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ARTICLES

JUDICIAL NOTICE UNDER ARTICLE II OF THE TEXAS RULES OF EVIDENCE*

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The provisions of Article II of the Texas Rules of Evidence and of the Texas Rules of Criminal Evidence are identical, except in Rule 201(g). References in this article to the Texas Rules of Evidence are intended to refer to both civil and criminal rules. The text of Article II, including both civil and criminal versions of Rule 201(g), is reproduced as the Appendix to this article.

This article is fifth in a series. *See* Wellborn, *Article VIII: Hearsay*, 20 HOUS. L. REV. 477 (1983); Wellborn, *Authentication and Identification Under Article IX of the Texas Rules of Evidence*, 16 ST. MARY'S L.J. 371 (1985); Wellborn, *The "Best Evidence" Article of the Texas Rules of Evidence*, 18 ST. MARY'S L.J. 99 (1986); Wellborn, *Article I of the Texas Rules of Evidence and Articles I and XI of the Texas Rules of Criminal Evidence: Applicability of the Rules, Procedural Matters, and Preserving Error*, 18 ST. MARY'S L.J. 1165 (1987).

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I. INTRODUCTION

All lawyers have some acquaintance with the subject of judicial notice, yet any discussion of it presents many difficulties. Although judicial notice is one of the most ancient institutions of our law,[1] "even down to the present time there has been no clear agreement on the meaning of the term, the underlying theory that supports it, or the procedural incidents to its operation."[2] As in many areas of law, a great deal of confusion has arisen from the use by courts and lawyers of a single term to refer to many different things.[3] It is therefore necessary to begin the present discussion by setting forth some basic refinements in terminology.

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1. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 277 (1898).

2. 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5102, at 458 (1977).

3. *See, e.g., id.* § 5102, at 460-64 (discussing various aspects of judicial notice); 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 200[01] (1986)(introducing diverse concepts encompassed by term); 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2565-2566 (Chadbourn rev. 1981)(presenting theories of judicial notice and examining various meanings of the term).

Our analysis requires, first, that a distinction be made between judicial notice of law and judicial notice of fact. For these purposes, the categories of law and fact are generally quite distinct and recognizable. Second, within both great categories of law and fact, subcategories appear. Within law, the principal distinction is between "local" law (Texas law, or federal law applicable in Texas) and "foreign" law (law of another state or of a foreign nation). Additional distinctions among either local or foreign laws may be significant. For example, the Texas Rules of Evidence treat the law of a sister state differently from the law of a foreign country.[4] Also, prior to the adoption of the Texas Rules of Evidence, Texas courts generally refused to take judicial notice of Texas ordinances and administrative regulations, although they naturally accepted Texas statutes and cases without evidentiary proof.[5] Even under the rules, judicial notice of Texas ordinances and regulations is now prescribed, but it is subject to procedural requirements and burdens that do not apply to statutes and cases.[6]

Within the category of facts, subcategorization is likewise important and entails practical consequences. Three subcategories are in effect created by Federal and Texas rule 201. These, which will be defined in due course,[7] are (1) adjudicative facts, (2) legislative facts, and (3) other non-adjudicative facts used as a part of the judicial reasoning process ("reasoning" facts).

The broadest definitions of judicial notice cover any use of information by a court without formal evidentiary proof.[8] Such an expansive concept includes judicial determinations of law as well as fact, and includes judicial use of any fact without proof, regardless of whether the fact is central to the case (adjudicative) or merely incidental to judicial lawmaking or reasoning. Compare Wigmore's much narrower definition of judicial notice "[i]n the orthodox sense":

> [I]t signifies that there are certain 'facta probanda' or *propositions in a party's case, as to which he will not be required to offer evidence;* these will be taken for true by the tribunal without the need of evidence,

4. *Compare* TEX. R. EVID. 202 *and infra* text accompanying notes 127-34 *with* TEX. R. EVID. 203 *and infra* text accompanying notes 135-38.

5. *See infra* text accompanying notes 139-45.

6. *See id.*

7. *See infra* text accompanying notes 20-48.

8. *See* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 200[01], at 200-02 (1986).

> either because they are notoriously known or capable of unquestionable demonstration.[9]

Wigmore's definition, the "orthodox" concept of judicial notice, differs from the most expansive version in two ways: (1) it confines the term to determinations of fact, omitting all matters of law; and (2) even as to facts, it only refers to facts that are "propositions in a party's case." Presumably, the factual category "propositions in a party's case" means those facts, specific to the case, that a party would be expected to plead and prove under the applicable rules of law. It would not include the more general facts that a court may find and employ in the processes of lawmaking and legal reasoning.

The narrower, "orthodox" concept of judicial notice thus described by Wigmore corresponds to the coverage of rule 201 of the Federal and Texas Rules of Evidence. Rule 201(a) provides, "This rule governs only judicial notice of adjudicative facts." The federal Advisory Committee's Note to that provision distinguishes among three categories of facts: (1) "adjudicative facts," (2) "legislative facts," and (3) other "non-adjudicative facts" that are employed "as a part of the judicial reasoning process." The definitions of these categories are explored in a later section of this article.[10] For the present, it suffices to note that the category of adjudicative facts—the only area of judicial notice regulated by rule 201—corresponds to Wigmore's "propositions in a party's case." Rule 201 may thus be viewed as a codification of the subject Wigmore defined as judicial notice "in the orthodox sense." The second and third categories of facts described by the federal Advisory Committee, legislative facts and "reasoning" facts, remain proper subjects of judicial notice in the broader sense of the term—that is, they may still properly be found and used without proof—but the process of judicial notice of them is not subject to regulation by rule 201,[11] or by any other evidence rule.

