

Written in Stone?

The Record on Appeal and the Decision-Making Process

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Rule Seven of Lord Hale's renowned *Rules for His Judicial Guidance* provides: "That I never engage myself in the beginning of a cause, but reserve myself unprejudiced till the whole be heard."¹ Lord Hale's rules for his own judicial conduct were composed more than three hundred years ago at a time when it was more than enough for a judge to aspire to be impartial, "not biased with compassion to the poor or favor to the rich,"² and "[t]o abhor all private solicitations . . . in matters depending."³ In twenty-first century litigation, Lord Hale's admonition to reserve himself unprejudiced "till the whole be heard"⁴ does little to answer questions regarding judicial conduct, but rather raises them; such as, when has the whole been heard? Does the record from the trial court bind the decision-making processes of appellate judges, or is it merely a fraction of the information that appellate courts may use?

This article will consider how appellate courts use the record on appeal in the decision-making process. First, this article tracks the origin of the concept of "the record" from pre-Norman Conquest to American statutory rules of appellate procedure. It then explores how the rules of appellate procedure define the "record on appeal," including what is or should be included in the record, what should be excluded, and what may correct or supplement the record, including the use of outside experts, judicial notice, and independent investigation as means by which the appellate court may transcend the record in its policy-making, or legislative function.

I. THE ORIGINS OF THE RECORD

A. *English Common Law*⁵

Before the Norman Conquest, England had a system of courts, called the "hundred courts," for land contests and criminal matters.⁶ The hundred courts provided no appeal except in cases of great importance.⁷ If a case were sufficiently

1. *In re* Code of Judicial Conduct, 643 So. 2d 1037, 1038 n.2 (Fla. 1994). "In the middle 1600s, Sir Matthew Hale of England set down eighteen rules for his judicial guidance." *Id.*

2. *Id.*

3. *Id.*

4. *Id.*

5. It is not the goal of this part of the article to give an exhaustive summary of the development of the English courts. The focus is on understanding the chronology of the court generally to understand the origin of the record on appeal.

6. FREDERICK G. KEMPIN, JR., *LEGAL HISTORY: LAW AND SOCIAL CHANGE* 13 (1963).

7. *Id.*

important, an aggrieved party might have court with the king or his council;⁸ otherwise, the local courts were the final authority in their own spheres.⁹ These local courts fulfilled all governmental responsibilities—judicial, executive, and legislative.¹⁰ As might be expected, the significant disputes of the day generally centered around ownership of property.¹¹

Thus, at the time of the Norman Conquest in 1066, there was no central court in England.¹² The King's Court, called the Curia Regis, was not established until King Henry II brought centralization to the English government by setting up the system of royal writs, trial by jury, and the "King's Peace," which embraced the idea that crime was not a wrong against an individual, but against the state.¹³ The King's Court steadily expanded its jurisdiction and gained power because it could offer remedies that the inferior courts could not.¹⁴ The power of the King's Court rested primarily upon the doctrine of the divine right of the sovereign to the ownership of all the land of England.¹⁵ The King's Court eventually split into several institutions, with the

8. *Id.*

9. H.G. HANBURY, *ENGLISH COURTS OF LAW* 29 (2d ed. 1954) (1944). The intricate network of local courts, called "the shires and the hundreds," were often private courts held by the landed gentry or the religious realm. F.W. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW: A COURSE OF LECTURES* 10 (A.H. Chaytor & W.J. Whitaker eds., 1968). There were also "feudal" courts presided over by the landlord who had enough tenants to need a court for settling disputes. *Id.*

10. HANBURY, *supra* note 9, at 29.

11. See R.M. JACKSON, *JACKSON'S MACHINERY OF JUSTICE* 4 (J.R. Spencer ed., 1989).

12. HANBURY, *supra* note 9, at 29.

13. *Id.* at 34. An inevitable feature of developing legal systems is that in the earlier stages, procedure is more important than substance. *Id.* In the English system, the rule of the writs was rigid and unyielding, such that if a man approached a tribunal with what he thought was a grievous wrong, and his case did not fit within the orbit of one of the recognized forms of action, he would be sent away with no remedy. *Id.* at 34-35.

14. JACKSON, *supra* note 11, at 4. In early times, the King's Court was not a court of appeal, but another court of limited jurisdiction, not open to every litigant. See MAITLAND, *supra* note 9, at 10. The cases that could originate in the King's Court were (1) "the pleas of the crown, matters which in one way or another especially affected the king, his crown and dignity"; (2) "infringements on the king's own proprietary rights"; and (3) criminal cases, which eventually led to the establishment of the King's Peace, i.e., that any criminal offense was an offense against the peace of the king. *Id.* Over time, the King's Peace became centralized and thus increased the king's power. See *id.* at 11.

Another factor that led to expansion of the jurisdiction of the King's Court was that disgruntled litigants wanted a place of further resort when an inferior court ruled against them. See *id.* Thus grew up the supervisory power of the King's Court over the other courts. See *id.* Maitland cautions that this supervisory power was not yet an 'appeal' as we know it today. See *id.* It was, rather, a place to go and complain about the other court, accusing the judges of rendering a false judgment, and challenging the judges to defend their judgment. *Id.* Finally, the king was required to bring justice to his own tenants as a feudal lord who owned more and more land. *Id.*

15. See KEMPIN, *supra* note 6, at 16.

court retaining the judicial functions and the King's Council having jurisdiction over inquiries into governmental matters.¹⁶

Despite this evolutionary growth in the system of courts, the methods of resolving disputes remained primitive, often ending in a physical battle between the litigants.¹⁷ The belief that men were fallible and that true judgment should be trusted only to God led to the reasoning that whoever won the battle must have been intended to prevail.¹⁸ By 1166, King Henry II had established a more humane decision-making forum called the "possessory assizes."¹⁹ Twelve men from the neighborhood were summoned to determine whether a person in possession of land was the true owner.²⁰ If the jury determined that the person in possession of the land

16. JACKSON, *supra* note 11, at 4.

17. HANBURY, *supra* note 9, at 36.

18. *See id.* at 37.

19. KEMPIN, *supra* note 6, at 16. "Assize" means "a sitting." HANBURY, *supra* note 9, at 106.

20. KEMPIN, *supra* note 6, at 16. In early English history, a jury was assembled to be the witnesses in a case; the members of the jury were apt to know the parties and the events. *See* HANBURY, *supra* note 9, at 118; JACKSON, *supra* note 11, at 5. In the 1300s, the civil trial would take place at one of the common law courts at Westminster. JACKSON, *supra* note 11, at 5. Because the jurors were neighbors of the litigants, they had to travel to Westminster along with the parties. *Id.* In 1285, the procedure was changed to allow the commencement of an action in one of the common law courts at Westminster, but with the trial in the county court to reduce the burden of travel. *Id.*

Initially, because it was generally the case that the members of the jury knew the parties and the witnesses, their own biases were material. *See* HANBURY, *supra* note 9, at 118-19. Later, the jury's function became more narrowly construed as finder of fact. *Id.*

From the 1300s to the 1600s, where a jury in a civil case intentionally made a false or corrupt verdict, the Court of Star Chamber had the power to punish the wayward jury. *Id.* at 122. A party aggrieved by the verdict could "sue out" a writ of "attaint" against the jury that had recorded the verdict and the party that had obtained it. *Id.* Another jury of twenty-four was empaneled and if it found that the evidence in the first trial did not support the verdict, not only would the verdict be reversed, but the first jury would be liable for stiff penalties, including "imprisonment, forfeiture of property, and perpetual infamy." *Id.* To alleviate some of the hardship of liability for attaint of the jury, the Statute of Westminster II provided that the jurors would not be compelled to precisely state the verdict; however, if it did, the verdict would be admitted at the jury's own peril. ROSCOE POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 39-40 (1941). Juries then developed the practice of rendering a special verdict in cases in which the real question was one of law. *Id.* at 40. The jury would merely set forth the facts and ask for the advice of the court:

If there be a special verdict, the plaintiff's attorney generally gets it drawn, from the minutes taken at the trial, and settled by his counsel, who signs the draft. It is then delivered over to the opposite attorney, who gets his counsel to peruse and sign it; and when the verdict is thus settled and signed, it is left with the clerk of *nisi prius* in a town cause, or with the associate in the country, who makes copies for each party. The whole proceedings are then entered, docketed, and filed of record; after which a *concilium* is moved for, a rule drawn up thereon with the clerk of the rules, the cause entered with the clerk of the papers, copies of the record made and delivered to the judges, and counsel instructed and heard, in like manner as upon arguing a demurrer.

was not its true owner, he was dispossessed of the land.²¹ The disposed party could then file a writ of right to the king challenging the decision.²²

By 1179, King Henry II had built upon the success of the possessory assizes and established the Grand Assize.²³ The justices of the assizes were itinerant judges who traveled to different areas of the kingdom two or three times a year to preside over civil and criminal jury trials.²⁴ A jury would be empaneled and evidence presented.²⁵ Originally, the judges were to make inquiries in the various counties about matters in which the king might have some interest.²⁶ Later, they were commissioned to hear and determine allegations of serious crime, while lesser offenses were dealt with by the local sheriff.²⁷ Thus, the formal process of appeal began to evolve during this period.²⁸

There was no clear distinction between trial and appeal in many early cases; the king undertook to hear some controversies himself.²⁹ The monk of Peterborough, a historian of the time, reports that Henry II established "a body of five judges, to be a supreme tribunal on all legal questions, with an appeal to [the king] and such members of the Curia Regis as he cared to [consult]."³⁰ The location of the court was fixed and did not follow the king as he progressed around the country.³¹

As barbarism receded and the court system of England developed, there was a "formal record of the trial."³² It consisted of little more than pleadings and other documentary evidence submitted at trial.³³ "Errors not on the record were irrelevant until the Statute of Westminster II in 1285 provided that a party to a civil action might

Id. (quoting 2 TIDD, PRACTICE OF THE COURT OF KING'S BENCH IN PERSONAL ACTIONS 596-97).

21. KEMPIN, *supra* note 6, at 16.

22. *Id.*

23. HANBURY, *supra* note 9, at 38.

24. *Id.* at 106-07; JACKSON, *supra* note 11, at 5.

25. HANBURY, *supra* note 9, at 39.

26. JACKSON, *supra* note 11, at 5.

27. *Id.*

28. *See id.* at 6.

29. HANBURY, *supra* note 9, at 108.

30. *Id.* at 52; *see also* KEMPIN, *supra* note 6, at 16.

31. HANBURY, *supra* note 9, at 52.

32. *See generally* HANBURY, *supra* note 9, at 34-39 (discussing Henry II's contributions to the development of English Common Law); JACKSON, *supra* note 11, at 13 (discussing development of English Common Law).

33. *See* JACKSON, *supra* note 11, at 13. "From the earliest days our superior courts [in England] have had an official 'record', but that contains merely the bare bones of the case and usually reveals little or nothing of the reasoning in the case." *Id.* Especially in cases of equity and admiralty, the evidence was reduced to writing before the hearing, and review of the case upon the written proof was "practicable and was no doubt an important check upon tribunals of first instance." Jerome N. Frank, Fact-Finding IX-3 (1946-47) (quoting POUND, *supra* note 20, at 5-6, 28) (unpublished class materials, Yale Law School) (available at University of Chicago Law Library).

... [file] a Bill of Exceptions" to raise errors not shown in the record.³⁴ The judge sealed the alleged error, and it became part of the record.³⁵ The record was assembled by the clerk of the assizes and his assistants; the clerk was charged with preparing and keeping all the clerical and administrative records.³⁶

The clerks were often young attorneys.³⁷ There was some concern early on that the clerk should be an employee of the judge so that the record would be official; otherwise, the clerk might be subject to outside influences and the record might easily be tainted.³⁸ As the system developed, the clerk was occasionally appointed as a deputy judge if illness or emergency prevented the judge from riding the circuit.³⁹ By a statute passed in 1541, the clerk was prohibited from acting as a barrister before the court for which he was the clerk.⁴⁰

By the mid-1600s, the clerk of assize was a full-time administrative official responsible for coordinating a staff of associate clerks.⁴¹ Instruction manuals for assize clerks were published describing the operating procedures for the office, thus illustrating the formality that had developed over time.⁴² The clerk was responsible for the opening of the assizes, the preparation and entry of items onto the record and the drafting of documents, though he assigned much of the work to associate clerks.⁴³

In 1872, Thomas Powell reported that the English practice was for the attorneys to copy and enter the trial proceedings onto a parchment roll.⁴⁴ The judge, or a proper officer of the court, would then sign the judgment on the roll.⁴⁵ The roll would be filed away in the court archives.⁴⁶ It was said that "a roll is not a record till it is put in the bundle."⁴⁷ Every paper filed, or made use of as part of the case, including affidavits, became part of the record.⁴⁸

34. HANBURY, *supra* note 9, 103-04.

35. *Id.* at 104.

36. J.S. COCKBURN, A HISTORY OF ENGLISH ASSIZES, 1558-1714, 70 (1972).

37. *See id.* at 71.

38. *See id.* at 70-71.

39. *Id.* at 71, 77.

40. *Id.* at 71.

41. COCKBURN, *supra* note 36, at 79.

42. *Id.*

43. *Id.* at 79-80. The clerk of arraigns, who worked on the criminal side of the court, had the duties of collecting fees, keeping the Crown records, reading the commissions at the opening of assizes, making up records during the term, and keeping entries of the final verdicts and other records. *Id.* at 83.

44. THOMAS W. POWELL, THE LAW OF APPELLATE PROCEEDINGS, IN RELATION TO REVIEW, ERROR, APPEAL, AND OTHER RELIEFS UPON FINAL JUDGMENTS 66 (1872).

45. *Id.*

46. *Id.*

47. *Id.* (quoting 6 Com. Dig. 172, Record A.; Fort. 355; 1 Stark Ev. 245).

48. *Id.*

B. Colonial America

English legal science crossed the Atlantic Ocean as the American colonies formed in the seventeenth century.⁴⁹ During the formative years of the American colonies, there was no common system of organizing courts.⁵⁰ “Some colonies were royal, others were proprietary, and others were modeled after the joint stock trading companies.”⁵¹ People of similar beliefs came together, as did groups of the criminal element sent to the new world to “rid England of their presence.”⁵² Some colonies continued to appeal to the king and his council in England from judgments of the highest court in the colony; others reproduced that ancient English model by giving that function to the colonial governor and his council.⁵³ All of the colonies except Maryland set about the task of codifying the essential elements of law.⁵⁴ Maryland was unique among the colonies as the first proprietary colony, and the proprietor, not unexpectedly, balked at having to share power.⁵⁵ While some of the colonies were attempting to extricate themselves from the rule of England, they nonetheless adopted the procedures of the English common law.⁵⁶

1. Massachusetts

The New England colonies always resisted the right of appeal to England because “that would render government and authority in the colony ineffectual and bring the court into contempt with all sorts of people.”⁵⁷ The Massachusetts colony had inferior county courts consisting of five judges, having jurisdiction in lesser civil and criminal cases.⁵⁸ The colony established a system of appeals, from the town court to the inferior court, and then to the general court.⁵⁹ No appeal to England was allowed.⁶⁰

49. Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale To Blackstone*, 45 EMORY L.J. 437, 509-10 (1996).

50. KEMPIN, *supra* note 6, at 22.

51. *Id.*

52. *Id.*

53. *Id.*

54. PAUL SAMUEL REINSCH, *ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES* 53 (Gordon Press 1977) (1899).

55. *Id.* at 40-41, 53; *see also* HENRY WILLIAM ELSON, *HISTORY OF THE UNITED STATES OF AMERICA* (1904), <http://www.usahistory.info> (last visited Sept. 15, 2004).

