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COMMENT

WIKIPEDIA MADE LAW? THE FEDERAL JUDICIAL CITATION OF WIKIPEDIA

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I. INTRODUCTION

Lamilen Badasa fled from her home country of Ethiopia and entered the United States on a fraudulent Italian passport.¹ She sought asylum in the United States because she was fearful of torture upon returning to Ethiopia.² Unable to establish her identity, both an Immigration Judge (“IJ”) and the Board of Immigration Appeals (“BIA”) dismissed her asylum case.³ Then, in a break-through, Badasa was able to obtain a travel document called a *laissez-passer* from Ethiopia.⁴ A *laissez-passer* is

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1. *Badasa v. Mukasey*, No. 07-2216, 2008 U.S. App. LEXIS 18603, at *1 (8th Cir. Aug. 29, 2008).

2. *Id.* The Immigration and Nationality Act sets forth the eligibility requirements and process for asylum in the U.S. Immigration and Nationality Act, 8 U.S.C. §1158 (2007). Any alien present in the U.S. may apply for asylum if the alien is a refugee, does not fall under certain exceptions, and must comply with the Department of Homeland Security requirements and procedures. *Id.* A refugee is defined as “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.” Immigration and Nationality Act, 8 U.S.C. §1101(a)(42) (2007).

3. *Badasa*, 540 F.3d at *2. Badasa gained entry into the U.S. by using a fraudulent Italian passport. *Id.* As a result, her asylum case was dismissed on the grounds she could not establish her identity due to lack of documentation. *Id.* Badasa had the burden of proof to establish that she was a refugee within the meaning of the statute. Immigration and Nationality Act, 8 U.S.C. §1158(b)(1)(B)(i) (2007).

4. *Id.* The IJ decided that the *laissez-passer* was created by information submitted by Badasa to the Ethiopian government; therefore the document was insufficient to establish

travel document similar to a passport.⁵

Badasa moved to reopen her case and the Department of Homeland Security (“DHS”), the defendant, concurred with Badasa’s motion to reopen.⁶ The BIA granted Badasa’s motion, and remanded her asylum case.⁷ On remand, the DHS argued the *laissez-passer* did not establish Badasa’s identity and the DHS submitted several articles, one from Wikipedia, to support their argument.⁸ The IJ agreed with the DHS, and concluded that the *laissez-passer* was based merely on information provided by Badasa and was insufficient to prove her identity.⁹ On appeal to the BIA, a three-judge panel disapproved of the use of Wikipedia but affirmed the decision.¹⁰

Undeterred, Badasa appealed the BIA decision to the United States Court of Appeals for the Eighth Circuit.¹¹ The appeals court reversed and remanded her case, and decided that the BIA needed to explain in greater detail why Badasa had failed to establish her identity.¹² Furthermore, the court disapproved of the DHS’s reliance on Wikipedia as a source, and discussed Wikipedia’s many disclaimers to support the

her identity because it was merely a self-serving document. *Id.* Ironically, the IJ came to this conclusion after the DHS submitted articles from Wikipedia and other internet sources to describe a *lasses-passer*. As this comment will explain, the Wikipedia article could have been self-serving because the DHS could have edited the Wikipedia article to assert any proposition.

5. *See* Scott v. United States, 193 Ct. Cl. 27, 49-50 (1970) (discussing UN *laissez-passer*); *see also* UN Convention on Privileges and Immunities Art. VII, § 24, 25 (1946).

6. *Badasa*, 540 F.3d at *2.

7. *Id.*

8. *Id.* Several cases in this comment discuss the citation of Wikipedia as well as other Internet sources. This comment narrows the focus on Wikipedia because of the unique problems Wikipedia’s design presents, as further discussed throughout this comment.

9. *Id.* “After considering evidence presented by the parties, including information submitted by the DHS from an Internet website known as Wikipedia, the IJ found that the *laissez-passer* is a single-use, one-way travel document that is issued based on information provided by the applicant. On this basis, the IJ concluded that the Ethiopian government’s issuance of the travel document did not change her prior decision regarding Badasa’s failure to prove her identity, and therefore denied the application for asylum.” *Id.*

10. *Badasa*, 540 F.3d at *3. “The BIA dismissed Badasa’s appeal, concluding that the IJ’s determination that the *laissez-passer* travel document was insufficient to establish Badasa’s identity was not clearly erroneous. The BIA stated that it did “*not condone or encourage the use of resources such as Wikipedia.com in reaching pivotal decisions in immigration proceedings,*” and commented that the IJ’s decision “*may have appeared more solid had Wikipedia.com not been referenced.*” The BIA declined, however, to find that Badasa was prejudiced, because without considering Wikipedia, the BIA believed the IJ’s conclusion “was supported by enough evidence to find no clear error.” *Id.* (emphasis added).

11. *Badasa*, 540 F.3d at *1.

12. *Id.* at *3. “The BIA did say that Badasa was not prejudiced by the IJ’s reliance on Wikipedia, but it made no independent determination that Badasa failed to establish her identity.” *Id.* at *5.

court's rejection of Wikipedia as a reliable source.¹³

The BIA judges are not alone in their citation of Wikipedia. Over three hundred federal judicial opinions have cited Wikipedia as a source.¹⁴ Most opinions cite Wikipedia in footnotes to define terms used in the opinion.¹⁵ Some judges, however, like the BIA in the *Badasa* case, have used Wikipedia as a source on which to base decisions.¹⁶ Judicial use of Wikipedia as a source of evidence or a basis for making decisions is a serious problem, because the nature of Wikipedia undermines the common law system. Wikipedia is an online encyclopedia that contains articles that *anyone* can create, alter, or revise. Additionally, Wikipedia is not only merely a secondary source, but the articles are subject to change on a daily, sometimes hourly, basis. For these and other reasons this comment will explore, federal judicial opinions should not cite Wikipedia. Wikipedia may be a starting point for research, but this comment will discuss many of the reasons why federal judges and members of the federal bar should not cite Wikipedia as a source. Additionally, Wikipedia's reliability is questionable at best, and for this reason alone Wikipedia should not be cited as an authoritative source on any topic.¹⁷

In Section II, this comment will explain how Wikipedia functions, and how articles are created and edited. This comment will then discuss, in Section III, major trends in federal judicial opinions that cite Wikipedia. Section III will also analyze several federal judicial opinions to determine the effect the citations to Wikipedia have on the common law. Finally, in Section IV, as a result of the precedential nature of judicial opinions, and the reverence due to judicial opinions, this comment will conclude that the Supreme Court and Congress should ban the citation of Wikipedia in federal judicial opinions and court filings.

13. *Id.* at *3-6.

14. Westlaw, Online search, allfed: "Wikipedia," March 10, 2009. Search resulted in 215 cases. LexisNexis, Online search, Federal Cases, combined; "Wikipedia," March 10, 2009. Search resulted in 309 cases. The LexisNexis database is larger, thus resulting in a greater number of cases.

15. Noam Cohen, *Courts Turn to Wikipedia, but Selectively*, New York Times, Jan. 29, 2007, <http://www.nytimes.com/2007/01/29/technology/29wikipedia.html>; Hicks v. Midwest Transit, Inc., 531 F.3d 467, 470 n. 1 (7th Cir. 2008) (citing Wikipedia to define "street name" stocks); United States v. Howell, 527 F.3d 646, 651 n. 3 (7th Cir. 2008) (citing Wikipedia to explain Quad Cities); United States v. Smith, 275 Fed. Appx. 184, 185 n. 1 (4th Cir. 2008) (citing Wikipedia to define "peer-to-peer").

16. *Badasa*, 540 F.3d at *2-*6 (admonishing the Immigration Judge and Board of Immigration for the reliance on Wikipedia article when rendering a decision); *Campbell v. Sec. of Health & Human Services*, 69 Fed. Cl. 775, 780-783 (Fed. Cir. 2006) (reversing the Special Master's decision that was based on Wikipedia and other online resources).

17. Diane Murley, *Technology for Everyone. . . In Defense of Wikipedia*, 100 LAW LIBR. J. 593, 595 (2008). "Criticism leveled at Wikipedia usually focus on its unreliability as a citable source. In general, students and lawyers should not be citing to articles from Wikipedia, or any other encyclopedia." *Id.* at 595.

II. BACKGROUND

A. WHAT IS WIKIPEDIA?

Wikipedia is a free online encyclopedia.¹⁸ Anyone with Internet access can create or edit Wikipedia articles.¹⁹ Wikipedia contains articles on virtually every subject, but the reliability of each article varies widely.²⁰ Articles generally start as a stub, “a short article in need of expansion.”²¹ Moreover, “articles are never finished, [t]hey are continually edited and (usually) improved over time;” the articles evolve over time as users add content to achieve the goal of culminating into balanced complete encyclopedia articles.²² It is important to note that *anyone* can add or edit Wikipedia articles, and “newer articles more frequently contain significant misinformation, unencyclopedic content, or vandalism.”²³

Wikipedia’s design enables it to have many advantages compared to a print encyclopedia.²⁴ First, Wikipedia contains a wide variety of content, some of which print encyclopedias normally do not contain, such as current events, popular culture, and slang terms.²⁵ Second, people of all ages and backgrounds can contribute to Wikipedia, as a result, the individual articles and Wikipedia as a whole may have a more balanced point of view as opposed to print encyclopedias.²⁶ Third, some Wikipedia articles contain hyperlinks to primary sources that users then can utilize to view the primary sources used to write the article.²⁷

On the other hand, Wikipedia’s design also causes it to have many drawbacks. First, articles can be inaccurate and are subject to vandalism.²⁸ Vandalism on Wikipedia occurs when articles contain “jokes, de-

18. Wikipedia, *Wikipedia:About*, <http://en.wikipedia.org/wiki/Wikipedia:About> (as of Sept. 17, 2008, 20:15 GMT).

19. *Id.*

20. *Id.*; Wikipedia, *Researching with Wikipedia*, http://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia (as of Sept. 17, 2008, 20:28 GMT).

