

## JUDICIAL NOTICE IN THE PROPOSED FEDERAL RULES OF EVIDENCE

### *Rule 2-01: Judicial Notice of Adjudicative Facts, 46 F.R.D. 161, 195 (1969)*

Article II, Rule 2-01, of the preliminary draft of the federal Proposed Rules of Evidence<sup>1</sup> provides for the “judicial notice of facts in issue or facts from which they may be inferred.”<sup>2</sup> The rule is built on the definitions provided by the caption and subsections (b) and (g):

Judicial Notice of Adjudicative Facts:

(b) **KINDS OF FACTS.** A judicially noticed fact must be 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, so that the fact is not subject to reasonable dispute.

(g) **INSTRUCTING JURY.** In civil jury cases, the judge shall instruct the jury to accept as conclusive any facts judicially noticed. In criminal jury cases, the judge shall instruct the jury that it may but is not required to accept as conclusive any fact that is judicially noticed.<sup>3</sup>

The Proposed Rule is not a drastic departure from previous academic proposals such as the Model Code of Evidence and the Uniform Rules of Evidence.<sup>4</sup> Nonetheless, only the legislatures of

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<sup>1</sup> Rule 2-01. Judicial Notice of Adjudicative Facts:

(a) **SCOPE OF RULE.** This rule governs judicial notice of facts in issue or facts from which they may be inferred.

(b) **KINDS OF FACTS.** A judicially noticed fact must be 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, so that the fact is not subject to reasonable dispute.

(c) **WHEN DISCRETIONARY.** A judge or court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) **OPPORTUNITY TO BE HEARD.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter to be noticed.

(f) **TIME OF TAKING NOTICE.** Judicial notice may be taken at any stage of the proceeding.

(g) **INSTRUCTING JURY.** In civil jury cases, the judge shall instruct the jury to accept as conclusive any facts judicially noticed. In criminal jury cases, the judge shall instruct the jury that it may but is not required to accept as conclusive any fact that is judicially noticed.

Proposed Rules of Evidence, 46 F.R.D. 161, 195-96 (1969).

<sup>2</sup> *Id.* at 195

<sup>3</sup> *Id.* at 195-96.

<sup>4</sup> MODEL CODE OF EVIDENCE ch. 9 (1942); UNIFORM RULES OF EVIDENCE II (1953). Subsection (a) of the Proposed Rule is the section which does not have a counterpart in the

California<sup>5</sup> and Kansas<sup>6</sup> have attempted to provide the courts with the kind of general guidelines found in the Model Code and Uniform Rules. Other state statutes simply list subjects of which the courts may take judicial notice.<sup>7</sup> For example, North Dakota lists 92 items.<sup>8</sup> Georgia's statute illustrates the opposite extreme, containing only a short paragraph of generalizations.<sup>9</sup> Federal legislation dealing with judicial notice also has been limited,<sup>10</sup> and even federal case law does not clearly define its limits.<sup>11</sup> The Proposed Rule attempts to bring some uniformity to federal decisions by providing general guidelines for the kinds of facts of which courts may take notice.<sup>12</sup>

The most controversial portions of the Proposed Rule are its limitation to adjudicative facts, and the disputable-indisputable standards of subsections (b) and (g). The first limits the kinds of facts subject to the statutory requirements of the Proposed Rule. The second settles a long-standing controversy and determines whether adjudicative facts which are judicially noticed may be subject to rebuttal.

Adjudicative facts are simply the facts in a particular case as applied to the parties involved.<sup>13</sup> Legislative facts, on the other hand, are facts which inform the tribunal's legislative judgment in developing law or

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Model Code or Uniform Rules and it is intended only as a definition of the scope of the rule. The Proposed Rule differs in that it does not require the party seeking judicial notice to notify the other party. However, the parties still have an opportunity to be heard under the Proposed Rule. Subsection (f) of the Proposed Rule, which allows notice to be taken at any time, is an innovation of the advisory committee and clarifies an area that was not specifically dealt with by the Model Code or Uniform Rules. Subsection (g) is comparable to Model Code rule 805 and Uniform Rules rule 11 which are labeled "Instructing the Trier of Fact." However, the Proposed Rule differs in that it specifies, at least in civil trials, that facts judicially noticed are conclusive upon the jury while not conclusive in criminal trials.