As for judicial notice of law, the Federal Rules of Evidence address the subject only by an Advisory Committee Note which refers to the foreign law provisions of the Federal Rules of Civil Procedure and the

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9. 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2565, at 694 (Chadbourn rev. 1981)(cross-references omitted; emphasis in original). Wigmore adds: "This general view of judicial notice is simple, natural enough, and traditional." *Id.*

10. *See infra* text accompanying notes 20-48.

11. *See* FED. R. EVID. 201(a) advisory committee's note ("[T]he regulation of judicial notice of facts by the present rule extends only to adjudicative facts.").

Federal Rules of Criminal Procedure,[12] and adds:

> These two new admirably designed rules are founded upon the assumption that the manner in which law is fed into the judicial process is never a proper concern of the rules of evidence but rather of the rules of procedure. The Advisory Committee on Evidence, believing that this assumption is entirely correct, proposes no evidence rule with respect to judicial notice of law. . . .[13]

The Texas rules contain three provisions on judicial notice of law: rule 202, on law of other states;[14] rule 203, on law of foreign countries;[15] and rule 204, on Texas ordinances and administrative regulations and rules.[16] It is apparent that just as rule 201 is not comprehensive of all subcategories of fact—regulating only judicial notice of adjudicative facts, leaving judicial notice of legislative and reasoning facts extant but unregulated—rules 202, 203, and 204 are not comprehensive of all subcategories of law. Rules 202 and 203 do seem to comprehend all kinds of sister state and foreign law, but rule 204 covers only relatively small areas of Texas law and no federal law at all. As with the omitted categories of fact, the effect is not to prohibit the exercise of judicial notice, and hence to require evidentiary proof, of such matters as Texas or federal statutes and cases. Rather, the effect is simply to omit regulation in these rules of the judicial notice process as to such items.[17]

In summary, the term judicial notice broadly includes any judicial determination, whether fact or law, without formal evidentiary proof. Judicial notice is generally appropriate as to all matters of law, subject to regulation as provided in rules 202, 203, and 204. Judicial notice is also generally appropriate as to legislative and reasoning facts; that is, the court may determine such facts without proof and without regulation by any of the rules of evidence. Judicial notice of adjudicative facts—what Wigmore calls judicial notice "in the orthodox sense"—is appropriate only as provided in rule 201.

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12. *See* FED. R. CIV. P. 44.1; *see also* FED. R. CRIM. P. 26.1.
13. FED. R. EVID. 201 advisory committee's note (Note on Judicial Notice of Law).
14. *See infra* text accompanying notes 127-34.
15. *See infra* text accompanying notes 135-38.
16. *See infra* text accompanying notes 139-45.
17. *See id.*

II. THE TEXAS RULES OF CIVIL EVIDENCE, THE TEXAS RULES OF CRIMINAL EVIDENCE, AND THE FEDERAL RULES OF EVIDENCE COMPARED

Article II of the Federal Rules of Evidence contains only Rule 201, Judicial Notice of Adjudicative Facts. The Advisory Committee's Notes accompanying rule 201 explain that judicial notice of non-adjudicative facts and of law are not regulated by the rules.

The Texas civil and criminal versions of rule 201, viewed together, are identical to the federal version, though they are not quite identical to one another. The reason is that Federal Rule 201(g), Instructing Jury, contains two sentences prescribing different rules for civil and criminal cases. In Texas the two separate codes simply split those sentences between them.[18]

The provisions concerning judicial notice of law, rules 202, 203, and 204, are identical in the two Texas codes. While they have no counterparts in the Federal Rules of Evidence, rule 203, the foreign law provision, is based upon Federal Rule of Civil Procedure 44.1 and Federal Rule of Criminal Procedure 26.1, which are referred to in the Advisory Committee's Note to Federal Rule of Evidence 201. Texas rule 203, however, is a significantly augmented version of the federal models.[19]

III. PROVISION-BY-PROVISION ANALYSIS OF ARTICLE II

A. *Rule 201(a): Judicial Notice of Adjudicative Facts—Scope of the Rule*

Rule 201(a) restricts the application of rule 201 to "adjudicative facts." The "black letter" of the rule does not define which facts are adjudicative or what other kinds of facts there may be. These matters are dealt with extensively, however, in the Federal Advisory Committee's Note.

Most of the Note to federal rule 201(a) is devoted to the distinction between adjudicative and legislative facts. The practical significance of the distinction is that judicial notice of adjudicative facts is regulated by rule 201, while judicial notice of legislative facts is not. This means, for example, that if a fact is adjudicative, it cannot be judi-

18. The criminal and civil versions omit, respectively, the phrases "[i]n a civil action or proceeding" and "[i]n a criminal case." *See infra* text accompanying notes 89-126.

19. *See infra* text accompanying notes 135-38.

cially noticed unless it is "one not subject to reasonable dispute" (rule 201(b)). If a fact is legislative, however, it may be judicially determined without evidentiary basis even though it remains disputable. Other practical consequences attach to the distinction, as will be noted below.[20]

"Adjudicative facts," the federal Advisory Committee tells us, "are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process . . . ." Professor Kenneth Davis coined this terminology[21] and developed the distinction in extensive writings on judicial notice, to which the federal Advisory Committee repeatedly refers.[22] The following passage from Professor Davis's treatise defines and distinguishes adjudicative and legislative facts:

> When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function, and the facts are conveniently called adjudicative facts. When a court or an agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which inform the tribunal's legislative judgment are called legislative facts.
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> Stated in other terms, the adjudicative facts are those to which the law is applied in the process of adjudication. They are the facts that normally go to the jury in a jury case. They relate to the parties, their activities, their properties, their businesses. Legislative facts are the facts which help the tribunal determine the content of the law and of policy and help the tribunal to exercise its judgment or discretion in determining what course of action to take. Legislative facts are ordinarily general and do not concern the immediate parties. In the great mass of cases decided by courts and by agencies, the legislative element is either absent or unimportant or interstitial, because in most cases the applicable law and policy have been previously established. But whenever a tribunal engages in the creation of law or of policy, it may need to resort to legislative facts, whether or not those facts have been devel-

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20. *See infra* text accompanying notes 37-40.