56. KEMPIN, *supra* note 6, at 22.

57. REINSCH, *supra* note 54, at 22.

58. *Id.* at 17.

59. *Id.*

60. *Id.*

The pleadings of the Massachusetts courts were oral until 1647 at which time they were required by law to be in writing and filed with the clerk of the court.⁶¹ "Contrary to the English custom, a record of evidence given in the courts seems to have been kept from the earliest times."⁶² However, because the clerk was not able to make a perfect record free of mistakes, and because it was inconvenient to take oral testimony in court, a law was passed in 1650 that the evidence should be presented in writing to the court, either attested before a magistrate or in a court upon oath.⁶³ Lawyers objected strenuously.⁶⁴ One Massachusetts lawyer reported that the records of the courts were not kept in good form, and in most cases, the verdict was the only thing entered on the record.⁶⁵ There was an absence of trained lawyers, as well as disdain for the lawyer class.⁶⁶ Litigants were encouraged to make their pleadings clear and concise and men were expected to plead their own cases in court.⁶⁷

2. New York

In New York, even before courts were created, the governor decided controversies and gave a judgment after a summary hearing.⁶⁸ Governor Nichols, being opposed to the idea of democracy, wanted to adhere to the English system and was dismayed that other colonies were trying to depart from it.⁶⁹ In the 1660s, laws

61. *Id.*

62. REINSCH, *supra* note 54, at 17. "Evidence was in many colonies given in writing, or at least taken down by the clerk and made a part of the record in the action; a practice utterly abhorrent to common law ideas, not so to the popular mind to whom the evidence is the most important part of the case." *Id.* at 55.

63. *Id.* at 17.

64. *Id.*

65. *Id.* at 21-22.

66. *See id.* at 21.

67. *See* REINSCH, *supra* note 54, at 55.

The technical knowledge of the lawyer was not demanded, and . . . the lawyers had to turn their hands to semi-professional or non-professional work, the courts of the colonies at that date having no need of the aid of a trained profession to discover what was the law, as by the custom of the time the law was in so many cases determined by the discretion of the court. It seems just to conclude that in most cases the administration of law was carried on not according to the technical rules of a developed system of jurisprudence but by a popular tribunal according to the general popular sense of right.

Id. at 54-55.

68. *Id.* at 31. Governor Nichols wrote to Clarendon that: "The very name of the Duke's power has drawn well-affected men hither from other colonies, hearing that the new laws are not contrived so democratically as the rest." *Id.* (quoting NEW YORK HISTORICAL SOCIETY COLLECTIONS 75 (1869)).

69. *Id.*

in New York were “confirmed, reviewed, and amended by the general assizes composed of the governor, the general council and the judges upon the bench.”⁷⁰

From the 1660s into the early 1700s, the concept of a “court” was not well-defined, though there were various courts in New York.⁷¹ In 1687, Governor Dongan provided a list of the courts of justice:

(1) a court of chancery composed of the governor and council, which is the supreme court of appeals; (2) the courts of oyer and terminer held yearly in each county; (3) the court of the mayor and alderman in New York; (4) the courts of session (justices of the peace); (5) court commissioners for petty cases; [and] (6) a court of adjudicature, a special court established to hear land cases.⁷²

Early jury trials in the New York colony were “very informal, more after the manner of a simple arbitration.”⁷³ In those days, the court functioned not only as the judicial arm of government, but as the administrative arm as well, like the itinerant judges of England.⁷⁴

3. New Jersey and Pennsylvania

In the East and West Jersey colonies, a similar system of simplistic adjudication developed.⁷⁵ A court of appeals was not instituted in West Jersey until 1693, and a final appeal from the supreme court of appeals to the general assembly was not authorized until 1699.⁷⁶ Apparently, there was no extensive “record” for the court to review.⁷⁷

A tension between breaking from the law of England and retaining it motivated the colonies to focus on articulating what was the “law,” to codify it, and to define what was and what was not of England.⁷⁸ The colony of Pennsylvania took care to produce as complete a codification as possible so that it did not have to rely on an “informal transfer” of the common law of England.⁷⁹ In this Pennsylvania “code” were the rules for proceeding through a trial.⁸⁰ It provided that “all pleadings and processes and reports in court shall be short and in English and in ordinary and plain

70. *Id.*

71. *See id.* at 30-35.

72. REINSCH, *supra* note 54, at 31-32 (citing DOCUMENTARY HISTORY OF NEW YORK I, 147).

73. *Id.* at 33.

74. *Id.*

75. *Id.* at 35.

76. *Id.*

77. *See* REINSCH, *supra* note 54, at 35.

78. *See, e.g., id.* at 36-37.

79. *Id.* at 37.

80. *Id.*

character, that they may be understood and justice speedily administered.”⁸¹ Thus, there was some written record, at least as to the pleadings, that could be presented on appeal, and the writing was intended to be short and to the point.

4. The Southern Colonies

During the colonial period, the southern colonies did not think well of lawyers.⁸² In fact, “[i]n 1645 an act was passed [in Virginia] expelling the mercenary attorneys.”⁸³ The act was not repealed until nine years later, but another act was passed prohibiting any person from giving advice in a case for which he expected a reward.⁸⁴ Hence, not many judges were lawyers.⁸⁵ In the county courts of Virginia, during the early to mid-1600s, the governor appointed gentlemen to preside over the courts.⁸⁶ These gentlemen did not have training in law.⁸⁷ The appellate court in Virginia consisted of the governor and his council.⁸⁸

There was no system of circuit courts in the southern colonies in the seventeenth century, and therefore no unified system of judicial appeal.⁸⁹ Thus, appealing to a central court would have been difficult. The law was generally pronounced by the local magistrates who had no training in law.⁹⁰

In sum, even in colonies that attempted to maintain a record, it was difficult to rely on the clerks and registers to keep the record error-free.⁹¹ Because the clerks were not learned, they made numerous mistakes.⁹² In 1763, Massachusetts addressed the problem by enacting a law that required the judges to inspect the clerks’ conduct, to make sure that the records were in order, and that penalties were enforced.⁹³ If a

81. *Id.* The courts were inventing themselves. *See id.* at 36-37. Jurisdiction of the Pennsylvania courts was established by the laws of 1683, giving jurisdiction in equity as well as judgments of law, but the lines were not clearly drawn. *Id.* at 38. It was reported that one court had reversed in equity its own judgment in law. *Id.* (citing *Hastings v. Yarrall*, Records Chester County Court (1686)). The appellate jurisdiction was also confused in that there was an appellate court, but the council also had appellate jurisdiction, including the authority to punish wrongdoing on the part of the powerful officials of the time. *Id.* at 39.

82. REINSCH, *supra* note 54, at 48.

83. *Id.*

84. *Id.*

85. *See id.* at 48-49.

86. *Id.* at 46.

87. REINSCH, *supra* note 54, at 46.

88. *Id.*

89. *Id.* at 51.

90. *See id.*

91. *See, e.g.,* POUND, *supra* note 20, at 99-100.

92. *See, e.g., id.* at 100.

93. *Id.* at 99. “As the practice in the courts more and more settled along English lines, the carelessness or ignorance of clerks and magistrates began to make trouble for courts and lawyers and

clerk was fined, any money recovered was applied to correct the deficient record under the direction of the court that found the deficiency.⁹⁴ “In Virginia, the clerks had a careless habit of making no distinction between a nonsuit, which left a plaintiff free to sue again, and a verdict and judgment for defendant which would be a bar to another action.”⁹⁵ There were several statutes in the colonies to prevent reversal of judgments based on slovenly records.⁹⁶ Despite the specific attempts by some colonies to enhance the reliability of the record, the system of appeal remained haphazard.

C. Modern Times

The record has evolved into a written product, but the most useful tool for the appellate court might be a discussion with the trial judge who heard and saw the evidence below, but to whom the upper court is not permitted to go for information.⁹⁷ Historically, in the English courts, the practice was different.⁹⁸ The trial judge would preside over a trial and then sit as one of the judges reviewing a point of law in the case.⁹⁹ At one time in this country, the trial judge might be “present at the hearing thereof to give the reasons of the judgment.”¹⁰⁰ Moreover, “a Supreme Court Justice

parties. In 1639, Massachusetts enacted that every judgment with all the evidence should be recorded in a book “to be kept to posterity.” *Id.* (quoting CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 43). “The foreman of every jury at the time of rendering the verdict was to give up to the clerk all testimonies and writings and they were to be filed and kept.” *Id.* “The clerks had to give bonds for faithful performance of their offices and the statutes imposed penalties for not keeping proper records.” *Id.*

94. *Id.* at 99-100.

95. *Id.* at 100.

96. POUND, *supra* note 20, at 100.

97. See, e.g. ALA. CODE § 12-1-13 (1995) (“No justice of the Supreme Court or judge of a Court of Appeals of Alabama shall participate in the decision of any case in the Supreme Court or a court of appeals appealed to said court from any lower court of the State of Alabama, of which lower court said justice was judge at the time said case was decided and who presided at the trial of said case in said lower court.”); CAL. CIV. PROC. CODE § 170.1(b) (West Supp. 2004) (“A judge before whom a proceeding was tried or heard shall be disqualified from participating in any appellate review of that proceeding.”); N.H. REV. STAT. ANN. § 492:1 (1997) (“A justice shall not sit in any case in which he has been concerned as party or attorney or in any appeal in which he has acted as judge in the court below.”); OKLA. STAT. tit. 20, § 1402 (2002) (“No justice of the Supreme Court of this state or Judge of the Criminal Court of Appeals shall participate in the decision of any cause in such Court appealed thereto from a lower court of said state, in which court such Justice or Judge was judge presiding at the trial of such cause.”).

98. Frank, *supra* note 33, at XVI-37 (citing POUND, *supra* note 20, at 39, 116, 266).

99. *Id.* (citing POUND, *supra* note 20, at 39, 116, 266).

100. *Id.* (quoting 9 New York State Constitutional Convention Committee 350-53 (1938)).

who had presided at a trial on circuit” would again sit when the case reached the highest court.¹⁰¹

In modern America, every state jurisdiction, as well as the federal court, has adopted appellate rules that govern the contents of the record.¹⁰² Historically, in federal courts, the clerk of the district court made and sent a certified copy of the record on file to the appellate court, while retaining the original.¹⁰³ In 1948, the Federal Rules of Civil Procedure allowed the courts of appeals to permit the original record to be sent as the record on appeal, and by 1962, every circuit was using that option.¹⁰⁴ In 1960, Chief Justice Earl Warren appointed a committee to study and draft federal rules of appellate procedure.¹⁰⁵ The draft became effective in 1968.¹⁰⁶ The latest revision of the Federal Rules of Appellate Procedure became effective in 1998.¹⁰⁷

II. THE FINITE RECORD—THE APPELLATE RULES

The basic purpose of appeal is for the appellate court to review and correct errors in the proceedings below.¹⁰⁸ A reviewing court cannot correct error if the basis for the appellant’s assertion of error is not before the court.¹⁰⁹ Therefore, a complete and

101. *Id.* Dean Leon Green wrote:

Instead of a more or less preliminary trial and a serious appeal, there should probably be a more serious trial and an informal checking up of the trial court’s work, something as is done in England to-day, or as was done both in England and in this country at one time on the hearing of the motion for a new trial before the court in banc. Instead of seeking to point out errors through the cumbersome process of appellate procedure and eradicate them through new trials or doctrinal subterfuges, they should be prevented . . . on the trial of cases in the first instance. In short, by the organization of a single court including all judges under flexible, administrative supervision, in which would be vested the complete judicial power as now found in our appellate courts, the business of handling litigation might be left to the court, primarily upon the trial in the first instance, with such quick and mobile superintendence by way of review as good business of any sort demands.

LEON GREEN, JUDGE AND JURY 393-94 (1930).

102. See, e.g., FED. R. APP. P. 10-11; COLO. APP. R. 10(a)(1); FLA. R. APP. P. 9.200(a)(1); KAN. SUP. CT. R. 3.01.

103. 20 CHARLES ALAN WRIGHT & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE, FEDERAL PRACTICE DESKBOOK § 111, at 1035 (2002).

104. *Id.*

105. 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3946, at 12 (1999).

106. *Id.* § 3946, at 13.

107. *Id.* § 3946.1, at 14.

108. *State ex rel. McGraw v. Telecheck Serv., Inc.*, 582 S.E.2d 885, 891-92 (W. Va. 2003); *Harris Trust & Sav. Bank v. Vill. of Barrington Hills*, 549 N.E.2d 578, 582 (Ill. 1989).

109. See, e.g., *Crowder v. Zoning Bd. of Adjustment*, 406 So. 2d 917, 918-19 (Ala. Civ. App. 1981) (stating that the general rule has been that an appellate court must look only to the record for

correct record of the proceedings below is essential. Moreover, a Florida trial court has expressed a common sentiment: "That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court."¹¹⁰

Karl Llewellyn referred to the appellate record as the "Frozen Record from Below,"¹¹¹ the factual material that the appellate court "has official liberty to consider."¹¹² As Llewellyn posits, "What is clear is that if counsel's business has been properly done,"¹¹³ the pleadings and the proof material will make "the stones speak and the reason sing."¹¹⁴ The whole must make sense, "obvious sense, inescapable sense, sense in simple terms of life and justice."¹¹⁵

The record under the Federal Rules of Appellate Procedure consists of "the original papers and exhibits filed in the district court, . . . the transcript of proceedings, if any, and . . . a certified copy of the docket entries prepared by the district clerk."¹¹⁶ Generally, only matters that have in fact been *presented to* and *filed in* the lower court "are considered as a part of the record on appeal."¹¹⁷ This finite aspect of the record gives litigants a set mechanism to use in preparing cases and guides the court in its deliberations.¹¹⁸

A. *The Record Proper*

Many states have adopted the federal rule verbatim or with slight variations.¹¹⁹

evidence and cannot look outside the record).

110. *Altchiler v. State Dept. of Prof'l Regulation*, 442 So. 2d 349, 350 (Fla. Dist. Ct. App. 1983).

111. *See* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 28 (1960).

112. *Id.*

113. *Id.* at 232.

114. *Id.*

115. *Id.* at 238.

116. FED. R. APP. P. 10(a). "Exhibits that cannot be copied may be sent to the appellate court in a separate container . . ." Deborah Alley Smith and Rhonda Pitts Chambers, *The Nuts and Bolts of Civil Appeals*, 56 ALA. LAW. 304, 307 (1995). If an exhibit is too large to be transmitted, the attorney should seek permission to substitute a regular sized copy of the exhibit. *Id.*

117. *WRIGHT ET AL.*, *supra* note 105, § 3956.1, at 322. *See* PA. R. APP. P. 1925(b) which makes a strong distinction between filing with the clerk and submitting to the court and requires both.

118. *See* LLEWELLYN, *supra* note 111, at 28. Indeed, the very intent of the rule requiring the preparation of a record on appeal "is to ensure that the appellate court will be given sufficient information to arrive at a just and reasoned decision." *People ex rel. J.L.P.*, 870 P.2d 1252, 1260 (Colo. Ct. App. 1994). Oddly, if the trial court has resolved a matter with conflicting evidence, the appellate court "is supposed to abdicate its own judgment on the matter if any man could in reason reach the result the trial tribunal did reach." LLEWELLYN, *supra* note 111, at 28.

119. *Compare* FED. R. APP. P. 10(a) ("The following items constitute the record on appeal: (1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk.") *with* ARIZ. R. CIV. APP. P.

