TASC Training & Advocacy Support Center

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Q&A
When and Why to Seek Judicial Notice in Federal Court

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Q: We are preparing a case in federal court. There are a number of studies and reports that we want the court to consider. Can the court take judicial notice of these studies?

A: Perhaps. Federal Rule of Evidence 201 allows a court to take judicial notice of "adjudicative facts" that are not subject to reasonable dispute and that can be determined from sources whose accuracy cannot reasonably be questioned. Each study/report will need to be individually assessed against this standard to determine whether to request judicial notice.

Discussion

Judicial notice establishes the noticed fact as conclusive and not subject to dispute. Judicial notice can save time and resources by establishing reasonably certain facts, up-front and without discovery, declarations, evidence, or witnesses.

Federal Rule of Evidence 201 allows a court to take judicial notice of an "adjudicative" fact -- the who, what, when, and where. "The 'adjudicative' nature of the fact refers to its role -- it is needed for adjudication of th[e] case -- and not the result of a judicial decision of a disputed fact based on evidence." Paul J. Kierman, *Better Living Through Judicial Notice*, 36 LITIGATION 1 (Fall 2009).[1] Most narrowly, courts take judicial notice of

[1] Rule 201 applies only to adjudicative facts, not legislative facts. Courts can take judicial notice of legislative facts, however. "These are the kind of facts that undergird policy judgment or developments in constitutional law or statutory right." Kierman, *Better Living Through Judicial Notice*, at 2 (noting *Brown v. Board of Education* as the most famous example of judicial notice of a legislative fact—that the system of separate schools adversely affected African-American children).

> (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.

Shajhar v. Bowers, 120 F.3d 211, 214 (11th Cir. 1997). As discussed below, however, judicial notice can play a more expansive role in a case.

Rule 201 provides that a court "may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Notably, the Rule does not require the fact to be an absolute certainty, nor does it require the sources establishing the fact to be indisputable. Rather, the fact and its source are subject to standards of reasonableness.

Some examples from the case law help to illustrate when the Rule applies. Public records are commonly admitted under the rule. Indeed, the Ninth Circuit Court of Appeals has found that "[a] trial court may presume that public records are authentic and trustworthy," *Gilbrook v. City of Westminster*, 177 F.3d 839, 858 (9th Cir. 1999), and therefore fall within the purview of Rule 201. *Villa v. United Site Servs. of Cal., Inc.*, 2012 WL 5503550, at *35 n.4 (N.D. Cal. Nov. 13, 2012). In *U.S. ex rel. Modglin v. DJO Global Inc*., 48 F. Supp. 3d 1362 (C.D. Cal. 2014), the court noted that it could take judicial notice of "'[p]ublic records and government documents available from reliable sources on the Internet,' such as websites run by governmental agencies." *Id*. at 1381 (internal quotations and citation omitted). The court in *U.S. ex rel. Fox Rx, Inc. v. Omnicare, Inc*., 38 F. Supp. 3d 398, 406 (S.D.N.Y. 2014), agreed to "take[] judicial notice of the fact that CMS, the agency that authored the regulations implementing Medicare Part D, made the statements … [regarding the proper use of outdated drugs] as these statements 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned…'"). A CMS-approved state Medicaid waiver application received judicial notice in *ARC of California v Douglas*, No. 2:11–cv–02545, 2013 WL 3331675, at *2 n.3 (E.D. Cal. July 1, 2013), *rev'd on other grounds*, 757 F.3d 975 (9th Cir. 2014). *See also Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 645 n. 34 (M.D. La. 2015) (taking judicial notice of CMS information bulletin sent to all state Medicaid agencies informing them of laws governing exclusion of providers from Medicaid); *DCIPA, LLC v. Lucile Slater Packard Children's Hosp. at Stanford*, 868 F. Supp. 2d 1042, 1048 (D. Or. 2011) (taking judicial notice of statutes, regulations as they existed on a certain date, a report concerning contracts between Medicaid plans and hospitals, and documents regarding Oregon's Medicaid plan).

