trial attorney wants to use a printout of the website itself to establish a particular fact? Will the hearsay objection be sustained? Should the court even consider the information?

Federal and state courts take somewhat differing approaches to answering these questions but the common thread seems to be an assessment of the reliability of the information and the weight it is given. There are two ways that website evidence is considered. The first is under the hearsay rubric, and the second under a judicial notice analysis.

In the federal courts, the focus is often on whether the judge can take judicial notice of information that is readily available and its accuracy can be determined without reasonable doubt. Judicial notice comes into play in two ways: without the request of a moving party or *sua sponte*, or based on a party's request with restrictions depending on whether it is a criminal or civil matter.[2] In civil cases, a judicially noticed fact is deemed conclusive and jurors are instructed as such. Whereas, in criminal cases, judicially noticed facts are not conclusive and jurors may or may not accept such facts.

In *United States v. Bari*, for example, the Second Circuit addressed whether the trial court erred in considering information confirmed by its own internet search.[3] While the opinion stemmed from a supervised release revocation hearing, where the rules of evidence are relaxed, the court nevertheless found that, in certain circumstances, a judge could use website information to confirm his or her intuition on a "matter of common knowledge."

In *Magnoni v. Smith & Laquercia, LLP*, Judge Marrero from the Southern District used an internet website to confirm a witness's testimony about the brand name of a wheelchair.[4] The court supported its search by stating that "it is generally proper to take judicial notice of articles and Web sites published on the Internet." The court reasoned that the information is publicly available and absent a challenge to the genuineness of the source of the document, judicial notice is appropriate.

In *A&E Television Networks, LLC v. Big Fish Ent., LLC*, a trademark infringement case, the court held that the plaintiff had pleaded sufficient facts to avoid dismissal. The court independently searched the internet–Google and YouTube in particular–to determine, among other things, that clips from both subject television shows appeared, supporting the court's holding that the plaintiff plausibly alleged, "that the products exist in the same online video market."[5]

Two other recent Southern District cases illustrate that federal courts are taking judicial notice of website information. First, in *Hesse v. Godiva Chocolatier, Inc.*, Judge Nathan took judicial notice of a trademark registration because it was "a matter of public record."[6] However, in *Carter v. Scripps Network, LLC*, judicial notice was taken of a non-governmental or public record website.[7] There, a class action suit was commenced against an entity that operated an online newsletter, which allegedly violated the Video Privacy Protection Act. The court took judicial notice of what the website entailed, which "included an online shop that recommended and linked to third-party home-and-garden products." The court did so in order to determine whether plaintiffs had failed to state a cause of action or could be part of the class that the Act meant to afford protection.

When courts view website evidence in the context of hearsay, the results are usually different. In *Novak v. Tucows, Inc.*, for example, the Second Circuit affirmed the lower court's holding that evidence from websites offered by a non-declarant to prove the truth are generally considered hearsay.[8] The court cited to other federal circuits elaborating on the idea of untrustworthiness of websites without proper authentication.

Similarly, in *F.T.C. v. Med. Billers Network, Inc.*, the Southern District found a website printout constituted inadmissible hearsay.[9] In that case, the defendant printed out graphs from a website depicting salaries that medical billers were allegedly receiving. However, the court found that the accuracy of the salary information in the printout could not be verified. Thus, the printout was inadmissible hearsay.

State courts, likewise, are reluctant to admit website documentation into evidence under hearsay exceptions when the website printout is not authenticated, even when it is a governmental website that is being used.

In *Faulkner v. Best Trails & Travel Corp.*, for example, the trial court allowed plaintiff to use an entity information printout from the Department of State's website to establish the defendant's principal place of business for venue purposes.[10] On appeal, however, the Second Department reversed, finding reliance on the website printout to establish the defendant's principal place of business was in error. The court reasoned that the website printout was not "certified or authenticated" so there was no "factual foundation sufficient to demonstrate its admissibility as a business record."

