

# Independent research on scientific issues by judges must be carefully weighed and considered

by GEORGE D. MARLOW

Professor Edward K. Cheng is to be congratulated for his article.<sup>1</sup> His well written, well researched, and well reasoned writing favors us with an important discussion about a topic that has gradually surfaced onto the legal landscape over the last 15 years, following and accompanying increasing efforts by lawyers to import scientific discovery and theory into the trial of cases. It should surprise nobody that one important issue this development has raised is whether—without the knowledge of, and absent a request from, the parties to a lawsuit—judges may enter the library or log onto the internet to research for themselves a question of science or technology that is *sub judice*, and which may not have been adequately presented by counsel. As Professor Cheng makes clear, this issue implicates our notions of due process and our standards of judicial ethics.

It is probably fair to assume that judges today are more frequently tempted to engage in independent reading of scientific and technological data as a result of the unprecedented explosion of scientific and technological research and knowledge we have all witnessed during the 20th century and beyond. Creative attorneys have not been passive bystanders, but, rather, have actively responded to this extraordinary phenomenon. Thus, they have looked to physical, biological, social, and other areas of science and technology for answers to the questions their lawsuits pose, questions that judges and juries must answer. Since relevant science

can, often conclusively, resolve a case or controversy, society has a profound interest in having its judges welcome *reliable* scientific evidence with open arms and an open mind.

## Internet research

Before the internet emerged as a major source of information, a curious judge who sought to understand a question of science would most often be required to visit a library or find some other way to locate an authoritative source. Today, the judge need only push a few buttons in the comfort of his or her home to open up a world of written material on virtually any subject known to humanity. Unlike the informal and formal screening inherent in the publication of most books and of articles published in professional journals—all of which are normally found in a traditional general or specialized library—there is no comparable process to screen writings that find their way onto the internet. Unless one is aware of, and sticks only to known publications with peer review standards—which, of course, is itself no guarantee of quality—there is no equivalent assurance that much of the matter found on the internet is screened at all, or is at all reliable. I would argue that the lack of any formal or informal structure or process, and the lack of any cost associated with publishing information on the internet, are among the primary reasons that in the year 2006 and beyond the issue of *ex parte, sua sponte*, independent research by judges during the decision-making process must be so carefully weighed

and considered, a goal the Cheng article helps us achieve.

## Educating judges

To allow such *ex parte* judicial research via the internet ignores the great value of a lawyer's role in an adversary system. I see lawyers—in cases involving a novel theory of science—as screeners of false and useless information, and, as much as



1. All references in this article to Professor Cheng's work are to his forthcoming (in 2007) *Duke Law Journal* piece, available on his website at [www.edwardcheng.com](http://www.edwardcheng.com).

anything, the court's teacher of new scientific or technological theory that these lawyers are asserting or resisting for their clients. Giving litigants notice of the material a judge has *sua sponte* decided to research and read is the best way to encourage attorneys to also see themselves that way, and to give them the opportunity to fulfill this vital aspect of their advocacy role.

Modern judges have, of necessity, been asked to become gatekeepers, responsible to make sure that only reliable—and not junk or fanciful—scientific theory enters the truth-finding process. In response, New York is only one of many states that has adopted an educative approach, and has enhanced its judicial education programs to assist judges to understand science and technology better. For example, in the last five years New York State's Judicial Institute has offered 18 courses on various such topics, including, among others, "Pharmacological Treatment of Children's Behavioral Disorders;" "Science of DNA—Introduction to Genetics;" "Medical Witnesses and Medical Records;" "Scientific Analysis of Children's Testimony;" "Evolving Issues in DNA Litigation;" and "Judicial Gatekeeping of Scientific Evidence and Expert Testimony."

### Judicial ethics

In 1995, as a candidate for a Masters of Judicial Studies (MJS) at the National Judicial College, I was in a seminar called "Behavioral and Social Science and the Law." The class of 13 judges, from about as many states, was taught by the director of the MJS program, Dr. James Richardson. Professor Richardson asked us to read an article entitled *Judicial Use of Social Science Research*, by John Monahan & Laurens

Walker.<sup>2</sup> During a class discussion about the article the following morning, I challenged, on judicial ethics grounds, the authors' assertion that judges, during and as part of the decision-making process, may search for legislative facts "through *sua sponte* library research," and consider empirical and social science research discovered by "searching for it themselves."<sup>3</sup> Not unlike the judicial survey results that Professor Cheng cites in his article, our class was evenly divided on whether such independent forays into the library by judges are ethically appropriate as part of their decision-making process. Dr. Richardson responded positively and with encouragement to my suggestion that this judicial ethics/due process issue might be apt for an interesting masters thesis, which I subsequently wrote.<sup>4</sup>

By his article, Professor Cheng has, most articulately, taken this judicial ethics/due process issue to the next level. With the advantage of witnessing the explosion of information on the internet from 1997 through the first half of 2006, he has given the question of the propriety of this type of *ex parte* research more immediate significance than it had in 1997, because our easy access to all information has so dramatically increased during those nine years. One need only review the supporting citations in his article to appreciate the issue's increasing significance, and the amount of attention it has deservedly attracted.

### In greater depth

Moreover, Professor Cheng has explored the issue in greater depth including, *inter alia*, 1) a close examination of the available approaches to the issue and the implications and effects of *Daubert v. Merrell Dow Pharms.* (509 U.S. 579 (1993)) on the issue in the last 15 years; 2) the controversy over the suggestion that judges be permitted to engage in independent research instead of limiting themselves to the material counsel has presented to them and to their own varying exposure to past and present educational programs and courses on science and technol-

ogy; 3) how a practice of allowing independent scientific research would square with current legal doctrine and ethics rules; 4) whether judges are, or can become, adequately equipped by education and experience to engage in independent research; and 5) whether judges who may currently oppose the practice would ever be inclined to employ independent research if a rule change explicitly permitted it.

While he seems somewhat more open to the notion of independent judicial research than I am, Professor Cheng's gift to the reader is the opportunity his article gives us to acquire a complete understanding of all significant issues surrounding *sua sponte, ex parte* research by judges at the trial level.<sup>5</sup> Where we may part company is over item #3. My strong belief is that such research would not be desirable except in the relatively unusual case where: 1) the judge must act as a gatekeeper in deciding the admissibility of novel theories of science and/or technology; 2) the judge believes the material presented by the parties is inadequate to reach a reliable result; and 3) out of concern for the overriding importance of due process, the judge notifies all parties of the articles, studies, or texts he or she has decided to read, and, of course, gives the parties a reasonable opportunity to respond.

We are in complete agreement that the issue needs to be examined, discussed, and ultimately addressed. Professor Cheng's article effectively and properly continues that examination and discussion, as this question will not go away in an environment where conscientious judges increasingly face complex cases that they must do their utmost to resolve correctly. ❧

GEORGE D. MARLOW

is an associate justice, New York Supreme Court, Appellate Division, and co-chair of the New York State Advisory Committee on Judicial Ethics. (gmarlow@courts.state.ny.us)

2. 15 Law & Hum. Behav. 571 [1991].

3. *Id.* at 574-575.

4. It was ultimately published. See, *From Black Robes to White Lab Coats: The Ethical Implications of a Judge's Sua Sponte, Ex Parte Acquisition of Social and Other Scientific Evidence During the Decision-Making Process*, 72 ST. JOHN'S L. REV. 291 (1998).

5. Because of the additional and/or different practical problems that may exist in considering such a practice at the appellate level, these comments are restricted to trial courts.