

Mohawk Industries, Inc. v. Carpenter: Signaling the Future of Interlocutory Appeals

By Amy Smith

On October 5, 2009, the first day of the Supreme Court's 2009–2010 term and Justice Sonia Sotomayor's first day on that bench, the Court heard oral argument in an important appeal regarding the scope of appellate jurisdiction in the federal courts. The question presented in *Mohawk Industries, Inc. v. Carpenter*¹ was whether, under the collateral-order doctrine established in *Cohen v. Beneficial Industrial Loan Corp.*,² a party may immediately appeal a district court's order finding waiver of the attorney-client privilege and compelling the production of privileged information. The Eleventh Circuit had answered that question in the negative, siding with the Second, Fifth, Seventh, Tenth, and Federal Circuits. On the other hand, the Third, Ninth, and D.C. Circuits had permitted collateral-order appeals of attorney-client privilege rulings.³ The Supreme Court's answer resolved a split among the circuits on this specific issue, and it also lended some valuable insight into the future of the collateral-order doctrine and interlocutory appeals generally.

The Court decided *Mohawk* on December 8, 2009.⁴ In an introductory paragraph of her first opinion on the Supreme Court, Justice Sotomayor succinctly stated:

The question before us is whether disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under the collateral order doctrine. Agreeing with the Court of Appeals, we hold that they do not. Postjudgment appeals, together with other review mechanisms, suffice to protect the right of litigants and preserve the vitality of the attorney-client privilege.⁵

The Opinions Below

In *Mohawk*, the plaintiff Norman Carpenter filed suit against Mohawk Industries and various employees of Mohawk, alleging that he was terminated in violation of 42 U.S.C. § 1985(2) and various state

laws. Carpenter contended generally that Mohawk engaged in a conspiracy, threatened him, and ultimately fired him to deter him from testifying in another civil action. Specifically, Carpenter contended that he reported to Mohawk's human-resources department that several temporary employees, hired by Mohawk through a temporary employment agency, were illegal aliens. After making his report, Carpenter was required to meet with an attorney named Juan P. Morillo, who represented Mohawk in a separate civil action.⁶ Mohawk terminated Carpenter's employment the day after the meeting. Mohawk's stated reason for terminating Carpenter was that it had discovered that he was committing immigration crimes by harboring illegal aliens.⁷

After learning of the complaint in *Mohawk*, the plaintiffs in the other action filed an emergency motion for an evidentiary hearing, and Mohawk's counsel in that action filed a response. The response that Mohawk filed in the other action stated in relevant part:

The true facts are these. On June 1, 2006, Mohawk hired Mr. Carpenter as a Shift Supervisor at Mohawk's Union Grove manufacturing facility. Mr. Carpenter was hired as a salaried employee, and his responsibilities included the supervision of hourly Mohawk employees. Shortly after he arrived at Mohawk, Mr. Carpenter engaged in blatant and illegal misconduct. . . . Mr. Carpenter's attempt to have Mohawk send a worker that Mr. Carpenter believed to be unauthorized to a temporary agency was a clear violation of Mohawk's Code of Ethics and an attempt to circumvent federal immigration law.

...

... Mohawk responded in an entirely appropriate manner. It

commenced an immediate investigation of Mr. Carpenter's efforts to cause Mohawk to circumvent federal immigration law and his claim that other temporary workers at the Union Grove Road facility were not authorized to work in the United States. As part of that investigation, Mohawk's outside counsel Juan P. Morillo interviewed Mr. Carpenter.

As a result of Mr. Carpenter's misconduct, Mohawk fired Mr. Carpenter and did not give him any severance package. His attempt to knowingly cause Mohawk to obtain and utilize an unauthorized worker blatantly violated Mohawk policy.⁸

Carpenter sought to compel information in discovery related to his communications with Mohawk's attorney and information related to Mohawk's decision to terminate his employment. The district court found that the communications at issue were protected by the attorney-client privilege, but concluded that Mohawk had implicitly waived the attorney-client privilege due to the response it filed in the other action. The district court stated:

