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Understanding Rule 201 of the Federal Rules of Evidence

WHILE THE FEDERAL RULES OF EVIDENCE erect numerous hurdles to the admission of evidence in a federal trial, many procedural devices can be employed to overcome—or at least sidestep—those hurdles. One of the more customary mechanisms used to clear evidentiary hurdles such as authentication and hearsay is a request for judicial notice pursuant to Rule of 201 of the Federal Rules of Evidence. Although requests for judicial notice sometimes will solve the evidentiary problem facing a practitioner—for example, how to admit into evidence data from a government agency's Web site or a previously filed declaration—many requests seem to demonstrate a lack of understanding of the proper function of a judicial notice or how to correctly make a request. A request for judicial notice is more than a substitute for formal proof but far less than an all-purpose cure for admissibility defects. Thus, it is important for practitioners to be aware of the device's limitations and its procedural requirements.

Rule 201 establishes the method for obtaining judicial notice of adjudicative facts, which are facts relevant to a particular case. Judicial notice can be used to take notice of facts generally known within the community that are not subject to reasonable dispute.[1] The statements "the sun rises in the East and sets in the West" and "water freezes at 32 degrees Fahrenheit" exemplify this use. Alternatively, judicial notice is also used to take notice of facts that are not subject to reasonable dispute and that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[2] In other words, notice can be taken of facts that can be looked up in a reliable source. This form of judicial notice has been used to obtain judicial notice of information contained in court records, public records, other government documents, and various other sources.[3]

Of the two, it probably is more common in motion practice to encounter a request for judicial notice of a fact that can easily be verified by a reliable source. It is central to understanding either form, however, that courts take judicial notice of facts, not documents. This point is frequently overlooked by practitioners, and courts often are asked to take judicial notice of a document as opposed to a fact contained within that document. For example, "Party A hereby requests that the Court take judicial notice of the document attached hereto as Exhibit B." The moving party bears the burden of persuading the court that judicial notice is proper because Rule 201(d) explicitly requires that the court be provided with the necessary information to take judicial notice of a fact. Without more information, the request for judicial notice of an entire document containing a judicially noticeable fact probably will not satisfy this burden.[4] However, Rule 201(d) does not explain what constitutes necessary information. At a minimum, any request probably should 1) identify the specific fact to be noticed, 2) attach the reliable source containing that fact, 3) provide a pinpoint citation to the reliable source, and 4) explain why it is appropriate for the court to take judicial notice of that specific fact.[5]

Significantly, notice of a fact that can easily be verified from a reliable source also allows a court to take notice of its own records, as well as records from a prior, related proceeding in state or federal court.[6] If the fact to be noticed concerns an order that was entered or a document filed in a prior related proceeding on a certain date, the request should ask the court to take notice of that fact as reflected in the attached document downloaded from PACER or a similar state Web site. More often than not, though, a request will seek something more and ask the court to take notice of the truthfulness of the contents of the court record. This is another way in which many requests may go awry. Some confusion over this issue may stem from California's rules regarding judicial notice of court orders, judgments, and findings of fact and conclusions of law, given that there is at least some authority standing for the proposition that judicial notice may be taken of the truth of the facts asserted in those documents.[7] As numerous courts have observed, taking judicial notice of a court record or its contents is not the same as taking judicial notice of the truthfulness of its contents.[8]

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Judicial notice nevertheless remains useful for admitting documents into evidence because

> [t]he taking of "judicial notice of court records" is actually a convenient shorthand for two distinct concepts—importing the documents into the record of the matter at hand and establishing their authenticity. Importing the documents into the record really is not a matter of judicial notice at all; it is a matter of offering evidence.[9]

Concerning obtaining notice of documents from the court's own records, several recent decisions have concluded that a request for judicial notice is not required to establish authenticity when a document is already part of the docket in the instant action.[10] Moreover, while courts may take judicial notice of declarations previously filed in the instant action, they generally would prefer that the movant make the effort to obtain and file a new declaration rather than require the court to take judicial notice of the old one.[11]

Importing a document into the record and establishing its authenticity by themselves will not render it admissible under the rules, and other grounds may exist that still could prevent its admission into evidence.[12] A hearsay statement, for example, is not transformed into

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a statement of fact because it appears in a previously filed document.[13] While a court may take judicial notice of its own files and records, it may not take judicial notice of the truth of any facts or findings contained within the document. The contents of those records may still be admissible pursuant to other rules, but they are not admissible solely because judicial notice is granted pursuant to Rule 201.