21. *See* Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 404-07 (1942).

22. The Committee cites, e.g., 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 15.01-15.14 (1958); Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69 (1964); Davis, *Judicial Notice*, 55 COLUM. L. REV. 945 (1955).

oped on the record.[23]

Adjudicative facts are ordinarily required to be established by evidence. Judicial notice is an exception to the normal requirement of proof,[24] which must be justified by a "high degree of indisputability."[25] Legislative facts, on the other hand, are not normally the objects of evidentiary proof. As to them, judicial notice instead of record evidence is the rule rather than the exception, and indisputability is not required to justify judicial notice.

The distinction in judicial notice doctrine between adjudicative and legislative facts rests upon the differences between the way the court functions as (adjudicative) fact-finder, on the one hand, and the way it functions as lawgiver, on the other. When the court is engaged in adjudicative fact-finding—the principal business of trials—the modern tradition accords to the parties the lion's share of responsibility and control over the sources of information upon which the factual determinations will be based.[26] Judicial notice of adjudicative facts, since it dispenses with normal proof, is an exception to party control that requires the justification of indisputability, plus an opportunity to be heard on the issue—rights codified in rule 201(b) and (e). These rights hold as to the facts of the parties' "own" case.

When the court functions as lawgiver, however, the issue of party control is markedly different. The law applied to one case must apply to all. It is appropriate that parties generally have responsibility and control of the sources of information upon which the determination of the facts of their case depends. After all, the determination of the adjudicative facts will affect only their case. It is not appropriate, by the same analysis, for the parties to be given similar control over the de-

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23. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03, at 353 (1958).

24. The other principal exception to the requirement of proof by evidence of adjudicative facts is "where the opponent by a solemn or infrajudicial admission has *waived* dispute." 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2565, at 693 (Chadbourn rev. 1981)(emphasis in original).

25. FED. R. EVID. 201(a) advisory committee's note. Indisputability is required by rule 201(b). *See infra* text accompanying notes 49-58.

26. The approach of early forms of trial in England was radically different. The ancestor of the modern jury, the Norman inquest, was free to consult sources of information over which the parties exercised no control. The modern idea that the facts should be determined solely upon evidence presented at the trial was not fully adopted by the common law until the eighteenth century. *See* E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 106-17 (1956); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 7-136 (1898) (chapters 1-3).

termination of the applicable law, because an announcement of law affects others who are not parties. Indeed, it affects everyone within the jurisdiction.[27] Therefore:

> In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present . . . . [T]he parties do no more than to assist; they control no part of the process.[28]

After quoting the preceding language, the federal Advisory Committee stated:

> This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level.[29]

As an example of a court employing legislative facts, the federal Advisory Committee cites *Hawkins v. United States*,[30] in which the United States Supreme Court reaffirmed the privilege of an accused to prevent his spouse from testifying against him. Justice Black justified the doctrine on the ground of preserving family harmony. "Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage," he asserted.[31] The Advisory Committee remarks, "This conclusion has a large intermixture of fact, but the factual aspect is scarcely 'indisputable.' "[32] Nevertheless, according

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27. *See* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5102, at 462 (1977). Professors Wright and Graham reason:

> When the question before the court is not merely the rights of the parties, but the interests of others who may be affected by the rule the court makes to govern the case, it would be foolish for the court to rely only on the evidence the parties have chosen to prove below. Thus it is, that when they are engaged in their lawmaking function, courts have always taken notice of facts without any evidence in the record.

Id. (footnotes omitted).

28. Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 270-71 (1944), *quoted in* FED. R. EVID. 201(a) advisory committee's note.

29. FED. R. EVID. 201(a) advisory committee's note.

30. 358 U.S. 74 (1958).

31. *Id.* at 78.

32. FED. R. EVID. 201(a) advisory committee's note. Indeed, Justice Stewart in his concurring opinion in *Hawkins* referred to the majority's "mere assumptions, perhaps naive assumptions, as to the importance of this ancient rule to the interests of domestic tranquillity

to the Committee, it was appropriate, indeed necessary, for the court to employ such facts as it believed, without either record evidence or indisputability, in formulating or evaluating a rule of law. Again they quote Professor Davis:

> My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are 'clearly . . . within the domain of the indisputable.' Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.[33]

Texas courts have used legislative facts in a manner identical to the *Hawkins* example. Therefore, since the treatment of legislative facts in the rule is simply a codification of that approach, it represents no change in Texas law. For example, in *Aboussie v. Aboussie*,[34] the Fort Worth Court of Civil Appeals stated:

> We believe that the peace and tranquility of the home and the best interest of minor children will be subserved by following the general rule that an unemancipated minor child cannot sue its parent for damages based on acts of ordinary negligence.[35]

The factual aspect of the foregoing statement is no less disputable than Justice Black's assumptions in *Hawkins*. In fact, both *Hawkins* and *Aboussie* have been substantially modified.[36] And note the fol-

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[sic]." Hawkins v. United States, 358 U.S. 74, 81-82 (1958)(Stewart, J., concurring). Justice Stewart was vindicated twenty-two years later, when the Court substantially modified *Hawkins*. *See* Trammel v. United States, 445 U.S. 40, 53 (1980). The Court in *Trammel*, speaking through Justice Burger, articulated a rather different version of the legislative facts concerning the spousal testimony situation:

> When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace.

Id. at 52.

33. Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69, 82 (1964), *quoted in* FED. R. EVID. 201(a) advisory committee's note.

34. 270 S.W.2d 636 (Tex. Civ. App.—Fort Worth 1954, writ ref'd).