By making those representations, Defendant Mohawk placed the actions of Attorney Morillo in issue. In fairness, evaluation of those representations will require an examination of otherwise-protected communications between Attorney Morillo and Plaintiff and between Attorney Morillo and Defendant Mohawk's personnel. Consequently, the Court must conclude that Defendant Mohawk has waived the attorney-client privilege with respect to the communications relating to the interview of Plaintiff and the decision to terminate Plaintiff's employment.⁹

The district court ordered Mohawk to respond to Carpenter's discovery requests, but stayed that portion of its order to give Mohawk an opportunity for appeal. Mohawk filed an appeal as well as a petition for a writ of mandamus, seeking to compel the district court to vacate the discovery order. Carpenter moved to dismiss the appeal on the basis that the federal courts of appeals lack jurisdiction to consider the appeal of a non-final discovery order.

The Eleventh Circuit granted Carpenter's motion to dismiss the appeal, refusing to apply the collateral-order doctrine established in *Cohen* to the exercise of its jurisdiction over an appeal of a discovery order implicating the attorney-client privilege. The court found that the first prong of the collateral-order doctrine was met because the district court's order requiring Mohawk to produce the disputed information left no room for the district court to further consider whether the information at issue was protected. Likewise, the court found that the second prong of the collateral-order doctrine was met because the attorney-client privilege is important and the district court could resolve the privilege issues without deciding the merits of the case. However, the court found that the third prong of the collateral-order doctrine was not met because it was not persuaded by Mohawk's argument that once privileged material is turned over, the "cat is out of the bag" and the damage is done. With respect to the petition for a writ of mandamus, the court concluded that Mohawk had not shown that its "right to issuance of the writ is 'clear and indisputable.'"

The Supreme Court Opinions

The Opinion of the Court

The Supreme Court framed the crucial question as to whether requiring litigants to seek review after final judgment so imperils the interests served by the attorney-client privilege as to justify the cost of allowing immediate appeal of the entire class of relevant orders. The Court agreed with the Eleventh Circuit that the third prong of the collateral-order doctrine was not met because collateral-order appeals are not necessary to ensure effective

review of orders adverse to the attorney-client privilege. Therefore, the Court did not decide whether the first two prongs of the collateral-order doctrine were met.¹⁰

The Court made it clear that it would not engage in an "individualized jurisdictional inquiry,"¹¹ but rather would focus on the "entire category to which a claim belongs."¹² The Court concluded that the limited benefits of applying "the blunt, categorical instrument of § 1291 collateral order appeal" to privilege-related disclosure orders simply cannot justify the likely institutional costs,¹³ and that "[p]ermitting parties to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals." The Court reiterated that the class of collaterally appealable orders must remain "narrow and selective in its membership."¹⁴

The Court reasoned that postjudgment appeals generally are sufficient to protect the rights of litigants and assure the vitality of the attorney-client privilege insofar as an appellate court may vacate an adverse judgment and remand a case for a new trial in which the protected material and its fruits are excluded from evidence. The Court acknowledged that an order to disclose privileged information intrudes on the confidentiality of attorney-client communications, but reasoned that deferred review does not meaningfully reduce the *ex ante* incentives for full and frank attorney-client consultations, because the breadth of the privilege and the narrowness of its exceptions exert a much greater influence on the conduct of clients and counsel than the small risk that the law will be misapplied.

Importantly, the Court identified several potential avenues of immediate review apart from collateral-order appeal. First, a party may request the district court to certify, and the court of appeals to accept, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) where there is "a controlling question of law," the prompt resolution of which "may materially advance the ultimate termination of the litigation."¹⁵ The Court suggested that the preconditions for section 1292(b) are most likely to be satisfied when a privilege

ruling involves a new legal question or is of special consequence.

Second, a party may petition the court of appeals for a writ of mandamus in extraordinary circumstances such as when a disclosure order "amount[s] to a judicial usurpation of power or a clear abuse of discretion," or otherwise works a manifest injustice.¹⁶ The Court noted that Mohawk had petitioned to the Eleventh Circuit for a writ of mandamus, but that it had not sought review of the denial of that relief.