21. Wikipedia, *Wikipedia:About*, <http://en.wikipedia.org/wiki/Wikipedia:About> (as of Sept. 17, 2008, 20:15 GMT); Wikipedia, *Stub*, <http://en.wikipedia.org/wiki/Stub> (as of Sept. 28, 2008, 23:25 GMT).

22. Wikipedia, *Researching with Wikipedia*, http://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia (as of Sept. 17, 2008, 20:28 GMT).

23. Wikipedia, *Wikipedia:About*, <http://en.wikipedia.org/wiki/Wikipedia:About> (as of Sept. 17, 2008, 20:15 GMT) (emphasis added).

24. Wikipedia, *Researching with Wikipedia*, http://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia (as of Sept. 17, 2008, 20:28 GMT).

25. *Id.*

26. *Id.*; Wikipedia, *Wikipedia:About*, <http://en.wikipedia.org/wiki/Wikipedia:About> (as of Sept. 17, 2008, 20:15 GMT). Generally, editors of Wikipedia are from a younger more affluent group and the articles may reflect some bias as a result.

27. *Id.*

28. *Id.*

liberately incorrect edits, advertisements, personal attacks, disputes which result in edit wars, and other disruptive behavior.”²⁹ Second, articles are in various states of development and may be biased, incomplete, or change over time.³⁰ Third, despite Wikipedia’s policies that require authors to cite sources, often authors do not follow Wikipedia’s policies, thus many articles contain no citations to primary source material.³¹

Perhaps the most famous incident of vandalism on Wikipedia involved John Seigenthaler, a former USA Today editor and free speech advocate.³² In 2005, John Seigenthaler discovered that his Wikipedia article stated that he was “directly involved in the Kennedy assassinations of both John and his brother Bobby.”³³ This was a complete fabrication; in reality, John Seigenthaler worked for Robert Kennedy and was even a pallbearer at his funeral.³⁴ Wikipedia claims that vandalism is corrected quickly, but this act of vandalism stayed on Wikipedia for four months before being discovered by John Seigenthaler.³⁵ Vandalism continues to be a persistent problem on Wikipedia.³⁶

In January 2009, Senators Edward Kennedy and Robert Byrd both died, according to their Wikipedia articles.³⁷ Obviously, this was false and Wikipedia editors corrected the errors within minutes.³⁸ In order to avoid these types of errors altogether, Wikipedia is considering new software, flagged revisions, that would allow certain pages to be flagged when edited, then trusted Wikipedia users, editors, would review and

29. Wikipedia, *Wikipedia:Who Writes Wikipedia*, http://en.wikipedia.org/wiki/Wikipedia:who_writes_wikipedia (as of Sept. 17, 2008, 20:48 GMT).

30. Wikipedia, *Wikipedia:Why Wikipedia is not so great*, http://en.wikipedia.org/wiki/Wikipedia:Why_Wikipedia_is_not_so_great (as of Sept. 29, 2008, 19:41 GMT).

31. Wikipedia, *Wikipedia:About*, <http://en.wikipedia.org/wiki/Wikipedia:About> (as of Sept. 17, 2008, 20:15 GMT).

32. Burt Helm, *Wikipedia’s Chief: Don’t Quote Us*, Bus. Week Online, Dec 14, 2005; Matthew Battles, *The Wiki Effect; Wikipedia Relies on ‘Community,’ a Notion that’s Beginning to Carry the Weight and Promise of ‘Expertise’*, Bos. Globe, Dec. 18, 2005, at §Ideas p K.

33. Murley, *supra* note 17, at 598.

34. *Id.* at 593, 597; Matthew Battles, *The Wiki Effect; Wikipedia Relies on ‘Community,’ a Notion that’s Beginning to Carry the Weight and Promise of ‘Expertise,’* Bos. Globe, Dec. 18, 2005, at §Ideas p K.

35. Murley, *supra* note 17, at 593, 597; Battles, *supra* note 34.

36. There are several websites dedicated to Wikipedia vandalism, the following are two examples: <http://www.wikipedia-watch.org/vandals.html> and http://www.wikitruith.info/index.php?title=vandalism_exposed.

37. Ben Pershing, *Kennedy, Byrd the Latest Victims of Wikipedia Errors*, Wash. Post, Jan. 21, 2009, http://voices.washingtonpost.com/capitol-briefing/2009/01/kennedy_the_latest_victim_of_w.html.

38. *Id.*

approve the changes before the changes would appear online.³⁹ Flagged revisions software was implemented in the German Wikipedia in May 2008, but is still awaiting approval by the Wikipedia community to be implemented in the English version.⁴⁰

B. HOW WIKIPEDIA ARTICLES ARE CREATED

Launched in 2001, Wikipedia has grown to contain over 2.5 million articles in English and thousands more articles in over fifty languages.⁴¹ Registered users can create new articles, and Wikipedia has established several guidelines for the creation of new articles.⁴² First, users should create new articles only about notable topics.⁴³ Second, users should search Wikipedia for the notable topic under several related searches to ensure another article has not already covered the topic.⁴⁴ Third, users should compile a list of reliable sources and should cite to the sources in the footnotes of the article.⁴⁵ Fourth, users should not violate copyright laws.⁴⁶ Finally, the user should write the article with a neutral tone.⁴⁷

After a user writes an article, users continuously edit and expand the article.⁴⁸ Anyone with Internet access can edit any article by simply clicking on the “edit this page” link on the article.⁴⁹ This link redirects the user to a new page that contains a text box of the existing article.⁵⁰ The user can make major or minor changes, preview the changes, and save the changes.⁵¹ Immediately, the new version of the article is visible to all other users.⁵² An article viewed one day may not be the same

39. Wikipedia, *Wikipedia:Flagged revisions*, http://en.wikipedia.org/wiki/Wikipedia:Flagged_revisions (as of March 6, 2009, 17:51 GMT).

40. *Id.*

41. Wikipedia, *Welcome to Wikipedia*, http://en.wikipedia.org/wiki/Main_Page (as of Sept. 29, 2008, 21:54 GMT).

42. Wikipedia, *Wikipedia:Starting an Article*, http://en.wikipedia.org/wiki/Wikipedia:Stating_an_article (as of Sept. 29, 2008, 21:48 GMT).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Wikipedia, *Researching with Wikipedia*, http://en.wikipedia.org/wiki/Wikipedia:Researching_with_Wikipedia (as of Sept. 17, 2008, 20:28 GMT). Sometimes users delete portions of the article or the article in its entirety as a form of vandalism.

49. Wikipedia, *Wikipedia:About*, <http://en.wikipedia.org/wiki/Wikipedia:About> (as of Sept. 17, 2008, 20:15 GMT); Wikipedia, *Wikipedia:How to edit a page*, http://en.wikipedia.org/wiki/Wikipedia:How_to_edit_a_page (as of Sept. 29, 2008, 22:15 GMT).

50. Wikipedia, *Wikipedia:How to edit a page*, http://en.wikipedia.org/wiki/Wikipedia:How_to_edit_a_page (as of Sept. 29, 2008, 22:15 GMT).

51. *Id.*

52. *Id.* If flagged revisions is implemented in the English version of Wikipedia, a change made on a flagged page would not be visible to users until the edit was approved by

when viewed at a later date; however, each article contains a history tab.⁵³ The history tab is a link to the article's page history, which is a detailed listing of all the previous versions of the article and the editor's description of the edits.⁵⁴ The page is organized in reverse chronological order by the exact date and time of every edit, and each edit displays either the username or IP address of the editor.⁵⁵

As a result of the continuously changing nature of Wikipedia articles, the *Harvard Journal of Law and Technology* has developed a citation format specifically for Wikipedia:

[*Signal*] Wikipedia, [*article*], [http://en.wikipedia.org/wiki/\[article\]](http://en.wikipedia.org/wiki/[article]) [(optional other parenthetical)](as of [date], [time] GMT).⁵⁶

Within the citation is the exact date and time the researcher viewed the specific Wikipedia article. If this citation format is followed, a reader can use the Wikipedia article's page history to locate the exact version the original researcher used.⁵⁷

A consequence of Wikipedia's design, Wikipedia provides numerous general disclaimers to its users.⁵⁸ Most notable of these disclaimers is:

Wikipedia cannot guarantee the validity of the information; [t]he content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of

an editor. Wikipedia, *Wikipedia:Flagged revisions*, http://en.wikipedia.org/wiki/Wikipedia:Flagged_revisions (as of March 6, 2009, 17:51 GMT).

53. Wikipedia, *Help:Page history*, http://en.wikipedia.org/wiki/Page_history (as of Oct. 1, 2008, 16:03 GMT). The ever-changing nature of Wikipedia articles is one of the main reasons judicial opinions should not cite Wikipedia as a source. An article may contain information to support a proposition when a judge initially reads the article, but the article may not contain the same information when the opinion is written, published, or read later. Additionally, this begs the question: what information is correct? If the article contains specific information that supports a proposition in a judicial opinion, but later does not contain the information, it is uncertain what information is correct.

54. *Id.*

55. *Id.* This is important when cite checking, as well as evaluating a Wikipedia article as a source. Some controversial articles contain several changes back and forth from opposing viewpoints. This is important because readers should be alert to determine whether the article is neutral or biased. A reader can view the past edits of the article to determine the various viewpoints represented to help differentiate what information is biased. See Wikipedia, *Wikipedia:Edit War*, http://en.wikipedia.org/wiki/Edit_war (as of March 21, 2009, 1:04 GMT).

56. Murley, *supra* note 17, at 597.

57. The citation format is rarely if ever used; therefore, Wikipedia citations are even more problematic because often the article may contain different information from the time the author first read the article to the time the reader views the Wikipedia article cited. Without a reference to the date and specific time, because Wikipedia articles may change multiple times each day, the reader is unable to verify the information that the author cited Wikipedia to support.