35. *Id.* at 639.

36. *See* Felderhoff v. Felderhoff, 473 S.W.2d 928, 933 (Tex. 1971), *modifying* Aboussie v. Aboussie, 270 S.W.2d 636 (Tex. Civ. App.—Fort Worth 1954, writ ref'd)(*Aboussie* overruled in so far as conflicts with instant case); *see also* Trammel v. United States, 445 U.S. 40, 53 (1980), *modifying* Hawkins v. United States, 358 U.S. 74 (1958)(spousal privilege in *Hawkins* modified).

lowing pronouncement of legislative facts by the Texas Supreme Court in abolishing interspousal immunity for intentional torts:

> We recognize fully the importance of the family unit in our society and that peace and tranquility in the home are endowed and inspired by higher authority than statutory enactments and court decisions. However, we do not believe that suits for wilful or intentional torts would disrupt domestic tranquility. The peace and harmony of a home which has already been strained to the point where an intentional physical attack could take place will not be further impaired by allowing a suit to be brought to recover damages for the attack.[37]

If a fact is classified as legislative rather than adjudicative, the practical consequences appear to be as follows: (1) the requirement of indisputability, rule 201(b), does not apply;[38] (2) the right to a hearing upon request concerning the matter, rule 201(e), does not apply;[39] (3) judicial notice is always discretionary; the mandatory provision, rule 201(d), does not apply;[40] (4) the jury instruction provisions, rule 201(g), prescribing mandatory instructions in civil cases and permissive instructions in criminal cases, do not apply.[41]

Besides adjudicative and legislative facts, the federal Advisory Committee recognized a third category: other "non-adjudicative facts" used "in ways other than formulating laws and rules . . . as a part of the judicial reasoning process."[42] These include the common general knowledge of jurors and judges as to such matters as the meanings of words and the features of the environment, both natural and man-made.

> When a witness in an automobile accident case says "car," everyone, judge and jury included, furnishes from non-evidence sources within himself, the supplementing information that the "car" is an automobile, not a railroad car, that it is self-propelled, probably by an internal com-

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37. Bounds v. Caudle, 560 S.W.2d 925, 927 (Tex. 1977)(citation omitted).

38. *See* FED. R. EVID. 201(a) advisory committee's note.

39. *See id.*

40. *See* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5103, at 476 (1977)(courts have wide discretion whether to notice facts other than adjudicative facts).

41. *See* FED. R. EVID. 201(g) advisory committee's note. In one case the court noted that a jury instruction "that cocaine hydrochloride is a schedule II controlled substance under the laws of the United States" did not violate FED. R. EVID. 201(g) because the fact that cocaine hydrochloride is a derivative of coca leaves is a legislative rather than an adjudicative fact. *United States v. Gould*, 536 F.2d 216, 218-20 (8th Cir. 1976); *see also infra* text accompanying notes 89-126.

42. FED. R. EVID. 201(a) advisory committee's note.

> bustion engine, that it may be assumed to have four wheels with pneumatic rubber tires, and so on. The judicial process cannot construct every case from scratch, like Descartes creating a world based on the postulate *Cogito, ergo sum*. These items could not possibly be introduced into evidence, and no one suggests that they be. Nor are they appropriate subjects for any formalized treatment of judicial notice of facts.[43]

The distinction between adjudicative facts and "reasoning" facts is further illustrated by the following example, offered by Professors Wright and Graham:

> For example, suppose that in a personal injury action arising out of a highway collision, the negligence alleged is that the defendant was driving too fast for the conditions at the time. Whether it was raining or not at the time would be a critical adjudicative fact that could only be noticed in compliance with rule 201. But once it was established, by judicial notice or otherwise, that it was raining, the facts that rain impairs visibility, reduces the effectiveness of brakes, and lowers the prudent driving speed can be assumed by the court without proof and without the need to comply with rule 201.[44]

Texas courts have repeatedly held that the jury may make use of common or general knowledge to supplement or to evaluate matters presented into evidence.[45] In *Missouri Pacific Railroad v. Kimbrell*,[46] the supreme court held that a jury could perform the operation of reducing damages for future losses to present value without any record evidence concerning interest rates. The court said, "It is a well-settled rule in this jurisdiction that the jury has the power to consider as proven any matter that is of common knowledge in the community."[47] In *Cruz v. State*,[48] the San Antonio Court of Appeals ap-

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43. *Id.*; *see also* McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779, 789-90 (1961). Professor McNaughton observed:

> It is considered appropriate that a judge or juror be permitted to employ, inconspicuously and interstitially in his elementary processes of understanding and reasoning, his beliefs (though they are not in evidence) which he reasonably thinks he shares with other intelligent persons as to the general nature of things—the meanings of ordinary words, typical modes of human behavior, causal relations between commonplace events, and the like.

Id.

44. 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5103, at 478 (1977).

45. *See* 1 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 156 (Texas Practice 3d ed. 1980).

46. 160 Tex. 542, 334 S.W.2d 283 (1960).

47. *Id.* at 547, 334 S.W.2d at 286.

proved a prosecutor's jury argument inviting the jury to infer, from the fact that the end of defendant's rifle barrel was threaded, that it was adapted for use of a silencer. The court said, "A jury is entitled to avail themselves of knowledge which comes from ordinary experience and observation."[49]

Judicial notice of reasoning facts, like judicial notice of legislative facts, is not regulated by rule 201 or any other rule. Thus, the court and the jury may, in apprehending and evaluating evidence and in applying legal rules to evidence, employ whatever facts they reasonably believe, without any requirements of indisputability or of opportunity for parties to be heard concerning such beliefs.

