Better Living Through Judicial Notice

by Paul J. Kiernan

Simpler is better. Simpler works. At trial, simplicity is essential. Good Guy against Bad Guy—not Complex Guy against Nuanced Guy. Charts need to be self-explanatory, questions direct, jury instructions plain. We know this, but we don't always do this. We assemble our key documents, tab our excerpts, list our essential facts—and then get lost in the proof process. We worry about "How are we going to get this in?" and "Do we need two witnesses about these issues?" We agonize over how leading a question can be. We love hearsay analysis: Any rule that has 23 listed exceptions must be the best place to invest our deepest thinking.

And we forget about judicial notice. We remember it's in the rules, and we remember we can ask the judge to take judicial notice. But we tend to think of it as a dusty relic, like craving oyer or making a Perry Mason objection of "incompetent, irrelevant, and immaterial." We forget that judicial notice is a litigation marvel. Sure, judicial notice makes life simpler: You don't have to spend valuable time and money proving what everyone already knows. That's better for the court, your clients, and you. But judicial notice can be so much more. Used correctly, and deployed tactically, judicial notice can become your new favorite tool. And you can pull judicial notice out of your toolbox and ask for it before, during, or after trial—even on appeal.

Judicial notice is all around. It shows up in a variety of cases, and it can be used in both civil and criminal matters (although this article deals only with the civil side). We may not always see it, and, I believe, we underuse it. Judicial notice is all too easy to overlook. We remember *Daubert*'s discussion of the admissibility of expert testimony but forget that the Supreme Court also discussed when scientific "facts"—like the laws of thermodynamics—are properly subject to judicial notice, not proof. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (U.S. 1993). There are discussions about judicial notice in *Doe v. Bolton*, as well as in the *Croson* discrimination case. In *Croson*, for example, the trial judge took judicial notice of the composition of the minority population of the city of Richmond in fashioning its remedy. *See Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989) (plurality opinion). And in *Roe v. Wade*, Chief Justice Warren E. Burger penned a separate concurrence to point out that while he was "somewhat troubled" that the Court had taken notice of various scientific and medical data, the majority had not exceeded the scope of proper judicial notice. *See Doe v. Bolton*, 410 U.S. 179 (1973) (Burger, C.J., concurring).

We should all look harder for opportunities to bring the power of judicial notice to bear. It can play a more vital role in streamlining and simplifying litigation than it currently does. With courts and parties trying to do more with less, and everyone properly concerned about the costs of discovery and litigation, it is past time for parties to press for more use of judicial notice, and for courts to overcome the traditional reluctance to apply judicial notice more broadly. It is not unusual for a withered procedural rule to be rejuvenated. Before the Supreme Court's Celotex trilogy in the early 1980s, summary judgment was widely viewed as a disfavored remedy for the courts; now it is the rare case that does not involve a summary-judgment motion. Similarly, in the last few years, through the *Twombly* and *Iqbal* decisions, the Supreme Court has breathed new life into the analysis of motions to dismiss, discarding the notion that they are disfavored intrusions into the litigation process. Judicial notice could be the next example that everything old is new again.

Judicial notice is both a rule of evidence and a procedure. Federal Rule of Evidence 201 refers to both aspects of judicial notice—not only what you must establish to invoke it but also how and when it is established.

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What can the court judicially notice? Judicial notice under Rule 201 applies to "adjudicative facts." "Adjudicative fact" is a concept borrowed from the field of administrative law to distinguish a case-specific or controlling fact (adjudicative fact) from the background or legislative or policy facts that animate the development of the law. The term "adjudicative fact" has a musty library feel to it, which may help explain why lawyers shy away from judicial notice. Think of it this way: Judicial notice applies to those facts needed by a jury to decide your particular case. Judicial notice helps in establishing the who, what, where, and when of events. In the classic formulation set forth by the Eleventh Circuit:

> [T]he kinds of things about which courts ordinarily take judicial notice are (1) scientific facts: for instance, when does the sun rise or set; (2) matters of geography: for instance what are the boundaries of a state; or (3) matters of political history: for instance, who was president in 1958.

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

I submit that this classic formulation is too limited, but you should be safe in seeking judicial notice of these kinds of adjudicative facts.