58. Wikipedia, *Wikipedia:General disclaimer*, http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer (as of Oct. 1, 2008, 16:26 GMT).

knowledge in the relevant fields; Wikipedia is not responsible for any information that may be inaccurate or libelous; and Wikipedia should not be used as a substitute for professional advice.⁵⁹

Additionally, Wikipedia has a legal disclaimer, which states: “Wikipedia contains articles on many legal topics; however, NO WARRANTY WHATSOEVER is made that any of the articles are accurate. There is absolutely no assurance that any statement contained in an article touching on legal matters is true, correct, or precise.”⁶⁰ Despite these strong disclaimers, federal judges continue to cite Wikipedia as a source for information.

C. FEDERAL CITATION OF WIKIPEDIA

The American common law system is a process whose “fundamental premise is that [a] judicial decision of an adjudicated issue, embodied and explained in an opinion by a judge, is a ‘precedent’ which under the doctrine of *stare decisis* (“to stand by the decision”) has the quality of controlling law for the future.”⁶¹ The United States Supreme Court, in *Randall v. Sorrell*, emphasized the importance of precedent, and explained *stare decisis* as “the basic legal principle commanding judicial respect for a court’s earlier decisions and their rules of law. . . adherence to precedent is the norm; departure from it is exceptional, requiring ‘special justification’.”⁶²

America inherited its common law judicial system from England; it is a system where judicial opinions make up a body of law. For example, property law developed over time through judicial opinions.⁶³ Previous decisions create precedent that can be binding or persuasive on courts depending upon jurisdictional boundaries.⁶⁴ Courts are bound by “prior decisions of superior courts, and even by the prior decisions of their own court; courts have the capacity to ‘make’ law.”⁶⁵ Not only are courts bound by the holding of prior cases, courts are also bound by the “mode of

59. *Id.*

60. Wikipedia, *Wikipedia:Legal disclaimer*, http://en.wikipedia.org/wiki/Wikipedia:Legal_disclaimer (as of Oct. 1, 2008, 16:28 GMT) (emphasis in original).

61. RICHARD B CAPPALLI, *THE AMERICAN COMMON LAW METHOD* 9 (Transnational Publishers 1997).

62. *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) quoting *Arizona v. Rumsey*, 427 U.S. 203, 212 (1984).

63. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 54-55 (Yale Univ. Press 1921).

64. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989). A court is bound by the precedent set by its own decisions and the decisions of courts that have appellate jurisdiction over the court. All other court decisions are persuasive, the court may choose to follow the persuasive decision or reject the decision. *Id.*

65. *Id.*

analysis” set forth by the prior decision.⁶⁶ *Stare decisis* allows the American justice system to attain degrees of uniformity, consistency, and certainty.⁶⁷ A Court’s respect for precedent is indispensable because “the very concept of the rule of law underlying our own Constitution requires such continuity over time.”⁶⁸

D. FEDERAL COURT RULES ON CITATION

Wikipedia may be used to answer simple questions or as an initial starting point for research, but it should not be used as an authoritative source, especially by the legal community.⁶⁹ Wikipedia itself cautions users about using Wikipedia as a research source, and many undergraduate schools have either considered or explicitly banned the citation of Wikipedia.⁷⁰ In addition, the U.S. Patent and Trademark Office removed Wikipedia from its list of acceptable sources in 2006.⁷¹ The federal court system, however, has yet to ban the citation of Wikipedia.

Under the Rules Enabling Act, the U.S. Supreme Court has the power to establish rules of procedure and evidence in all federal courts,

66. *Id.* The “mode of analysis” is the method of deciding a case. *Id.*

67. CARDOZO, *supra* note 63, at 68-69. Quoting Sir James Parke:

Our common law system consists in applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents and for the sake of attaining uniformity, consistency and certainty, we must apply those rules when they are not plainly unreasonable and inconvenient to all cases which arise; and we are not at liberty to reject them and to abandon all analogy to them in those in which they have not yet been judicially applied, because we think that the rules are not as convenient and reasonable as we ourselves could have devised. *Id.*

68. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992). Justice O’Connor writing for the Court explained when precedent is followed or overruled:

Even when the decision to overrule a prior case is not, as in the rare, latter instance, virtually foreordained, it is common wisdom that the rule of *stare decisis* is not an ‘inexorable command,’ and certainly it is not such in every constitutional case. Rather, when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. *Id.* (omitting internal citation).

69. Murley, *supra* note 17, at 595, 599.

70. Jason R. Richards, *Courting Wikipedia*, Trial, Apr. 1, 2008, http://goliath.ecnext.com/coms2/summary_0199-7775543_ITM.

71. *Id.*

subject to Congressional approval.⁷² Congress created the Judicial Conference of the United States to perform a variety of functions, one of which is to promote procedural uniformity among the circuit courts.⁷³ The Chief Justice of the U.S. Supreme Court is the presiding judge of the Judicial Conference, which is comprised of the chief judge from each circuit court of appeals, the chief judge of the court of international trade, and a district court judge from each district.⁷⁴ The Judicial Conference promulgates the Federal Rules of Appellate Procedure, then the U.S. Supreme Court and Congress adopt the rules.⁷⁵ The Federal Rules of Evidence are promulgated in the same manner as the Federal Rules of Appellate Procedure, except a different advisory committee within the Judicial Conference develops the rules of evidence.⁷⁶

Recently in December 2006, Congress adopted Rule 32.1 of the Federal Rules of Appellate Procedure.⁷⁷ Rule 32.1 permits the citation of unpublished opinions and prohibits courts from restricting the citation of unpublished opinions.⁷⁸

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designed as ‘unpublished,’ ‘not for publication,’ ‘non-precedential,’ ‘not precedent’ or the like; and (ii) issued on or after Jan. 1, 2007.⁷⁹

Prior to the adoption of Rule 32.1, several local rules restricted the citation of opinions.⁸⁰ Many courts only allowed citation to published opinions, despite the availability of unpublished opinions.⁸¹ The Judicial

72. Rules Enabling Act, 28 U.S.C. §§2071-2077 (2006). All federal courts are bound by the federal rules, often courts have local rules in addition to the uniform federal rules.

73. 28 U.S.C. §331 (2006 & Supp. 2008); see also Scott E. Gant, *Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1*, 47 B.C. L. REV. 705, 708 n. 10 (2006). Discussion of the history of unpublished federal opinions and the Appellate Procedure rule 32.1.

74. 28 U.S.C. §331 (2006 & Supp. 2008).

75. 28 U.S.C. §§2073-2074 (2006). The rules can be modified or rejected by Congress before the rules take effect. *Id.* See also *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 620 (1997). The Supreme Court, when discussing the Federal Rule of Appellate Procedure 23, emphasized that “[f]ederal rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commentators, the Judicial Conference, this Court, the Congress.” *Id.*

76. Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1664 n. 65 (1995).

77. FED. R. APP. P. 32.1.

78. *Id.*

79. *Id.*

80. Gant, *supra* note 73, at 705 (2006).

81. *Id.* at 709-10.

Initially, opinions designated as unpublished were available to anyone who wished to pay a visit to the clerk’s office at each court of appeals, but were not otherwise disseminated to the public or to legal publishers. Over time, however, more and

Conference with Supreme Court and Congressional approval adopted Rule 32.1 to provide a uniform standard for federal courts.⁸² The rule provides for the citation to all opinions regardless whether the official reporter published the opinion.⁸³ The majority of federal opinions that have cited Wikipedia are unpublished opinions; therefore, the affect Wikipedia may have had on the common law was minimal prior to the enactment of Rule 32.1 because many local rules banned the citation of unpublished opinions.⁸⁴

Rule 32.1, however, allows the citation of all opinions. As a result, court filings and federal court opinion can cite federal opinions that cite Wikipedia as authority, despite the opinions unpublished status. Thus, opinions that cite Wikipedia now have the potential to have a greater impact on the common law.⁸⁵ Wikipedia is a secondary source, which itself warns the information found on Wikipedia may not be accurate. Therefore, to avoid misinformation contained in Wikipedia articles from affecting the common law the Judicial Conference with Supreme Court and Congressional approval should adopt a rule to ban the citation of Wikipedia in judicial opinions and court filings. The Judicial Conference should model the rule after Federal Rule of Appellate Procedure Rule 32.1 and state the following:

more ‘unpublished’ opinions became widely available, primarily through private publishers such as West and Lexis. Today, most unpublished opinions (which comprise approximately 80% of all appeals court dispositions) are accessible through electronic legal databases, or in West’s *Federal Appendix*, established in 2001, which includes every ‘unpublished’ decisions sent to it by the courts of appeals. Moreover, the E-Government Act of 2002 requires that all opinions, published and unpublished, be posted on every federal court’s own website. *Id.*

82. Memorandum from Judge Samuel A. Alito, Jr., Chair Advisory Committee on Appellate Rules, to Judge David F. Levi, Chair Standing Committee on Rules of Practice and Procedure (May 6, 2005, revised Oct. 7, 2005) available at <http://www.uscourts.gov/rules/Reports/AP10-2005.pdf>.

83. *Id.*

84. The local rules have since been superseded by Rule 32.1, but the following are a few examples of local rules that banned the citation of unpublished opinions prior to the enactment of Rule 32.1. Fourth circuit local rule 32.1: “Citation of this Court’s unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing *res judicata*, estoppel, or the law of the case.” 4TH CIR. R. 32.1. The following is the relevant portion of the third circuit rule governing citations in effect before federal rule 32.1. “Citations to services and topical reports, whether permanent or looseleaf, and to electronic citation systems, must not be used if the text of the case cited has been reported in the United States Reports, the Federal Reporter, the Federal Supplement, or the Federal Rules Decisions.” 3RD CIR. R. 28.3.

85. Courts may still choose whether to follow the previous holding. Rule 32.1 did not add any precedential value to case; rather the rule’s scope is narrow, only allowing the citation to unpublished cases, not assigning any precedential value to the cases.