B. *Rule 201(b): Kinds of Facts*

Rule 201(b) sets forth a two-stage test for judicial notice of adjudicative facts. The first stage, which must always be satisfied, is indisputability ("not subject to reasonable dispute"). It requires that the judge find that reasonable persons would not doubt the fact. The second stage requires the judge to find that the fact is either notorious ("generally known within the territorial jurisdiction of the trial court") or verifiable ("capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").

The case law in Texas prior to the adoption of the Texas Rules of Evidence is entirely consistent with rule 201(b). Many cases mention the criterion of indisputability.[50] The additional alternative requirements of notoriety or verifiability have appeared in Texas cases in language nearly identical to the rule. For example:

> The doctrine of judicial notice is one of common sense. The theory is that, where a fact is well-known by all reasonably intelligent people in the community, or its existence is so easily determinable with certainty from unimpeachable sources, it would not be good sense to require formal proof.[51]

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48. 645 S.W.2d 498 (Tex. App.—San Antonio 1982, pet. granted).

49. *Id.* at 503.

50. *See, e.g.*, Eagle Trucking Co. v. Texas Bitulithic Co., 612 S.W.2d 503, 506 (Tex. 1981); Johnson v. Cooper, 379 S.W.2d 396, 399 (Tex. Civ. App.—Fort Worth 1964, no writ); Harper v. Killion, 345 S.W.2d 309, 311 (Tex. Civ. App.—Texarkana), *aff'd*, 162 Tex. 481, 348 S.W.2d 521 (1961).

51. Harper v. Killion, 345 S.W.2d 309, 311 (Tex. Civ. App.—Texarkana), *aff'd*, 162 Tex. 481, 348 S.W.2d 521 (1961).

The category of notorious facts is both more ancient[52] and less frequently useful today[53] than the category of verifiable facts. It has been held in Texas, quite logically, that a matter does not qualify as "generally known" merely because the individual judge knows it.[54] With equal logic, Texas courts have held that knowledge of a matter within a trade or special class of persons is not sufficient notoriety for this category of judicial notice.[55] Both these lines of authority remain sound under rule 201(b)(1).

Rule 201(b)(2) requires two not entirely independent conditions: (1) that the adjudicative fact in question is "capable of accurate and ready determination;" and (2) that the source used to determine it is accurate beyond reasonable question. These two conditions in turn are not quite independent of rule 201(b)'s general requirement of indisputability. In any event, taken together and properly applied, these conditions are ample protection against the "major risk" noted by one pair of commentators that "when the trial judge resorts to outside sources to verify facts . . . he may choose to decide the whole dispute on the basis of his own independent research."[56]

For example, in one federal case applying rule 201(b)(2), the district judge refused to take judicial notice of the causes of asbestosis and mesothelioma, because of the existence of ongoing scientific disputes on the subjects. He properly left the issue for expert testimony at trial.[57] In another case, a Colorado court of appeals did overstep the bounds of rule 201(b)(2) when it used medical treatises to take judicial notice on a hotly disputed medical causation issue, rejecting

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52. *See* G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 7, at 10 n.20 (1978)(older cases limit judicial notice to "indisputable facts of common knowledge"); *see also* E. CLEARY, MCCORMICK ON EVIDENCE § 329, at 922 (3d ed. 1984)(oldest ground for judicial notice is that the fact is commonly known in the community and indisputable).

53. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 329, at 924 (3d ed. 1984); *see also* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5105, at 495 (1977)(significance of power to notice notorious facts constantly decreasing).

54. *See, e.g.*, Eagle Trucking Co. v. Texas Bitulithic Co., 612 S.W.2d 503, 506 (Tex. 1981); Barron v. Marusak, 359 S.W.2d 77, 84 (Tex. Civ. App.—Austin 1962, no writ); 1 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 152 (Texas Practice 3d ed. 1980).

55. *See* Johnson v. Cooper, 379 S.W.2d 396, 399 (Tex. Civ. App.—Fort Worth 1964, no writ)(meaning of term "square" in roofing trade); *see also* Kennedy v. General Geophysical Co., 213 S.W.2d 707, 710 (Tex. Civ. App.—Galveston 1948, writ ref'd n.r.e.). Of course, facts within the knowledge of a trade or specialty may be judicially noticed if found within a source that meets the tests of rule 201(b)(2).

56. 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 57, at 439 (1977).

57. *See* Laster v. Celotex Corp., 587 F. Supp. 542, 543-44 (S.D. Ohio 1984).

contrary expert testimony in the record which had been relied upon by the referee and the Industrial Commission.[58] The Colorado Supreme Court promptly and soundly reversed, noting that the court of appeals's scientific conclusions were clearly not indisputable, as shown by the conflicting expert testimony in the record.[59] The Colorado case provides a good lesson: a court using rule 201(b)(2) must not let its conviction as to the authoritativeness of a source overwhelm the more fundamental issue of the indisputability of the fact to be noticed.

C. *Rule 201(c): When Discretionary*

If an adjudicative fact is appropriate for judicial notice under the standards of rule 201, a trial or appellate court may take judicial notice of the fact sua sponte. This doctrine was well established in Texas prior to the adoption of the rules.[60] In exercising this power, the court must, of course, comply with rule 201(e), which entitles all parties, upon request, to an opportunity to be heard concerning judicial notice of any adjudicative fact.[61]

D. *Rule 201(d): When Mandatory*

Rule 201(d) creates a new doctrine in Texas: judicial notice of an adjudicative fact is mandatory if a party requests it and supplies the court with the necessary information. Except for dicta[62] and unsupported commentary,[63] all the pre-rules authority in Texas treated judicial notice as discretionary.[64] Yet the soundness of the idea underlying rule 201(d) is apparent. If a party demonstrates that an

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58. *See* Legouffe v. Prestige Homes, 634 P.2d 1010, 1013 (Colo. Ct. App. 1981), *rev'd*, 658 P.2d 850 (Colo. 1983).