Thus, the typical record on appeal consists of two parts: (1) the record proper¹²⁰ and (2) a reporter's transcript, narrative, or agreed statement.¹²¹

The record includes the original papers filed with the court; for example, the Colorado Appellate Rules identify more specifically than most what papers shall compose the record on appeal:

the final pleadings which frame the issues in the trial court; the findings of fact, conclusions of law and judgment; the judgment entered upon any jury verdict, the jury verdict, and answers by the jury to any special interrogatories, motions for new trial and other post-trial motions, if any, and the trial court's ruling; together with any other documents which by designation of either party or by stipulation are directed to be included . . .¹²²

11(a)(1); FLA. R. APP. P. 9.200(a)(1); HAW. R. APP. P. 10(a) (includes "written jury instructions given, or requested and refused or modified over objection"); ILL. SUP. CT. R. 321 (record shall consist of judgment appealed from notice of appeal, and entire original common law record); IOWA CT. R. 6.10(1); KAN. SUP. CT. R. 3.01(a); ME. R. APP. P. 5(a); MD. R. P. 7-109(a); MASS. R. APP. P. 8(a) (also must include the report of the trial judge to the appellate division); MICH. CT. R. 7.210(A)(1), (3) ("original papers" or a "certified copy" as well as "[t]he substance or transcript of excluded evidence offered at a trial and the proceedings at the trial in relation to it"); MINN. R. CIV. APP. P. 110.01; MONT. R. APP. P. 9(a); NEV. R. APP. P. 10(a); N.H. SUP. CT. R. 13(1); N.J. R. APP. PRAC. 2:5-4(a); N.D. R. APP. P. 10(a); OH. R. APP. P. 9(A); PA. R. APP. P. 1921; R.I. SUP. CT. R. Art. I, 10(a); S.C. APP. CT. R. 209(b); S.D. CODIFIED LAWS § 15-26A-47 (Michie 2002) (include original pleadings); UTAH R. APP. P. 11(a) (also the index prepared by the clerk of the trial court); W. VA. R. APP. P. 10(a). The Colorado Appellate Rules specify that "[t]he *original* papers in all instances," not copies, shall be the ones transmitted to the appellate court. COLO. APP. R. 10(a)(1) (emphasis added).

120. See, e.g., ARIZ. R. CIV. APP. P. 11(a)(1); FLA. R. APP. P. 9.200(a)(1); HAW. R. APP. P. 10(a) (includes "written jury instructions given, or requested and refused or modified over objection"); ILL. SUP. CT. R. 321 (record shall consist of judgment appealed from notice of appeal, and entire original common law record); IOWA CT. R. 6.10(1); KAN. SUP. CT. R. 3.01(a); ME. R. APP. P. 5(a); MD. R. P. 7-109(a); MASS. R. APP. P. 8(a) (also must include the report of the trial judge to the appellate division); MICH. CT. R. 7.210(A)(1), (3) ("original papers" or a "certified copy" as well as "[t]he substance or transcript of excluded evidence offered at a trial and the proceedings at the trial in relation to it"); MINN. R. CIV. APP. P. 110.01; MONT. R. APP. P. 9(a); NEV. R. APP. P. 10(a); N.H. SUP. CT. R. 13(1); N.J. R. APP. PRAC. 2:5-4(a); N.D. R. APP. P. 10(a); OH. R. APP. P. 9(A); PA. R. APP. P. 1921; R.I. SUP. CT. R. art. I, 10(a); S.C. APP. CT. R. 209(b); S.D. CODIFIED LAWS § 15-26A-47 (Michie 2002) (include original pleadings); UTAH R. APP. P. 11(a) (also the index prepared by the clerk of the trial court); W. VA. R. APP. P. 10(a). The Colorado Appellate Rules specify that "[t]he *original* papers in all instances," not copies, shall be the ones transmitted to the appellate court. COLO. APP. R. 10 (emphasis added).

121. See, e.g., ALA. R. APP. P. 10(b); ARIZ. R. APP. CIV. P. 11(a)(1); IOWA CT. R. 6.10(1); KAN. SUP. CT. 3.01(a); ME. R. APP. P. 5(a); MD. R. P. 7-109(a); MASS. R. APP. P. 8(a); MICH. CT. R. 7.210(A)(1); MONT. R. APP. P. 9(a); N.H. SUP. CT. R. 13(1); N.J. R. APP. PRAC. 2:5-4(a); N.D. R. APP. P., Rule 10(a); OH. R. APP. P. 9(A); PA. R. APP. P. 1921; S.C. APP. CT. R. 209; S.D. CODIFIED LAWS § 15-26A-47 (Michie 2002); UTAH R. APP. P. 11(a); VA. SUP. CT. R. 5:10(a); W. VA. R. APP. P. 10(a).

122. COLO. APP. R. 10(a)(1).

In fact, in Colorado, failure to include the lower court's judgment as part of the record on appeal will warrant an order of dismissal.¹²³ The Florida rules exclude "summonses, praecipes, subpoenas, returns, notices of hearing or of taking deposition, depositions, other discovery, and physical evidence."¹²⁴ The Alabama rules provide that subpoenas or summonses for witnesses, motions and orders of continuance, and any "pretrial discovery material that is not made a part of the trial court's proceedings" may be omitted from the record unless some particular question is raised with respect to those items.¹²⁵

Usually, the appellant will be required to file with the clerk of the trial court and serve on the appellee a written designation of the portions of the clerk's record that should be included in or excluded from the record on appeal.¹²⁶ "If the appeal is from a summary judgment, the appellant must designate any depositions which are to be included in the record. If less than all of the record is designated, the appellant also must serve a statement of the issues he intends to present on appeal."¹²⁷

B. Reporter's Transcript or Agreed Statement or Narrative

In addition to the record proper is the transcript of the trial or hearing, if one is available.¹²⁸ Even where the transcript is available, however, the parties may choose to create their own agreed statement of the proceedings instead of incurring the costs of having the entire proceeding transcribed.¹²⁹ In those instances when a transcript is not available, several states' rules allow the parties to develop their own narrative of the proceedings, or to stipulate to what the proceedings were below.¹³⁰

123. See *Horlbeck v. Walther*, 279 P.2d 434, 434 (Colo. 1955).

124. FLA. R. APP. P. 9.200(a)(1).

125. ALA. R. APP. P. 10(a). Other omissions are allowed in criminal proceedings. *Id.* at 10(c).

126. See, e.g., ALA. R. APP. P. 10(b)(1); ALASKA R. APP. P. 210(b)(1)(A) ("[a]ppellant shall file and serve on the other parties to the appeal a designation of the parts of the electronic record which appellant intends to transcribe."); ARIZ. R. CIV. APP. P. 11(b)(2) ("[A]ppellant shall . . . file a description of the parts of the transcript which he intends to include in the record. . ."); CAL. R. CT. 4(a)(1); FLA. R. APP. P. 9.200(a)(3); IOWA CT. R. 6.10(2)(a) ("appellant shall . . . serve it on all parties to the appeal and on the reporter from whom the transcript was ordered, and file it with the clerks of both the district and the supreme court."); MASS. R. APP. P. 8(b)(1); MICH. CT. R. 7.210(F); MINN. R. CIV. APP. P. 110.02(1)(a), (2)(a); MONT. R. APP. P. 9(b); MO. SUP. CT. R. 81.12(d); N.J. R. APP. PRAC. 2:5-4(b); N.C. R. APP. P. art. II, (a)(1); OH. R. APP. P. 9(B); UTAH R. APP. P. 11(e)(3).

127. Smith, *supra* note 116, at 306.

128. See, e.g., ALASKA R. APP. P. 211.

129. See, e.g., *id.*

130. See, e.g., ARIZ. R. CIV. APP. P. 11(c), (d); COLO. APP. R. 10(c), (d); FLA. R. APP. P. 9.200(a)(4); HAW. R. APP. P., 10 (c), (d); ME. R. APP. P. 5(d), (f); MASS. R. APP. P. 8(c), (d).

1. Transcript

If a court reporter's transcript is available, the appellant will order from the reporter those parts of the transcript necessary to the issue on appeal, especially where the issue concerns a "finding or conclusion [that] is unsupported by the evidence or is contrary to the evidence."¹³¹ The appellee likewise may designate portions of the transcript in addition to those already designated by the appellant.¹³²

Arizona rules not only specify what is a part of the transcript, but also state what is *not* a part of the transcript unless specifically designated to be included: "testimony of jurors touching on their qualifications, . . . matters preceding the impaneling of a jury, or the opening statements or arguments of counsel to the jury, . . . [and] any matter not essential to the decision of the questions presented by the appeal."¹³³

2. Agreed Statement

Even if a court reporter's transcript is available, the parties may instead stipulate to an agreed statement which recapitulates the evidence essential to a decision on the issue before the court.¹³⁴ If the parties choose this option, they submit the statement to the lower court for approval or correction.¹³⁵ The agreed statement, with whatever modifications or corrections the lower court makes, is then transmitted to the appellate court.¹³⁶

131. ARIZ. R. CIV. APP. P. 11(b)(1); *see also* ALA. R. APP. P. 10 (b)(2); FLA. R. APP. P. 9.200(b)(1); HAW. R. APP. P. 10 (b)(1)(A)(3) ("If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion."); IOWA CT. R. 6.10(2)(a), (c); ME. R. APP. P. 5(b)(2)(A) ("If the appellant intends to urge on appeal that a finding . . . is unsupported by the evidence [.] . . . the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion."); MASS. R. APP. P. 8 (b)(1); N.C. R. APP. art. II, 7(a)(1); OH. R. APP. P. 9 (B); UTAH R. APP. P. 11(e)(1), (2); VT. R. APP. P. 10 (b)(1), (2).

132. ALA. R. APP. P. 10(b)(2); ARIZ. R. CIV. APP. P. 11(b)(2); CAL. R. CT. 4(a)(2); COLO. APP. R. 10(b); FLA. R. APP. P. 9.200(b)(1); HAW. R. APP. P. 10(b)(4); ILL. SUP. CT. R. 323(a); IOWA CT. R. 6.10(2)(d); ME. R. APP. P. 5(b)(2)(A); MASS. R. APP. P. 8(b) (1); MINN. R. CIV. APP. P. 110.02(1)(c); MO. SUP. CT. R. 81.12(c); MONT. R. APP. P. 9(b); N.C. R. APP. P. art. II, 7(a)(1); OH. R. APP. P. 9(B); UTAH R. APP. P. 11(e)(3); VT. R. APP. P. 9(C); W. VA. R. APP. P. 8(a)(2).

133. ARIZ. R. CIV. APP. P. 11(b)(5), (6).

134. ALA. R. APP. P. 10(e); ALASKA R. APP. P. 210(b)(8); ARIZ. R. CIV. APP. P. 11(d); CAL. R. CT. 6(a); COLO. APP. R. 10(d); FLA. R. APP. P. 9.200(a)(4); HAW. R. APP. P. 10(d); ILL. SUP. CT. R. 323(d); KAN. SUP. CT. R. 3.05; ME. R. APP. P. 5(f); MD. R. P. 7-109(b) ("The parties are strongly encouraged to agree to such a statement."); MASS. R. APP. P. 8(d); MICH. CT. R. 7.210 (B)(1)(e); MONT. R. APP. P. 9(e); N. H. SUP. CT. R. 13(6); N.D. R. APP. P. 10(g); OH. R. APP. P. 9(D); OR. REV. STAT. § 19.380 (2001); PA. R. APP. P. 1924; R. I. SUP. CT. R. art. I, 10(d); S.D. CODIFIED LAWS § 15-26A-55 (Michie 2002); UTAH R. APP. P. 11(f); VT. R. APP. P. 10(d).

135. *See, e.g.*, VT. R. APP. P. 10(e).

136. ARIZ. R. CIV. APP. P. 11(d); *see also* ALA. R. APP. P. 10(e); ALASKA R. APP. P. 210(b)(8);

3. Narrative Statement

If no transcript is available, the appellant may prepare a narrative statement of the evidence derived by “the best available means,” including the attorney’s recollection.¹³⁷ That statement is then subject to the appellee’s objections or proposed amendments, as well as the lower court’s approval before its transmittal to the appellate court.¹³⁸ Of course, the party that wishes to appeal where there is no transcript below is at the mercy of the trial court and the opposing party. “It is unlikely that either the opposing party or the trial court will approve a statement of the evidence that does not support the judgment entered. Thus, it always is advisable to see that a court reporter is present to record the proceedings.”¹³⁹

The Florida rules require that the statement should include a complete summary of the testimony of witnesses given in sufficient detail to determine whether the trial court’s findings and conclusion were supported.¹⁴⁰ In *Clayton v. Clayton*, the parties filed conflicting statements of the evidence.¹⁴¹ The trial court could not recall the evidence and therefore could not reconstruct or approve of the statements or reconcile them.¹⁴² A Florida Court of Appeals held that the record was therefore insufficient for review and affirmed the trial court’s decision.¹⁴³

When there is no transcript presented for its review, an appellate court must presume that the findings below are supported by evidence presented to and considered by the court.¹⁴⁴ Likewise, where the record does not contain any of the

COLO. APP. R. 10(d); HAW. R. APP. P. 10(d); KAN. SUP. CT. R. 3.05; ME. R. APP. P. 5(f); MASS. R. APP. P. 8(d); MONT. R. APP. P. 9(e); N.D. R. APP. P. 10(g); OH. R. APP. P. 9(D); PA. R. APP. P. 1924; R.I. SUP. CT. R. art. I, 10(d); S.D. CODIFIED LAWS. § 15-26A-55 (Michie 2002); UTAH R. APP. P. 11(f); VT. R. APP. P. 10(d). Allowing the parties to draft their own statements of the evidence reduces the cost of appellate review to the litigants and conserves review time by the court. *Alvarez v. Carpenter*, 477 P.2d 792, 796 (Colo. 1970).

137. ALA. R. APP. P. 10(d); ARIZ. R. CIV. APP. P. 11(c); COLO. APP. R. 10(c); FLA. R. APP. P. 9.200(b)(4); GA. CODE ANN. § 5-6-41(i) (1995); HAW. R. APP. P. 10(c) (“[b]est available means, including the party’s recollection or uncertified transcripts or reporter’s notes.”); ILL. SUP. CT. R. 323 (c); IOWA CT. R. 6.10(3); KAN. SUP. CT. R. 3.04; ME. R. APP. P. 5(d); MASS. R. APP. P. 8(c); MICH. CT. R. 7.210(B)(2); MINN. R. CIV. APP. P. 110.03; MONT. R. APP. P. R. 9(d); N.D. R. APP. P. 10 (f); OH. R. APP. P. 9(C); PA. R. APP. P. 1923; R.I. SUP. CT. R. art. I, 10(d); UTAH R. APP. P. 11(g); VT. R. APP. P. 10(c); WY. R. APP. P. 3.03.

138. See, e.g., ARIZ. R. APP. P. 11(c).

139. *Smith*, *supra* note 116, at 306; see also *King v. Garrett*, 613 So. 2d 1283, 1283-84 (Ala. 1993) (“This Court is limited to a review of the record alone. If the record does not contain the matter or materials considered by the trial court, then this Court has no basis upon which to review the trial court’s judgment.” (citations omitted)).

140. *Lee v. Lee*, 544 So. 2d 1083, 1088 (Fla. Dist. Ct. App. 1989).

141. 442 So. 2d 310, 311 (Fla. Dist. Ct. App. 1983).