Citation Prohibited. All documents filed with any federal judicial court and all federal judicial opinions, orders, judgments, and other written dispositions are prohibited from the citation of Wikipedia.

III. ANALYSIS

A. GENERAL CITATION

An alarming number of federal opinions cite Wikipedia and this trend is continuing. An online Westlaw search, conducted on September 14, 2008, resulted in one hundred seventy-one (171) federal opinions citing Wikipedia.⁸⁶ The same search conducted only one month later on October 17, 2008 resulted in one hundred eighty (180) federal options citing Wikipedia, and later, the same search conducted on March 10, 2009 resulted in two hundred fifteen (215) federal opinions citing Wikipedia.⁸⁷ An online LexisNexis search, conducted on September 14, 2008, resulted in two hundred fifty-four (254) federal opinions citing Wikipedia.⁸⁸ One month later on October 17, 2008, the same search resulted in two hundred sixty-three (263) federal opinions citing Wikipedia, and the same search conducted on March 10, 2009 resulted in three hundred nine (309) federal opinions citing Wikipedia.⁸⁹ This prevalence of federal opinions citing Wikipedia has been noticed; other federal judges have commented in opinions about the prevalence of the citation of Wikipedia. A judge from the Southern District of New York noted that, “[c]ountless contemporary judicial opinions cite [I]nternet sources, and many specifically cite *Wikipedia*.”⁹⁰ While the majority of the judicial citations of Wikipedia occur in dicta, judges have based decisions on information from Wikipedia.

1. *Definitions of Terms*

The majority of the judicial citations of Wikipedia occur within a footnote when the court is explaining a term, generally when stating the facts of the case. Most often, the term is a slang term or an obscure term that is not readily found in a dictionary.

The following are just a few examples of federal opinions that cite Wikipedia to explain terms not found in dictionaries. In *EMI Entertain-*

86. Westlaw search: Database: allfed, Searchterm: “Wikipedia,” (Sept. 14, 2008).

87. Westlaw search: Database: allfed, Searchterm: “Wikipedia,” (Oct. 17, 2008); Westlaw search: Database: allfed, Searchterm: “Wikipedia,” (March 10, 2009).

88. LexisNexis search: Database: Federal Cases, combined, Searchterm: “Wikipedia,” (Sept. 14, 2008).

89. LexisNexis search: Database: Federal Cases, combined, Searchterm: “Wikipedia,” (Oct. 17, 2008).

90. *Alfa Corp. v. Oao Alfa Bank*, 475 F. Supp. 2d 357, 361 (S.D.N.Y. 2007) (listing judicial opinions citing Wikipedia).

ment World, Inc. v. Priddis Music, Inc., a case about a dispute concerning copyrighted music used in karaoke machines, the court relied on Wikipedia to define the term “karaoke” as used throughout the opinion.⁹¹ In *B&E Juices, Inc. v. Energy Brands, Inc.*, the court cited Wikipedia to define the term “SKU” or “Stock Keeping Unit,” and the parties used the definition from Wikipedia during the trial and the court used the definition from Wikipedia in the opinion.⁹² In *Martin v. Wal-Mart Stores*, the court cited Wikipedia to define the term “MP3 Player.”⁹³

Wikipedia may not be the best choice for information, but the federal courts’ reliance on Wikipedia to define terms, commonly known, but not readily found in dictionaries, is not very problematic. This is especially true when the explanation is designed to educate the reader and the court cites Wikipedia in a footnote. The reliance on Wikipedia becomes problematic when courts use Wikipedia to define terms that are central to the issues of the case and the definition of the term is central to the outcome of the case. The following is an example of a court relying on Wikipedia to define a term central to the outcome of the case.

In *Aubin v. Residential Funding Company*, a homeowner alleged that the mortgage company failed to comply with the Federal Truth in Lending Act (“TILA”) when the right to rescind notice did not “clearly and conspicuously” give the date for the end of the rescission period.⁹⁴ One of the terms in the notice in dispute was the term “business days,” specifically whether Saturday was considered a business day.⁹⁵ For TILA cases, the court must apply an objective standard to determine whether a creditor “clearly and conspicuously” gave notice.⁹⁶ The court used the definitions of “business day” found on Wikipedia and in Black’s Law Dictionary, and reasoned that the average person would not regard

91. *EMI Entm’t World, Inc. v. Priddis Music, Inc.*, 505 F. Supp. 2d 1217, 1219 (C.D. Utah 2007).

92. *B & E Juices, Inc. v. Energy Brands, Inc.*, No. 3:07CV1321, 2007 U.S. Dist. LEXIS 79153, at *15-16 n.2 (D. Conn. Oct. 25, 2007). Distributee claims distributor’s termination of a beverage distribution agreement was a violation of the Connecticut Franchise Act. *Id.* at *1.

93. *Martin v. Wal-Mart Stores, Inc.*, No. 07 C 3458, 2007 U.S. Dist. LEXIS 89715, at *1 n.1 (N.D. Ill., Oct. 25, 2007). Breach of contract and negligence claim arising out plaintiff’s purchase of an MP3 Player from defendant. Defendant, Wal-Mart, has a store policy to sell returned items as new. Plaintiff bought an MP3 Player from Wal-Mart that contained hardcore gay porn stored on the device. *Id.* at *1-2.

94. *Aubin v. Residential Funding Co.*, 565 F. Supp. 2d 392, 393 (D. Conn. 2008). Under the TILA, a consumer has three business days to rescind a mortgage contract and the creditor must “clearly and conspicuously” disclose the end of the rescission period. 12 C.F.R. § 226.15 (2008).

95. *Aubin*, 565 F. Supp. 2d at 393, 395-98.

96. *Id.* at 395.

Saturday as a business day.⁹⁷ As a result, the court denied the defendant's motion to dismiss because there was a genuine issue for trial.⁹⁸ The court discussed the fact that the TILA includes Saturday in its definition of "business days"; however, the court relied upon Wikipedia's definition to render its decision.⁹⁹ The court further discussed the meaning of "business day" as defined in other binding court opinions within the Second Circuit.¹⁰⁰ The court should have relied on the previous court decisions to define "business day" instead of Wikipedia.¹⁰¹

The court in *Aubin* reasoned that a reasonable person would not include Saturday as a business day because the definition of "business day" on Wikipedia did not include Saturday. The court may have looked to Wikipedia because it is likely that a reasonable person would use Wikipedia to define "business day." This use of Wikipedia is logical; however, the following examples are instances where Wikipedia was not a logical source for information. Federal opinions may have to discuss medical terms because of the nature of the claim, but Wikipedia is not a reliable source to define medical terminology.

2. *Medical Terminology*

Wikipedia contains strong medical disclaimers:

Wikipedia contains articles on many medical topics; however, **no warranty whatsoever** is made that any of the articles are accurate. There is absolutely no assurance that any statement contained or cited in an article touching on medical matters is true, correct, precise, or up-to-date. The overwhelming majority of such articles are written, in part or in whole, by nonprofessionals.¹⁰²

Nonetheless, federal judicial opinions have relied on Wikipedia to explain medical terms central to the facts of the case. It is shocking that federal judges would use a source that warns it may not be "true, correct,

97. *Id.* at 397-98.

98. *Id.*

99. *Id.* at 397.

Indeed, it would likely surprise the average person (it certainly surprised this judge) to learn that 'Saturday' is included within TILA's definition of a 'business day.' For Regulation Z states that, 'for purposes of rescission under §§ 226.15 and 226.23, and for purposes of §226.31, [business day] means all calendar days except Sundays and the legal public holidays specified in 5 U.S.C. 6103(a).' *Id.*; 12 C.F.R. § 226.2(a)(6) (2008).

100. *Aubin*, 565 F. Supp. 2d at 397; 12 C.F.R. § 226.2(a)(6) (2008).

101. *Aubin*, 565 F. Supp. 2d at 394, 397-398. The court sits in the Second Circuit. *Id.* at 398. While the court likely used Wikipedia to define "business day" in a manner understood by a reasonable person in accordance with the standard imposed, the court could have omitted the Wikipedia and relied on the further citations to Black's Law Dictionary and previous opinions within the Second Circuit.

102. Wikipedia, *Wikipedia: Medical Disclaimers*, http://en.wikipedia.org/wiki/Wikipedia:Medical_disclaimer (as of October 17, 2008, 22:31 GMT) (emphasis in original).

precise, or up-to-date,” to explain medical terms central to a case.¹⁰³ Certainly, there are better sources to explain medical terms, such as medical journals, treatises, or medical textbooks. Despite the availability of these reliable sources, the following are examples of federal opinions that chose to cite Wikipedia to explain medical terms.¹⁰⁴

In *Cahill v. Astrue*, the plaintiff appealed a denial of Social Security disability benefits and the district court recounted the relevant portions of the plaintiff’s medical history, which comprised pertinent facts of the claim.¹⁰⁵ The Missouri district court explained several medical terms citing various sources: two Medical dictionaries; MayoClinic.com; and Wikipedia.¹⁰⁶ In another appeal for disability benefits, *Jefferson v. Astrue*, the Connecticut district court used several sources to explain the medical terms used throughout the opinion.¹⁰⁷ The court, in *Jefferson*, cited Wikipedia to explain four different medical terms.¹⁰⁸ The courts in both *Cahill* and *Jefferson* should not have adopted Wikipedia’s definition of medical terminology. In both cases, the plaintiffs appealed the Social Security Administration’s decision denying them disability benefits. Both plaintiffs claimed to suffer a disability that they argued entitled them to Social Security disability benefits. Consequently, the medical conditions suffered were at issue, *i.e.*, were the conditions debilitating enough to render the plaintiffs eligible for Social Security disability benefits. Because the medical conditions were central issues to these cases,

103. *Id.*

104. The reason judges are turning to Wikipedia to explain medical terms may be a result of a lack of training in medical terminology or availability of medical resources. Judges who have a high volume of medical intensive cases, for example cases heard under the Social Security Act, may take Continuing Legal Educational courses that focus on medical issues for lawyers. The availability of this option may reduce the reliance on Wikipedia to explain medical terminology. Interestingly, in Great Britain, cases under the British equivalent to the Social Security Act are not decided by judges but are decided by doctors. BERNARD SCHWARTZ ET AL., ADMINISTRATIVE LAW 335-336, (6th ed. 2006). The doctors decide the case after examining the claimant. *Id.*

105. *Cahill v. Astrue*, No. 07-CV-03432, 2008 U.S. Dist. LEXIS 66135, at *1-16 (W.D. Mo Aug. 25, 2008).