59. Prestige Homes v. Legouffe, 658 P.2d 850, 854 (Colo. 1983)(en banc).

60. *See, e.g.*, Harper v. Killion, 162 Tex. 481, 483, 348 S.W.2d 521, 522 (1961); Vahlsing, Inc. v. Missouri Pac. R.R., 563 S.W.2d 669, 674 (Tex. Civ. App.—Corpus Christi 1978, no writ); Texas Sec. Corp. v. Peters, 463 S.W.2d 263, 265 (Tex. Civ. App.—Fort Worth 1971, no writ); Buckaloo Trucking Co. v. Johnson, 409 S.W.2d 911, 913 (Tex. Civ. App.—Corpus Christi 1966, no writ).

61. *See infra* text accompanying notes 75-85.

62. *See* Clement v. McNiel, 328 S.W.2d 823, 824 (Tex. Civ. App.—Waco 1959, no writ)(dictum)("There are certain facts of which a court must take judicial notice.").

63. *See* 1 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 153 (Texas Practice 3d ed. 1980)(citing in support of doctrine of mandatory judicial notice only dictum in *Clement v. McNiel)*. The dictum in *Clement*, however, cites only an earlier edition of the Ray treatise. *See* Clement v. McNiel, 328 S.W.2d 823, 824 (Tex. Civ. App.—Waco 1959, no writ).

64. *See* Skinner v. HCC Credit Co., 498 S.W.2d 708, 711 (Tex. Civ. App.—Fort Worth

adjudicative fact meets the standards of rule 201(b) ("supplie[s] the necessary information"), then by definition the fact is beyond reasonable dispute. It follows that a judge could have no reasonable justification for refusing to take judicial notice of such a fact, and he should be accorded no discretion to do so.

While the principle behind rule 201(d) is manifest, its procedural incidents are less obvious. By its terms, a party acquires a right to judicial notice of an adjudicative fact[65] upon (1) requesting it and (2) supplying "the necessary information." When and how must the request be made? What is "the necessary information," and how is it to be presented? Neither the rule nor the federal Advisory Committee's Note provides direct answers to these questions.

The rule prescribes no requirement, for example, concerning the time of the request. Professors Wright and Graham persuasively argue, "Although the rule is somewhat unclear on this point, it seems obvious that the request-notice must be timely."[66] That is, the request must be made in time to permit the court to act appropriately upon it, and notice of the request must be given to opposing parties sufficiently in advance of the necessary judicial action to permit effective response.[67] For example, "Surely a party cannot invoke the mandatory notice provisions for the first time on a motion for a new trial or in the appellate court."[68]

A case recently decided under the Texas rules illustrates the last point. In *Duderstadt Surveyors Supply v. Alamo Express,*[69] while appeal was pending, appellant filed a motion in the court of appeals that

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1973, no writ); *see also* State v. Arkansas Fuel Oil Co., 268 S.W.2d 311, 319-20 (Tex. Civ. App.—Austin 1954), *rev'd on other grounds*, 154 Tex. 573, 280 S.W.2d 723 (1955).

65. Judicial notice of legislative and reasoning facts, which are not covered by rule 201, appears never to be mandatory. *See supra* text accompanying notes 20-48.

66. 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5107, at 509 (1977).

67. *See id.*; *see also* FED. R. EVID. 201(e) advisory committee's note. The advisory committee's note to FED. R. EVID. 201(e) states:

> An adversely affected party may learn in advance that judicial notice is in contemplation, either by virtue of being served with a copy of a request by another party under subdivision (d) that judicial notice be taken, or through an advance indication by the judge.

Id.

68. 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5107, at 509 (1977); *see also id.* § 5110 (concluding that rule 201(d) does not apply on appeal); 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 59, at 482 (1977)("in the absence of something akin to plain error").

69. 686 S.W.2d 351 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

it take judicial notice of a tariff of the Railroad Commission. No excuse was presented for the party's failure to bring up the tariff at the trial. Appellant nevertheless invoked the mandatory notice of rule 201(d), citing it and rule 201(f), which provides, "Judicial notice may be taken at any stage of the proceeding," which clearly includes appeal.[70] The court of appeals refused to apply the tariff, holding that no provision of rule 201 overturns "well settled Texas law that an allegation not contained in the pleadings nor otherwise raised or proven in the trial court cannot be raised for the first time on appeal."[71] The judgment of the court of appeals was both fair and sound. While no timeliness requirement is specified in rule 201(d) as a condition of mandatory notice, the *Duderstadt* case illustrates why such a requirement should be implied.[72]

The "necessary information" that a requesting party must provide to make judicial notice mandatory under rule 201(d) is not defined in the rule or in the federal Advisory Committee's Note. Undoubtedly the "necessary information" is simply that information which establishes that the adjudicative fact in question meets the standards of rule 201(b). With regard to facts covered by rule 201(b)(1)—notorious facts—it is unlikely that the request needs to be accompanied by any information, since presumably the judge will be aware of community knowledge of indisputable facts.[73] With regard to facts covered by rule 201(b)(2)—verifiable facts—the requesting party must provide two things:[74] (1) the "source[ ] whose accuracy cannot reasonably be questioned" in which the fact appears and (2) any additional information required to show that the source is one "whose accuracy cannot reasonably be questioned."

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70. *See id.* at 353. Rule 201(f) is discussed *infra* text accompanying notes 86-88.

71. Duderstadt Surveyors Supply v. Alamo Express, 686 S.W.2d 351, 354 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

72. *See* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5107, at 510 (1977). Professors Wright and Graham write that:

> The failure to make a timely request does not mean that judicial notice cannot be taken; it simply means that notice is not mandatory. The trial court can, as a matter of discretion, take judicial notice on the basis of an untimely request, so long as the opponent is given an opportunity to be heard on the question.