142. *Id.*

143. See *id.*

144. *People v. Gallegos*, 499 P.2d 315, 316 (Colo. 1972); *White v. Unemployment Appeals*

trial court's jury instructions, a reviewing court will presume that an instruction given by the trial court correctly and clearly stated the law.¹⁴⁵

C. Appendix

The appendix is an addendum to the briefs for the convenience of the judge.¹⁴⁶ Any party to the appeal "may include copies of any of the papers making up the record on appeal as an appendix [to the brief]."¹⁴⁷ The federal appellate rules contemplate that the parties will file an appendix containing all the portions of the record to which either side wishes to direct the court's attention.¹⁴⁸

D. Supplementing or Correcting the Record

After the clerk compiles the record and makes it available to the parties, it is the responsibility of the parties to determine that the record is complete and correct.¹⁴⁹ The purpose is to make the record conform to the truth of what actually transpired at the trial.¹⁵⁰ If anything pertinent to the proceedings has been omitted, the parties may either stipulate to what should be done to correct or supplement the record; or, if the parties cannot agree, the appellant may file a motion with the trial court to supplement or correct the record on appeal.¹⁵¹ The appellee may then file such a

Comm'n, 714 So. 2d 667, 667-68 (Fla. Dist. Ct. App. 1998) (no factual record existed to dispute that the decision was presumptively correct). The upper court makes assumptions about the lower court's findings of fact: (1) "that the trial court actually did make the inferences (from the evidence) which justify its findings" and (2) if there is contradictory testimony, "that the trial court did not believe it." Frank, *supra* note 33, at IX-1. Where the lower court has made no findings of fact, the upper court must also assume that the lower court made some undisclosed finding of facts "based upon logical inference from some of the relevant and competent evidence, which inference . . . will justify its decision." *Id.* at IX-2.

145. See *State v. Linden*, 761 P.2d 1386, 1388 (Utah 1988).

146. Wright, *supra* note 103, § 111, at 1035.

147. E.g., ARIZ. R. CIV. APP. P. 11(a)(4); see also CAL. R. CT. 5.1(a)(2); MASS. R. APP. P. 8(d) ("copies of the agreed statement shall be filed as the appendix required by Rule 18"); MONT. R. APP. P. Rule 9(e) ("[c]opies of the agreed statement may be filed as the appendix required by Rule 25"); NEV. R. APP. P. 10(b); N.J. R. APP. PRAC. 2:5-4(a); N.Y. CT. R. § 510.11(d)(1)-(8).

148. FED. R. APP. P. 30(b)(1).

149. See *Am. Nat'l Fire Ins. Co. v. Esquire Labs, Inc.*, 694 P.2d 800, 808 (Ariz. Ct. App. 1984).

150. See ALA. R. APP. P. 10(f). The rule was not, however, designed to provide a procedure for substituting one judgment for another. For example, in *Farmer v. Jackson*, 553 So. 2d 550, 552 (Ala. 1989), a party appealed after the time for appeal had run out. He filed a motion in the trial court to modify or correct the record to change the dates so that his appeal would be timely. *Id.* at 551. The trial court agreed to modify the dates, but the Alabama Supreme Court found the change to be an unacceptable way to get around the deadline and dismissed the appeal. *Id.* at 553.

151. E.g., FLA. R. APP. P. 9.200(f)(2) ("No proceeding shall be determined, because of an

motion when the record comes to him.¹⁵² The Colorado Court of Appeals maintains that where a motion is made to correct a misstatement in the record, even after the appellate court's opinion has been announced, it is reasonable for the trial court to correct the record where it is necessary to do so in order to prevent an injustice that would result if the appeal were decided on the basis of an incorrect record.¹⁵³

Controversies arising as to matters within the record, such as where testimony or other evidence is omitted or misstated may be corrected in two ways; either the lower court may correct the record upon motion of the parties if the error is noted before the record has been transmitted to the appellate court, or the appellate court, upon motion, may direct that the record be corrected.¹⁵⁴ If the trial court denies the motion to supplement, a dissatisfied party may seek relief in the appellate court.¹⁵⁵ Supplementing and perfecting the finite record is critical to the appellate process because a reviewing court may "dismiss a proceeding where the record is confused or incomplete."¹⁵⁶

In *Hinshaw v. Dyer*, more than half of the reporter's transcript of the trial consisted of "hard-to-follow colloquy between the court and counsel."¹⁵⁷ Only one witness testified at the trial, but the transcript of the proceeding was so confused and incomplete, that the court found it "unintelligible."¹⁵⁸ The Colorado Supreme Court, sitting en banc, said,

[B]ecause of the basic unclearness of the record, we are simply unable to come to grips with the issues now sought to be raised by the plaintiff in error. The fact that the reporter's transcript successfully defies comprehension should not be attributed to any one person. Rather it results from the joint effort of all concerned, including the trial court, counsel for the various parties and the court reporter.¹⁵⁹

incomplete record, until an opportunity to supplement the record has been given."). Where the parties have done nothing in that regard, it is not the responsibility of the court to supplement the appellate record in a civil case. *Am. Nat'l Fire Ins. Co.*, 694 P. 2d at 808.

152. See *People v. Wolfe*, 9 P.3d 1137, 1140 (Colo. Ct. App. 1999).

153. *Id.*

154. ALA. R. APP. P. 10(f); ARIZ. R. CIV. APP. P. 11(e); CAL. R. CT. 12(c)(1); COLO. APP. R. 10(e); FLA. R. APP. P. 9.200(f); HAW. R. APP. P. 10(e)(1); ILL. SUP. CT. R. 329; IOWA CT. R. 6.10(4); KY. R. CIV. P. 75.08; ME. R. APP. P. 5(e); MD. R. P. 7-109(d); MASS. R. APP. P. 8(e); MINN. R. CIV. APP. P. 110.05; MONT. R. APP. P., Ch. 21, R. 9(f); NEV. R. APP. P. 10(c); N.J. R. APP. PRAC. 2:5-5(a); N.M. R. APP. 12-209(c); N.D. R. APP. P. 10(h); OHIO R. APP. P. 9(E); PA. R. APP. P. 1926; R.I. SUP. CT. R. art. I, 10(f); TENN. R. APP. P. 24(e); UTAH R. APP. P. II(h); VT. R. APP. P. 10(e); W. VA. R. APP. P. 8(3)(f); WYO. R. APP. P. 3.04.

155. See, e.g., ALA. R. APP. P. 10(f).

156. *Hinshaw v. Dyer*, 443 P.2d 992, 993 (Colo. 1968).

157. *Id.*

158. *Id.*

159. *Id.*

The court refused to remand the case for a new trial, since the appellant was as much to blame for the botched record as anyone else.¹⁶⁰

Supplementation of the record is not intended to cure inadequacies in the record that result from failure to make a proper record at trial.¹⁶¹ Nor does the rule impose on the lower court a duty to review the adequacy of the prepared record.¹⁶² Imperfection in the "transcript cannot be cured by guesswork or by indulging in inferences or presumptions."¹⁶³

Rules of appellate procedure carefully specify what should be included in and excluded from the record before the appellate court, so that the appellate court may be provided with the means to verify whether the trial was correctly conducted.¹⁶⁴ Where the record does not accurately reflect what happened below, the record may be corrected; however, the record may not be changed to cure inadequacies in the case below.¹⁶⁵

III. ATTEMPTS TO EXPAND THE RECORD

Notwithstanding the admonition that "there is no excuse for any attorney to attempt to bring such matters [outside the 'frozen' record] before the court,"¹⁶⁶ attorneys do attempt to get information before the court even when that information is submitted improperly or untimely to the trial court.¹⁶⁷ These attempts generally fail.¹⁶⁸ On its own initiative, however, the court may recognize a duty as a precedent-setting institution to look at information beyond the record that it considers important to the performance of the court's "legislative function."¹⁶⁹

The principal reasons that information that is not a part of the record may not be submitted on appeal to the reviewing court is that the newly-submitted evidence was not before the trial court, could not have been considered by the trial court, and,

160. *Id.*

161. FLA. R. APP. P. 9.200(f) committee notes.

162. *Id.*

163. *Hinshaw*, 443 P.2d at 993.

164. *See, e.g., id.*

165. FLA. R. APP. P. 9.200(f) committee note.

166. *Althiler v. State Dep't of Prof'l Regulation*, 442 So. 2d at 349, 350 (Fla. Dist. Ct. App. 1983).

167. *Id.*; *see also In re Estate of Phillips v. Worldwide Church of God*, No. 01-0879, 2002 WL 1447482, at *1 n.3 (Iowa Ct. App. July 3, 2002); *Anderson v. Minn. Ins. Guaranty Ass'n*, 520 N.W.2d 155, 164-65 (Minn. Ct. App. 1994).

168. *See, e.g., In re Estate of Phillips*, 2002 WL 1447482, at *1 n.3; *Anderson*, 520 N.W.2d at 164-65.

169. *See* FED. R. EVID. 201 advisory committee notes; *Shahar v. Bowers*, 120 F.3d 211, 212 (11th Cir. 1997).

therefore, cannot be the basis for assigning error to the trial court.¹⁷⁰ Nevertheless, attorneys and lower courts often try to alter the appellate record.¹⁷¹

A. A Submission After the Trial Court Has Ruled Comes Too Late

In 2002, the Appellate Court of Iowa reviewed an attempted expansion of a trial record when an Iowa testator revised his will, but failed to comply with certain statutory requirements.¹⁷² After the testator's death, the party who would have benefitted from the changes was unable to convince the probate court to uphold the revision of the will.¹⁷³ After the probate court had ruled, he sent the appellate court a letter written by John H. Langbein, a Yale Law School professor, giving Langbein's opinion on the subject.¹⁷⁴ The Court of Appeals of Iowa, in an unpublished opinion, ruled that the letter was not properly before the court because it was not in the record, having been generated after the trial court's ruling.¹⁷⁵ Interestingly, though, the court plainly was affected by having read the letter; the court stated that even though it would not consider the opinion expressed in the letter, it was not prevented from considering the "recognized, published works cited to in the letter."¹⁷⁶ Therefore, it seems the submission actually had some effect, perhaps as a quasi-brief, but not to alter the findings of fact of the lower court or to alter the factual basis upon which a finding of legal error might be premised.

The Minnesota Court of Appeals has recognized that, in general, "law review articles are not considered to be outside the record on appeal because they are legal resources, and not factual assertions."¹⁷⁷ However, in *Anderson v. Minnesota Insurance Guaranty Association*, the Minnesota court addressed the exception that explains the rule.¹⁷⁸ On appeal, Minnesota Insurance offered the affidavit of an insurance expert as support for its theory of the case.¹⁷⁹ The affidavit was in the form of an appendix to a law review article that Minnesota Insurance submitted to the appellate court.¹⁸⁰ Anderson moved to strike the affidavit, arguing that it was not a part of the record on appeal and that Minnesota Insurance was attempting to use it as

170. See *Crowder v. Zoning Bd. of Adjustment*, 406 So. 2d 917, 918-19 (Ala. Civ. App. 1981).

171. See, e.g., *In re Estate of Phillips*, 2002 WL 1447482, at *1 n.3; *In re Welfare of D.S.S.*, 506 N.W.2d 650, 652-53 (Minn. Ct. App. 1993).

172. *In re Estate of Phillips*, 2002 WL 1447482, at *1.

173. See *id.*

174. *Id.* at *1 & n.3.

175. *Id.*

176. *Id.*

177. *Anderson v. Minn. Ins. Guaranty Ass'n*, 520 N.W.2d 155, 164 (Min. Ct. App. 1994).

178. *Id.*

179. *Id.*

180. *Id.*

factual evidence.¹⁸¹ Anderson further moved to supplement the record with a rebuttal affidavit.¹⁸² The court recognized that Minnesota Insurance's affidavit was not being submitted merely as legal theory.¹⁸³ The court of appeals declined to strike Minnesota Insurance's affidavit, and granted Anderson's motion to supplement the record with its own affidavit, but left it to the trial court as the fact finder to determine the facts.¹⁸⁴

B. The Attorney Must Follow the Rules for Creating the Record

Under the Pennsylvania Rules of Appellate Procedure, an appellant is required to file with the clerk of the court a concise statement of the matters to be considered on appeal and also to serve that statement on the trial judge.¹⁸⁵ It is this filing with the clerk that makes the statement a part of the official record.¹⁸⁶ In *Everett Cash Mutual Insurance Company v. T.H.E. Insurance Company*, the appellant served its statement on the trial judge, but failed to file it with the clerk's office.¹⁸⁷ Because the statement was not filed, the appellate court said that it was "non-existent" and refused to recognize it.¹⁸⁸ The attorney's attempt to include the statement as an attachment to the brief would not bootstrap the matter into the official record.¹⁸⁹

Likewise, merely reproducing a paper not of record does not make it of record.¹⁹⁰ In *Pittsburgh's Airport Motel, Inc. v. Airport Asphalt and Excavating Company*, the appellants, after filing an appeal, filed a statement of the proceedings which was docketed and transmitted to the appellate court as part of the record.¹⁹¹ The statement referenced a "Motion for Leave to Amend Complaint."¹⁹² It was undisputed that the motion had in fact been presented to the trial court.¹⁹³ However, the appellate court refused to recognize the motion, strictly following the appellate

181. *Id.*

182. *Anderson*, 520 N.W.2d at 164-65.

183. *Id.* at 164. ("Respondents are attempting to convert the O'Malley affidavit from the mere factual assertion that it is into a legal resource by including it in a law review article.").

184. *Id.* at 165.

185. PA. R. APP. P. 1925(b).

186. *Id.* at 1921; *see also* *Everett Cash Mut. Ins. Co. v. T.H.E. Ins. Co.*, 804 A.2d 31, 34 (Pa. Super. Ct. 2002).

187. 804 A.2d at 34.

188. *Id.*

189. *See* PA. R. APP. P. 1921 ("The original papers and exhibits filed in the lower court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases.").

190. *Pittsburgh's Airport Motel, Inc. v. Airport Asphalt & Excavating Co.*, 469 A.2d 226, 228 (Pa. Super. Ct. 1983).

191. *Id.* at 227.

192. *Id.* at 227-28.

193. *Id.* at 228.

rule that the record consists only of the “original papers and exhibits filed in the lower court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court.”¹⁹⁴ There was no mention of the motion in the docket entries or in the papers and exhibits filed in the lower court.¹⁹⁵ Even though the appellants printed the motion as part of their reproduced record, the mere reproduction of the paper did not make it a part of the record.¹⁹⁶

C. Briefs and Other Matter Are Not a Part of the Record

It should be clear to attorneys that the appellate court will consider only the facts established in the record; yet, it is not unusual for attorneys to state in their briefs “facts” that are not in the record, or they may mischaracterize the facts that are of record.¹⁹⁷ In a divorce action, *Rosselli v. Rosselli*, both the husband and the wife had submitted trial briefs to the lower court.¹⁹⁸ Those briefs, however, had not been filed of record.¹⁹⁹ Under the Pennsylvania Rules of Appellate Procedure, the husband could designate parts of the record for appeal and was *required* to reproduce the parts of the record that would be significant to his case; the full record would be available to the court.²⁰⁰

In his appellate brief, the husband cited to 165 pages of the record that he had not reproduced in his designated record.²⁰¹ He also cited extensively to the trial briefs, which he had included in his reproduced record but which were not a part of the official record.²⁰² The court stated that merely placing reproduced information into the record did not make that information a part of the record.²⁰³ The Pennsylvania

194. *Id.* (quoting PA. R. APP. P. 1921).

195. *Pittsburgh's Airport Motel, Inc.*, 469 A.2d at 228.

196. *Id.*

197. *See Siler v. Johns*, 327 S.E.2d 810, 812 (Ga. Ct. App. 1985) (holding that where the record did not contain correspondence that the party referred to in the brief and there was no transcript of hearings below, the appellate court could not rely on the parties' briefs to supply that information). A court cannot make something where nothing exists. *See Eckel v. Adair*, 698 P.2d 921, 924 (Okla. 1984) (noting that “[e]rror may not be presumed from a silent record. It must be affirmatively demonstrated.”); *see also Robert Harmon and Bore, Inc. v. Jenkins*, 318 S.E.2d 371, 375 (S.C. Ct. App. 1984). Seeking to recover for the breach of an oral contract within the Statute of Frauds, the litigant marked notes for identification at trial, but never introduced the notes into evidence. *Id.* at 374-75. On appeal, one of the parties referred to the notes in brief, but the appellate court ignored the reference because the notes were neither reproduced nor included in the record on appeal. *Id.* at 375.