The Internet

The latest frontier for judicial notice has been the Internet. When presented with facts or documents obtained from a government Web site, courts usually will take judicial notice of them.[14] For example, in *Seely v. Cumberland Packing Corporation*, the court took judicial notice of statistics available on the Web site of the administrative office of the courts because "these statistics are an official report of the United States government" and "are 'capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.'"[15] Similarly, in *Aspenlind v. American Servicing Company*, the court took judicial notice of documents obtained from the Web site of the California State Bar showing that defense counsel were licensed to practice law.[16]

Thus, courts routinely take judicial notice of government-compiled statistics, as well as official reports and publications from agencies of the United States and state governments.[17] There is no rule, however, that a court must accept as true all statements contained on a government Web site or in government documents, and a party must be allowed the opportunity to dispute their authenticity and the accuracy of any facts.[18]

A request for judicial notice of facts or documents obtained from a Web site should be accompanied by a declaration setting forth the process used to obtain the facts or documents, including the specific address (uniform resource locator, or URL) of the Web site in which the document was published, the date the Web site was accessed, and attesting that the document is a true and correct copy of the Web page downloaded from that Web site on that date, and that the printout containing the facts is an accurate reflection of what appeared on the Web site. Without this kind of declaration, it may prove impossible for a court to determine that a fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" in the face of an objection.

Courts are less likely to take judicial notice of facts or documents obtained from a private Web site. For example, courts have expressed concerns regarding the authenticity of a Web site and who is maintaining the Web site, as well as whether statements from the Web site are "mere puffery."[19] So long as authenticity is not disputed, however, some courts have taken judicial notice of facts available on a private Web site.[20] For example, in *O'Toole v. Northrop Grumman Corporation*, the court took judicial notice of a retirement fund's earnings history taken from Northrop Grumman's Web site because the company could not explain "why its own website's posting of historical retirement fund earnings is unreliable."[21]

Surprisingly, Wikipedia has been relied on by several courts, but most courts have concluded that due to its open-source nature, which allows that content can be written, edited, and revised by anyone, Wikipedia is inherently unreliable and cannot satisfy the requirements for judicial notice.[22] The Internet Archive's Way Back Machine poses similar issues with some courts' admitting documents for certain purposes, such as prior art in the patent context.[23] For a fee, the Internet Archive will provide an affidavit describing how it uses software programs to "surf the Web and automatically store copies of website files, preserving these files as they exist at the point of time of capture" and states that the attached documents "are true and accurate copies of printouts of the Internet Archive's records of the HTML files for the URLs and the dates specified in the footer of the printout."[24] Most courts have found that this declaration is sufficient to authenticate a document, which means that the declaration also could be sufficient to demonstrate that the Way Back Machine is a source "whose accuracy cannot reasonably be questioned" for purposes of judicial notice.[25]

Regardless of whether judicial notice is sought from court records, government records, or the Internet, and no matter the extent of authentication submitted, judicial notice under Rule 201 is limited to facts, not documents. With that distinction in mind, and with sufficient effort to ensure that the court has the necessary information to take judicial notice, parties can put themselves in the best possible position to identify any potential evidentiary pitfalls and to determine whether judicial notice is an appropriate evidentiary shortcut. If these precautions are taken, a party can address any issues in the preliminary stage and avoid an unfortunate surprise at the hearing or trial if the court unexpectedly declines to take judicial notice of a fact integral to the party's case. ■

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[1] *See* FED. R. EVID. 201(b)(1).

[2] FED. R. EVID. 201(b)(2); *see also* Roe v. Wade, 410 U.S. 113, 149-50 (1973); Brown v. Board of Educ., 347 U.S. 483, 493, 494-95 (1954).

[3] *See* United States v. Esquivel, 88 F. 3d 722, 726-27 (1996).

[4] *See* In re Harmony Holdings, LLC, 393 B.R. 409, 416 (2008).

[5] *See* Newman v. San Joaquin Delta Cmty. Coll. Dist., 272 F.R.D. 505, 516 (2011); Thompson v. Shasta County, No. CIV S-06-0504 LKK EFB PS, 2007 WL 137163, at *1 (Jan. 17, 2007); In re Tyrone F. Conner Corp., Inc., 140 B.R. 771, 781-82 (1992).

[6] *See, e.g.*, Holder v. Holder, 305 F. 3d 854, 866 (2002).