106. *Id.* “Cellulitis” as defined in Dorland’s Illustrated Medical Dictionary. *Id.*; “Myotonia Congenita” as defined in Dorland’s Illustrated Medical Dictionary. *Id.* at *5-6 n.3; “Raynaud’s Phenomenon” as defined in Dorland’s Illustrated Medical Dictionary. *Id.* at *10 n.5; “Charcot-Marie-Tooth” as defined in Stedman’s Medical Dictionary. *Id.* at *10-11 n.6; “Meralgia paresthetical” as defined by MayoClinic.com. *Id.* at *12 n.7; “IVIIG” treatment as defined by Wikipedia.org. *Id.* at *14 n.8.

107. *Jefferson v. Astrue*, No. 3:06cv1729, 2008 U.S. Dist. LEXIS 26020, *2-20 (D. Conn. March 11, 2008).

108. *Id.* The court used Wikipedia to define these four medical terms. The “Lasegue test” is a test to determine whether a herniated disk causes lower back pain in the patient. *Id.* at *4 n.1. “Radiculopathy” is a term used to describe nerve damage. *Id.* *7 n.7. The “tibialis anterior” the long muscle that attaches to the tibia in humans. *Id.* *9 n.9. The “gastrocnemius muscle” is the large muscle in humans also called the calf. *Id.* at *9 n.10.

the courts should not have relied on a source that itself warns may be entirely inaccurate to define the medical conditions.¹⁰⁹ The courts had to analyze the medical conditions at issue to determine if they were debilitating enough to warrant disability benefits under the Social Security Act. *Cahill* and *Jefferson* are just two examples of a large number of cases citing Wikipedia to define medical terminology.

Courts should not rely on a source that has an “overwhelming majority of [medical] articles written, in part or in whole, by nonprofessionals.”¹¹⁰ There are many reputable sources to which federal courts can cite that are written, edited, and checked for accuracy by professionals, such as medical journals or treatises.

Federal courts’ reliance on Wikipedia to define medical terminology is problematic, especially in light of the limits on lay witness testimony in the Federal Rules of Evidence.¹¹¹ Wikipedia’s medical disclaimers clearly alert users that lay people, not experts, write the majority of the medical articles.¹¹² According to the Federal Rules of Evidence, a layperson may not testify on any matter related to the medical field, only a witness first qualified, in the medical field, as an expert is allowed to testify concerning matters related to the medical field.¹¹³ An expert can explain a specialized term if it will assist the trier of fact.¹¹⁴ Therefore, courts should not use sources not written by experts because the court should adhere to the same standard as testifying witnesses.

109. Wikipedia, *Wikipedia: Medical Disclaimers*, http://en.wikipedia.org/wiki/Wikipedia:Medical_disclaimer (as of October 17, 2008, 22:31 GMT).

110. *Id.*

111. FED. R. EVID. 701.

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific technical, or other specialized knowledge within the scope of Rule 702. *Id.*

112. Wikipedia, *Wikipedia: Medical Disclaimers*, http://en.wikipedia.org/wiki/Wikipedia:Medical_disclaimer (as of October 17, 2008, 22:31 GMT). “The overwhelming majority of such articles are written, in part or in whole, by nonprofessionals.” *Id.*

113. FED. R. EVID. 702.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. *Id.*

114. *Id.*

3. *Medical Conditions*

Similarly, federal opinions have also cited Wikipedia to explain medical conditions. In *Montanez v. Astrue*, another appeal from a decision denying social security benefits, the court relied on Wikipedia to explain two of the conditions suffered by the plaintiff.¹¹⁵ The plaintiff alleged that as a result of the many conditions from which she suffered, the Social Security Administration should have declared her disabled; two of her conditions were Systemic Lupus Erythematosus (SLE) and Fibromyalgia.¹¹⁶ The court used Wikipedia to explain these two conditions.¹¹⁷

In a similar case, *Urso v. Prudential Insurance Co.*, an Employee Retirement Income Security Act (“ERISA”) claim, the plaintiff sought long-term benefits to which he presupposed he was entitled because he believed he was disabled.¹¹⁸ The plaintiff suffered from thoracic outlet syndrome, pronator teres syndrome, and carpal tunnel syndrome.¹¹⁹ The court used several online sources to explain the plaintiff’s medical conditions, including Wikipedia to explain pronator teres syndrome, somatoform disorder, and hypertensive retinopathy.¹²⁰

In a civil suit, *Thomas v. Sifers*, the plaintiff alleged that the defendant, her doctor, was supposed to perform a new weight reduction surgery on her, but the defendant instead performed an “unknown variation of a much older procedure.”¹²¹ The plaintiff suffered severe complications following the surgery and filed suit alleging fraud, negligence, battery, and violation of the Kansas Consumer Protection Act.¹²² The court cited Wikipedia to explain “gastric dumping syndrome.”¹²³ The court qualified its citation with the following explanation: “[t]he court wishes to specifically note that it is not endorsing the use of Wikipedia as a reliable source for citation, but the general nature of gastric dumping syndrome appears to be fairly generally accepted and provides context to understanding the parties’ dispute here.”¹²⁴ The court justified its citation of Wikipedia because the Wikipedia article reflected a general understanding of the term. The court must have referenced other sources to make the determination that Wikipedia reflected the general under-

115. *Montanez v. Astrue*, No. 3:07cv1039, 2008 U.S. Dist. LEXIS 63551, at *1, *13 n.3, *23 n.5 (D. Conn. Aug. 1, 2008).

116. *Id.*, at *3-4, *22-26.

117. *Id.* at *11-12 n.3, *22 n.5.

118. *Urso v. Prudential Ins. Co. of Am.*, 523 F. Supp. 2d 292, 295 (D.N.H. Jan. 9, 2008).

119. *Id.*

120. *Id.* at 295-96 n.2; 296 n.3; 300 n.6.

121. *Thomas v. Sifers*, 535 F. Supp. 2d 1200, 1201 (D. Kan. 2007).

122. *Id.*

123. *Id.* at 1202-03 n.3.

124. *Id.*

standing of the term, and it should have cited the other sources instead of Wikipedia.

Courts should not cite to Wikipedia to explain medical conditions. Wikipedia itself warns that the information may not be accurate.¹²⁵ In the cases discussed above, an expert witness would have to testify to the information that the courts used Wikipedia to explain.¹²⁶ The Wikipedia articles used by the courts were most likely written by people who could not qualify as expert witnesses; therefore, federal courts should not rely on a source that would not meet evidentiary standards. In cases where a party's medical condition is central to the claim, such as Social Security benefits cases, courts should not rely on research from Wikipedia, but instead should use respected sources written by medical professionals, such as medical journals, textbooks, or treatises.

4. *Prescription Drugs*

In addition to medical terminology and medical conditions, federal judges have also relied on Wikipedia as a source to explain prescription drugs. The following cases are examples of federal opinions citing Wikipedia for this reason. In *Morales v. United States*, a former Chicago police officer challenged his criminal conviction and sentence after he entered a plea-bargain.¹²⁷ The plaintiff claimed his guilty plea was not voluntary because he was incompetent and points to his taking Mirtazapine, which he claims is an anti-psychotic drug, as evidence.¹²⁸ The court cited Wikipedia and another Internet source to discuss the drug Mirtazapine.¹²⁹ Then the court stated, “[t]o be clear, the court relies on the absence of evidence submitted by Morales, not on Internet

125. Wikipedia, *Wikipedia: Medical Disclaimers*, http://en.wikipedia.org/wiki/Wikipedia:Medical_disclaimer (as of October 17, 2008, 22:31 GMT).

126. FED. R. EVID. 702.

127. *Morales v. United States*, No. 06 C 6219, 2007 U.S. Dist. LEXIS 62634, at *1 (N.D. Ill. June 21, 2007).

128. *Id.* at *27.

He also contends that he takes Mirtazapine, which he describes as a “powerful anti-psychotic drug” to treat anxiety, paranoia, mood-swings, psychotic behavior and to help him sleep. Morales has not submitted any evidence that he had these conditions at the time he pleaded guilty or, even if he had, that his untreated headaches and depression would have been severe enough to render him unable to consult with his lawyers or understand the proceedings. To the contrary, at the change of plea colloquy, Morales told the Court that he had no trouble understanding the proceeding and its consequences and was able to consult with his lawyers. Moreover, there is no evidence that Morales has ever suffered from psychosis. He has provided no support for the proposition that Mirtazapine is an anti-psychotic medication. The Court has likewise found no such evidence on its own. *Id.* (internal citation omitted).

The court then points to Wikipedia and another online source to explain that Mirtazapine is not an anti-psychotic drug, but used to treat depression. *Id.* at *28.

129. *Id.* at *10.

references. But these references do tend to support the proposition that Mirtazapine is not an anti-psychotic medication.”¹³⁰

In *Roberts v. Green Ridge Nursing Home*, a breach of duty of care case involving a nursing home resident, the court cited Wikipedia to explain several prescription medications and conditions.¹³¹ The court relied on Wikipedia to explain two prescriptions used to treat congenital heart failure and two medical conditions.¹³²

The explanation of prescription drugs referenced in cases is important because it helps the reader understand the facts of the case, but courts should not use Wikipedia to explain prescription drugs because the information may or may not be accurate. Instead, courts should use a reliable source used in the medical profession like the Physician’s Desk Reference.¹³³

B. PARTIES’ CITATION

Federal judges are not alone in the citation of Wikipedia; parties to lawsuits have cited Wikipedia in documents filed with the court, and sometimes the court has noted the parties’ use of Wikipedia, either in acceptance or rejection.¹³⁴ The following cases are examples of opinions

130. *Id.* at *28.