In *Dyer v. 930 Flushing, LLC*, a defendant similarly tried to use a computer printout from the DOS's website to establish that its principal office was located in Nassau County for venue purposes.[11] The Second Department affirmed the denial of defendant's venue motion, again finding that "the

computer printout submitted by the defendant in support of its motion was inadmissible, since it was not certified or authenticated by the head of the New York State Department of State, and it was not supported by a factual foundation sufficient to demonstrate its admissibility as a business record."

A lack of certification or authentication does not end the inquiry, however. Some state courts, like their federal counterparts, take judicial notice of online facts.

In *Munaron v. Munaron*, the defendant used a company's website showing that plaintiff was still listed as the president in an attempt to establish that fact.[12] The court rejected defendant's argument, finding the website lacked authenticity because "there is no way of knowing when the Web site was last updated, nor is there any way of knowing whether plaintiff remained president of the company notwithstanding his sale of the company."

The court, however, did its own search of the DOS entity information website and found that it stated plaintiff's executive position with the company. Although acknowledging the "unusual" nature of the evidence, the court found that it could "take judicial notice of this matter of public record."

Judicial notice, although discussed on a state level, has been narrowed more to the use of government websites.

In *Kingsbrook Jewish Med. Ctr. v Allstate Ins. Co.*, the defendant used the U.S. Department of Health and Human Services' website to illustrate the plaintiff's wrongdoing.[13] Specifically, the defendant requested that the court take judicial notice of procedure codes used by the hospital. These codes were displayed on the government's website and plaintiff did not contest this fact. The Second Department took judicial notice of this information and held "that the diagnosis and procedure codes key published by the United States Government on its HHS Web site may properly be given judicial notice (see CPLR 4511 [b]), as the key is reliably sourced and its accuracy not contested."

As early as 1989, the First Department held, "this court may, in general, take judicial notice of matters of public record."[14] In *LaSonde v. Seabrook*, the court held that it "has discretion to take judicial notice of material derived from official government web sites such as those generated by the New York State Department of State."[15]

Courts are understandably skeptical of information supported only by website evidence when the information is used to establish a dispositive fact and there are no other assurances that the information is reliable. Reliability is the key.

Courts are the gatekeepers of what is or is not reliable. The rules of hearsay assist judges when making the determinations regarding credibility. With the internet ever evolving as a source of information that most use every day, it is not surprising that attorneys are increasingly asking courts to allow website information as evidence. As the world of artificial intelligence soars and social media becomes more news-like, it is reasonable to expect that attorneys will use evidence gleaned from those sources more regularly, too. The key to it all is the way in which the evidence is being introduced. As mentioned earlier, official government websites are more likely than others to be admissible, but the reliability of the information and the way it is to be used are still the touchstones to admissibility.

It will be interesting to see how this body of evidentiary law continues to evolve.

1. Fed. R. Evid. 801; CPLR 800.
2. Fed R. Evid. 201; CPLR 4511.
3. 599 F.3d 176, 180-81 (2d Cir. 2010).
4. 701 F. Supp. 2d 497, 501 (S.D.N.Y. 2010).
5. No. 22 CIV. 7411 (KPF), 2023 WL 4053871, at *18 (S.D.N.Y. June 16, 2023)
6. 463 F. Supp. 3d 453, 463 (S.D.N.Y. 2020).
7. 670 F. Supp. 3d 90, 98 (S.D.N.Y. 2023).
8. No. 06-CV-1909(JFB)(ARL), 2007 WL 922306, at *5 (E.D.N.Y. Mar. 26, 2007), *aff'd*, 330 F. App'x 204 (2d Cir. 2009).
9. 543 F. Supp. 2d 283, 301–02 (S.D.N.Y. 2008).
10. 203 A.D.3d 890 (2d Dep't 2022).
11. 18 A.D.3d 742, 742-43 (2d Dep't 2014).
12. 21 Misc. 3d 295, 296-97 (Sup. Ct. Westchester Cnty. 2008).
13. 61 A.D.3d 13, 20 (2d Dep't 2009).
14. 146 A.D.2d 666, 667 (2d Dep't 1989).
15. 89 A.D.3d 132, 137, n.8 (1st Dep't 2011).

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