Third, a party may opt for noncompliance and subject itself to a contempt citation, which would be immediately appealable at least when the contempt citation is characterized as criminal. Perhaps less drastic, the Court also suggested that a district court may impose less severe sanctions on a party that defies a disclosure order, such as "directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action," "prohibiting the disobedient party from supporting or opposing designated claims or defenses," or "striking pleadings in whole or in part."¹⁷ These sanctions would allow a party to obtain postjudgment review without having to reveal its privileged information.

The Court bolstered its conclusion with reference to Congress's amendment in 1990 of the Rules Enabling Act,¹⁸ to authorize the Court to adopt rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291,"¹⁹ and its subsequent enactment of 28 U.S.C. § 1292(e), which empowered the Court to prescribe rules in accordance with the Rules Enabling Act to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under section 1292. Indeed, as discussed below, this is the *only* portion of the opinion in which Justice Thomas joined.

Justice Thomas's Opinion

As indicated above, Justice Thomas concurred in the judgment and in Part II-C of the Court's opinion. Justice Thomas expressly agreed with the majority that the judiciary should respect Congress's designation of the rulemaking process as

the way to define or refine when a district-court ruling is final and when an interlocutory order is appealable. In his separate opinion, Justice Thomas stated that he would have affirmed the Eleventh Circuit's judgment on the ground that any avenue for immediate appeal beyond certification under section 1292(b), petitions for mandamus and appeals from contempt orders *must* be left to the rulemaking process. Thus, he would have taken the opportunity in *Mohawk* "to limit—effectively, predictably, and in a way we should have done long ago—the doctrine that, with a sweep of the Court's pen, subordinated what the appellate jurisdiction statute says to what the Court thinks is a good idea."²⁰

The First Decisions Following *Mohawk*

At first, it seemed that the courts of appeals, at least those that previously had permitted collateral order appeals of attorney-client privilege rulings, might narrowly construe the Supreme Court's decision in *Mohawk*, and ignore the broader message limiting the collateral-order doctrine more generally. Just three days following the Supreme Court's decision in *Mohawk*, the Ninth Circuit issued its original opinion in *Perry v. Schwarzenegger*.²¹ In *Perry*, the plaintiffs, who were challenging California's Proposition 8 barring gay marriage, sought discovery of internal electoral strategy and communications documents of the defendants, who had been involved in the campaign for passage of the proposition. The district court entered an order requiring the defendants to produce the documents, and the defendants appealed to the Ninth Circuit, arguing that the documents were privileged under the First Amendment because they implicated the defendants' freedom of association.

In its original opinion, the Ninth Circuit permitted an appeal under the collateral-order doctrine, attempting to distinguish *Mohawk* on the ground that freedom of association is a constitutional right that involves a greater public interest and is likely to generate fewer interlocutory appeals than attorney-client-privilege rulings. The court also relied, however, on its mandamus jurisdiction to hear the appeal.

Subsequently, on January 4, 2010, the Ninth Circuit filed an amended opinion in *Perry*.²² The amended opinion explained that after *Mohawk*, it is uncertain whether the collateral-order doctrine applies to discovery orders denying claims of First Amendment privilege. Therefore, the court assumed without deciding that discovery orders denying claims of First Amendment privilege are not reviewable under the collateral-order doctrine. The court instead relied exclusively on its mandamus jurisdiction to review the district court's rulings.

More recently, on January 22, 2010, the Tenth Circuit, which had not permitted collateral-order appeals of attorney-client

The legislative and rulemaking framework Congress has established will define the future of interlocutory appeals.

privilege rulings prior to *Mohawk*, held in *Bailey v. Connolly*²³ that a bankruptcy-court order directing the appellant to sign a prepared, sworn statement was not a final, appealable order under the collateral-order doctrine. The court held that the sworn-statement order in that case met none of the prongs of the collateral-order doctrine.

