

## *California Evidence Code— Federal Rules of Evidence*

### **VIII. Judicial Notice: Conforming the California Evidence Code to the Federal Rules of Evidence**

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#### **I. Introduction**

**T**HIS ARTICLE COMPARES the approaches of the California Evidence Code (“Code”) and the Federal Rules of Evidence (“Rules”) to judicial notice. It is part of a study commissioned by the California Law Revision Commission to assess whether the Code should be conformed to the Rules.<sup>1</sup> The California Legislature created the Commission in 1953 as the permanent successor to the Code Commission. Its chief responsibility is to review California statutory and decisional law to discover defects and anachronism and to recommend legislation to make needed reforms.

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1. Cal. Law Revision Comm’n, <http://www.clrc.ca.gov/Mbg-history.html> (last visited July 1, 2009).

This Article is the eighth in a series and was submitted to the Commission on July 1, 2007.<sup>2</sup> The California and federal provisions compared were in effect as of December 2007. To assist the reader, the pertinent Rules and Code sections are reproduced at the beginning of each section of this Article. They are followed by a Comparative Note in which the Code sections are compared with the Rules.

The opinions, conclusions, and recommendations contained in this Article are those of the author and do not necessarily represent or reflect the opinions, conclusions, or recommendations of the Commission.

## II. Judicial Notice Under the Federal Rules

### RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) **Scope of rule.** This rule governs only judicial notice of adjudicative facts.

(b) **Kinds of facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it 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.

(c) **When discretionary.** A court may take judicial notice, whether requested or not.

(d) **When mandatory.** A 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 noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

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2. See generally Miguel Méndez, VII. *Relevance: Definition and Limitations—Conforming the California Evidence Code to the Federal Rules of Evidence*, 42 U.S.F. L. REV. 329 (2008); Miguel Méndez, VI. *Authentication and the Best and Secondary Evidence Rules*, 41 U.S.F. L. REV. 1 (2006); Miguel Méndez, V. *Witnesses: Conforming the California Evidence Code to the Federal Rules of Evidence*, 39 U.S.F. L. REV. 455 (2005); Miguel Méndez, IV. *Presumptions and Burden of Proof: Conforming the California Evidence Code to the Federal Rules of Evidence*, 38 U.S.F. L. REV. 139 (2003); Miguel Méndez, III. *The Role of Judge and Jury: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. REV. 1003 (2003); Miguel Méndez, II. *Expert Testimony and the Opinion Rule: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. REV. 411 (2003); Miguel Méndez, I. *Hearsay and Its Exceptions: Conforming the Evidence Code to the Federal Rules*, 37 U.S.F. L. REV. 351 (2003).

**(f) Time of taking notice.** Judicial notice may be taken at any stage of the proceeding.

**(g) Instructing jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

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**Comparative Note.** When a judge “notices” a fact, the party with the burden of proving that fact is relieved of the obligation of introducing evidence to establish the fact. Judicial notice is thus a substitute for evidence.<sup>3</sup>

Judicial notice confers an additional benefit on the party with the obligation of establishing the noticed fact. Except as noted below, matters that are judicially noticed are binding on the jury and preclude the opponent from offering evidence disputing the noticed fact.<sup>4</sup> Judicial notice, however, does not generally replace the need to produce evidence because a judge can notice only a few matters.

Federal Rule of Evidence 201(a) limits judicial notice to “adjudicative facts,” those a party would normally be expected to prove in the absence of judicial notice.<sup>5</sup> Rule 201(b) defines an adjudicative fact as “one not subject to reasonable dispute in that it 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.”<sup>6</sup> As discussed in the next section, these are the matters the Code denominates as universally known facts, locally known facts, and easily verifiable facts.

Federal judges have discretion to notice adjudicative facts on their own motion.<sup>7</sup> They must, however, take judicial notice of an adjudicative fact when requested by a party and supplied with the necessary information.<sup>8</sup> But before taking judicial notice, federal judges, upon request, must accord a party an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter to be noticed.<sup>9</sup>

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3. See MIGUEL A. MÉNDEZ, EVIDENCE: THE CALIFORNIA CODE AND THE FEDERAL RULES, A PROBLEM APPROACH § 19.01 (4th ed. 2008).