5. CAL. EVID. CODE §§ 450-60 (Deering 1966).

6. KAN. STAT. ANN. § 60-409 (1964).

7. See, e.g., ILL. ANN. STAT. ch. 51, § 48a (Smith-Hurd 1966); LA. REV. STAT. ANN. § 15:422 (1967); OHIO REV. CODE ANN. § 2317.44 (Page 1954).

8. N.D. CENT. CODE § 31-10-02 (1960).

9. GA. CODE ANN. § 38-112 (1954).

10. Congress provides for judicial notice of material printed in the Federal Register, 44 U.S.C. § 1507 (Supp. IV. 1968); official seals of various governmental agencies, e.g., 10 U.S.C. § 8011 (1964), 13 U.S.C. § 3 (1964), 26 U.S.C. § 7514 (1964); and extortionate credit transactions, 18 U.S.C. § 891(9) (Supp. IV. 1968).

11. It is generally recognized that courts can take notice of facts which are common knowledge. See, e.g., *Fox v. City of West Palm Beach*, 383 F.2d 189, 194-95 (5th Cir. 1967); *Application of Knapp-Monarch Co.*, 296 F.2d 230, 232 (C.C.P.A. 1961); *United States v. Kansas Gas & Elec. Co.*, 215 F. Supp. 532, 542-43 (D.C. Kan. 1963).

12. Proposed Rules of Evidence, 46 F.R.D. 161, 195 (1969).

13. See Proposed Rules of Evidence, 46 F.R.D. 161, 195, 200 (1969); C. McCORMICK, EVIDENCE 687, 710 (1954); Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955).

policy.<sup>14</sup> By captioning the Proposed Rule “Judicial Notice of Adjudicative Facts,” the advisory committee explicitly incorporated the distinction between adjudicative and legislative facts into Rule 2-01,<sup>15</sup> though neither the Model Code nor the Uniform Rules make this distinction.<sup>16</sup> The Proposed Rule, then, applies strictly to notice of adjudicative facts. It supplies no guidelines for the notice of legislative facts. Since the advisory committee felt that there are “fundamental differences between adjudicative facts and legislative facts,”<sup>17</sup> it felt that the requirement imposed upon noticed adjudicative facts would be unworkable and undesirable if imposed upon notice of legislative facts.<sup>18</sup> Under the Proposed Rule, then, courts may continue noticing legislative facts as in the past.

14. See Proposed Rules of Evidence, 46 F.R.D. 161, 196 (1969); Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955). The practical difference between adjudicative and legislative facts is that adjudicative facts must be supported by evidence but the findings or assumptions of legislative facts need not and often cannot be supported by evidence. Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952-53 (1955). In *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953), the Court articulated the distinction between adjudicative and legislative or “non-evidence” facts when it said, “. . . in devising a remedy the Board is not confined to the record of a particular proceeding.”

Courts have often used extra-record facts or assumptions to support their findings. See generally: *Brown v. Bd. of Education*, 347 U.S. 483 (1954) (segregation of the races in public schools has a detrimental effect upon Negro children); *Dennis v. United States*, 341 U.S. 494 (1951) (judicial notice of the ascendancy of Communist doctrines); *United States v. Butler*, 297 U.S. 1 (1936) (agricultural dislocation termed “a widespread similarity of local conditions”); *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954) (medico-legal writers presented “convincing evidence” of a different approach for an insanity test).

A category of “constitutional facts” has emerged in constitutional cases distinguishing between these facts and adjudicative facts. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 403 (1942). Davis cites for support in his article *Borden's Farm Products, Inc. v. Baldwin*, 293 U.S. 194 (1934) and *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 520 (1924).

It is also considered appropriate that a court not be limited to formal evidence in its determination of matters of law. The judge must determine law consistently with determination in other similar cases, *McNaughton, Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779, 787, 791 (1961).

15 The distinction between adjudicative and legislative facts is one which was first drawn by Professor Kenneth Culp Davis. He explains this classification by pointing out that adjudicative facts concern “who did what, where, when, how, and with what motive or intent” while legislative facts are those “which inform the tribunal’s legislative judgment. . . .” Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 952 (1955); Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402-03 (1942).