Id.

73. *See* 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 58, at 454 (1977)(merely bringing proposition to court's attention likely sufficient).

74. *See* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5108, at 514-15 (1977)(discussing distinction between source and proof of accuracy of source).

The rules of evidence do not apply to the process of judicial notice. Therefore, information supplied to the court in support of (or against) a request for judicial notice need not be in a form that would be admissible as evidence.[75]

E. *Rule 201(e): Opportunity to be Heard*

Rule 201(e) differs from counterpart provisions in some older model codes, in that it does not require the court to notify the parties and give them an opportunity to be heard before judicially noticing a fact.[76] Instead, rule 201(e) makes prior notification and hearing optional, and provides for an after-the-fact right to a hearing in cases where judicial notice is taken without prior notification. The drafters of the federal rules were apparently persuaded by Professor Davis's denunciation of the earlier model provisions as "utterly impractical."[77] "In ninety-nine instances of judicial notice out of a hundred," he argued, "a notification of the parties of intent to take judicial notice is inconvenient and serves no good purpose."[78] Undoubtedly Davis's view, now codified in rule 201(e), is a more accurate reflection of actual practice under the common law than were the provisions he assailed.[79] There is no pertinent pre-rules case authority in Texas, but it seems unlikely in the extreme that Texas courts were in the habit of scrupulously providing notice and hearing every time they judicially noticed a fact.

Judicial notice may be taken by the judge on his own motion, under rule 201(c).[80] In such instances the judge may choose to notify the parties beforehand and offer a hearing on the matter, but he is not

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75. *See, e.g., id.* § 5108, at 512-13; M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 201.7, at 81 (2d ed. 1986); 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 58, at 451 (1977). Pre-rules Texas authority is in accord. *See* Continental Oil Co. v. Simpson, 604 S.W.2d 530, 535 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.)("[T]he source from which a fact is judicially noticed is not evidence to establish the fact and is not subject to the rules of evidence.").

76. *Compare* TEX. R. EVID. 201(e) (providing for hearing only upon request) *with* MODEL CODE OF EVIDENCE RULE 804(1) (1942) *and* UNIF. R. EVID. 10(1) (1953)(both requiring prior notice and hearing before court may take judicial notice).

77. Davis, *Judicial Notice*, 55 COLUM. L. REV. 945, 975 (1955).

78. Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69, 75 (1964).

79. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 333, at 934 (3d ed. 1984) ("[O]nly a rare case insists that a judge must notify the parties before taking judicial notice of a fact on his own motion . . . .").

80. *See supra* text accompanying notes 59-60.

required to do so.[81] The federal Advisory Committee reasoned that judicial notice without any advance notification is an occurrence made quite likely "by the frequent failure to recognize judicial notice as such."[82] If no advance notification is afforded, the rule provides that a hearing may be requested after the judicial notice has been taken. Once requested, the hearing is a matter of right. If no party "timely" requests a hearing, the matter is foreclosed. It is implicit in rule 201(e) that if a court takes judicial notice of an adjudicative fact sua sponte, it must at some point notify the parties that it has done so, so that they in fact receive the opportunity to be heard granted by the rule.[83] This is probably required by the Constitution as well as by the rule.[84]

Judicial notice may also be taken, under rule 201(d), upon a party's request. In these instances, at least according to one authority, "the request of the proponent under rule 201(d) should suffice as a request for a hearing as well as a request for the taking of judicial notice and no additional demand should be required."[85] If that is so, then presumably an opponent's opposition or objection to a request that judicial notice be taken also suffices as a request for a hearing.

The rules of evidence do not apply to the process of judicial notice.[86] Thus, at a hearing on judicial notice under rule 201(e), a party may present, without regard to the rules of evidence, any matter that is relevant to determining whether the adjudicative fact in question comes within the standards of rule 201(b).

F. *Rule 201(f): Time of Taking Notice*

The federal Advisory Committee's Note to rule 201(f) makes it clear that "any stage of the proceedings" includes appeal. Many Texas cases decided prior to the adoption of the Texas Rules of Evi-

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81. *See* FED. R. EVID. 201(e) advisory committee's note (party "may have no advance notice at all" of taking of judicial notice).

82. *Id.*

83. *See* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5107, at 507 (1977).

84. *See, e.g.*, Garner v. Louisiana, 368 U.S. 157, 173-74 (1961); Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292, 302-03 (1937); 1 D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 58, at 454-61 (1977)(discussing *Ohio Bell*); 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5107, at 507 (1977)(discussing *Garner* and *Ohio Bell*).

85. 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5109, at 516-17 (1977).

86. *See supra* text accompanying notes 61-74.

dence invoked judicial notice on appeal, despite the absence in the trial record of any request for judicial notice or announcement of judicial notice by the trial court. Most of these cases spoke of a presumption that the trial court took judicial notice of a fact that was properly noticeable on the basis of materials appearing in the trial record, even though no request or announcement appeared.[87] Appellate judicial notice employed in this manner is clearly authorized by rule 201(f).

