THE
# APPELLATE ADVOCATE

NEWSLETTER OF THE AMERICAN ACADEMY OF APPELLATE LAWYERS ■ 2017 ISSUE 1

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IMPORTANT DATES

**2017 Spring Meeting**
Boston, Massachusetts
April 6-8, 2017

**2017 Fall Meeting**
San Francisco, California
October 5–7, 2017

AMERICAN ACADEMY OF APPELLATE LAWYERS

## AAAL 2017 Spring Meeting in Boston, Massachusetts

*By David Rothstein*

The Academy returns to Boston for its 2017 Spring Meeting, which will be held April 6–8, 2017, at the Omni Parker House Hotel. Founded in 1855, the Parker House is one of the oldest, continuously operating luxury hotels in the country. Famous for its Parker House Rolls and Boston Cream Pie, the hotel is near Boston's theater district, the Freedom Trail, the Boston Common and Public Gardens, and the State House. It is a short walk from the hotel to the Faneuil Hall Marketplace as well as abundant shopping and fine dining options.

The Spring Meeting features five panels that include four federal circuit judges, five state supreme court justices, seven law professors, six AAAL fellows, and three additional experienced appellate practitioners. Our luncheon speaker, Massachusetts Attorney General Maura Healey, is an accomplished appellate advocate and one of the Commonwealth's most highly respected public officials. As usual, the program will include an opening night reception, a dine-around at a selection of the city's best restaurants, and the induction dinner.

The conference will open with a panel on mooting. It features Dori Bernstein, the director of Georgetown's Supreme Court Institute, which moots lawyers in nearly every case argued before the United States Supreme Court. Professor Bernstein has

# Off the Record Research—Do the Appellate Rules Need to Be Changed?

*By Sylvia Walbolt*

The matter of appellate judges doing their own factual research from sources such as the internet is becoming an increasing issue for our appellate world. It has been the source of heated opinions, including by a dissent to a majority opinion of Judge Richard A. Posner, an enthusiastic supporter of judicial use of extra-record facts to reach a "sensible opinion." Posner, Richard A., *Reflections on Judging*, Harvard University Press, 2013, at 131; *see also Rowe v. Gibson*, 798 F.3d 622 (7th Cir. 2015). Indeed, opinions issued in the last few weeks of the Supreme Court's 2016 term included facts from the internet, as well as opinions decrying the reliance on non-record facts. *See Utah v. Streiff*, 579 U.S. __, 136 S. Ct. 2056 (2016); *Fisher v. Univ. of Texas at Austin*, 579 U.S. __, 136 S. Ct. 2198 (2016).

The September 2015 edition of *Appellate Issues,* published by the ABA's Council of Appellate Lawyers, contains thoughtful articles on various issues relating to the appellate record in today's informational overload. *See Appellate Issues*, American Bar Association Council of Appellate Lawyers, Summer Edition, September 2015. It should be reviewed by every appellate lawyer who thinks he or she is necessarily constrained by the record created below.

In addition, all of us should review the excellent recommendations for rule changes and consider proposing such changes in our particular jurisdiction.

Those proposed rule changes, with some friendly amendments on my part, are as follows:

1. Standards should be established and required to be followed for an appellate court's consideration of an internet or other extrarecord source of facts not cited in the briefs or dealt with by judicial notice.
2. An appellate court should be required to expressly state facts in its opinion that it is judicially noticing.
3. The court should be required to attach all such sources as appendices to any opinion citing them.

The "Google Earth" authors in that issue further recommend that "[a] ppellate courts should adopt procedures to allow parties to challenge the propriety of judicially noticing facts." They stress that "[a]t a minimum," a rule should be adopted specifically authorizing requests for rehearing of the appellate court's reliance on judicially noticed facts without a prior order granting a request for judicial notice.

In an article (to be published later this year) urging amendment of Florida's rules, we suggest a rule requiring notice to the parties that the appellate court is considering taking judicial notice of certain specified facts and allowing the parties to submit written memoranda on the appropriateness of doing so *before* a published decision is rendered in reliance on those facts. In sum, we urged that Florida's rules should be specifically amended to ensure that parties are afforded notice of any such independent factual research by appellate judges and given the opportunity to address the proposed extrarecord facts and, if necessary, supplement the record with *other* relevant extrarecord fact *before* oral argument, if possible and at a minimum before issuance of the Court's opinion.

Hope all this prompts some rule changes across the country! ❖