Courts also take judicial notice of so-called legislative facts—those facts on which no one presents evidence but that inform the decisional process. These are the kinds of facts that undergird policy judgments or developments in constitutional law or statutory rights. The most famous example of judicial notice of legislative facts was the Supreme Court's conclusion in *Brown v. Board of Education* that the system of separate schools adversely affected African-American children. The court relied on sociological studies and academic research in arriving at this conclusion, which was essential to its ultimate constitutional ruling. This kind of judicial notice is obviously important, but it is outside the scope of this article, as is the related issue of how to get the trial court to take notice of foreign law.

In the area of adjudicative facts, however, we are accustomed to thinking of judicially noticed facts as unimportant, idle curiosities—Saturn has rings, that sort of thing. And there are courts that continue to take a cramped view of the scope of proper judicial notice. But a judicially noticed adjudicative fact can be *the critical fact* in your case. A few years ago, plaintiffs in class actions filed against the phone companies that participated in the Bush administration's warrantless wiretaps asked the trial court to take judicial notice of the statements made by the attorney general and the director of national intelligence regarding the program and the need for surveillance. Those public statements formed a crucial link in their allegations. Or in a recent criminal case, the Second Circuit took judicial notice, on appeal, that the distance between the scene of a burglary and the location where the police spotted the defendant was only one-tenth of a mile. *See Briscoe v. Ercole*, 565 F.3d 80, 83 (2d Cir. 2009). A defense lawyer or a prosecutor can go a long way in the case with that kind of fact established conclusively without need for additional proof.

The term "adjudicative facts" does not refer to the process of judicial fact finding. When a judge makes factual findings, she is not taking notice of those facts. And when she interprets a contract applying the rules regarding custom and practice, she is not employing judicial notice. The "adjudicative" nature of the fact refers to its role—it is needed for adjudication of this case—and not the result of a judicial decision of a disputed fact based on evidence. Frankly, however, many judges who back away from employing judicial notice in the proper setting may themselves be confusing their different functions. To meet judicial hostility to your request to take judicial notice, emphasize that you are not asking the judge to find facts that are in dispute, only to take notice of those adjudicative facts for which you have met the evidentiary burden.

What makes an adjudicative fact judicially noticeable? Under Rule 201(b), a judicially noticed fact "must be one not subject to reasonable dispute" because it is either well known already or it can be easily looked up. In the parlance of the rule, the judicially noticed fact must be one not subject to "reasonable dispute in that [the fact] is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." As I said, it's already well known, or it can be easily looked up.

The Rule 201 definition twice uses the term "reasonable" in a single sentence. That is not accidental. Judicial notice is appropriate for more than indisputable truths. The only limitation is that the facts to be noticed cannot be subject to "reasonable dispute." And for trial and appellate lawyers, the term "reasonable dispute" means that there is room to argue about it. We are not limited to schoolbook facts about the length of the Mississippi River or the Komodo dragon's status as the world's largest lizard. We can argue that other things are "generally known" in our state or city—like the political leanings in the Ninth Ward or the popularity of lacrosse in Baltimore. If those facts are relevant to your case, they can be judicially noticed.

Moreover, the rule uses the term "reasonable dispute," not "actual dispute," "conceivable dispute," or even "genuine dispute" as the latter is used in the summary-judgment rule. The judicial notice rule calls on the judge to decide whether the fact is not subject to reasonable dispute. That standard invites the court to consider not only what is known but also what could be disputed. In this sense, the judge's decision on whether a fact should be judicially noticed does not invade the province of the jury because the judge is not deciding how the fact should apply. There may still be a triable issue about how a fact not subject to reasonable dispute applies to your particular case. For example, if a court takes judicial notice that people take aspirin to relieve headaches, that does not pre-empt a decision about whether the plaintiff had a headache, how many aspirin she took, or what side effects she experienced. Or there may be no reasonable dispute about the mechanics of how an anti-lock braking system works, but a lot of dispute about whether a particular car's system worked on a particular day. And if a court observes that it is "a subject of common knowledge that the consumption of a procession of drinks of intoxicating liquors produces a variety of reactions in the deportment of human beings, the development of which emotions the tavern-keeper should be reasonably alert to detect," that judicial conclusion does not pre-empt the jury's function of deciding whether bartender McDermott acted reasonably on the night that Moriarity and McGee started a fight down at the 180 Club. *See Reilly v. 180 Club, Inc.*, 82 A.2d 210, 212 (N.J. App. Div. 1951). Judicial notice helps the court and the parties to focus their efforts on what is in dispute by eliminating proof of what cannot reasonably be disputed.