131. *Roberts v. Green Ridge Nursing Home*, No. 3:CV-06-0303, 2007 U.S. Dist. LEXIS 33034, at *1-2 (M.D. Pa. May 4, 2007).

132. *Id.* at *3-5 nn.2 & 3.

133. There is an online version of the Physician’s Desk Reference for consumers at <http://www.drugs.com/pdr/>. This is a free resource available for information on prescription drugs and is a better resource than Wikipedia.

134. To date, there has been only one case where the opinion discussed an expert witness’ use of Wikipedia. In *Alfa Corp. v. Oao Alfa Bank*, the plaintiff, a U.S. based financial services company, claimed the defendant, a Russian based financial group, infringed on the plaintiff’s trademark and engaged in unfair competition. *Alfa Corp. v. Oao Alfa Bank*, 475 F. Supp. 2d 357, 358-59 (S.D. N.Y. 2007). A new entrant in the U.S. market, the defendant’s name was a translation of its Russian name. *Id.* at 359. The plaintiff’s expert in linguistics determined that the best English translation of the Russian name was not “Alfa” rather “Alpha.” *Id.* at 361. In his report, he cited a number of Online sources, and one was Wikipedia. *Id.* The defendant objected to the expert’s opinion arguing that the online sources were “inherently unreliable.” *Id.* The court discussed the citation of Wikipedia and noted many federal and state judicial opinions that have cited to Wikipedia. *Id.*; see, e.g., *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128, 133 n.3 (1st Cir. 2006); *Reuland v. Hynes*, 460 F.3d 215, 218 n.5 (3d Cir. 2005); *N’Diom v. Gonzales*, 442 F.3d 494, 496 (6th Cir. 2006); *United States v. Krueger*, 415 F.3d 766, 769 (7th Cir. 2005); *Bourgeois v. Peters*, 387 F.3d 1303, 1312 (11th Cir. 2004); *Sacirey v. Guccione*, No. 05 Civ. 2949, 2006 WL 2585561, *1 n.2 (S.D. N.Y. Sept. 7, 2006); *applied Interact, LLC v. Vermont Teddy Bear Co.*, No. 04 Civ. 8713, 2005 WL 2133416, at *11 (S.D.N.Y. Sept. 6, 2005). The court reasoned that the frequent citation of Wikipedia by the courts means that they do not believe that Wikipedia is an “inherently unreliable source.” *Alfa Corp. v. Oao Alfa Bank*, 475 F. Supp. 2d 357, 361-62 (S.D.N.Y. 2007). The court further reasoned that the defendant did not point out any errors in the articles cited by the expert, and that the expert did not base

that discuss practitioners' citation of Wikipedia in various court filings.

1. *Citation in Filings*

In *Iovate Health Sciences v. Bio-Engineered Supplements & Nutrition, Inc.*, a patent infringement case, the court issued an opinion ruling after a claim construction hearing.¹³⁵ The court pointed out that the defendant's technology synopsis, a document submitted to educate the court, contained portions copied from Wikipedia.¹³⁶ The defendant warned the court that the statements from the technology synopsis were untrustworthy and the court noted Wikipedia can be edited by anyone.¹³⁷ The court seemed to disapprove of the use the defendant's use of Wikipedia, but determined the information was correct.¹³⁸ Parties should not rely on Wikipedia as an authoritative source. Parties and the court should not take a risk on whether or not information is accurate.

Courts have accepted, with approval, a party's use of Wikipedia. In *Murdick v. Catatlina*, an employment discrimination case based on religion, both parties cited Wikipedia in court filings.¹³⁹ The plaintiff's religion was Buddhist and both parties cited to Wikipedia to explain Buddhism.¹⁴⁰ The court did not state an opinion as to whether Wikipedia was an acceptable source, but instead relied on Wikipedia because the parties seemed to agree that Wikipedia was an acceptable

his opinion on Wikipedia rather mostly his own experiences as a Russian speaker; therefore, the court allowed the testimony of the expert. *Id.* at 362-63. The defendants in *Alfa Corp. v. Oao Alfa Bank* made a good point that Wikipedia can be an "inherently unreliable" source. *Id.* at 361. Wikipedia itself "does not guarantee the validity of the information" found on Wikipedia. Wikipedia, *Wikipedia:General disclaimer*, http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer (as of Oct. 1, 2008, 16:26 GMT). Nevertheless, the court allowed the expert to testify. *Alfa Corp. v. Oao Alfa Bank*, 475 F. Supp. 2d 357, 362-63 (S.D.N.Y. 2007).

135. *Iovate Health Sci. v. Bio-Engineered Supplements & Nutrition, Inc.*, No. 9:07-CV-46, 2008 U.S. Dist. LEXIS 24989, at *2-3, (E.D. Tex. Mar. 28, 2008). A claim construction hearing is held prior to trial in patent litigation. During the claim construction hearing, the judge determines the meaning of the patent claim before the case is presented before a jury. *Markmen v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

136. *Iovate*, 2008 U.S. Dist. LEXIS 24989 at *21 n.4.

137. *Id.* The defendant warned the court that portions of the technology synopsis may be untrustworthy because several portions were copied from Wikipedia, an inherently untrustworthy source. *Id.*

138. *Id.*

Questioning revealed that BSN had copied excerpts from Wikipedia, an on-line encyclopedia service that can be altered at will by any user. In spite of BSN's kind warning to the court that the documents and statements it presents to the court are not to be trusted, BSN's description of citric acid in three ionic forms is, in this instance, correct. *Id.* (internal citation omitted).

139. *Murdick v. Catatlina Mktg. Corp.*, 496 F. Supp. 2d 1337, 1339-45, 1351 (M.D. Fla. 2007).

140. *Id.* at 1351.

source on Buddhism.¹⁴¹

On one hand, the court in *Murdick* accepted the use of Wikipedia because both parties relied on Wikipedia for the same proposition. In the next case, however, despite the fact that only one party to the lawsuit relied upon Wikipedia, the court accepted the party's use of Wikipedia. In *Gen. Conf. of Seventh-Day Adventists v. McGill*, the plaintiff claimed that the defendant's church name, Creation Seventh Day Adventist Church, infringed on the plaintiff's trademarked general conference church name, Seventh-day Adventist.¹⁴² On a motion for summary judgment, the court accepted the defendant's submission of a Wikipedia article on Adventism.¹⁴³ The court accepted the Wikipedia article because it supported the proposition central to the claim that Adventism referred to a general set of ideas rather than the churches in the Seventh-day Adventist's General Conference.¹⁴⁴ The court denied the motion for summary judgment because it determined that the Wikipedia article supported the conclusion that there was a genuine issue for trial.¹⁴⁵

Litigants, like federal courts, should not use Wikipedia as a source for legal assertions. The prudent court in *Iovate* discovered that the party's memorandum submitted to the court contained inaccurate, copied portions from Wikipedia.¹⁴⁶ This comment will not discuss the ethical implications of the party's plagiarism. Rather, the case is illustrative of the inherent unreliability of Wikipedia and the case supports the proposition that the citation to Wikipedia should be banned in order to protect the integrity of the legal profession, specifically the integrity of the federal court system. Some courts have been wise to reject parties' reliance on Wikipedia as an authoritative source, but other courts have accepted the use of Wikipedia. Courts should reject parties' use of Wikipedia in court filings.

2. *Wikipedia as Evidence*

Parties to a lawsuit, like the Department of Homeland Security in the *Badasa* case, discussed in Part I, have used Wikipedia articles as evidence to support their claim. Courts have to determine whether to accept the articles into evidence. Different types of evidence are subject to specific rules of evidence, but all evidence is required to be relevant

141. *Id.*

142. *Gen. Conf. of Seventh-Day Adventists v. McGill*, No. 06-1207, 2008 U.S. Dist. LEXIS 45526, at *3-4 (W.D. Tenn. June 11, 2008).

143. *Id.* at *26.

144. *Id.*

145. *Id.*

146. *Iovate*, 2008 U.S. Dist. LEXIS 24989 at *21 n.4.

according to Rule 402 of the Federal Rules of Evidence.¹⁴⁷ In *Steele v. McMahon*, the plaintiff alleged that the defendant, a police officer, used excessive force during a suspected driving under the influence stop in violation of the plaintiff's civil rights.¹⁴⁸ The plaintiff, a *pro se* litigant, in support of his opposition to the defendant's motion for summary judgment submitted a United Nations report and a Wikipedia article.¹⁴⁹ The defendant objected to the articles on several grounds and the court sustained the objection because the articles did not meet the requirements of Federal Rule 201.¹⁵⁰

In *Helen of Troy L.P. v. Zotos Corp.*, a breach of warranty, negligence, and strict liability case, the plaintiff, a seller of bottled hair straightening chemical solutions, claimed that the defendant's bottles did not properly tighten causing chemicals to leak.¹⁵¹ The defendant filed several motions; one was a motion to strike the plaintiff's evidence.¹⁵² The court, when ruling on the motion to strike, considered the plaintiff's request that the court take judicial notice of the fact "that urea is an acid having a very low ph."¹⁵³ The source the plaintiff used as a basis for the fact was Wikipedia.¹⁵⁴ The court, when ruling on the motion to strike, considered the plaintiff's request that the court take judicial notice of the fact "that urea is an acid having a very low ph."¹⁵⁵ The source the plaintiff used as a basis for that fact was Wikipedia.¹⁵⁶ The court determined the fact met the requirements of Federal Rules of Evidence 201, *i.e.* it "is not subject to reasonable dispute in that it is . . . capable of accurate and ready determination by resort to *sources whose accuracy cannot reasonably be questioned.*"¹⁵⁷ The fact that the court determined Wikipedia is a "source whose accuracy cannot reasonably be questioned," is questionable.¹⁵⁸

If courts start to admit Wikipedia as evidence, abuses could abound. A forward-thinking litigant could edit a Wikipedia page in a favorable

147. FED. R. EVID. 402. "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." *Id.*

148. *Steele v. McMahon*, No. CIV S-05-1874, 2007 U.S. Dist. LEXIS 73288, at *1 (E.D. Cal. Sept. 2007).