4. FED. R. EVID. 201(g); CAL. EVID. CODE § 457 (West 2009).

5. FED. R. EVID. 201(a).

6. *Id.* at 201(b).

7. *Id.* at 201(c).

8. *Id.* at 201(d).

9. *Id.* at 201(e).

The power to take judicial notice is not limited to the federal trial bench or the trial phase of the case. Federal appellate judges may also take judicial notice at any stage of the appellate proceeding.<sup>10</sup>

A major difference between the Code and the Rules is that judicially noticed facts are not binding on the jury in federal criminal cases. In these cases, the judge must instruct the jury “that it may, but is not required, to accept as conclusive any fact judicially noticed.”<sup>11</sup> By converting such facts into permissive inferences, Rule 201 reduces possible conflicts with the constitutional requirement that the prosecution prove beyond a reasonable doubt “every fact necessary to constitute the crime with which [the accused] is charged.”<sup>12</sup> In California, case law prohibits judges from giving a conclusive effect to judicially noticed facts which the prosecution must prove beyond a reasonable doubt.<sup>13</sup>

### III. Judicial Notice Under the California Evidence Code

#### 450. Judicial notice may be taken only as authorized by law

Judicial notice may not be taken of any matter unless authorized or required by law.

#### 451. Matters which must be judicially noticed

Judicial notice shall be taken of the following:

(a) The decisional, constitutional, and public statutory law of this state and of the United States and the provisions of any charter described in Section 3, 4, or 5 of Article XI of the California Constitution.

(b) Any matter made a subject of judicial notice by Section 11343.6, 11344.6, or 18576 of the Government Code or by Section 1507 of Title 44 of the United States Code.

(c) Rules of professional conduct for members of the bar adopted pursuant to Section 6076 of the Business and Professions Code and rules of practice and procedure for the courts of this state adopted by the Judicial Council.

(d) Rules of pleading, practice, and procedure prescribed by the United States Supreme Court, such as the Rules of the United States

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10. *Id.* at 201(f).

11. *Id.* at 201(g).

12. *In re Winship*, 397 U.S. 358, 364 (1970).

13. *People v. Barre*, 14 Cal. Rptr. 2d 307, 310 (Ct. App. 1992).

Supreme Court, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Admiralty Rules, the Rules of the Court of Claims, the Rules of the Customs Court, and the General Orders and Forms in Bankruptcy.

(e) The true signification of all English words and phrases and of all legal expressions.

(f) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.

#### **452. Matters which may be judicially noticed**

Judicial notice may be taken of the following matters to the extent that they are not embraced within Section 451:

(a) The decisional, constitutional, and statutory law of any state of the United States and the resolutions and private acts of the Congress of the United States and of the Legislature of this state.

(b) Regulations and legislative enactments issued by or under the authority of the United States or any public entity in the United States.

(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.

(d) Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(e) Rules of court of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

(g) Facts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.

(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.

#### **452.5. Criminal conviction records; computer-generated records; admissibility**

(a) The official acts and records specified in subdivisions (c) and (d) of Section 452 include any computer-generated official court records, as specified by the Judicial Council which relate to criminal convictions, when the record is certified by a clerk of the superior

court pursuant to Section 69844.5 of the Government Code at the time of computer entry.

(b) An official record of conviction certified in accordance with subdivision (a) of Section 1530 is admissible pursuant to Section 1280 to prove the commission, attempted commission, or solicitation of a criminal offense, prior conviction, service of a prison term, or other act, condition, or event recorded by the record.

### **453. Compulsory judicial notice upon request**

The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:

(a) Gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and

(b) Furnishes the court with sufficient information to enable it to take judicial notice of the matter.

### **454. Information that may be used in taking judicial notice**

(a) In determining the propriety of taking judicial notice of a matter, or the tenor thereof:

(1) Any source of pertinent information, including the advice of persons learned in the subject matter, may be consulted or used, whether or not furnished by a party.