But judicial notice is not an open door for every opinion

disguised as a "generally known" fact. Someone opposing the court's notice of a requested fact needs to hit hard on whether the "fact" is really a matter of opinion. That is why a court properly would refuse to take judicial notice of the contents of the plaintiff's medical records (*see Sigler v. American Honda Motor Co*., 532 F.3d 469, 476–77 (6th Cir. 2008)), but a court could take judicial notice of the fact that the Department of Veterans Affairs maintains medical records for service personnel (*see Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003)). The opinions and the disputed issues of what is contained in the records is a far cry from the easily recognized fact that there are such records. And if your opponent secures from the court a ruling taking judicial notice of a fact, you need to be sure to limit that ruling to the essential fact noticed, and not allow your opponent to get opinion evidence in through the judicial notice door.

A lot has been written about "sources whose accuracy cannot reasonably be questioned." The guideline is that the sources should be authoritative (reference books, calculators), ancient (old newspapers, floppy disks), or official (court records). Official records are among the easiest to qualify for judicial notice but also can present issues depending on what fact the court is being asked to be noticed. For example, if you were seeking to have the court take judicial notice that this plaintiff has filed an identical suit in another jurisdiction, the fact would be beyond reasonable dispute based on a copy of the complaint in the other jurisdiction obtained from that court; the accuracy of that source cannot reasonably be questioned. But if you are asking the court to take judicial notice of certain allegations in that complaint, or to draw certain conclusions outside the fact of the filing of the complaint, you may not be granted the same presumption afforded to a source whose accuracy cannot reasonably be questioned.

The rule does not limit the sources from which the facts are drawn.

The rule does not limit the sources from which the facts are drawn. The goal is to identify a fact not subject to reasonable dispute because it is capable of accurate determination by resort to sources whose accuracy cannot reasonably be questioned. So, depending on the fact at issue, you may look at different sources, including books, media, and government reports. In *Dias v. City and County of Denver*, 2009 WL 1490359 (10th Cir., May 27, 2009), the trial court reviewing the scope of an "anti-pit bull" ordinance took judicial notice of the American Kennel Club's breed designations available on the club's website. Internet sites have been used as sources for judicial notice, as in *Briscoe v. Ercole*, 565 F.3d 80, 83 (2d Cir. 2009), where the Second Circuit logged on to Yahoo! Maps to determine the distance between two addresses. But, no, as of this writing, courts have generally not allowed judicial notice to be taken of Wikipedia entries; its open editing undercuts the idea of accuracy that "cannot *reasonably* be questioned." So in *Cynergy Ergonomics, Inc. v. Ergonomic Partners, Inc.*, 2008 WL 2064967 (E.D. Mo., May 14, 2008), a trademark infringement case, the trial court said it would take judicial notice of Leonardo da Vinci's "Vitruvian Man" drawing because it is generally known, but it would not take notice of the Wikipedia entry about that drawing in deciding whether to grant the motion to dismiss. *See also Capcom Co., Ltd. v. MKR Group, Inc.*, 2008 WL 4661479 (N.D. Cal., Oct. 20, 2008) (declining to take judicial notice of a Wikipedia entry about zombie movies).

How do you get something judicially noticed? You can hope, or you can act. Under Rule 201(c) a court "may take judicial notice" whether you ask or not. Many of us figure that the judge will take appropriate judicial notice—without considering that the court might take judicial notice of a fact running against us. So if you agree that "hope is not a strategy," hope should not be your evidence plan either.

Rule 201(d) and Rule 201(e) provide that the court "shall take judicial notice if requested by a party and supplied with the necessary information" and after giving the other side an opportunity to be heard on the matter. This is how you can use the procedures of judicial notice to advance your case. You can file requests with the judge to take judicial notice, and give him the necessary information to render a pre-trial or trial ruling on the fact. You can still serve requests for admission to the other side or send your interrogatories, but why not go right to the top? If on Wednesday, October 22, 2008, it was sunny in Los Angeles, you can get that judicially noticed before trial by putting the weather report or the newspaper or the almanac in front of the judge. Then, come trial, you don't have to hope a witness remembers that it was sunny.

If the other side moves for judicial notice to be taken, or if the judge does so on her own initiative, you should be ready to respond immediately. The opponent should argue that the fact at issue is not a "fact," and therefore the matter is not susceptible to "accurate" determination by a source. Rule 201(e) further reminds the opponent to speak up quickly ("timely request") if judicial notice is sought, even if it is after judicial notice has been taken.