149. *Id.* at *22-23.

150. *Id.* at *23 n.5.

151. *Helen of Troy v. Zotos Corp.*, 235 F.R.D. 634, 636 (W.D. Tex. 2006).

152. *Id.* at 636-37.

153. *Id.* at 639.

154. *Id.*

155. *Id.*

156. *Id.*

157. FED. R. EVID. 201 (emphasis added); *Helen of Troy*, 235 F.R.D. at 640.

158. FED. R. EVID. 201.

manner and submit the document, written by the litigant, as evidence. Congress should ban use of Wikipedia in order to avoid this type of abuse.

C. ADDITIONAL TRENDS

This comment previously discussed the trends of judicial opinions citing Wikipedia to explain medical terms and parties' reliance on Wikipedia. There is also a trend of the use of Wikipedia in prison litigation.

1. *Prison Litigation*

Prisoners file a large number of lawsuits. Most bring civil rights lawsuits claiming violations of their Constitutional rights, among the most commonly alleged are violations of the First and Eighth Amendments.¹⁵⁹ Judges have used Wikipedia to explain medical terms in cases brought by prisoners. Judges have also used Wikipedia to explain religions and religious terminology in prison litigation opinions.

In *Hayes v. Snyder*, an Eighth Amendment deliberate indifference claim brought by a prisoner against prison medical staff, the circuit court used Wikipedia to explain the plaintiff's medical condition.¹⁶⁰ In *Abad v. Roff*, a *pro se* prisoner claimed he received inadequate medical treatment while in prison.¹⁶¹ The court cited Wikipedia in a footnote to explain the prisoner's medical condition.¹⁶²

In *Talbert v. Jabe*, a *pro se* inmate filed a civil rights suit alleging, *inter alia*, a free exercise civil rights claim.¹⁶³ The federal district court granted the defendant's motion to dismiss and cited Wikipedia four times in the opinion.¹⁶⁴ First, the court cited Wikipedia as support for its explanation of the plaintiff's religion.¹⁶⁵ The plaintiff was a member

159. Most commonly, prisoners file suits complaining of violations of the free exercise clause of the First Amendment and deliberate indifference under the Eighth Amendment.

160. *Hayes v. Snyder*, 546 F.3d 516 (7th Cir. 2008).

161. *Abad v. Roff*, No. 7:07-cv-00405, 2008 U.S. Dist. LEXIS 22261, *1, *3 (W.D. Va. Mar. 18, 2008).

162. *Id.* at *5-6 n.6. The plaintiff's condition was lipoma. *Id.*

163. *Talbert v. Jabe*, No. 7:07-cv-00450, 2007 U.S. Dist. LEXIS 82962, *1 (W.D. Va. Nov. 8, 2007). The defendants were Virginia Department of Corrections employees and were sued in their official capacity. *Id.* Plaintiff's five civil right claims were (1) he was improperly held in segregation, (2) he was denied the free exercise of his religion because his religion was "improperly classified as a security threat group," (3) mail containing religious materials had been improperly confiscated and he was charged postage for legal mail, (4) he was denied dental care in violation of the 8th Amendment, and (5) he was not offered a diet in accordance to his religious dietary needs. *Id.* at *2-5.

164. *Id.*

165. *Id.* at *16-17 n.10.

of the Nation of Gods and Earths, a sect of Islam.¹⁶⁶ Second, the court cited Wikipedia when the court analyzed the plaintiff's religious diet claim.¹⁶⁷ The plaintiff claimed he was forced to violate his religion because he was served yellow cheese.¹⁶⁸ The court rejected his claim because the prisoner was served yellow cheese only infrequently and, according to the court's "research," yellow cheese is "kosher."¹⁶⁹ The court's research, at least what the court cited, consisted of Wikipedia articles.¹⁷⁰ The court cited three different Wikipedia articles to support the determination that yellow cheese is kosher.¹⁷¹ Almost a year later, none of the three Wikipedia articles cited supports the determination that yellow cheese is kosher.¹⁷² The court stated its research indicated "that there are 'yellow' cheeses that are kosher, that some processes convert unacceptable foods into acceptable ones, and that it is sometimes acceptable to eat prohibited foods if one waits a prescribed period of time before consuming permitted foods."¹⁷³ Of the Wikipedia articles cited in regards to this statement, none of the articles even mentions yellow cheese.¹⁷⁴ Only one of the articles mentions cheese at all, and it is an article about kosher guidelines set forth by the Jewish religion.¹⁷⁵

The judge who wrote the *Talbert* opinion also wrote an opinion in a similar case, *Blount v. Jabe*, published only three days prior.¹⁷⁶ In *Blount*, another *pro se* prisoner brought a two-part civil rights complaint and part of the complaint alleged that the Virginia Department of Prisons denied him a religious diet. The judge cited the same three Wikipedia articles in *Blount* as in *Talbert*.¹⁷⁷ The plaintiff, a member of

166. *Id.* at *16.

167. *Id.* at *60-61 n.28.

168. *Id.* at n.10.

169. *Id.* at *62-63 n.10.

170. *Id.*

171. *Id.*

172. *Id.* Decision dated November 8, 2007. *Id.* at *1. The court cited these three Wikipedia articles: Wikipedia, *Kashrut*; Wikipedia, *Halal*; Wikipedia, *Islamic dietary laws*.

173. *Id.* at *62-63 n.10.

174. Wikipedia, *Kashrut*, <http://en.wikipedia.org/wiki/Kosher> (as of Nov. 2, 2008, 15:22 GMT); Wikipedia, *Halal*, <http://en.wikipedia.org/wiki/Halal> (as of Nov. 2, 2008, 15:33 GMT); Wikipedia, *Islamic dietary laws*, http://en.wikipedia.org/wiki/Islamic_dietary_laws (as of Nov. 2, 2008, 15:35 GMT).

175. Wikipedia, *Kashrut*, <http://en.wikipedia.org/wiki/Kosher> (as of Nov. 2, 2008, 15:22 GMT). The article stated that often adherents will wait hours to eat dairy products after eating meat because the two food groups are not to be eaten at the same time. *Id.* The article later discusses that cheese is generally only acceptable under certain conditions, one being that the cheese must have been made by a person of Jewish descent. *Id.*

176. *Blount v. Jabe*, No. 7:07-cv-00480, 2007 U.S. Dist. LEXIS 81789, *1 (W.D. Va. Nov. 2, 2007). *Blount* was filed on November 5, 2007 and *Talbert* was filed on November 8, 2007. *Id.*; *Talbert*, 2007 U.S. Dist. LEXIS 82962 at *1.

177. *Blount*, 2007 U.S. Dist. LEXIS 81789, at *19 n.9; *Talbert*, 2007 U.S. Dist. LEXIS 82962, at *1, *62-63 n.10.

the Nation of Islam, received a religious diet but claimed on two incidents that the meal consisted of both meat and dairy products together and this food pairing was a violation of his religious beliefs.¹⁷⁸ The court dismissed the claim on other grounds, but the court noted that one of the incidences, when the prisoner was served cottage cheese and meat, was not a violation of the plaintiff's religious beliefs.¹⁷⁹ The court relied on the same three Wikipedia articles and again none of the articles support the determination made by the court.¹⁸⁰

The Wikipedia articles possibly supported the court's determination when the research was completed, but this is a perfect example of why federal judicial opinions should not cite Wikipedia. The articles are constantly changing as new users add or change the information. As a result, the articles no longer support the determinations made by the court. Also, the citation format used by the court does not show the date or time when the judge viewed the Wikipedia articles. If the citation included the date and time when the judge viewed the article, a later reader of the opinion could look at the Wikipedia article's page history to view the same version. A more informative citation may solve this problem, yet another problem remains. Which version of the article is correct? This is the inherent problem of the federal judicial citation of Wikipedia. Wikipedia is not a reliable source for information because there is no guarantee of accuracy and Wikipedia articles change over time. These are just two of the many reasons why federal judicial opinions should not cite Wikipedia articles. A Wikipedia citation ban is vital to protect the integrity of federal judicial opinions. The unreliability of Wikipedia presents a troubling problem especially when courts rely on Wikipedia as a basis for opinions. Federal judicial opinions make up the common law; therefore, the underlying information upon which federal opinions are based must be accurate.

D. BASIS FOR DECISION

A federal court relying on Wikipedia as a basis for an opinion is the most problematic of all judicial citations of Wikipedia, because the holding of the opinion sets precedent for later cases. Additionally, if the underlying content from Wikipedia relied upon by the court is inaccurate, this would undermine the entire the judicial system. Reliance on Wikipedia to render a decision is especially problematic because of the

178. *Blount*, 2007 U.S. Dist. LEXIS 81789, at *10-11 n.5.

179. *Id.* at *19 n. 9.

180. *Id.* Wikipedia, *Kashrut*, <http://en.wikipedia.org/wiki/Kosher> (as of Nov. 2, 2008, 15:22 GMT), Wikipedia, *Halal*, <http://en.wikipedia.org/wiki/Halal> (as of Nov. 2, 2008, 15:33 GMT), Wikipedia, *Islamic dietary laws*, http://en.wikipedia.org/wiki/Islamic_dietary_laws (as of Nov. 2, 2008, 15:35 GMT).

recent decision to allow the citation to all judicial opinions regardless of the opinion's unpublished status or designation as non-precedential.¹⁸¹ Not only may the court deny justice to the original claimant, the injustice has the possibility of replication in the future. The following cases are examples of where the reliance on Wikipedia denied a claimant justice.