198. 750 A.2d 355, 359 (Pa. Super. Ct. 2000).

199. *Id.*

200. *Id.* at 357-58.

201. *Id.* at 359.

202. *Id.*

203. *Rosselli*, 750 A.2d at 359.

Appellate Court considered the trial briefs, to which the husband cited extensively, to be extraneous documents that the appellate court could not consider.²⁰⁴ The court went further, admonishing and sanctioning the attorney for failing to follow the rules of procedure and for his "attempts to misdirect [the] Court's review to documents not of record."²⁰⁵

Similarly, the mere attaching of supplementary materials to the attorney's brief is not a procedural vehicle by which an attorney can add evidence to the record.²⁰⁶ In *Kincaid v. Western Operating Company*, the defendant cited two law review articles in its appellate brief, attempting thereby to show a custom in the oil and gas industry.²⁰⁷ The Colorado Court of Appeals refused to consider the information because the articles had not been submitted to the trial court.²⁰⁸ The articles were not a part of the record, and it was the province of the trial court to consider such evidence and to find the facts.²⁰⁹

D. The Trial Court May Not Submit Evidence

There was a time when the trial judge heard a case and then was present at the appeal to clarify or to explain to the appellate court what happened below, but that day is gone.²¹⁰ Communication between the courts is officially confined to the record on appeal and to the resultant appellate opinion.²¹¹ In *In re Welfare of D.S.S.*, the trial court wanted to explain itself to the appellate court.²¹² *D.S.S.* was a complicated juvenile proceeding where the juvenile had not had counsel for several matters but had later obtained counsel.²¹³ The trial court judge apparently felt a need to explain to the appellate court what had gone on at the trial level and therefore filed a memorandum that he headed "In Court of Appeals"²¹⁴ and titled "Response and Clarification to Issues on Appeal."²¹⁵

204. *Id.*

205. *Id.* at 360.

206. *Crotty v. Crotty*, 465 S.E.2d 517, 520 (Ga. Ct. App. 1995).

207. 890 P.2d 249, 252 (Colo. Ct. App. 1994).

208. *Id.*

209. *See id.*

210. Frank, *supra* note 33, at XVI-37 (quoting 9 NEW YORK STATE CONSTITUTIONAL CONVENTION COMMITTEE 350-53 (1938)).

211. *See, e.g., Hinshaw v. Dyer*, 443 P.2d 992, 993 (Colo. 1968); *Altchiler v. State Dept. of Prof'l Regulation*, 442 So. 2d 349, 350 (Fla. Dist. Ct. App. 1983); *In re Welfare of D.S.S.*, 506 N.W.2d 650, 653 (Minn. Ct. App. 1993).

212. *See* 506 N.W.2d at 652.

213. *Id.* at 651.

214. *Id.* at 653 n.1.

215. *Id.* at 652.

The Minnesota Court of Appeals held that the trial court memorandum was not a part of the record, noting that a trial court is not a party and may not include a brief or memorandum addressed to the appellate court in the record.²¹⁶ The court of appeals concluded that the trial court was inappropriately interjecting itself into the adversarial process.²¹⁷

E. Attempts to Substitute Materials for the Record Will Not Be Effective

In *Rivera v. Harris*, a pro-se litigant attempted to file a complaint but the trial court refused to accept it.²¹⁸ The litigant filed a notice of appeal, and the record was transmitted to the appellate court.²¹⁹ The clerk failed to include, as a part of the record, a copy of the disallowed complaint and other documents that it appears had been lost or discarded.²²⁰ The litigant tried to remedy this situation by attaching to his brief an appendix that contained copies of the missing documents.²²¹

The Supreme Court of Georgia held that it could not consider the materials and it dismissed the appeal, stating that the appropriate procedure would have been for the litigant to move to complete the record.²²² The appellate court took the extraordinary step of asking the trial court to certify what had transpired in the lower court, but that court could not do so because crucial documents had been destroyed and the trial court judge did not have an independent recollection of the case.²²³ Therefore, the appellate court noted, "it would have been futile for the [litigant] to have attempted to supplement the record."²²⁴ The litigant was free to re-file his complaint without prejudice; however, the court said that it had no choice but to affirm the trial court's decision.²²⁵

The Supreme Court of Nevada, in *Wichinsky v. Mosa*, relied to a limited extent on a record that was an affidavit submitted by counsel.²²⁶ The parties had engaged in arbitration and the appellate record was very thin because the arbitration proceedings had not been recorded.²²⁷ One party's counsel submitted an affidavit to inform the appellate court of the facts.²²⁸ The court said that statements made by counsel

216. *Id.* at 653.

217. *In re Welfare of D.S.S.*, 506 N.W. 2d at 653.

218. 377 S.E.2d 844, 845 (Ga. 1989).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *See Rivera*, 377 S.E.2d at 845.

224. *Id.*

225. *Id.*

226. 847 P.2d 727, 729 (Nev. 1993).

227. *Id.*

228. *Id.*

portraying what occurred generally would not be considered on appeal.²²⁹ However, the court considered the affidavit because the opposing counsel did not submit a counter affidavit, and the court felt constrained to rely on the affidavit that was before it as the factual basis for the appeal.²³⁰ The Nevada rules were amended three years later to provide that where no transcript is available, a party's statement of the proceedings might suffice.²³¹

Under New York's rules, a court may consider an official record even though it is outside the appellate record if the document is incontrovertible.²³² In *Brandes Meat Corporation v. Cromer*, it was undisputed that Brandes, the plaintiff, sold meat to Cromer, the defendant.²³³ The corporation for which Cromer worked had been dissolved and its sole authority was to wind up its affairs.²³⁴ Cromer nevertheless continued to procure meat from Brandes in the corporate name.²³⁵ Brandes sued Cromer individually to recover the money that was owed for the meat.²³⁶ The trial court issued a summary judgment in favor of Cromer because he was not the corporation in whose name the meat had been ordered.²³⁷

On appeal, Brandes submitted a certificate issued by the secretary of state substantiating the fact that the corporation had been dissolved and, as a result, Cromer was receiving the meat without corporate authority.²³⁸ The appellate court acknowledged the general rule that documents not submitted to the trial court should not be considered on appeal.²³⁹ In New York, however, a court may accept "an incontrovertible official document, even though it dehors [is outside] the record, [and it] may be considered on appeal for the purposes of sustaining a judgment."²⁴⁰ A court's allowance of such a document would foster judicial economy, since sending the matter back to the lower court would waste time, given the obvious result that there was no error. However, this court concluded that the exception may also extend to reliable documents, the existence and accuracy of which are not disputed, when those documents are used "for the purpose of *modifying or reversing* the order under review."²⁴¹ Such a conclusion is not supported by the principle that a trial court can

229. *Id.*

230. *Id.*

231. See NEV. R. APP. P. 9(d).

232. *Brandes Meat Corp. v. Cromer*, 537 N.Y.S.2d 177, 178 (App. Div. 1989).

233. *Id.* at 177.

234. *Id.* at 178.

235. *Id.* at 177-78.

236. See *id.* at 177.

237. *Brandes Meat Corp.*, 537 N.Y.S.2d at 177-78.

238. *Id.* at 178.

239. *Id.*

240. *Id.*

241. *Id.* (emphasis added).

be held in error only on facts properly before it.²⁴² Nor does it seem to be supported by notions of judicial economy, unless the appellate court is prepared to effectively become what it is ill-equipped to become: the trial court on remand. Thus, at least in this case, counsel was able to modify the factual record on appeal in order to have the trial court found in error based on evidence that was not before the trial court when it ruled.²⁴³

IV. APPELLATE COURT SUPPLEMENTATION OF THE RECORD

The appellate function is to review the proceedings below for error; it is, therefore, axiomatic that the trial court cannot be held in error based on evidence not before it.²⁴⁴ Nevertheless, there are three ways in which additional information may be presented to the appellate court even though the information was not formally presented at trial.²⁴⁵ First, in certain complex cases the court may need expert assistance in order to understand the law, facts, or the interrelationship between them.²⁴⁶ Second, as Professor Llewellyn acknowledged, the appellate court may consider “common knowledge about things in general,”²⁴⁷ conceding that the record in some sense includes what the court “sees in the kaleidoscope of life outside.”²⁴⁸ Third, the appellate court performs not only an adjudicative function that is based on the record below, but also a policymaking function that is based on what are referred to as “legislative” facts.²⁴⁹

A. Canon Three and the Use of Disinterested Experts

For a court “to perform its high function in the best way, ‘justice must satisfy the appearance of justice.’”²⁵⁰ To that end, canons of judicial conduct have been

242. See *Broida v. Bancroft*, 478 N.Y.S.2d 333, 337 (App. Div. 1984).

243. See *Brandes Meat Corp.*, 537 N.Y.S.2d at 177-79.

244. See, e.g., *Broida*, 478 N.Y.S.2d at 337.

245. See FED. R. EVID. 201(f) advisory committee notes; ABA MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7) (1999) [hereinafter ABA CANONS]; LLEWELLYN, *supra* note 111, at 28.

246. ABA CANONS, *supra* note 245, at 3B(7)(b).

247. LLEWELLYN, *supra* note 111, at 28.

248. *Id.*

249. See FED. R. EVID. 201 advisory committee notes.

250. *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). The United States Supreme Court has noted that a basic requirement of due process is that of a fair trial before a fair tribunal:

Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that ‘every procedure

promulgated to set ethical standards that judges, including appellate courts, must follow.²⁵¹ Canon Three of the American Bar Association's Model Code of Judicial Conduct requires a judge to perform the duties of office impartially and diligently, and to accord the right to be heard to every person who is legally interested in a proceeding.²⁵² A judge is expected not to "initiate, permit or consider" communications outside the presence of the parties to a proceeding;²⁵³ however, the "judge may obtain the advice of a disinterested expert on the law applicable to a proceeding . . . if the judge"²⁵⁴ (1) gives the parties notice as to whom the judge is consulting, (2) reveals the substance of the advice sought, and (3) "affords the parties reasonable opportunity to respond."²⁵⁵ The commentary to this canon first proscribes communications from lawyers, law professors, and other persons the judge might seek out, unless the notice provisions are complied with.²⁵⁶ The clear message is that the parties are to be provided notice of, and input into, the decision-making process not only at trial, but also the appellate level. Second, the commentary mandates that "judge[s] must not independently investigate facts in a case and must consider only the evidence presented."²⁵⁷ Third, it urges judges who seek advice of a disinterested expert to do so by asking that expert to file an amicus brief.²⁵⁸ Many states have adopted the Model Canons, with slight variation,²⁵⁹ but a few states allow the court to

which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.'

Id. (quoting *Turney v. Ohio*, 273 U.S. 510, 532 (1927)).

251. See *Johnson v. Bd. of Control of Employees' Ret. Sys.*, 740 So. 2d 999, 1011 (Ala. 1999) (stating that the canons are applicable to all judges); MD. R. 16-813 Canon 6A (2002) (stating the "Code of Judicial Conduct applies to each judge of the Court of Appeals").

252. See ABA CANONS, *supra* note 245, at 3B(7) (1990).

253. *Id.*

254. *Id.*

255. *Id.* The Code of Conduct for United States Judges, Canon 3A(4), adopted in 1998, tracks the language of the ABA Canons. See 175 F.R.D. 363, 367 (1998). "This Code applies to United States Circuit Judges, District Judges, Court of International Trade Judges, Court of Federal Claims Judges, Bankruptcy Judges, and Magistrate Judges." *Id.* at 363.

256. See ABA CANONS, *supra* note 245, at 3B(7) cmt.

257. *Id.*

258. *Id.* However, the comments do not suggest who would pay for the expert's time. Presumably the court would inform the litigants about what sort of expert information was needed and solicit amicus briefs via the parties. At that point, it would be arguable that the experts were not a "friend of the court," but would be taking adversarial positions.

The code for federal judges includes the suggestion that it is appropriate to seek an amicus brief if the court desires the advice of a disinterested expert, but it does not contain the other admonitions of the ABA Canons and allows consultation with other judges. Code of Conduct for United States Judges, 175 F.R.D. at 367, 370.

259. See, e.g., CONN. CODE OF JUDICIAL CONDUCT Canon 3A(4) (2002); DEL. CODE OF JUDICIAL CONDUCT Canon 3A(4) (2004); IND. CODE OF JUDICIAL CONDUCT Canon 3B(8) (2002);

use its discretion in obtaining the advice of an expert without giving notice to the parties.²⁶⁰

This canon insures fairness and impartiality to all parties, and admonishes the court to keep the inquiry to the record and not to outside influences.²⁶¹ Since the court should seek assistance of an expert only as to matters of legal theory or to help it understand other areas of expertise, and not as to the facts of the case, this canon is consistent with the error-review function of the court; it does not alter the basic facts presented.²⁶²

When the canon's proscription of independent fact finding by the court is applied to the appellate courts, it is consistent with the notion that the appellate function is error correction, not an independent determination of the case.²⁶³ The canon's policy of requiring notice to the parties and an opportunity for their participation when the court seeks expert advice on legal, technical, or policy matters is motivated by the concern for fairness and its appearance.²⁶⁴ The cost of introducing the formality of disclosure to the parties regarding the court's attempts to understand the issues before it, arguably discourages an already busy court from seeking such assistance, thereby depriving it of assistance it may well need. Moreover, the argument may be made

L.A. CODE OF JUDICIAL CONDUCT Canon 3A(6) (2002); ME. CODE OF JUDICIAL CONDUCT Canon 3B(7)(b) (2001); MD. R. 16-813 Canon 3A(5) (2002); MO. SUP. CT. R. 2.03, Canon 3B(7)(b) (2004); R.I. SUP. CT. art. VI, Canon 3B(8)(b) (2004); S.C. APP. CT. R. 501, Canon 3B(7) (2003); VT. CODE OF JUDICIAL CONDUCT Canon 3B(7) (2000).

260. ALA. SUP. CT. R., CANONS OF JUDICIAL ETHICS Canon 3A(4) (1999) ("A judge, however, may obtain the advice of a disinterested and impartial expert on the law applicable to a proceeding before him; provided, however, a judge should use discretion in such cases and, if the judge considers that justice would require it, and should give notice to the parties of the person consulted and the substance of the advice, and afford the parties reasonable opportunity to respond."); ARIZ. SUP. CT. R. 81, CODE OF JUDICIAL CONDUCT Canon 3B(7)(b) (1993) ("A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding."); N.C. CODE OF JUDICIAL CONDUCT Canon 3A(4) (2003) ("A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him.").

A few state codes do not mention the use of experts. ILL. SUP. CT. R. 63, Canon 3A(4) (2003) (not speaking to the use of experts specifically, the effect of the rule is that no substantive matters should be discussed without notifying parties of the conversation and allowing an opportunity to respond); IOWA CODE OF JUDICIAL CONDUCT Canon 3A(4) (2002) ("A judge should accord to every person who is legally interested in a proceeding . . . full right to be heard according to law.").

261. See *In re Kensington Int'l Ltd.*, 368 F.3d 289, 309-310 (3d Cir. 2004).

Indeed, the best protection for the litigants, the bar, and the bench at trial and on appeal is a verbatim record. Rather than having to speculate upon what was said and the manner in which an argument was made, the court then has before it, when a record is taken, the exact words of counsel and the exact words and rulings of the court.

Id.