[7] *Compare* Kilroy v. State, 119 Cal. App. 4th 140, 147 (2004) (finding it was error to take judicial notice of facts contained in an order, finding of fact, or conclusion of law unless "the order or judgment establishes a fact for purposes of law of the case or…res judicata or collateral estoppel"), *with* Magnolia Square Homeowners Ass'n v. Safeco Ins. Co., 221 Cal. App. 3d 1049, 1056 (1990) (finding court may "'take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments.'" (quoting JUDGE BERNARD S. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK §47.3 (1972)).

[8] *See* Lee v. City of Los Angeles, 250 F. 3d 668, 689-90 (2001); United States v. Southern Cal. Edison Co., 300 F. Supp. 2d 964, 974 (2004).

[9] In re Bestway Prods., Inc., 151 B.R. 530, 540 (1993).

[10] *See*, *e.g.*, Ameritox, Ltd. v. Millennium Labs. Clinical Supply, Inc., 12CV2797 W RBB, 2013 WL 5775116, at *4 (Oct. 25, 2013); Negrete v. Petsmart, Inc., No. 2:13-CV-01218-MCE-AC, 2013 WL 4853995, at *1 n.2 (Sept. 10, 2013); Sarantapoulos v. Bank of Am., N.A., No. C 12-0564 PJH, 2012 WL 4761900, at *6 (Oct. 5, 2012).

[11] *See* Peviani v. Hostess Brands, Inc., 750 F. Supp. 2d 1111, 1117 (2010).

[12] *See* In re James, 300 B.R. 890, 895 (W.D. Tex. 2003).

[13] *See* In re Harmony Holdings, LLC, 393 B.R. 409, 413 (2008).

[14] *See*, *e.g.*, Hansen Beverage Co. v. Innovation Ventures, LLC, No. 08–CV–1166–IEG, 2009 WL 6597891, at *2 (Dec. 23, 2009); Paralyzed Veterans of Am. v. McPherson, No. C 06-4670 SBA, 2008 WL 4183981, at *5–6 (Sept. 9, 2008).

[15] Seely v. Cumberland Packing Corp., No. 10–CV–02019–LHK, 2010 WL 5300923, at *7 n.5 (2010) (quoting FED. R. EVID. 201(b)).

[16] Aspenlind v. American Servicing Co., No. 2:07-cv-0768-GEB-EFB-PS, 2008 WL 686596, at *4 (Mar. 13, 2008).

[17] *See* United States v. Orozco-Acosta, 607 F. 3d 1156, 1164 n.5 (2010); J & J Sports Prods., Inc. v. Cal City Post No. 476, 1:10-CV-00762 AWI, 2011 WL 2946178, at *8 n.5 (July 21, 2011).

[18] *See* FED. R. EVID. 201(e); Daniels–Hall v. National Educ. Ass'n, 629 F. 3d 992, 998–99 (2010).

[19] *See* Victaulic Co. v. Tieman, 499 F. 3d 227, 236 (3d Cir. 2007).

[20] *See* O'Toole v. Northrop Grumman Corp., 499 F. 3d 1218, 1224-25 (10th Cir. 2007); Doron Precision Sys., Inc. v. FAAC, Inc., 423 F. Supp. 2d 173 (S.D. N.Y. 2006).

[21] O'Toole, 499 F. 3d at 1225.

[22] *Compare* Tiffany (NJ) Inc. v. eBay, Inc., 600 F. 3d 93, 96 n.1 (2nd Cir. 2010), United States v. Lane, 591 F. 3d 921, 924 n.1 (7th Cir. 2010), *and* Brown v. Nucor Corp., 576 F. 3d 149, 156 n.9 (4th Cir. 2009), *with* Performance Pricing, Inc. v. Google Inc., No. 2:07cv432, 2009 WL 2497102, at *12 n.15 (D. Tex. 2009), *and* Capcom Co., Ltd. v. MKR Group, Inc., C 08-0904 RS, 2008 WL 4661479, at *4 (Oct. 20, 2008).

[23] *See* Market-Alerts Pty. Ltd. v. Bloomberg Fin. L.P., 922 F. Supp. 2d 486, 494 n.12 (D. Del. 2013); Keystone Retaining Wall Sys., Inc. v. Basalite Concrete Prods., LLC, 10-CV-4085 PJS/JJK, 2011 WL 6436210, at *14 n.9 (D. Minn. Dec. 19, 2011).

[24] *See* https://archive.org/legal.

[25] *See*, *e.g.*, Mahmood v. Research in Motion Ltd., No. 11 Civ. 5345(KBF), 2012 WL 242836, at *4 n.2 (S.D. N.Y. 2012).