16 Professor Davis criticizes the Model Code and Uniform Rules for failing to recognize that courts go beyond the record for facts about the parties and their activities. Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 946 (1955).

17 Proposed Rule of Evidence, 46 F.R.D. 161, 195, 196 (1969).

18 See *id.* at 198.

Because courts have no statutory guidelines when taking notice of legislative facts under the Proposed Rule, the threshold question is whether a fact is adjudicative or legislative. To use an historical illustration, the court may have to decide whether segregation of the races in public schools has a detrimental psychological effect upon Negro children.<sup>19</sup> The Proposed Rule provides no standard for making this threshold determination. Simply because the advisory committee points out in its commentary that there are differences between the two types of facts is no reason why a standard should not be formally established for determining when a fact is adjudicative or when it is legislative.

The effect of the disputability of judicial notice of fact usually has been considered within the Morgan-Wigmore dichotomy.<sup>20</sup> On one side, Professors Morgan and McNaughton contend that the primary purpose of judicial notice is to prevent unnecessary litigation of moot questions of fact.<sup>21</sup> Therefore, notice should be confined to patently indisputable questions of fact.<sup>22</sup> Further, since the matter noticed is indisputably true, it should not be allowed to be controverted and is thus conclusive upon the jury.<sup>23</sup> McNaughton views the issue as: "[a]ssuming that it is proper to take judicial notice of information central to what is called the factual component of a determination of liability or remedy, may the prejudiced party rebut the judge's determination by formal evidence tendered to the trier of fact?"<sup>24</sup> The advisory committee, in agreement with Morgan and McNaughton, answers in the negative.<sup>25</sup>

However, Wigmore and Thayer argue that, for the sake of convenience, a judge additionally may notice facts which are unlikely to be challenged as well as those which are patently indisputable.<sup>26</sup> If

19. See note 14, *supra*.

20. See McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779 (1961); Note, *The Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528, 534 (1968).

21. See note 20, *supra*.

22. See McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779 (1961); Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 279 (1944).

23. See note 22, *supra*.

24. McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779, 795 (1961). For various answers to the issue as stated by McNaughton, see cases and statutes *id.* at 796-805 n.3.

25. Subsection (g) states that the jury shall be instructed to accept as conclusive any judicially noticed facts. Proposed Rules of Evidence, 46 F.R.D. 161, 195-96 (1969).

26. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 308-09 (1898); J. WIGMORE, EVIDENCE § 2571 (3rd ed. 1940).

the opponent believes that the matter is disputable, he may offer evidence to that effect.<sup>27</sup> This is basically the “disputables” approach. Judicial notice then operates much as a presumption because the opponent may attempt to persuade the jury to find the noticed fact untrue.<sup>28</sup>

In resolving the controversy over disputable-indisputable standards, subsection (b) of the Proposed Rule would standardize the federal courts into so-called “indisputable” jurisdictions by allowing an adjudicative fact to be noticed only when it is “not subject to reasonable dispute”<sup>29</sup> or, in other words, indisputable. This seems to apply to facts which are “generally known within the territorial jurisdiction of the trial court”<sup>30</sup> and to facts “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”<sup>31</sup> A logical extension of subsection (b) is subsection (g) which provides that once a fact is noticed under subsection (b), a civil jury is instructed to accept the noticed fact as conclusive.<sup>32</sup>

The Proposed Rule’s “indisputables” limitation is consistent with a majority of federal cases<sup>33</sup> although there are times when judges deem it proper to notice matters which are not clearly indisputable.<sup>34</sup> It

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27 9 J. WIGMORE, EVIDENCE § 2567(a) (3rd ed. 1940).

28 See McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779 (1961); Note, *The Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528, 536 (1968). Morgan opposes the “disputables” view and the underlying presumption it establishes. He contends that if taking judicial notice of a matter means that it is indisputable, then it must follow that no evidence to the contrary is admissible. If the evidence is admissible, then Morgan reasons that the basis for judicial notice is only convenience and not a prohibition against moot issues. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 279 (1944).