(2) Exclusionary rules of evidence do not apply except for Section 352 and the rules of privilege.

(b) Where the subject of judicial notice is the law of an organization of nations, a foreign nation, or a public entity in a foreign nation and the court resorts to the advice of persons learned in the subject matter, such advice, if not received in open court, shall be in writing.

### **455. Opportunity to present information to court**

With respect to any matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action:

(a) If the trial court has been requested to take or has taken or proposes to take judicial notice of such matter, the court shall afford each party reasonable opportunity, before the jury is instructed or before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed.

(b) If the trial court resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action and the court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

#### **456. Noting denial of request to take judicial notice**

If the trial court denies a request to take judicial notice of any matter, the court shall at the earliest practicable time so advise the parties and indicate for the record that it has denied the request.

#### **457. Instructing jury on matter judicially noticed**

If a matter judicially noticed is a matter which would otherwise have been for determination by the jury, the trial court may, and upon request shall, instruct the jury to accept as a fact the matter so noticed.

#### **458. Judicial notice by trial court in subsequent proceedings**

The failure or refusal of the trial court to take judicial notice of a matter, or to instruct the jury with respect to the matter, does not preclude the trial court in subsequent proceedings in the action from taking judicial notice of the matter in accordance with the procedure specified in this division.

#### **459. Judicial notice by reviewing court**

(a) The reviewing court shall take judicial notice of (1) each matter properly noticed by the trial court and (2) each matter that the trial court was required to notice under Section 451 or 453. The reviewing court may take judicial notice of any matter specified in Section 452. The reviewing court may take judicial notice of a matter in a tenor different from that noticed by the trial court.

(b) In determining the propriety of taking judicial notice of a matter, or the tenor thereof, the reviewing court has the same power as the trial court under Section 454.

(c) When taking judicial notice under this section of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, the reviewing court shall comply with the provisions of subdivision (a) of Section 455 if the matter was not theretofore judicially noticed in the action.

(d) In determining the propriety of taking judicial notice of a matter specified in Section 452 or in subdivision (f) of Section 451 that is of substantial consequence to the determination of the action, or the tenor thereof, if the reviewing court resorts to any source of information not received in open court or not included in the record of the action, including the advice of persons learned in the subject matter, the reviewing court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.

#### **460. Appointment of expert by court**

Where the advice of persons learned in the subject matter is required in order to enable the court to take judicial notice of a matter, the court on its own motion or on motion of any party may appoint one or more such persons to provide such advice. If the court determines to appoint such a person, he shall be appointed and compensated in the manner provided in Article 2 (commencing with Section 730) of Chapter 3 of Division 6.

*Comparative Note.* The Code divides the matters a California judge may notice into two categories. One—mandatory judicial notice—consists of matters which the judge must notice, whether or not the judge has been requested to notice them.<sup>14</sup> The other—permissive judicial notice—consists of matters the judge may notice on his or her own motion but which the judge must notice if requested by a party and certain procedural requirements are met.<sup>15</sup>

*Mandatory Judicial Notice.* The mandatory category recognizes that courts must be free to discover and apply the law applicable to the case. Though the category includes matters both of law and fact, most are legal in nature and include the decisional, constitutional, and public statutory law of California and the United States.<sup>16</sup> Factual matters a court must notice include the true “signification” of all English words and phrases and of all legal expressions,<sup>17</sup> and, perhaps more importantly, universally known facts.<sup>18</sup>

14. CAL. EVID. CODE § 451 and Comment (West 2009).

15. *Id.* §§ 452–453.

16. *Id.* § 451(a).

17. *Id.* § 451(e).

18. *Id.* § 451(f).