Why judicial notice? In the wonderful words of Rule 201(g), "the court shall instruct the jury to accept as conclusive any fact judicially noticed." Is there any better reason to invoke judicial notice? The jury must accept your facts as conclusive, with the bonus of the judge telling them they must do so. Your opponent cannot present evidence to contradict the judicially noticed fact. And if the grounds for judicial notice were properly established, it could be reversible error for the judge in a bench trial to have refused to take judicial notice. Strong stuff.

This brief overview is intended only as a jumping-off point for discussing some tools and tips for the practicing lawyer. Your goal is to make the process simpler and therefore more effective by reducing the evidentiary burdens at trial and by simplifying the courtroom choreography of lawyers, witnesses, documents, and admission of evidence.

Under federal practice, the court ruling on a motion to dismiss may take judicial notice of matters of public record or similar matters that meet the judicial notice test, without converting the motion to dismiss into a motion for summary judgment. *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007) (standard for motion to dismiss a Rule 10(b) claim). Indeed, just as the court need not accept as true allegations of a complaint that are contradicted by the exhibits attached to the complaint, the court need

not accept as true allegations that contradict matters properly subject to judicial notice. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). So, notwithstanding a plaintiff's allegations, the court can rely on judicial notice to dispose of meritless claims. *See Moyer v. IBM Corp.*, 2003 WL 256931 (S.D.N.Y., Feb. 3, 2003) (taking notice that IBM could not possibly have lulled plaintiff into not filing suit by means of "frequencies that hit his brain"). In the post-*Twombly* and post-*Iqbal* world, where the Supreme Court has freed the trial courts to conduct a more searching inquiry at the motion-to-dismiss stage, the early deployment of materials that properly are subject to judicial notice may give a defendant even firmer grounds for a dismissal. Judicial filings from other related cases, or public document filings that are not subject to reasonable dispute as to their accuracy, could bolster a motion to dismiss and highlight how the plaintiff has not pled a plausible claim for relief.

Build judicial notice into your trial planning, and give yourself adequate time to develop your requests. Too often we do not think of these things until faced with a pre-trial order that says "identify any stipulations of the parties [check "none"] or any proposed stipulations." By then, you have spent hours and dollars chasing evidence that frankly should be subject to judicial notice. And as noted above, while your requests for judicial notice do not necessarily displace your discovery requests, it's far better (and more effective) for the court to take judicial notice that Tobin Parkway is a southbound one-way street than for you to wrangle with your adversary about the nuances of that fact.

Be bold in your requests for judicial notice. Focus on the big issues, not just the details. Think through your case and look for opportunities for the judicial stamp of approval that your fact is not subject to reasonable dispute. Understanding the reluctance of some courts to treat judicial notice expansively, you still can reduce the risk of being burned by an adverse ruling at trial if you put forth a bold request for judicial notice early on in the case. For example, make an assertion about an industry practice or the mechanics of a process and submit the information supportive of it. If the judge denies the request to take judicial notice of your fact, you at least will get a reading from the judge about your theory and the quality of your evidence.

This enthusiasm for using judicial notice should be coupled with the acknowledgment that a lot of judges hate it, and you can get scalded by a judge who sufficiently detests it. In some circuits (I'm talking about you, Eleventh Circuit), there is a mantra that judicial notice is properly limited to facts about geographical borders and what time the sun comes up. I think that judicial notice is about more than what time breakfast is. It is an underused tool that can and should simplify matters, to eliminate what is not really in genuine dispute. But you need to have your eyes open on how far your court or your circuit will let you or your opponent go.

By the same token, judicial notice is not the receptacle for every piece of gossip, hearsay, or Internet cite (or site) that a lawyer can find written down somewhere. The court still serves as gatekeeper for the record and is not required to—and should not—okay every data point that an obscure government report happens to mention. You may need to do some convincing to get the judge to agree that your source's accuracy cannot reasonably be questioned.

Almost 10 years ago in this publication, Len Niehoff labeled judicial notice the "*Deus Ex Machina* of Evidence," and he predicted it would continue as a "bit player" at trial. *See* 27 LITIGATION 31 (Fall 2000). The time is ripe for a reappraisal of the role of judicial notice. Lawyers and judges have a powerful tool for shaping the issues and limiting costs, but we are not using it effectively. Start doing your part to get noticed today.