262. See ABA CANONS, *supra* note 245, at 3B(7) & cmt.

263. See *id.*

264. See *In re Harris*, 713 So. 2d 1138, 1141 (La. 1998) ("It is well recognized that the primary purpose of the Code of Judicial Conduct is to protect the public not to discipline a judge.").

that, just as the appellate judge ought not ask a law professor a question about the rule against perpetuities, for example, without giving notice and an opportunity to argue for or against the professor's response, the appellate judge ought not read a book, article or case on the rule without giving the parties notice and the opportunity to argue the position taken in the book, article, or case.²⁶⁵ If there is a principled distinction, it is not articulated in the canon.²⁶⁶

The ultimate question is, of course, how much should we rely on the discretion of judges and how much should we formally regulate judicial conduct. The problem is that the expert may be biased.²⁶⁷ For example, a judge may call a lawyer who works for the Securities and Exchange Commission for help in understanding the issue. When the problem is hypothetically explained, the lawyer may help enlighten the judge, but may also express his personal biases for or against one side of the issue. If the judge never tells the parties that he contacted the expert, the parties will have no opportunity to refute what amounts to "testimony," and will never be able to address what shaped the reasoning behind the decision.

The tradeoff for the formal isolation of judges from legal and analytical give and take is that the judge becomes more dependent solely on what the lawyers present in their briefs.²⁶⁸ The growth of the law becomes less influenced by the quality of legal analysis in the academy and in the community, and more dependent on the quality of briefs.²⁶⁹ Llewellyn recognized that there are:

265. See ABA CANONS, *supra* note 245, at 3B(7) cmt.

266. See generally *id.* In the case of a book or an article, the same professor who can be consulted in print could not be consulted by telephone. If the distinction is that the article presumably preceded the case reaching the appellate court, then the concern may be that the professor might be influenced by her awareness of the facts of the particular case. Of course, the typical case has been around for some time before it reaches the appellate court; therefore, the professor may have been aware of the case before the article was published. However, the answer to this problem would be to prohibit the disclosure of those facts; that is, to permit the judge to ask only abstract questions of law.

267. LLEWELLYN, *supra* note 111, at 327; see Si-Hung Choy, *Judicial Education After Markman v. Westview Instruments, Inc.: The Use of Court-Appointed Experts*, 47 UCLA L. REV. 1423, 1449-52 (2000) (discussing the problems of bias in court-appointed experts).

268. See generally Honorable Roger J. Miner, *Professional Responsibility in Appellate Practice: A View From the Bench*, 19 PACE L. REV. 323 (1999).

269. Cf. *id.* The argument for allowing judges to seek outside expertise is strengthened by the perception (and often, the reality) that many appellate briefs are poorly written. *Id.* Even though there are many articles written about brief writing, lawyers seem to ignore them. See *id.* at 334-35. Judge Roger Miner notes that too often, briefs have many basic flaws, such as poor organization, lack of focus, and overuse or deficiency in citations and quotations. *Id.* at 333. When the brief writer cannot even get the basics down, it is doubtful that the brief would enlighten the court on more important substantive information. *Id.*; see also LINC Fin. Corp. v. Onwuteaka, 129 F.3d 917, 921 (7th Cir. 1997) (chastising the brief writer for failing to provide citation to any authority in the argument).

[t]rusteds friends, some at the bar, some not, with whom puzzled judges may discuss this case or that, sometimes for light on doctrine, sometimes for light on laymen's practice, sometimes to test the general reaction of a man valued for his much more than common judgment, his *horse* sense, sometimes to see whether a person of known ingenuity can turn up some unsuspected lead.²⁷⁰

It was widely known that when Lord Mansfield was fashioning English commercial law during the eighteenth century, "he did not limit himself to what the parties presented."²⁷¹ He often went outside the record, visiting with the merchants in local taverns, then returning to his chambers to devise the law based on what he had learned of the customs and attitudes of the merchants.²⁷² Llewellyn called these merchants "special jurymen."²⁷³ It is such exposure to experience that the canon seeks to deny to judges because of the countervailing concern that the judge will fail to exercise proper judicial restraint and be improperly influenced.

The most convenient source of a sounding board for appellate judges is to look to one another as informal experts, commonly having come to the court with some areas of expertise.²⁷⁴ It has even been suggested that if there is an internal expert, that judge should write the opinion since he or she might have more facility with the language of the subject matter.²⁷⁵

B. Appointment of an Appellate Expert

Appellate courts occasionally seek formal appellate expertise to sort out complex issues.²⁷⁶ In *North End Foundry Co. v. Industrial Commission*, a statutory construction case, the Wisconsin Supreme Court convened "a conference with the [state's] Industrial Commission in an effort to find a workable rule."²⁷⁷ "Counsel for all parties were notified by the court" and all counsel were present at the meeting.²⁷⁸ It is reported that for many years the Wisconsin court made a practice of calling upon "any department in the State Capitol for information necessary for an intelligent understanding' of a policy issue posed to the court."²⁷⁹

270. LLEWELLYN, *supra* note 111, at 323.

271. Kenneth Culp Davis, *Judicial, Legislative, and Administrative Lawmaking: A Proposed Research Service for the Supreme Court*, 71 MINN. L. REV. 1, 7 (1986).

272. *Id.*

273. LLEWELLYN, *supra* note 111, at 333.

274. *See id.* at 334.

275. *See id.* at 335.

276. *See, e.g., North End Foundry Co. v. Indus. Comm'n*, 258 N.W. 439, 442 (Wis. 1935).

277. *Id.*

278. George R. Currie, *Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation*, 1960 WIS. L. REV. 39, 47 (1960).

279. Edward J. Imwinkelried, *Expert Testimony By Ethicists: What Should Be the Norm?*, 76

In another unusual situation in 1978, the Alabama legislature passed an act authorizing appellate rule 33A at a time when the Alabama Supreme Court had several complex rate cases before it.²⁸⁰ The rule allowed the supreme court to appoint appellate experts in rate-making cases, limiting use of the experts to "cases involving controversies respecting rates and charges of telephone companies or public utilities."²⁸¹ The rule was designed specifically to assist the appellate court in "assimilating and digesting complex scientific and technological information within the adversary process in utility rate-making cases."²⁸²

Under the rule, if the court decides that it needs an expert, it must first notify the parties and solicit their input.²⁸³ Either all of the parties must agree on one person who could advise the court, or each side must submit names and biographical data to the clerk of the court from which the court will compile a list of three potential experts.²⁸⁴ Somewhat like the striking of the jury, each party (appellee and appellant) has one "strike," thus leaving the court with one expert.²⁸⁵ If the parties cannot agree on their strikes, the chief justice makes the choice from the names not stricken from the list.²⁸⁶ At no time during the selection process is any member of the court allowed to communicate with potential experts, except by written communication, which must be filed with the clerk of court and served on all parties.²⁸⁷

In an apparent effort to keep the process focused and unbiased, all the communication to and from the expert is to be written.²⁸⁸ The clerk of the court is to submit written inquiries to the expert and the expert must respond in writing.²⁸⁹ The questions must be limited to matters on appeal in that case, and the expert must not be

TEMP. L. REV. 91, 118 (2003) (quoting Kenneth Culp Davis, *An Approach to the Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 406 (1942).

280. ALA. R. APP. P. 33A committee cmt.

281. *Id.* at 33A(a). The statute allows direct appeal from the Public Service Commission, the state's utility-regulating agency, to the state supreme court in cases where the commission has ruled in utility rate-making cases. ALA. CODE § 37-1-142 (1975). The legislature recognized (1) that the court needed help because of the complexity and size of this type of case and (2) there is no trial record in these cases, just an opinion from the commission. ALA. R. APP. P. 33A committee cmt. It therefore authorized the chief justice of the court, with the advice and consent of the other members of the court, to "appoint such special masters, accountants, utility rate-making consultants and such other personnel" as they see necessary to advise them on technical matters. *Id.* As sometimes happens, the legislature did not provide any funds for the court to hire experts. *Id.*

282. *Id.*

283. ALA. R. APP. P. 33A(b)(1). The Alabama Canons of Judicial Conduct do not require such notice in other cases. *See* ALA. SUP. CT. R., CANONS OF JUDICIAL ETHICS Canon 3A cmt.

284. ALA. R. APP. P. 33A(b)(1), (4).

285. *Id.* at 33A(b)(4).

286. *Id.*

287. *Id.* at 33A(b)(1), (4).

288. *Id.* at 33A(c)(3).

289. ALA. R. APP. P. 33A(c)(3), (6).

called on to decide any issue.²⁹⁰ Specifically, the expert “shall not provide any new or additional evidence, either factual or opinion,” in the case.²⁹¹ The expert may submit questions to the clerk of the court if he or she needs clarification.²⁹² In essence, the expert would produce something like a technical manual.

One potential problem with confining the communication to writing is that the court might be more easily informed if the expert could speak with the court in person, addressing concerns much like parties do at oral argument. A face-to-face meeting would seem to be much more economical in terms of time and resources. The court could have a short seminar on the subject instead of having to propound questions on a subject it has acknowledged it knows little about, and then wait for the written responses. On the other hand, a face-to-face encounter might appear more like there was an expert witness on the stand, and the legislature clearly wanted to avoid turning this system into the provision of a testimonial expert.²⁹³

Professor Francis McGovern, who participated in formulating Rule 33A describes dissatisfaction with the process:

Justices of the court were generally dissatisfied with the inquiry-response communication format. They doubted whether the appellate expert understood their questions. Moreover, they found the time lag between posing inquiries and receiving responses unacceptable, because it forced them to refamiliarize themselves with the case repeatedly. The prehearing conference ameliorated this situation somewhat, although the justices would have preferred a conference without previous written communication.²⁹⁴

The appellate expert rule has been used only three times in Alabama.²⁹⁵ Justice Hugh Maddox, a veteran of thirty-one years on the court, recalled that the legislature passed the rule to help the court at a time when there were some complicated controversies over rates.²⁹⁶ The different sides in these politically charged controversies were providing conflicting figures about what the utility rates should be, and the court felt that it needed expert help.²⁹⁷ While the experts did help,

290. *Id.* at 33A(c)(4), (5).

291. *Id.* at 33 A(c)(6).

292. *Id.*

293. See Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440, 473 (1986).

294. *Id.* at 476.

295. See *Union Springs Tel. Co. v. Ala. Pub. Serv. Comm’n*, 437 So. 2d 485, 486 (Ala. 1983); *Gen. Tel. Co. v. Ala. Pub. Serv. Comm’n*, 424 So. 2d 1288, 1289 (Ala. 1982); *Ala. Gas Corp. v. Ala. Pub. Serv. Comm’n*, 425 So. 2d 430, 432-33 (Ala. 1982).

296. Telephone Interview with Justice Hugh Maddox, retired Associate Justice of the Alabama Supreme Court (March 25, 2004).

297. *Id.*

technology and accounting procedures have eliminated the need for experts in such cases today and there are now fewer appeals.²⁹⁸

In *E. I. du Pont de Nemours & Co. v. Collins*, the United States Supreme Court chastised the United States Court of Appeals for the Eighth Circuit for employing its own expert, a university professor, "to assist the court in understanding the record and to prepare reports and memoranda for the court."²⁹⁹ The Court stated that the reports included a "variety of data and economic observations which had not been examined and tested by the traditional methods of the adversary process."³⁰⁰ The case was an appeal from a decision of the Securities and Exchange Commission where the record revealed substantial evidence to support the findings of the commission.³⁰¹ The standard of review was whether there was substantial evidence to support the commission's findings.³⁰² The Supreme Court concluded that the eighth circuit should have affirmed the findings.³⁰³ Instead, it undertook an independent investigation with its own expert, and substituted its own judgment for that of the Commission.³⁰⁴

*C. Appellate Use of Judicial Notice: The Distinction Between
Adjudicative and Legislative Facts*

The purpose of the doctrine of judicial notice is to permit a court to consider as "established in a case a matter of law or fact without the necessity of formal proof."³⁰⁵ The judicial process is not meant to construct every case from scratch.³⁰⁶

298. *Id.*

299. 432 U.S. 46, 57 (1977).

300. *Id.*

301. *Id.* at 47-48, 57.

302. *Id.* at 54.

303. *Id.* at 57.

304. *E.I. du Pont de Nemours & Co.*, 432 U.S. at 57.

305. 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5102, at 464 (1977) (quoting BERNARD S. JEFFERSON, *CALIFORNIA EVIDENCE BENCHMARK* 833 (1972)). "In recognition of the shortness of life and the scarcity of resources available to the judicial function, the evidence . . . must be limited." Harold See, *An Essay on Legal Ethics and the Search for Truth*, 3 *GEO. J. LEGAL ETHICS* 323, 329 (1989).

306. *FED. R. EVID.* 201(a) advisory committee notes.

The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts . . . includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention.

Rule 201 of the Federal Rules of Evidence provides for the judicial notice of “adjudicative facts,” but not “legislative” facts.³⁰⁷ Adjudicative facts are those which relate specifically to the activities or characteristics of the litigants, and are facts that would typically go to the jury in a jury trial.³⁰⁸ Those facts concern “who did what, where, when, how, and with what motive or intent.”³⁰⁹ “Legislative” facts concern matters which relate to what is known as the “legislative” function of the court, where the court is in essence “making law” either by filling a gap in the common law by formulating a rule, construing a statute, or framing a constitutional rule.³¹⁰

1. The Adjudicative Function

A trial court employs judicial notice of adjudicative facts to move the trial along.³¹¹ For a court to take judicial notice of an adjudicative fact, the “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

Id. at 201(b) advisory committee notes (quoting Kenneth Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in *Perspective of Law* 69, 93 (1964)).

Professor Harold See has noted that the objective of the adversary system is not to discover “truth,” but to create social order through law-making and to find out the facts in an individual case. See, *supra* note 305, at 325. He says that ideally truth should be the end, but “the adversary system is not a machine for the discovery of ‘the truth, the whole truth, and nothing but the truth.’” *Id.* at 325-26 (quoting *Bronston v. United States*, 409 U.S. 352, 358-59 (1973)). Further,

[t]he adversary system is neither designed nor intended to consider all that may have some bearing. Rather, it is designed to consider enough that society and its members are satisfied that the *result* is correct, that is, that the result of the proceeding is substantially the same as that which would have been achieved in an omniscient (“truth knowing”) society.

Id. at 328.

Professor Edmund Morgan said:

It is not the function of the trier of fact either to know or to discover the truth, or even to discover what the truth appears to be as disclosed by all available data, but merely to find, for the sole purpose of settling the dispute between the litigants, what the facts appear to be as disclosed by the materials submitted.

Edmund M. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 271-72 (1943-44).

307. FED. R. EVID. 201(a) advisory committee notes.

308. *Qualley v. Clo-Tex Int’l, Inc.*, 212 F.3d 1123, 1128 (8th Cir. 2000).

309. *United States v. Gould*, 536 F.2d 216, 219 (8th Cir. 1976) (quoting 2 KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE §15.03, at 353 (1958)).

310. Edward J. Imwinkelried, *supra* note 279, at 114. Professor Imwinkelried notes that the advisory comments to Rule 201 expressly concur with Professor Kenneth C. Davis’s view that only adjudicative facts, not legislative facts, should be governed by that rule. *Id.* at 116. Professor Davis thought it sensible to apply traditional, formal evidentiary rules when the court, through judicial notice of adjudicative facts, must “reconstruct historical events and pass on credibility.” *Id.*

311. See FED. R. EVID. 201 advisory committee notes (citing Davis, *supra* note 306, at 73).

determination by resort to sources whose accuracy cannot reasonably be questioned.³¹² A court may notice a fact on its own motion, or a party may move that the court take judicial notice of the fact.³¹³

The advisory committee's comments to the rules indicate that appellate courts, as well as trial courts, may take judicial notice of adjudicative facts.³¹⁴ An appellate court will not, however, use the doctrine as a "talisman" on appeal to fill gaps in a litigant's evidence.³¹⁵ Moreover, while indisputable facts may be judicially noticed as a matter of judicial economy,³¹⁶ it is not appropriate to take judicial notice of a fact

312. FED. R. EVID. 201(b). Some courts define judicial notice as having "three material requisites: (1) the matter must be a matter of common and general knowledge; (2) it must be well and authoritatively settled; and (3) it must be known within the limits of the jurisdiction of the court." *Cosom v. Marcotte*, 760 A.2d 886, 893 (Pa. Super. Ct. 2000) (quoting 8 STANDARD PA. PRACTICE 2d § 49:68 (1982)).