Similarly, the Fourth Circuit held in *United States v. Myers*²⁴ that *Mohawk* controlled the question of whether there could be an appeal under the collateral-order doctrine of a civil contempt order arising from a discovery order. Because *Mohawk* had made plain that delaying review for a challenge invoking the attorney-client privilege does not imperil any substantial public interest or other value enough to render the order being appealed "effectively unreviewable on appeal from the final judgment in the underlying action,"²⁵ the court found the collateral-order doctrine inapplicable to the respondent's

challenge to the district court's order for her to produce missing items. The court noted that the collateral-order doctrine would not apply for the additional reason that deciding whether the crime-fraud exception to the attorney-client privilege applied as argued by the respondent would require the court to delve into factual and legal considerations enmeshed in the merits of the underlying dispute.²⁶

The Future of Interlocutory Appeals

The Supreme Court opinions in *Mohawk* not only soundly rejected the question presented of whether disclosure orders adverse to the attorney-client privilege qualify for immediate appeal under the collateral-order doctrine, but also they have severely limited any opportunities to expand the collateral-order doctrine. Not only is this evident in the Court's narrow reading of the collateral-order doctrine, but also perhaps even more so in the Court's recognition that Congress has established a legislative and rulemaking framework, which should be employed to provide for appeals of interlocutory decisions to the courts of appeals in those categories of cases that are not otherwise provided for under 28 U.S.C. § 1292. That legislative and rulemaking framework will define the future of interlocutory appeals.

As indicated above, *Mohawk* referred to Congress's amendment in 1990 of the Rules Enabling Act. The Judicial Improvements Act of 1990²⁷ added subdivision (c) to 28 U.S.C. § 2072. Subdivision (c) permits the Supreme Court to define through rules, the term "final" as used in 28 U.S.C. § 1291. The same process that governs rulemaking for other major rules compilations, such as the Federal Rules of Civil Procedure, would be followed in rulemaking under subdivision (c).

The Federal Courts Study Committee hoped at the time that Congress would also permit the rules to expand the appealability of interlocutory determinations,²⁸ which were restricted to those listed in section 1292(a). Congress, however, did not give the Supreme Court the authority to promulgate such rules until two years later. Instead of providing such authority in amendments to the Rules Enabling

Act, that authority came in the form of an amendment to section 1292.

In section 101 of the Federal Courts Administration Act of 1992, Congress amended section 1292 to add subdivision (e). Subdivision (e) permits the Supreme Court, by rule, to provide for interlocutory appeals “not otherwise provided for”²⁹ in section 1292(a) through (d). The quoted language indicates that rules adopted by the Supreme Court may enlarge the list of appealable interlocutory determinations, but may not curtail it. Thus, the House Report specifically describes the amendment as designed “to expand the appealability of interlocutory determinations by the courts of appeals.”³⁰

In 1998, the Supreme Court employed the rulemaking authority in section 1292(e) in promulgating Federal Rule of Civil Procedure 23(f). Rule 23(f) permits an interlocutory appeal from an order granting or denying class certification at the sole discretion of the court of appeals. The current version of Rule 23(f), which was amended in December 2009, provides that a petition for permission to appeal must be filed with the circuit clerk within 14 days after the order is entered. An appeal does not stay proceedings in the district court absent an order to that effect entered either in the district court or court of appeals.

Also in 1998, Federal Rule of Appellate Procedure 5, which governs appeals by permission, was similarly amended to accommodate new rules such as Rule 23(f) authorizing additional interlocutory appeals. Rather than add a separate rule governing each such appeal, it was believed preferable to amend Rule 5 so that it would govern all such appeals. Thus, Rule 5 is intended to govern all discretionary appeals from district-court orders, judgments, or decrees, including any additional interlocutory appeals that may be authorized under section 1292(e) to the extent that they may be discretionary.

Of course, one drawback to rulemaking (though some may see this as a benefit) is that it is accomplished by a slow and deliberate process. Moreover, attorneys who are comfortable with the litigation process may be unfamiliar with the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice

and Procedure. These are the procedures that govern the operations of the Judicial Conference Committee on Rules of Practice, Procedure, and Evidence (Standing Committee) and the various Judicial Conference advisory committees on rules of Practice and Procedure in drafting and recommending new and amended rules of practice, procedure, and evidence.