*Permissive Judicial Notice.* The permissive category also includes matters of law and fact.<sup>19</sup> If the party requesting judicial notice of matters in this category furnishes the court with adequate information for the court to notice the matter, then the court must do so if proper notice has been given to each adverse party.<sup>20</sup>

Matters which may be judicially noticed under the permissive category include the decisional, constitutional, and statutory law of sister states.<sup>21</sup> Factual matters a court may notice are limited to locally known and easily verifiable facts.<sup>22</sup>

*Universally and Locally Known Facts and Easily Verifiable Facts.* These facts are singled out for special treatment for two reasons. First, under the view reflected in Federal Rule of Evidence 201, they are the only facts that are the proper subject of judicial notice.<sup>23</sup> Second, the other essentially legal matters alluded to in the mandatory and permissive categories of the Code are considered by some commentators as an inappropriate subject of judicial notice.<sup>24</sup>

Universally and locally known facts and easily verifiable facts are “adjudicative facts” in the sense that they comprise the kind of factual propositions which must be proved in any lawsuit. Jurisdictional requirements, for example, may require a party to establish that a cause of action arose in a particular geographical area. In the absence of judicial notice, the party would have to introduce evidence establishing this fact. Accordingly, commentators would agree that universally, locally known and easily verifiable facts are the proper subject of judicial notice.<sup>25</sup>

Some commentators classify as “legislative facts” the legal matters alluded to in the Code’s mandatory and permissive categories.<sup>26</sup> These commentators believe that judges should be free to consult pertinent data to determine the content or applicability of a rule of law.<sup>27</sup> While parties and their counsel may be consulted on these matters, these commentators emphasize that whether a particular legal rule

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19. *Id.* § 452.

20. *Id.* § 453.

21. *Id.* § 452(a).

22. *Id.* §§ 452(g)–(h).

23. FED. R. EVID. 201(a).

24. *Id.* advisory committee’s note.

25. *Id.*

26. *Id.*

27. *Id.*

governs a case is not normally a matter determined by resort to evidentiary sources, such as witnesses.<sup>28</sup>

As discussed in the previous section,<sup>29</sup> the Federal Rules of Evidence adopt this view and limit judicial notice to adjudicative facts. The Code does not, but as a practical matter, most California controversies surrounding judicial notice involve adjudicative facts.<sup>30</sup> Thus, the usual question presented is whether a particular matter falls within the categories created for noticing universally known facts, locally known facts, and easily verifiable facts.

Universally known facts are propositions so widely known that they cannot reasonably be the subject of dispute.<sup>31</sup> An example is who won the last United States presidential election.

Locally known facts are propositions of “such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute.”<sup>32</sup> Territorial “refers to the county in which a superior court is located or the judicial district in which a municipal or justice court is located.”<sup>33</sup> But the fact judicially noticed need not be something physically located within the court’s territorial jurisdiction so long as common knowledge of the fact exists within the court’s territorial jurisdiction.<sup>34</sup> For example, the Golden Gate Bridge is not in Santa Clara County, but a judge in that county can take judicial notice that it is located in San Francisco and Marin Counties. Most Santa Clara County residents know where the Golden Gate Bridge is located.

Easily verifiable facts are propositions that are not widely known but can be readily ascertained by “resort to sources of reasonably indisputable accuracy.”<sup>35</sup> The fact that Christmas 1942 fell on a Wednesday is not widely known. But that fact can be readily ascertained by consulting a calendar.

*Opportunity to Be Heard.* Before taking judicial notice of universally known facts or of any matter within the permissive category “including locally known and easily verifiable facts” the judge must afford the

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28. *Id.*

29. *See supra* Part I.

30. *See* MÉNDEZ, *supra* note 3.

31. CAL. EVID. CODE § 452(f) (West 2009).

32. *Id.* § 452(g).

33. *Id.* and Comment.