In *Basada v. Mukasey*, first discussed in Section I, the lower courts decided the case based on a Wikipedia article. The injustice was not corrected until the Eighth Circuit rejected the courts reliance on Wikipedia and remanded the case.¹⁸² The immigration judge accepted the Department of Homeland Security's assertion based on a Wikipedia article and as a result decided that *Badasa's laissez-passer* failed to establish her identity.¹⁸³ Additionally, the Immigration Board of Appeals affirmed the decision because the court did not find any error by the immigration judge.¹⁸⁴ If this decision were left to stand, subsequent immigration cases could cite *Badasa* for the proposition that *laissez-passers* fail to establish identity of the holder.

The original information contained in the Wikipedia article, relied upon in the *Badasa* case, may or may not have been accurate. The court, nevertheless, relied upon the information and held that a *laissez-passer* was insufficient to establish a holder's identity.¹⁸⁵ Now assume the information from Wikipedia the court relied upon was incorrect, perhaps even in direct opposition of the truth, and the decision was either not appealed or was affirmed on appeal.¹⁸⁶ The Wikipedia article's misinformation would have become a part of the common law and future cases could cite *Badasa* as authority. This misinformation potentially could have affected the outcome of future litigation.

In *Campbell v. Secretary of Health & Human Services*, the Federal Court of Claims reviewed a decision made by a special master to dismiss a claim filed under the Vaccine Act.¹⁸⁷ In *Campbell*, the parents of a

181. FED. R. APP. P. 32.1 "(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been: (i) designed as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent' or the like; and (ii) issued on or after Jan. 1, 2007." *Id.*

182. *Badasa*, 540 F.3d at 910.

183. *Id.*

184. *Id.* at 909-11.

185. *Id.*

186. As discussed previously, the *Badasa* case was appealed to the U.S. District Court and the decision was remanded. The district court chastised the BIA for relying on Wikipedia and on remand directed the court to clarify what evidence was used by the court when it rendered the decision. *Badasa*, 540 F.3d at 909.

187. *Campbell v. Sec. of Health & Human Serv.*, 69 Fed. Cl. 775, 776 (Fed. Cl. 2006). "Under the Vaccine Act, special masters are charged to make vaccine proceedings expeditious, flexible, and less adversarial, but not at the expense of providing each party a 'full and fair opportunity to present its case and creating a record sufficient to allow review of

young girl filed suit on the girl's behalf. The suit claimed the acellular DPT vaccine given to the girl caused her to have febrile seizures.¹⁸⁸ The special master denied Campbell's claim without first holding an evidentiary hearing.¹⁸⁹ The special master rejected Campbell's expert and instead based her decision on her own Internet research composed of nine articles, at least one of which was from Wikipedia.¹⁹⁰ The Federal Court of Claims explained that, in vaccine cases, the causal link between the vaccine and the medical condition must be proved by a "reputable medical or scientific explanation."¹⁹¹ The issue upon review was whether or not the evidence relied upon by the special master was reliable.¹⁹² The court determined the Internet articles were not reliable.¹⁹³ The court cited numerous "disturbing" Wikipedia disclaimers to support the court's determination that Wikipedia is unreliable.¹⁹⁴ The court determined the special master's reliance on the Internet articles and subsequent actions denied Campbell "fundamental fairness"; therefore, the court vacated and remanded the case.¹⁹⁵

Had the *Campbell* case been affirmed, its ruling could have affected future litigation, and the Wikipedia article used as a basis for the decision could have been made a part of the common law regardless of the accuracy of the article. For this reason, federal courts should not use Wikipedia to make a determination of the outcome of a case. The reviewing court in the *Campbell* case pointed out that this was not the first time that particular special master relied on Internet sources and was reversed.¹⁹⁶ The court noted, years of exposure to similar cases might

the special master's decision." 42 U.S.C. § 300aa-12(d)(3)(B)(iii), (v) (1994), Vaccine Rule 3(b); *Hovey v. Sec. of Health & Human Serv.*, 38 Fed. Cl. 397, 400-01 (1997)." *Id.*

188. *Campbell*, 69 Fed. Cl. at 776-77.

189. *Id.* at 777.

190. *Id.* at 781-82.

191. *Id.* at 781 quoting *Althen v. Sec. of Health & Human Serv.*, 418 F.3d 1274, 1278 (Fed. Cir. 2005); see also *Knudsen v. Sec. of Health & Human Serv.*, 35 F.3d 543, 548 (Fed. Cir. 1994).

192. *Campbell*, 69 Fed. Cl. at 780.

193. *Id.* at 781.

194. *Id.*

A review of the Wikipedia website reveals a pervasive and, for our purposes, disturbing series of disclaimers, among them, that: (i) any given Wikipedia article "may be, at any given moment, in a bad state: for example it could be in the middle of a large edit or it could have been recently vandalized;" (ii) Wikipedia articles are "also subject to remarkable oversights and omissions;" (iii) "Wikipedia articles (or series of related articles) are liable to be incomplete in ways that would be less usual in a more tightly controlled reference work;" (iv) "another problem with a lot of content on Wikipedia is that many contributors do not cite their sources, something that makes it hard for the reader to judge the credibility of what is written;" and (v) "many articles commence their lives as partisan drafts" and may be "caught up in a heavily unbalanced viewpoint." *Id.*

195. *Id.* at 784.

196. *Id.* at 783.

have influenced the special master to take a “cookie cutter” approach, but emphasized that, to serve justice, the special master should not rely on Wikipedia and other Internet sources.¹⁹⁷

IV. CONCLUSION

Wikipedia is a free, user-friendly, online encyclopedia that anyone can edit.¹⁹⁸ Despite Wikipedia’s own disclaimers that the information found on Wikipedia may not be accurate, federal courts continue to cite it as a source in federal opinions.¹⁹⁹ Wikipedia was launched in 2001 while it is a very popular and relatively old website, many people may be unaware of Wikipedia’s numerous strong disclaimers. Additionally, many people do not understand the process by which Wikipedia’s article are created and changed. The ignorance of Wikipedia’s design may be a reason federal judges are citing to Wikipedia in opinions. The aim of this comment is to educate federal practitioners about Wikipedia’s design and lead readers to the conclusion that Wikipedia is not an acceptable source for federal judicial opinions. The very core of Wikipedia, a free online encyclopedia that anyone can edit, renders it a source that will never rise to the level of an acceptable source for cases that make up the common law system. For this reason, a ban of the citation of Wikipedia is essential to conserve the integrity of the common law tradition.

One can argue that an outright ban is too far-reaching; that perhaps Wikipedia is an acceptable source for limited purposes where, for example, citation to Wikipedia is confined to a footnote. This argument fails for two reasons. First, Wikipedia is a secondary source and federal judges should not cite secondary materials for any purpose. Wikipedia may be an acceptable starting point for research but not the end. Researchers should look to primary source material for information. In order to preserve the integrity of the federal case law system, Wikipedia must not be an acceptable source. In fact, many colleges have banned the citation of Wikipedia in academic papers. If Wikipedia is unacceptable for college students, it should be considered unacceptable for federal judges.²⁰⁰ Second, limiting Wikipedia citations to footnotes does not

197. *Id.* at 784.

198. Wikipedia, *Wikipedia:About*, <http://en.wikipedia.org/wiki/Wikipedia:About> (as of Sept. 17, 2008, 20:15 GMT).

199. Wikipedia, *Wikipedia:General disclaimer*, http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer (as of Oct. 1, 2008, 16:26 GMT).

200. Scott Jaschik, *A Stand Against Wikipedia*, INSIDE HIGHER ED, Jan. 26, 2007, available at <http://www.insidehighered.com/news/2007/01/26/wiki>. The history department of Middlebury College voted to ban the citation of Wikipedia in student papers. *Id.* The chair of the department stated “[a]s educators, we are in the business of reducing the dissemination of misinformation. Even though Wikipedia may have some value, particularly from the value of leading students to citable sources, it is not itself an appropriate source for

eliminate the potential serious effect on the common law. The mere fact the citation appears in a footnote does not eliminate the reliance on Wikipedia for the basis of an opinion. Additionally, even if the use of Wikipedia is confined to dicta this does not eliminate the potential effect on the common law. While dicta is not binding, courts have referred to the dicta of previous cases and have conformed the opinion to the dicta of a previous case.

Federal courts have used Wikipedia for a variety of reasons. This comment discussed the federal court's reliance on Wikipedia for definitions of slang or obscure terms. Additionally, this comment discussed the federal court's use of Wikipedia to define medical terms, medical conditions, and prescription drugs. Also, parties have relied on Wikipedia as an authoritative source in court filings, as evidence to support a claim. Moreover, several prison litigation opinions have used Wikipedia as a source. Finally, most troubling is the Federal court's reliance on Wikipedia as a basis for a verdict.

Users should consider Wikipedia's disclaimers and design before users rely upon Wikipedia as an authoritative source. A Wikipedia article cited in an opinion may state a proposition when the judge first views the article, but after the opinion is published, the Wikipedia article cited may state an entirely different proposition.²⁰¹ Federal judges and practitioners should not cite Wikipedia as a source, but should find a more reliable and appropriate source to cite. As a result of the Federal courts' continued and widespread citation of Wikipedia, Congress should ban the citation of Wikipedia. Congress should adopt the following rule:

Citation Prohibited. All documents filed with any federal judicial court and all federal judicial opinions, orders, judgments, and other written dispositions are prohibited from the citation of Wikipedia.

The adoption of the proposed rule would protect the integrity of the common law system because the citation of Wikipedia, a constantly changing source of unverified information, undermines the federal common law system.

citation." *Id.* An English professor at University of California at Santa Barbara also adopted a policy that bans the citation of Wikipedia stating that Wikipedia "is not appropriate as the primary or sole reference for anything that is central to an argument, complex, or controversial." *Id.*

201. Wikipedia, *Wikipedia:General disclaimer*, http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer (as of Oct. 1, 2008, 16:26 GMT).