Anyone may take the first step in the process by sending suggestions and recommendations with respect to the rules governing interlocutory appeals to the Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544. The secretary should acknowledge in writing all written suggestions or recom-

No one should complain unless he or she has implemented these procedures as suggested in the opinions.

mendations and refer them to the appropriate advisory committee. To the extent feasible, the secretary, in consultation with the chairman of the Advisory Committee, should advise the person making a recommendation or suggestion of the action taken thereon by the advisory committee.³¹

Others may wish to attend public hearings and provide written comments to proposed rules. Hearings must be preceded by adequate notice, including publication in the *Federal Register*. Generally, a period of at least six months is provided from the time of publication of the notice in the *Federal Register* for comment.

No one should complain about the decision in *Mohawk* unless and until he or she has implemented these procedures as suggested in the opinions.

Conclusion

Mohawk may have effectively closed the door to expansion of the collateral-order doctrine, but it has also framed several

windows of interlocutory appeal. In individual cases, these windows may include requests for certified questions under 28 U.S.C. § 1292(b), petitions for writs of mandamus or appeals from criminal contempt orders. When there is an entire class or category of orders for which an interlocutory appeal is desirable, however, the Court will likely defer to Congress's grant of rulemaking authority in 28 U.S.C. § 1292(e). Although the rulemaking procedures typically move more slowly than a civil action, they provide opportunities for everyone to participate. ■

Amy Smith is a member of *Steptoe & Johnson PLLC* in Clarksburg, West Virginia.

Endnotes

1. No. 08-678 (U.S. Argued Oct. 5, 2009).
2. 337 U.S. 541 (1949). The collateral-order doctrine provides an exception to the finality requirement of 28 U.S.C. § 1291. Under *Cohen*, an order is appealable if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).
3. *Compare* *FD.I.C. v. Ogden Corp.*, 202 F.3d 454, 458 & n.2 (1st Cir. 2000), *Boughton v. Cotter Corp.*, 10 F.3d 746, 749-50 (10th Cir. 1993), *Texaco, Inc. v. La. Land & Exploration Co.*, 995 F.2d 43, 44 (5th Cir. 1993), *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 162-63 (2d Cir. 1992), *Reise v. Bd. of Regents*, 957 F.2d 293, 295 (7th Cir. 1992), and *Quantum Corp. v. Tandon Corp.*, 940 F.2d 642, 644 (Fed. Cir. 1991), with *In re Napster, Inc. Copyright Litig.*, 479 F.3d 1078, 1087-89 (9th Cir. 2007), *United States v. Philip Morris, Inc.*, 314 F.3d 612, 617-21 (D.C. Cir. 2003), and *In re Ford Motor Co.*, 110 F.3d 954, 964 (3d Cir. 1997).
4. 130 S. Ct. 599 (2009).
5. *Id.* at 603. The judgment of the Court was unanimous; however, Justice Thomas joined the majority opinion only as to Part II-C. Justice Thomas filed a separate opinion, concurring in part and concurring in the judgment.
6. See *Williams v. Mohawk Indus., Inc.*, No. 4:04-cv-0003-HLM (N.D. Ga.). In *Williams*, a group of current and former Mohawk employees filed a class action alleging that Mohawk

conspired to place illegal aliens to work in violation of federal and state RICO laws.

7. *Carpenter v. Mohawk Indus., Inc.*, 541 F.3d 1048, 1050–51 (11th Cir. 2008).

8. *Williams*, Docket Entry No. 94, at 4–5 (emphasis added; citations omitted).

9. *Carpenter*, 541 F.3d at 1051.

10. *Mohawk*, 130 S. Ct. at 606.

11. *Id.* at 605 (citing *Coopers & Lybrand*, 437 U.S. at 473).

12. *Id.* (citing *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)).

13. *Id.* at 608 (quoting *Digital Equip.*, 511 U.S. at 883).

14. *Id.* at 609 (quoting *Will v. Hallock*, 546 U.S. 345, 350 (2006)).

15. 28 U.S.C. § 1292(b).

16. *Mohawk*, 130 S. Ct. at 607 (quoting *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 390 (2004)).

17. *Id.* at 608 (quoting Fed. R. Civ. P. 37(b)(2)(i)–(iii)).

18. 28 U.S.C. §§ 2071–2077.

19. *Id.* § 2072(c).