34. *Id.*

35. *Id.* § 452(h).

opposing party an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter to be noticed.<sup>36</sup>

*Instructing the Jury on Judicial Notice.* If the court notices a matter that otherwise would have been for determination by the jury, the court may and, upon request, must instruct the jury to accept the noticed matter as a fact.<sup>37</sup> Because of its conclusive effect, the opponent is not permitted to introduce evidence disputing the noticed fact.<sup>38</sup>

The conclusive nature of judicially noticed facts can pose problems in criminal cases. As has been discussed, judges may not give a conclusive effect to facts, which under the Federal Constitution, the prosecution must prove beyond a reasonable doubt.<sup>39</sup>

*Judicial Notice by Reviewing Courts.* The power to take judicial notice is not limited to the trial courts. Reviewing courts may also take judicial notice.<sup>40</sup>

#### IV. Summary of the Differences Between the Code and the Rules

With regard to adjudicative facts, the Code and federal provisions on judicial notice are virtually the same. Although the Code has a separate category for universally known facts,<sup>41</sup> these facts are within the definition of the Rules' provisions on facts generally known within the territorial jurisdiction of the trial court or facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.<sup>42</sup>

The Code, however, has a number of provisions that are not found in the Rules. The most prominent are the sections subjecting legislative facts to the judicial notice requirements.<sup>43</sup> As a result of this mandate, the California courts have developed useful guidelines to help judges determine the propriety of documents that can be used in ascertaining the legislative history of statutes, whether enacted by legislation<sup>44</sup> or initiative.<sup>45</sup>

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36. *Id.* § 455(a).

37. *Id.* § 457.

38. *Id.* § 457 and Comment.

39. *See supra* Part II.

40. CAL. EVID. CODE § 459 (West 2009).

41. *Id.* § 451(f).

42. *Compare id.*, with FED. R. EVID. 201(b).

43. CAL. EVID. CODE §§ 451(a)–(d), 452(a)–(f) (West 2009).

44. *See, e.g.*, *People v. Patterson*, 84 Cal. Rptr. 2d 870, 872–73 (Ct. App. 1999).

45. *See, e.g.*, *People v. Snyder*, 992 P.2d 1102, 1105 n.5 (Cal. 2000).

Other provisions found only in the Code include section 456, which provides that if the trial court denies a request to take judicial notice, the court must inform the parties at the earliest practicable time and indicate its ruling for the record.<sup>46</sup> The notice requirement is intended to provide the parties with an opportunity to offer evidence proving or disproving the fact the court declined to notice.<sup>47</sup>

In addition, section 454 provides that in determining the propriety of taking judicial notice of a matter, a judge, in addition to consulting any source of pertinent information, may consider the advice of persons learned in the subject matter.<sup>48</sup> Where the advice of an expert is required, section 460 authorizes the judge to appoint an expert on his or her own motion or on the motion of any of the parties.<sup>49</sup> Federal Rule of Evidence 201 does not expressly empower federal judges to appoint experts to advise on the propriety of taking judicial notice, but as the Advisory Committee emphasizes in its Note to Rule 706, "The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned."<sup>50</sup>

Finally, section 455(b) provides important procedural safeguards. Where in taking judicial notice the court resorts to any source of information not received in open court, section 455(b) requires the court to make the information a part of the record in the action and to afford the parties a reasonable opportunity to meet the information before taking judicial notice.<sup>51</sup> "Making the information and its source a part of the record assures its availability for examination by the parties and by a reviewing court."<sup>52</sup> Additionally, "subdivision (b) requires the court to give the parties a reasonable opportunity to meet such additional information before judicial notice of the matter may be taken."<sup>53</sup>

All of these provisions should be retained. In addition, consideration should be given to amending section 457 to reflect that part of Rule 201(g) which provides that "[i]n a criminal case the court shall instruct the jury that it may, but is not required, to accept as conclusive any fact judicially noticed."<sup>54</sup> Such an amendment would diminish

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46. CAL. EVID. CODE § 456 (West 2009).

47. *Id.* and Comment.

48. *Id.* § 454(a)(1).

49. *Id.* § 460.

50. FED. R. EVID. 706 advisory committee's note.

51. CAL. EVID. CODE § 455(b) (West 2009).

52. *Id.* and Comment.

53. *Id.*

54. FED. R. EVID. 201(g).

the risk that instructions on the effect of judicially noticed facts might conflict with the prosecution's burden to prove each fact essential to conviction beyond a reasonable doubt.

