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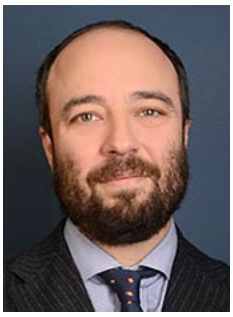
Briefly: Motions for judicial notice in the 8th Circuit

By: Glenn A. Danas, Eric J. Magnuson and Stephen P. Safranski August 24, 2021



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As most litigators know, the federal courts of appeals generally do not hear evidence, but instead examine whether the District Court has committed error based on the evidentiary record before it. Thus, the courts of appeals review judgments and certain orders on a closed record, relying on the District Courts' gatekeeping function to assure that evidence is reliable and relevant. The basic rule regarding composition of the record is found in Federal Rule of Appellate Procedure 10(a), which provides that the record on appeal consists only of the "original papers and exhibits filed in the District Court," "the transcript of proceedings, if any," and "a certified copy of the docket entries prepared by the District Court clerk. Rule 10's scope reflects the fact that it would frustrate the appellate courts' error correction function to allow litigants to "move the goalposts" by introducing new evidence at appeal.

However, in the course of working on the appeal, a lawyer may come across relevant evidence outside the appellate record, evidence which she thinks the Court of Appeals should know about. For instance, in drafting her legal arguments, the appellate lawyer comes across legislative history that supports her interpretation of a key statute. Or the lawyer has new evidence showing that that the appeal is now moot. Or the lawyer is aware of important changes in a foreign country relevant to an immigration appeal.

Is this hypothetical appellate lawyer simply out of luck? One option might be simply to cite to the evidence and hope the court and opposing counsel do not notice that it is outside of the record. This strategy is probably not a good idea, as it invites a motion to strike and/or a rebuke from the court. See, e.g., Keiser v. Johnson, 283 F. App'x 427, 428 (8th Cir. 2008)

(striking documents in appellant's addendum and appendix not contained in the record below); Shea v. Esensten, 208 F.3d 712, 720 (8th Cir. 2000) (granting motion to strike portions of appellant's appendix and references to those documents in appellant's brief where the documents were not before the trial court when it ruled on the matter below).

One could also try to obtain a stipulation from opposing counsel to modify the record pursuant to FRAP 10(e)(2)(A). However, there are some real problems with that, not the least of which is if the new information is good for you, it is probably bad for them. On top of that, the court would have to agree to honor the stipulation. Rule 10(e)(2)(A) is also quite limited and available only in very specific circumstances, such as where the District Court relied on the materials but they were inadvertently omitted from the District Court record. This avenue is therefore of limited practical use.

Another option is to seek judicial notice. Judicial notice has been at the center of numerous high-profile cases, having been relied on by the United States Supreme Court to take judicial notice of the economic conditions of the Great Depression, to establish that a state of emergency existed (Home Building & Loan Association v. Blaisdell, 290 U.S. 398 (1934)) and of the gassing of Jews at Auschwitz in a suit against a notorious holocaust denial organization ("California Judge Rules Holocaust Did Happen," The New York Times, Associated Press, October 10, 1981, p. A26).


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The benefits of moving for judicial notice, rather than simply relying on the evidence and hoping the court does not notice it was not in the lower court record, are manifold. Most importantly, filing a motion for judicial notice follows the rules. See Huelsman v. Civic Ctr. Corp., 873 F.2d 1171, 1175 (8th Cir. 1989) (noting that "an appellate court can properly consider only the record and facts before the District Court and … only those papers and exhibits filed in the District Court can constitute the record on appeal.") A motion for judicial notice also creates an opportunity to discuss the evidence, and its relevance to the appeal, in greater detail than could be done in a footnote in a brief. Moreover, because the merits panel will likely decide the motion, it assures that the circuit judges will be aware of the evidence and the appellate issues it affects.

The basic rules regarding judicial notice are set out in Federal Rule of Evidence 201. Under rule 201(d), judicial notice of "adjudicative facts" (facts relevant to the adjudication of the particular controversy and specific parties before the court) may be taken at any time in a litigation, including on appeal. Rule 201(b) limits judicial notice to adjudicative facts that are "not subject to reasonable dispute" because they are "generally known" or are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Note that Rule 201 does not govern "legislative facts," which refer to those facts "which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." FRE 201(a), Advisory Committee Notes. In general, courts are free to take

notice of legislative facts, including research data and writings, because such facts are considered essential to the growth of the common law, to develop rules to apply in future cases. In contrast, adjudicative facts apply strictly to the parties and the dispute presently before a court, and should be tested by a trial court to assure their veracity.