313. FED. R. EVID. 201(c), (d); Paul Mark Sandler & Francis B. Burch, Jr., *Appellate Judicial Notice: Oasis or Mirage*, in APPELLATE PRACTICE MANUAL 155 (Priscilla Anne Schwab ed., 1992).

314. FED. R. EVID. 201(f) advisory committee notes; see, e.g., *Brown v. State*, 421 S.E.2d 340, 341 (Ga. Ct. App. 1992) (judicial notice may be taken even on appeal); *CGC Enter. v. State Bd. of Tax Comm'rs*, 714 N.E.2d 801, 803 (Ind. T.C. 1999) (judicial notice may be taken at any stage of proceedings, including on appeal); see also Sandler & Burch, *supra* note 313, at 155.

315. *Am. Stores Co. v. Comm'r of Internal Revenue*, 170 F.3d 1267, 1270 (10th Cir. 1999) (quoting *City of New Brunswick v. Borough of Milltown*, 686 F.2d 120, 131 n.15 (3d Cir. 1982)). For example, in *Dollar Inn, Inc. v. Slone*, 695 N.E.2d 185, 186 (Ind. Ct. App. 1998), a woman was injured at a hotel when a hypodermic needle concealed inside a toilet paper roll stuck her thumb. A member of the hotel staff told her that the needle probably was that of an intravenous drug user on the hotel staff. *Id.* The woman was tested for AIDS and experienced great fear that she would contract the disease, though she did not. *Id.* She sued the hotel for emotional distress. *Id.* at 187. The hotel did not offer any scientific evidence at trial concerning the transmission of AIDS and did not ask the trial court to take judicial notice of such evidence. *Id.* In a post-trial motion, however, the hotel asked the trial court to enter judgment in its favor, notwithstanding a jury verdict, and to take judicial notice of scientific evidence not offered at trial. *Id.*

The trial court denied the motion, and the hotel asked the appellate court to take judicial notice of the same scientific information. *Id.* The Indiana Court of Appeals recognized the ploy, refusing to take notice of evidence that should have been submitted to the jury. *Id.* at 188. In essence, the hotel was saying that the jury verdict was incorrect because it was based only on the evidence submitted by the injured woman, and that if this scientific evidence had been before the jury, it would have decided differently. *Id.* at 187.

316. Examples of adjudicative facts that may be judicially noticed include:

laws of nature; human impulses, habits, functions and capabilities; the prevalence of a certain surname; established medical and scientific facts; well-known practices in . . . businesses and professions; the characteristics of familiar tools and appliances, weapons, intoxicants, and poisons; the use of highways; the normal incidence of the operation of trains; . . . prominent geographical features . . . population and area as shown by census reports; the days, weeks, and months of the calendar; the effect of natural conditions on the construction of public improvements; the facts of history; important current events; general economic and social conditions; matters affecting public health and safety; the meaning of words and abbreviations; and the results of mathematical computations.

that is open to dispute, such as whether criminal activity is prevalent around an area that is the subject of litigation or whether low income housing is unavailable.³¹⁷ The judge's personal knowledge of a topic is not sufficient to allow him or her to take judicial notice of that information; the court must find that the accuracy of the fact or its source is an uncontested matter of public knowledge.³¹⁸

The concept of taking "notice" of facts was not necessary when the jury was a body of "quasi-witnesses" likely to know the defendant since the jury knew the situation surrounding the case.³¹⁹ When the jury became more of a fact-finding body, without knowledge of the defendant or of his situation, the emphasis shifted to making sure the fact finders were "blank pads" upon which each party could inscribe a version of the facts.³²⁰ At that point, judicial notice became a useful tool to prevent reinventing the wheel with facts too obvious or common to justify the time and effort to prove.³²¹ The trial is a closed universe, confined to the facts and evidence essential

Hinkle v. Hartsell, 509 S.E.2d 455, 457-58 (N.C. Ct. App. 1998).

317. See *id.* at 458.

318. See *In re S.M.*, 312 S.E.2d 829, 831 (Ga. Ct. App. 1983). Notably, the judge cannot claim his own personal knowledge as a realm of judicial notice since that would perhaps create a subjective bias the parties could not penetrate. See, e.g., *id.* Instead, in order to keep the process at an objective level, the court must declare what matters it is taking judicial notice of and show a basis for that notice by an indisputable authority, such as taking notice that it rained on a certain day three years ago, by reference to an almanac. See FED. R. EVID. 201(b) advisory committee notes.

319. WRIGHT & GRAHAM, *supra* note 305, at 458-59.

320. *Id.* Under Livingston's Code in 1873, the purpose of stating facts in terms of judicial notice was to keep the role of juror separate from the witness's role and the jurors were not permitted to "act on evidence of their own knowledge." *Id.* 459 n.7 (quoting 2 WORKS OF LIVINGSTON 464 (1873)).

321. Edmund Burke noted in 1794 in his Report to the House of Commons that, [Juries] have generally no previous preparation or possible knowledge of the matter to be tried; and they decide in a space of time too short for any nice or critical disposition. These Judges, therefore, of necessity must forestall the evidence where there is a doubt on its competence, and indeed observe much on its credibility, or the most dreadful consequences might follow.

1 JOHN HENRY WIGMORE, EVIDENCE § 28, at 410 (3d ed. 1940) (quoting Edmund Burke, *Report to the House of Commons*, in 31 PARL. HIST. ENG. 357 (1794)).

As the doctrine of judicial notice took root, the fiction developed that a court was "refreshing [its] memory" as to certain facts, by taking judicial notice of them, even though the facts were likely unknown to the court. See Currie, *supra* note 278, at 39. The United States Supreme Court said that "if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper." *Id.* (quoting *Brown v. Piper*, 91 U.S. 37, 42 (1875)).

Justice Currie of the Wisconsin Supreme Court recognized in 1960 that the trend at that time was to widen the scope of judicial notice to allow a judge to make an independent investigation of indisputable sources to ascertain the facts about which judicial notice might be taken, resorting "to any such informative source as the court may deem dependable." *Id.* at 40 (quoting *Harris v. Pounds*, 187 So. 891, 893 (Miss. 1939)). The types of material noted include statistics, scientific data, historic facts, and statutory history; all are data that would inform the court even though the information was

and relevant to that particular case.³²² Likewise, the appellate court is confined to the record of the facts adjudicated in the court below.³²³

If the goal of the trial is to resolve the conflict between litigants, the wisdom of Rule 201 is to allow the courts to be efficient by taking judicial notice of indisputable facts, easy to prove, that are necessary and specific to the case at hand.³²⁴ The application of Rule 201 is consistent with the error-correction function of appellate courts as long as the appellate court takes judicial notice only of those facts that the trial court noticed, or, in light of its decision in the case below must have noticed.

2. The Legislative Function Beyond the Record

While a court may have some discretion in taking judicial notice of adjudicative facts, that discretion is fettered by the strictures of Rule 201 and the recognition that judicial notice is a "highly limited process" since it "bypasses the safeguards which are involved with the usual process of proving facts."³²⁵ The idea that a court has a legislative function apart from its error-correction function has led to the development of the notion that appellate courts may seek all kinds of information unrelated to the adjudication of the case at hand.³²⁶ The notion of legislative fact finding muddies the water. Legislative facts are not the facts of the case between the litigants and are not necessarily indisputable.³²⁷ Rule 201 does not encompass legislative facts.³²⁸

Professor Kenneth Davis defined legislative facts as those that have relevance to legal reasoning and the lawmaking process.³²⁹ While judicial notice of adjudicative facts requires that they be essentially indisputable, Professor Davis believed that legislative facts should be viewed differently:

My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are 'clearly . . . within the domain of the indisputable.' Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.³³⁰

not part of the record below. *Id.* at 40-42.

322. See FED. R. EVID. 104(a), (b).

323. *Altchiler v. State Dept. of Prof'l Regulation*, 442 So. 2d 349, 350 (Fla. Dist. Ct. App. 1983).

324. FED. R. EVID. 201(b) advisory committee notes.

325. *Shahar v. Bowers*, 120 F.3d 211, 214 (11th Cir. 1997).

326. FED. R. EVID. 201(a) advisory committee notes.

327. See *id.*

328. *Id.*

329. See *id.* (citing Davis, *supra* note 279, at 404-07).

330. See *id.* (quoting Davis, *supra* note 306, at 82).

Legislative facts are those relevant to the court's thinking about what the law ought to be instead of what the facts of the case are.³³¹ Professor Davis asserted that courts need to be able to expand their judicial thinking by considering the sorts of information that will assist them in achieving that end.³³² Those 'facts' may encompass theories rather than facts, theories which would ostensibly assist the court in performing its task of reasoning through the case at hand by thinking about matters beyond the case at hand.³³³ Legislative facts are "established truths, facts, or pronouncements that do not change from case to case but apply universally."³³⁴

The authors of the advisory comments to Rule 201 believed that judicial access to legislative facts should be unhindered.³³⁵ They cite Professor Edmund Morgan, who favors the unrestricted investigation of legislative facts:

[The judge] may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present . . . [T]he parties do no more than to assist; they control no part of the process.³³⁶

The precise problem here is that the parties may have a limited say in the persuasive process at the appellate level.³³⁷ While the taking of judicial notice of adjudicative facts at the trial level is a matter of convenience, the judicial notice of legislative facts at the appellate level becomes an unknown for the litigants.³³⁸ An appellate court may be deciding a case based on information that was not before the trial court.³³⁹ The parties should participate in providing information, rather than leaving it to the court to ascertain such information through independent research.³⁴⁰ In 1960, Karl Llewellyn wrote that, "as of the last eighty or ninety years the 'orthodox ideology' . . . [has made clear that] the rules of law are to decide cases;

331. FED. R. EVID. 201(a) advisory committee notes.

332. *See id.* (quoting Davis, *supra* note 306, at 83).

333. *See* Davis, *supra* note 279, at 409.

334. *Hagelstein v. Swift-Eckrich Div.*, 597 N.W.2d 394, 399 (Neb. 1999).

335. *See* FED. R. EVID. 201(a) advisory committee notes.

336. *Id.* (quoting Morgan, *supra* note 306, at 270-71).

337. The function of the rules of evidence at the trial level is, in part, to allow the parties to construct an abridged history of the case while avoiding the appearance that the court itself would intervene with its own version of the evidence. *See* *See*, *supra* note 305, at 331. That appearance changes at the appellate level if the court takes judicial notice of "facts" not in evidence at trial. *See* LLEWELLYN, *supra* note 111, at 325, 332.

338. *See id.* at 29, 325.

339. *See id.*; Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. REV. 197, 199 (2000).

340. LLEWELLYN, *supra* note 111, at 232-35; Margolis, *supra* note 339, at 202-03.

policy is for the legislature, not for the courts.”³⁴¹ He also noted, however, that “[t]oday’s ‘legal’ literature, the law reviews especially . . . and you find the footnotes and the argument shot through with social discipline material like ‘double-colored silk.’”³⁴²

In the October term of 1900, the United States Supreme Court cited one law review article.³⁴³ In the October term of 1940, it cited thirty-one articles.³⁴⁴ By the 1978 term, the Court referenced 286 articles.³⁴⁵ Frederick Schauer and Virginia J. Wise analyzed the content of United States Supreme Court judicial decisions and found that while there was no significant increase in the citation of nonlegal sources from 1950 through 1990, from 1991 forward there has been a “substantial and continuing increase in the Court’s citation of nonlegal sources.”³⁴⁶

Professor Ellie Margolis aptly sets forth the reasons why an appellate brief writer should include policy arguments and make use of the legislative facts advancing the rule that is more favorable to her client.³⁴⁷ First, she says, no rule prohibits the introduction of non-legal sources to an appellate court, given that those materials provide information as “legislative” facts beyond the scope of Rule 201.³⁴⁸ Second, since it is well known that courts will seek and use non-legal materials even if lawyers do not provide the material, lawyers should provide the material to have

341. LLEWELLYN, *supra* note 111, at 38.

342. *Id.* at 234.

343. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 500 (2002) (citing Wes Daniels, *Far Beyond the Law Reports: Secondary Source Citations in United States Supreme Court Opinions; October Terms 1900, 1940, and 1978*, 76 LAW LIB. JN. 1, 30 (1983)).

344. *Id.*

345. *Id.*

346. Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080, 1108 (1997).

Non-legal citations consisted of secondary materials other than cases, constitutional provisions, legal treatises, law reviews, governmental documents, and standard compilations of legislative and constitutional history. Thus, the set of non-legal citations consists largely of citations to history, political science, economics, and other non-legal academic journals, to newspapers and popular periodicals, to dictionaries and encyclopedias, to books of history, politics, and the like, and occasionally to poetry, plays, and literature.

Id. at 1110 n.92.

347. Margolis, *supra* note 339, at 201.

348. *Id.* at 203. To those who have criticized the lack of rules regarding how courts should assimilate legislative facts, Margolis responds with some proposed solutions to the problem. First, lawyers and judges need to be educated about the importance of legislative facts. *Id.* at 204-05. Judges should be encouraged to solicit factual briefs from parties and amici, and allow the parties to respond to the legislative facts. *Id.* at 205. Judges might also appoint experts and as an alternative to the taking of independent facts on appeal, the court should remand so a more complete record could be developed. *Id.* This would be more consistent with the theory that the appellate court reviews decisions for lower court error. See Currie, *supra* note 278, at 49.

input into the process.³⁴⁹ Finally, since any good brief should provide authority for the arguments presented, it makes sense that a lawyer making policy arguments should be able to provide the types of authority most persuasive on policy matters.³⁵⁰ Policy issues are not necessarily addressed by the case at hand, but by resort to “aesthetic principles, scientific models, social organization, economic analysis, efficiency concerns, political realities and predictable psychological reactions.”³⁵¹ Margolis cites a study by Thomas Marvell who analyzed a sampling of briefs to determine what use is being made of policy arguments.³⁵² According to the study, many of the attorneys whose briefs were analyzed recognized that courts use “social” facts in their deliberations, but seventy percent of the briefs devoted almost no space to argument based on social facts.³⁵³

D. *From the Brandeis Brief to Independent Investigation*

The most obvious factor outside the record influencing the appellate process is the mindset of the appellate judge regarding the scope of the inquiry.³⁵⁴ Justice Oliver Wendell Holmes has been quoted as saying he “‘hated facts,’ preferring theoretical generalizations.”³⁵⁵ Justice Brandeis, on the other hand, has been celebrated for “his logic, his learning, the lucid order of his reasoning, the exactness of his language, and his *extraordinary penetration of facts*.”³⁵⁶ Stated differently, “Brandeis, in contrast [to Holmes], loved facts and distrusted philosophy, which he

349. Margolis, *supra* note 339, at 206. Margolis makes the point that when a judge conducts independent research, that research might be counter-productive to the lawyer’s theory of the case. *See id.* at 207. Therefore, the lawyer’s own reporting of “substantial empirical research or established social theories” may counteract the judge’s own misguided research. *Id.* at 208-09.

350. *Id.* at 210-11, 213.

351. *Id.* at 213 (quoting LINDA HOLDEMAN EDWARDS, *LEGAL WRITING—PROCESS, ANALYSIS, AND ORGANIZATION* 25 (2d ed. 1999)).

352. *Id.* at 199.