29 Proposed Rules of Evidence, 46 F.R.D. 161, 195 (1969). Professor Davis establishes a more detailed criteria than the phrase, “not subject to reasonable dispute” by contending that judges must be given a wide range of discretionary power.

The principal variables are (a) whether the facts are close to the center of the controversy between the parties or whether they are background facts at or near the periphery, (b) whether they are adjudicative or legislative facts, and (c) the degree of certainty or doubt—whether the facts are certainly indisputable, probably indisputable, probably debatable or certainly debatable.

Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 977 (1955).

30 Proposed Rules of Evidence, 46 F.R.D. 161, 195 (1969).

31 *Id.*

32 *Id.*

33 See, e.g., *Reed v. Mann*, 237 F. Supp. 22, 24 (N.D. Ga. 1964); *Lisco v. McNichols*, 208 F. Supp. 471, 478 (D.C. Colo. 1962).

34 See, e.g., *Ohio Bell Tel. Co. v. Public Util. Comm’n*, 301 U.S. 292, 301-02 (1937); *Gleaton v. Green*, 156 F.2d 459, 462 (4th Cir. 1946); *Alexander v. Corey*, 98 F. Supp. 1013, 1014 (D.C. Ala. 1951).

appears that federal law would be changed in this respect by making judicially noticed facts not only indisputable but conclusive upon juries in civil trials.<sup>35</sup> On the other hand, a criminal jury is instructed only that it may or may not accept the noticed fact as conclusive although no rebuttal is allowed.<sup>36</sup>

Limiting judicial notice to those facts which are clearly indisputable unduly restricts the rule. It may prevent notice when a disputable issue is not central to the case, thus reducing its usefulness by complicating records. Courts ought to take notice of facts which may be subject to some dispute if they are not crucial in order to speed the conduct of the trial and lessen jury confusion.

Moreover, if the court mistakenly notices a fact which would otherwise be subject to reasonable dispute, it inadvertently deems the fact indisputable simply because of binding instructions upon the jury. Therefore, the refusal of the court to allow rebuttal evidence may be contrary to the rationale of the adversary system.<sup>37</sup> To the contrary, it has been argued that the "disputables" approach keeps the adversary nature of the proceeding substantially intact by testing the propriety of noticed facts.<sup>38</sup> This seems to pose a major problem with the Proposed Rule particularly in criminal cases. Since the opponent of the noticed fact is not allowed rebuttal, a possible conflict with the sixth amendment's right to trial by jury may arise when the jury is not allowed to weigh alternatives.<sup>39</sup> Even though the noticed fact is not binding upon the criminal jury, the opponent is not allowed access to the jury. Nevertheless, subsection (g) is not subject to attack unless the standard of indisputability of subsection (b) is rejected since (g) is basically an extension of (b).

Under the Proposed Rule, trials could be shortened and, consequently, trial backlogs decreased. Yet trials also can be conveniently processed using a "disputables" method since it is not likely that much of the noticed material would be challenged. It seems that a longer trial in the instances in which an opposing party wants

35. See *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 301-02 (1937).

36. Proposed Rules of Evidence, 46 F.R.D. 161, 195-96 (1969).

37. See *Timson v. Manufacturers Coal & Coke Co.*, 220 Mo. 580, 119 S.W. 565 (1909) where the Missouri Supreme Court held that if the question can be disputed, then evidence so disputing it should be admitted. See generally Note, *The Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528, 552-56 (1968) for interesting procedural discussions.

38. See note 37, *supra*.

39. For an interesting constitutional argument, see Note, *The Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528, 542-43 (1968).

to challenge a judicially noticed fact does not justify preventing a jury from considering the truth of offered evidence. Further, it appears appropriate to require the party advocating judicial notice of legislative facts at least to establish that adequately informed men, such as a legislator, might reasonably believe in the actuality of a condition which prompted action such as legislation.<sup>40</sup> This type of standard would help insure the accuracy of the factual proposition.

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40. See J. MAGUIRE, *EVIDENCE, COMMON SENSE AND COMMON LAW* 171-74 (1947) where the author discusses the use of the "Brandeis brief."