The Eighth Circuit appears to have clear preferences for granting judicial notice of some types of facts, but the purpose for which the evidence is cited is critical. For instance, judicial notice of pleadings, records and judgments in other cases are likely to be granted, so long as the material is proffered for the fact that certain litigation occurred. See, e.g., Insulate SB, Inc. v. Advanced Finishing Sys., Inc., 797 F.3d 538, 543 n.4 (8th Cir. 2015) (granting party's motion for judicial notice of a prior FTC complaint, a District Court's order denying summary judgment and a deposition transcript in a related matter, "to the extent we note the existence of and basic facts surrounding these actions"). However, the Eighth Circuit consistently refuses to take judicial notice of pleadings from other litigation if offered for the "truth of the matters within [such documents] and inferences to be drawn from them." See id. (citing Kushner v. Beverly Enters., 317 F.3d 820, 832 (8th Cir.2003)); McIvor v. Credit Control Servs., Inc., 773 F.3d 909, 914 (8th Cir. 2014) (refusing to take judicial notice of the facts underlying other cases—facts which are subject to reasonable dispute).


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The court is also loath to take judicial notice of facts that were available to the party in the lower court, but were not offered, especially where permitting judicial notice might be unfair either to the parties or to the District Court whose ruling is under review. For instance, in Minnesota Fed'n of Tchrs. v. Randall, 891 F.2d 1354, 1359 n.9 (8th Cir. 1989), the majority rejected the appellant teacher's union's citation to evidence outside the record of lost membership and union dues in an attempt to satisfy organizational standing, mainly because of concern over lack of fairness:

[W]e believe that the better reasoned rule is the one followed by the Seventh Circuit in Zell v. Jacoby–Bender, Inc., 542 F.2d 34, 37–38 (7th Cir.1976) (circuit will consider on appeal only the record before the trial court). It is unfair to reverse the District Court upon evidence which it had no opportunity to consider. Here, it is also unfair to the parties, especially the appellees, to have an appeal considered on factual matters not offered or received as part of the Fed.R.Civ.P. 56 proceeding.

See also, Tamari v. Bache & Co., 838 F.2d 904, 907 (7th Cir. 1988) (Posner, J.) (criticizing attempt to move for judicial notice of facts available to the movant in the District Court as "sandbagging").

The Eighth Circuit, like other federal appellate courts, is also increasingly likely to take judicial notice of facts found on the Internet, especially of government websites. See, e.g., Missourians for Fiscal Responsibility v. Klahr, 830 F.3d 789, 793 (8th Cir. 2016) (taking judicial notice of IRS website); Kittle-Aikeley v. Strong, 844 F.3d 727, 744 (8th Cir. 2016) (JJ. Beam & Loken, concurring and dissenting) (taking judicial notice of the ACLU's homepage to conclude that the organization is nearly always opposed to drug testing and screening, especially in educational settings); see also Levan v. Capital Cities/ABC Inc., 190 F.3d 1230, 1235 n.12 (11th Cir. 1999) (taking judicial notice of Federal Reserve Board's website for prime interest rate).

However, the court also cautions against lower courts using judicial notice to reach conclusions regarding, for example, the financial sophistication of a party to establish an agency relationship. See Am. Prairie Const. Co. v. Hoich, 560 F.3d 780, 798 (8th Cir. 2009) (reversing the District Court's decision to take judicial notice of a book through the lower court's independent research, in part because the premises on which the lower court relied were not "matters of common knowledge" or "capable of certain verification."). This is a

topic upon which we have spoken at length. See, e.g., "Siri, how heavy is a 9-MM pistol?": Emerging Ethical Issues in Independent Judicial Research, American Bar Association, National Judicial Institute & Conclave, Chicago, Illinois (April 19, 2018); The Lure of the Internet: The Ethics of Judicial Use of the Internet, Hennepin County Bench Meeting, Minneapolis, Minnesota (August 7, 2018); The Ethics of Judicial Use of Internet Resources, The Eighth Circuit Bar Association, St. Paul, Minnesota (November 18, 2015) (materials from these and other presentations on the topic can be found on the Robins Kaplan web page).

In short, practitioners should exercise caution if tempted to cite materials outside the limited appellate record. First, consider whether the material is actually important. If not, it will often be better simply to draft the appellate brief without reference to the material. If the material is important, don't try to smuggle it into your brief. No matter the merits of citing it, it looks bad and can result in parts of your brief being stricken.

Instead, determine whether it falls within the limited exception under Rule 10 for supplementing the record via stipulation. Even if the material does not fall precisely into one of the narrow exceptions to appellate admissibility, the best option usually will be a motion for judicial notice. Explain to the court why the material is not subject to reasonable dispute, and it is not unfair to the parties or the District Court for the Eight Circuit to take judicial notice. At least you get the information before the court.

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