353. *Id.* at 199 (citing THOMAS B. MARVELL, *APPELLATE COURTS AND LAWYERS* 173, 190 (1978)).

354. *See* Frank, *supra* note 33, at XIV-21 n.22. “Every judge knows who the reasonable prudent man really is. It is the judge himself. He takes himself as the standard because it is mentally, physically, morally and spiritually impossible to take any other standard.” *Id.* (quoting Judge Crane, *Part Played By Tradition in Work of Judiciary*, U.S. DAILY, Jan. 19, 1931); *see also* BENJAMIN N. CARDOZO, LL.D., *THE NATURE OF THE JUDICIAL PROCESS* 16-17 (1921) (writing “[i]n the long run ‘there is no guaranty of justice . . . except the personality of the judge.’”).

355. G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 588 (1995) (quoting Letter from Oliver W. Holmes to Harold J. Laski (May 18, 1919), in 1 *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski* 204, 204-05 (Mark D. Howe ed., 1953)).

356. *Id.* at 600 (quoting Mr. Justice Brandeis, N.Y. TIMES, Nov. 8, 1931, § 3, at 1) (emphasis added).

viewed as an escape from the real intellectual battles of life."³⁵⁷ Brandeis led the use of sociological facts, filling his brief in *Muller v. Oregon* with data and setting the stage for others to do likewise.³⁵⁸

The most famous *ex cathedra* expansion of the record on appeal occurred when Brandeis filed his brief in *Muller*.³⁵⁹ The so-called "Brandeis Brief" contained a mere two pages denominated as "argument."³⁶⁰ Those pages were, in fact, not argument as we know it today, but contained a terse statement of the legal rules applicable to the case with virtually no persuasive appeal.³⁶¹ The remaining 102 pages were devoted entirely to "a 'hodgepodge'"³⁶² of reports of factory or health inspectors, testimony before legislative investigating committees by witnesses such as physicians or social workers, statutes, and quotes from medical text in journals, along with similar sources.³⁶³

Brandeis's premise in introducing these "facts" was that they should be judicially noticed at the appellate level since they were matters of common knowledge,³⁶⁴ although they were not before the trial court, which is an apparent violation of the rule that neither facts nor issues may be introduced for the first time on appeal.³⁶⁵ The U.S. Supreme Court, however, was receptive to the idea of going beyond the record from below, stating in *Muller*, "[i]t may not be amiss, in the present case,

357. Daniel A. Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, 1995 U. ILL. L. REV. 163, 174 (1995) (citing PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 310 (1984)).

358. 208 U.S. 412, 419 (1908).

359. See JOHN J. DALY, THE USE OF HISTORY IN THE DECISIONS OF THE SUPREME COURT: 1900-1930, at 61 (1954).

360. See Brief for the State of Oregon at *8, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107); see also DALY, *supra* note 359, at 61. ("This brief . . . is an exhaustive treatise on the course of legislation in this country and abroad, and contains as well expressions of opinion from innumerable other sources to substantiate his argument that long hours of labor are dangerous for women.").

361. Brief for Oregon State at *8-9, *Muller*, (No. 107). For example, the first "argument" said only: "The right to purchase or sell labor is a part of the 'liberty' protected by the 14th Amendment of the Federal Constitution." *Muller*, 208 U.S. at 416 (citing *Lochner v. New York*, 198 U.S. 45, 53 (1905)).

362. OWEN M. FISS, THE TROUBLED BEGINNINGS OF THE MODERN STATE 1888-1910, at 175 (1993).

363. David E. Bernstein, *Lochner's Feminist Legacy*, 101 MICH. L. REV. 1960, 1968 (2003). The *Muller* case was a constitutional challenge to an Oregon Act that provided:

Sec. 1. That no female (shall) be employed in any mechanical establishment, or factory, or laundry in this state more than ten hours during any one day. The hours of work may be so arranged as to permit the employment of females at any time so that they shall not work more than ten hours during the twenty-four hours of any one day.

Muller, 208 U.S. at 416-17.

364. Brief for Oregon State at *11, *Muller* (No. 107).

365. Cf. Bernstein, *supra* note 363, at 1968. The Brandeis Brief has been sharply criticized for not being factual but rather "anecdotal and unscientific." *Id.*

before examining the constitutional question, to notice the course of legislation, as well as expressions of opinion other than judicial sources.”³⁶⁶ The Court then cited with approval Brandeis’s brief as being “a very copious collection of all these matters.”³⁶⁷ Justice Brewer acquiesced in considering the sources in the brief resorting to judicial notice.³⁶⁸ “We take judicial cognizance of all matters of general knowledge.”³⁶⁹

When Brandeis later sat as a justice on the Supreme Court, it had been noted that he realized “that the Supreme Court of the United States and other tribunals called upon to consider the constitutionality of regulative legislation must have proper exposition of factual bases underlying legislative action, if their decisions [are] to embody wise judicial statesmanship.”³⁷⁰ In his dissenting opinion in *Burns Baking Co. v. Bryan*, Brandeis explained the methods he used to assist in his understanding of the issues before the court, explicitly stating that he went beyond the facts in the record:

Much evidence referred to by me is not in the record. Nor could it have been included. It is the history of the experience gained under similar legislation, and the result of scientific experiments made, since the entry of the judgment below. Of such events in our history, whether occurring before or after the enactment of the statute or of the entry of the judgement, the Court should acquire knowledge,

366. *Muller*, 208 U.S. at 419.

367. *Id.* Brandeis’s admirers contend that “[h]is approach to practice was unusual for that time . . . and would be more peculiar today . . . he had the odd notion that the lawyer’s duty is not to act as a hired gun but to advance the public interest as well as that of his client.” Farber, *supra* note 357, at 172 (citing STRUM, *supra* note 357, at 16; William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 STAN. L. REV. 565, 568 (1985)).

“[H]e piled facts upon facts, having to do with labor, fatigue, health, economic productivity, and so forth, all for the purpose of showing the urgent social need for the legislation he was supporting.” White, *supra* note 355, at 605 (quoting Alpheus T. Mason, *Mr. Justice Brandeis: A Student of Social and Economic Science*, 79 U. PA. L. REV. 665, 683 (1931)). But see Bernstein, *supra* note 363, at 1970.

The importance of Brandeis’s brief in *Muller*, however, has been exaggerated. While Brewer, who certainly had no sympathy for Brandeis’s progressivism, made the unusual gesture of acknowledging Brandeis’s brief . . . Brewer stated that the brief simply provided evidence of the “widespread belief” that long hours of labor were harmful to women and their progeny.

Id. (quoting *Muller*, 208 U.S. at 420).

368. *Muller*, 208 U.S. at 420-21.

369. *Id.* at 421.

370. JOHN MACARTHUR MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 171-72 (1947).

and must, in my opinion, take judicial notice, whenever required to perform the delicate judicial task here involved.³⁷¹

Brandeis attempted to put himself in the posture of the legislature, saying that, in his role of determining the validity of a statute, he had to "know the facts on which the legislators may have acted" whether or not the record revealed them.³⁷² In essence, he saw the need in *Burns* to become something of an expert on bread-making and its trade usage.³⁷³

Brandeis remained attuned throughout his career to the "impracticability of proving in routine fashion the necessary masses of statistics, scientific determinations, and other broad observations involved."³⁷⁴ Brandeis's approach to the scope of the record on appeal has been supported by twenty-first century ethicists who consistently contend that when information is submitted to assist a court in construing statutes or formulating constitutional standards and policies, technical evidentiary standards cannot apply.³⁷⁵ It is now the norm, rather than the exception, for appellate courts to consider information outside the record when dealing with legislative facts or policy.³⁷⁶

It is understandable that lawyers may be uncertain about what types of information to put in a brief. In one case, attorneys "had combed the libraries in order to establish current understanding against which the language of certain corporate papers" ought to be read.³⁷⁷ The Missouri Appellate Court, in 1958, noted:

Counsel have furnished us with a bibliography of approximately 50 texts, treatises and articles, some legal, some financial and some historical. We have read all of these which are available to us. These, we are sure furnish a comprehensive picture . . . Some, being neither legal writings nor properly in evidence (many not even being offered), we would not consider, anyway.³⁷⁸

Justice Blackmun took it upon himself to do some independent investigation before he authored *Roe v. Wade*.³⁷⁹ He spent two weeks at the Mayo Clinic in Rochester, Minnesota, to "search for scientific and medical data upon which to base

371. 264 U.S. 504, 533 (1924).

372. *Id.* at 520.

373. *See id.*

374. MAGUIRE, *supra* note 370, at 172. Brandeis graduated first in his class from Harvard Law School with what are rumored to have been the highest grades ever attained there at that time. Farber, *supra* note 357, at 172.

375. Imwinkelried, *supra* note 279, at 128.

376. *See* Margolis, *supra* note 339, at 199.

377. LLEWELLYN, *supra* note 111, at 233.

378. St. Louis S.W. Ry. Co. v. Loeb, 318 S.W.2d 246, 255-56 (Mo. 1958).

379. *See* 410 U.S. 113, 116-17 (1973).

the opinion.”³⁸⁰ He “virtually closeted” himself at the clinic and spoke to no one about what he was doing.³⁸¹ Although Chief Justice Burger concurred in the opinion, he was “somewhat troubled that the Court has taken notice of various scientific and medical data in reaching its conclusion.”³⁸² Chief Justice Burger did not think, however, that the Court had exceeded the “scope of judicial notice accepted in other contexts.”³⁸³

In apparent acceptance of his court’s legislative function Justice Blackmun said that when he was considering and writing *Roe*, he knew that the issue before the Court was explosive, but that he “never thought that [he] would be standing against the combined might of the Roman Catholic Church and the Mormon Church and 1600 Pennsylvania Avenue and other forces.”³⁸⁴ He also noted that he had received 70,000 letters about *Roe* and that he had read nearly every one.³⁸⁵ “It showed me once again that the federal bench is no place to win a popularity contest.”³⁸⁶

This is not the place to recount the debate alluded to by Karl Llewellyn about whether the judiciary ought to be performing a legislative function: “as of the last eighty or ninety years [before 1960], ‘the orthodox ideology’” has been that “the rules of law are to decide the cases; [and] policy is for the legislature, and not for the courts.”³⁸⁷ Legislative facts are the great exception to the rule that the appellate court is limited in its review to the record created below.³⁸⁸ This great exception is based on a doctrine that accepts that, as to adjudicative facts, the appellate court does no more than review the decision of the trial court for error, and that it cannot find error based on adjudicative facts that were not properly before the trial court.³⁸⁹ The doctrine asserts a separate appellate court legislative function.³⁹⁰ In order to properly perform its legislative function the appellate court must have unfettered access to the

380. ROSEMARY J. ERICKSON & RITA J. SIMON, *THE USE OF SOCIAL SCIENCE DATA IN SUPREME COURT DECISIONS* 41 (1998).

381. *Id.* (citing BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* (1981)). Blackmun is credited with devising the trimester system in *Roe*. *Id.*

382. *Roe v. Wade*, 410 U.S. 179, 179 (1973) (Burger, C.J., concurrence).

383. *Id.*

384. Angie Cannon, *A Supreme Paper Trail*, U.S. NEWS & WORLD REPORT, March 15, 2004, at 18.

385. *Id.*

386. *Id.* It is not clear whether Blackmun read the letters before or after the decision was released. In contrast, the Alabama Supreme Court had received “scores of letters by concerned citizens” that had been sent to members of the court in a very sensitive adoption case, but the court was prohibited from reading and considering them under Canon 3A(4) of the Canons of Judicial Ethics. *See Ex parte C.V.*, 810 So. 2d 700, 704 n.1 (Ala. 2001).

387. LLEWELLYN, *supra* note 111, at 38.

388. *See* Margolis, *supra* note 339, at 198.

389. *See* LLEWELLYN, *supra* note 111, at 28.

390. *See* Imwinkelried, *supra* note 279, at 114.

legislative facts that are needed to make sound policy. There is as yet no generally-accepted doctrine requiring that those facts be developed at the trial court level.

V. CONCLUSION

The record on appeal originated as a way for an appellate tribunal to know what happened at trial.³⁹¹ The purpose of the appeal was to assure that the trial had provided the litigants a proper hearing.³⁹² The written record often consisted of not more than each party's written statement of the case and the pleadings.³⁹³ As trials have become more sophisticated and more technical, more information is included in the records, but the rules of evidence and the rules of appellate procedure have strictly governed what the appellate courts receive in order to judge whether there was error at trial.³⁹⁴ The appellate rule allowing parties to seek supplementation or correction of the record indicates the desire that the record reflect the "truth" of what happened at trial.³⁹⁵

Even when the doctrine of judicial notice was developed to short-cut the process of considering facts so obvious that there need be no cumbersome process of proving them, Rule 201 of the Federal Rules of Evidence still carefully guarded which facts could be considered, assuring that the record would contain only what had been developed by the presentation of evidence that had been subject to confrontation, and clear indisputable facts of common knowledge.³⁹⁶ The objectivity of the trial was protected by limiting judicial notice to adjudicative facts.³⁹⁷ However, there is no clear understanding as to how this traditional function is to be protected from an over exuberant performance of the appellate court's other perceived function of making policy. The reviewing court may perform an independent investigation in order to discover "legislative" facts so that it may perform its "legislative function."³⁹⁸

The scope and nature of the record on appeal can be explained and understood by an appreciation of the appellate functions. Historically, the appellate function has been that of reviewing the trial court for error.³⁹⁹ The trial court cannot err based on evidence that was not before it.⁴⁰⁰ Therefore, the only evidence relevant to review is

391. See generally JACKSON, *supra* note 11, at 13; Frank, *supra* note 33, at IX-3.

392. See JACKSON, *supra* note 11, at 13; Frank, *supra* note 33, at IX-3.

393. See generally COCKBURN, *supra* note 36, at xi-xii; JACKSON, *supra* note 11, at 13.

394. See, e.g., FED. R. APP. P. 10; FED. R. EVID. 103(a)(2).

395. See, e.g., ALA. R. APP. P. 10(f).

396. FED. R. EVID. 201(b) advisory committee notes.

397. *Id.* at 201(a) advisory committee notes.

398. *Id.*

399. State *ex rel.* McGraw v. Telecheck Serv., Inc., 582 S.E.2d 885, 891-92 (W. Va. 2003); Harris Trust & Sav. Bank v. Vill. of Barrington Hills, 549 N.E.2d 578, 582 (Ill. 1989).

400. See, e.g., Crowder v. Zoning Bd. of Adjustment, 406 So. 2d 917, 918-19 (Ala. Civ. App. 1981) (stating that the general rule has been that an appellate court must look only to the record for evidence and cannot look outside the record).

evidence that the trial court had the opportunity to review.⁴⁰¹ This explains what material goes into the record. It also explains why the record may be altered or supplemented only to correct errors in what was included in the record, not to correct oversights by the lawyers at trial. Recently, many appellate courts, and especially the Supreme Court of the United States, have expressly accepted their precedent-making function as one of lawmaking.⁴⁰² Following the legislative model, the notion of “legislative facts” has developed.⁴⁰³ These “facts” are not subject to the protective doctrine of judicial notice that prohibits the noticing of facts unless they are either 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.⁴⁰⁴ Because, as Justice Brandeis, Justice Blackman, and others have demonstrated, there is no ready demarcation between legislative and adjudicative facts, and because either type of fact may be practically dispositive of a case, the attorney is well-advised to consider submitting legislative facts, and appellate courts might, in the interest of fairness, wish either to have such matters addressed at trial or at least to give notice and an opportunity for response from the parties.

401. See LLEWELLYN, *supra* note 111, at 28.

402. See Imwinkelried, *supra* note 279, at 114-15.

403. See Margolis, *supra* note 339, at 198-99.

404. FED. R. EVID. 201(a) advisory committee note.