20. 130 S. Ct. at 612 (Thomas, J., concurring in part and in the judgment).

21. 591 F.3d 1126 (9th Cir. 2010).

22. *Id.* at 1131 (amended opinion).

23. No. 09-1171, 2010 WL 227255 (10th Cir. Jan. 22, 2010).

24. 593 F.3d 338 (4th Cir. 2010).

25. *Id.* at 345 (quoting *Mohawk*, 130 S. Ct. at 605).

26. *Id.* at 347 n.14.

27. Pub. L. No. 101-650.

28. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 95–96 (Apr. 2, 1990).

29. 28 U.S.C. § 1292(e).

30. H.R. REP. NO. 102-1006, pt. 1, at 18 (1992).

31. In *Mohawk*, the American Bar Association, the Chamber of Commerce of the United States of America, and the DRI—the Voice of the Defense Bar—each filed amicus briefs in support of *Mohawk*'s position that the collateral-order doctrine should apply to allow

an immediate appeal from a district court's order finding waiver of the attorney-client privilege and compelling the production of privileged information. Any of these groups could make a suggestion and recommendation for a rule change following the Court's opinions in *Mohawk*. So too could anyone else interested in the promulgation of a rule allowing interlocutory appeals from orders like the one entered by the district court in *Mohawk*.

Editor's Note: The author recently sent a letter to the secretary of the Committee on Rules of Practice and Procedure, suggesting that Federal Rule of Civil Procedure 37 be amended to authorize discretionary interlocutory appeals from a district court's order granting or denying a motion to compel discovery of information claimed to be protected by the attorney-client privilege. She has received a response, which indicates that the suggestion has been assigned Docket Number 10-CV-A.

Effective Appellate Brief Writing

Continued from front cover

advocate and a judge. But it's just the beginning of the differences in perspective between the two roles.

So, my essential advice to the appellate brief writer is to put yourself in the judge's shoes all the way, as it were. That will help you grasp the relevant differences between judge and advocate and so will enable you to write a brief that will communicate your position effectively.

You will, if your imagination is working properly, understand the following things about appellate judges: that we won't spend nearly as much time on the case as you will; that we are likely to know far less about the parties and about the commercial field in which the case arises, or other real-world context of the case, than you; and that unless you are arguing a criminal appeal, we're unlikely (because of the vastness of the jurisdiction of the federal courts, which via the diversity jurisdiction encompasses most state law as well) to have a deep or comprehensive knowledge of the law

applicable to your case, although this will vary from judge to judge depending on the judge's background and interests. But in the Seventh Circuit, the appellate panel that will decide your case is not announced in advance. It is drawn randomly from the court's judges, so you cannot count on the panel's containing a judge who knows a lot about the particular field of law in which the case arises, even if there is such a judge on the court.

It will also help you as an advocate if you understand—though this is probably the most difficult thing for a practicing lawyer to understand about the judiciary—that we judges are for the most part practical people (even the former academics among us). We are conscious that our decisions make a difference in people's lives, which is a different feeling or sensation or awareness from being handed a case and told to make as persuasive an argument for it as you can within legal and ethical limits. We judges want to reach a sensible and reasonable result in those cases—and they are surprisingly common—that are not governed by clear statutory text or precedent. A result is sensible and reasonable if it could be explained and justified to a layperson. We

therefore are interested not merely in the rule on which you rely, but in the rule's purpose as well, and not merely in the facts as developed in an evidentiary hearing, but also in nonadjudicative facts that illuminate the background and context of a case—that make the case come alive to a person not immersed in the field of law, or the commercial or personal situation, out of which it arises. Don't just state a rule and argue a semantic correspondence between it and the facts of the case.

So now that you know what you need to know about the bench, the specific advice that follows should be easy to understand and to follow. Do some online background research—explore Google, Wikipedia, Google Earth, and the other riches of the Web for information that will help you to help us to a realistic understanding of your case—just as “real” people do, and as judges and their law clerks (and even jurors!) increasingly are doing.

I have been doing this in some of my cases of late and have been criticized that in doing so I have been “going outside the record.” It would be a just criticism if I was looking for adjudicative facts on the Web, the kind of facts that benefit from being