Public records are not the only documents subject to Rule 201. The Rule has applied to a range of documents, from scientific data to American Kennel Club breed listings. *See Doe v. Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring) (noting he was "somewhat troubled" that the Court had taken judicial notice of certain scientific and medical data, but agreeing that the Court had not exceeded the scope of judicial notice);

Dias v. City and County of Denver, 567 F.3d 1169, 1173 n.2 (10th Cir. 2009) (taking judicial notice of American Kennel Club breed designations when reviewing a pit bull ordinance); *Briscoe v. Ercole*, 565 F.3d 80, 83 n.2 (2d Cir. 2009) (taking notice of distances stated in Yahoo! Maps); *Benak v. Alliance Capital Mgmt., L.P*., 435 F.3d 396, 401 n. 15 (3d Cir. 2006) (taking judicial notice of newspaper articles to "indicate what was in the public realm at the time"); *Vizion One, Inc., v. D.C*., No. 14–883, 2015 WL 4247795 at *4 (D.D.C. July 13, 2015) (taking judicial notice of office of administrative hearing rulings regarding Medicaid payments and notices of appeal of those rulings). As a final example, a court will likely take judicial notice of the fact that an entity maintains medical records but not the contents of an individual's particular records. *Compare Denius v. Dunlap,* 330 F.3d 919, 926 (7th Cir. 2003) (taking judicial notice of the fact that the Department of Veterans Affairs maintains medical records), *with Sigler v. American Honda Motor Co*., 532 F.3d 469, 476-77 (6th Cir. 2008) (refusing to take judicial notice of the content of medical records).

Of particular relevance, Wikipedia entries have not found favor under Rule 201. Describing Wikipedia as "a website that allows virtually anyone to upload an article into what is essentially a free, online encyclopedia," one court's review of the site found

> a pervasive and … 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) "[a]nother 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."

Campbell ex rel. Campbell v. Secretary of Health and Human Services, 69 Fed. Cl. 775, 781 (2006)"). *See also In re Yagman,* 473 Fed. Appx. 800, 801 n. 1 (9th Cir.2012) (declining to take judicial notice of attorney's "curriculum vitae" and Wikipedia page); *Cynergy Ergonomics, Inc. v. Ergonomic Partners, Inc*., No. 4:08-CV-243 , 2008 WL 2064967 at *6 (E.D. Mo. May 14, 2008) (refusing judicial notice of Wikipedia entry about Di Vinci's Vitruvian Man); *Capcom Co. Ltd. v. MKR Group, Inc*., No. C 08-0904, 2008 WL 4661479 (N.D. Cal. Oct. 20, 2009) (refusing judicial notice of Wikipedia entries about zombie movies and video games).

It is important to keep in mind that a court can take judicial notice on its own, but it "must take judicial notice if a party requests it and the court is supplied with the necessary supporting information." Fed. R. Evid. 201(c). When a request for judicial notice is filed, upon "timely request," a party is entitled to be heard on the propriety of taking notice. Fed. R. Evid. 201(e). Finally, "[t]he court may take judicial notice at any stage of the proceeding." Fed. R. Evid. 201(d). *See*, *e.g*., *O.B. v. Norwood*, 838 F.3d 837, 840-41

(7th Cir. 2016) (*sua sponte* incorporating poverty and workforce data from federal and state websites and affirming preliminary injunction requiring Illinois Medicaid agency to arrange for in-home nursing services needed by children with medically complex conditions).

Conclusion and Recommendation

Parties rarely use Federal Rule of Evidence 201. However, use of the Rule can save time and resources, in addition to avoiding needless discovery and foundation work. As a result, advocates should consider Rule 201 an essential part of case planning.

1. Consider asking the court to take judicial notice of adjudicative facts early in the case, but remember that the court can take notice at any stage, even on appeal.
2. If a motion to dismiss is filed early in your case, consider whether there is a role for judicial notice. *See Norris v. Hearst Trust*, 500 F.3d 454, 461 n. 9 (5th Cir. 2007) (finding it "clearly proper" to take judicial notice in deciding Rule 12(b)(6) motion to dismiss).
3. When assessing whether to seek judicial notice, remember that the fact need not be completely undisputed or its source completely reputable. Rather, the fact cannot be subject to "reasonable" dispute and the accuracy of its source cannot be "reasonably" questioned. Depending on the case and the facts, there are a number of potentially adjudicative facts with reasonable sources, including in official documents, government websites, reference books, studies and reports, and certain internet sites.
4. When seeking judicial notice, make sure to provide the supportive information for the source for the fact. *See Dasfortus Tech. v. Precision Prod. Mfg. Co*., No. 3:07–cv–0866, 2011 WL 4344114 at *1 (M.D. Tenn. Sept. 14, 2011) (refusing the take judicial notice where the party failed to provide a precise source for the document).