In one case decided prior to the rules, the Texas Supreme Court recognized that a request for judicial notice on appeal may present quite a different issue if the pertinent materials were not presented to the trial judge:

> [A]n appellate court is naturally reluctant to take judicial notice of matters . . . when the trial court was not requested to do so and was not given an opportunity to examine the necessary source material. This does not mean we would refuse to take judicial notice under similar circumstances where necessary to avoid an unjust judgment.[88]

This sensible language indicates that judicial notice of an adjudicative fact on appeal should always be discretionary, "to avoid an unjust judgment"; judicial notice of an adjudicative fact on appeal should never be mandatory. This is consistent with the use of the permissive word "may" in rule 201(f). Accordingly, rule 201(d) should be interpreted to require a *timely* request as a prerequisite to mandatory judicial notice.[89]

G. *Rule 201(g): Instructing Jury*

1. Civil Cases

The civil version of rule 201(g) prescribes a peremptory instruction to the jury on any judicially noticed adjudicative fact. As a corollary, once the judge has judicially noticed a fact, no evidence is admissible to rebut it.[90]

Since rule 201(b) confines judicial notice of adjudicative facts to

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87. *See, e.g.*, Continental Oil Co. v. Simpson, 604 S.W.2d 530, 535 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.); Vahlsing, Inc. v. Missouri Pac. R.R., 563 S.W.2d 669, 674 (Tex. Civ. App.—Corpus Christi 1978, no writ); Texas Sec. Corp. v. Peters, 463 S.W.2d 263, 265 (Tex. Civ. App.—Fort Worth 1971, no writ); Buckaloo Trucking Co. v. Johnson, 409 S.W.2d 911, 913 (Tex. Civ. App.—Corpus Christi 1966, no writ); Harper v. Killion, 345 S.W.2d 309, 311-12 (Tex. Civ. App.—Texarkana), *aff'd*, 162 Tex. 481, 348 S.W.2d 521 (1955).

88. Sparkman v. Maxwell, 519 S.W.2d 852, 855 (Tex. 1975)(citation omitted).

89. *See supra* text accompanying notes 61-74.

90. *See* FED. R. EVID. 201(g) advisory committee's note.

facts that are "not subject to reasonable dispute," the procedural effect given in rule 201(g) is logical. There is no reason to permit evidentiary dispute concerning that which is indisputable; nor should a civil jury be permitted to reject the indisputable. Due process is accorded in the parties' right to a hearing before the judge upon the issue of the "propriety" of judicial notice, granted in rule 201(e).[91]

In adopting this approach to judicial notice, the federal Advisory Committee was aware that the leading authorities on evidence had long been divided upon the issues of the proper scope and procedural effects of judicial notice.[92] One group, led by Morgan,[93] McCormick,[94] Maguire,[95] and McNaughton,[96] supported confining judicial notice to indisputable facts and accordingly giving it conclusive effect.[97] The other group, led by Thayer,[98] Wigmore,[99] and Davis,[100] contended that judicial notice should have a broader scope, to include not only indisputable facts, but also facts that are not likely to be disputed. Under their approach, the procedural effect of judicial notice would be similar to that of a presumption: it would create a rebuttable prima facie case.[101]

Although the Advisory Committee appears to have sided decisively with the Morgan group, it must be remembered that rule 201 only governs judicial notice of adjudicative facts. In the Committee's view:

> The proponents of admitting evidence in disproof [i.e., Thayer, Wigmore, Davis] have concentrated largely upon legislative facts. Since the present rule deals only with judicial notice of adjudicative facts, argu-

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91. *See supra* text accompanying notes 75-85.

92. *See* McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779 (1961)(extensive comparison and analysis of competing theories), *cited in* FED. R. EVID. 201(g) advisory committee's note.

93. *See* Morgan, *Judicial Notice*, 57 HARV. L. REV. 269, 279 (1961).

94. *See* McCormick, *Judicial Notice*, 5 VAND. L. REV. 296, 321-22 (1952).

95. *See* J. MAGUIRE, EVIDENCE—COMMON SENSE AND COMMON LAW 174 (1947).

96. *See* McNaughton, *Judicial Notice—Excerpts Relating to the Morgan-Wigmore Controversy*, 14 VAND. L. REV. 779, 779 (1961).

97. *See* Keeffe, Landis & Shaad, *Sense and Nonsense About Judicial Notice*, 2 STAN. L. REV. 664, 668 (1950).

98. *See* J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 308 (1898).

99. *See* 9 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2567-2567a (Chadbourn rev. 1981).

100. *See* Davis, *A System of Judicial Notice Based on Fairness and Convenience*, in PERSPECTIVES OF LAW 69, 94 (1964).

101. *See* Comment, *The Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528, 534-36 (1968)(describing differences between two theories of judicial notice).

ments directed to legislative facts lose their relevancy.[102]

Thus, "[w]hat the Advisory Committee did was to split the field of judicial notice and give part of it to each of the contending schools."[103]

On the precise issue of whether judicial notice is conclusive or behaves like a presumption, there appear to have been no Texas decisions prior to the adoption of the Texas Rules of Evidence.[104] Therefore, it is impossible to say whether the adoption of the "Morgan rule" for judicial notice of adjudicative facts represents a change in Texas practice or a codification of it.

Rule 201(g) is mandatory. That is, it requires a peremptory instruction in every instance in which a court takes judicial notice of an adjudicative fact. Nevertheless, a party may not complain on appeal of the failure of the trial court to give the instruction unless he made a timely request for it.[105]

2. Criminal Cases

The criminal version of rule 201(g) prescribes a permissive, rather than peremptory, jury instruction concerning any judicially noticed adjudicative fact. The decision to forbear the peremptory instruction in criminal cases arose from concerns about its constitutionality. The history of the federal version of rule 201(g) reflects that the constitutional issue is debatable.

In its 1969 draft of the rule, the federal Advisory Committee proposed the permissive instruction for criminal cases, in a version substantially identical to the version of rule 201(g) ultimately adopted by Congress.[106] In its Note to that proposed rule, the Committee explained:

> The considerations which underlie the general rule that a verdict cannot be directed against the accused in a criminal case seem to foreclose the

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102. FED. R. EVID. 201(g) advisory committee's note.

103. 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5102, at 467 (1977). Judicial notice of legislative facts is examined *supra* text accompanying notes 20-48.

104. *See* 1 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 154, at 199 (Texas Practice 3d ed. 1980).

105. 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5111, at 535 (1977)(judge's failure to give instruction is invited error if party does not request instruction).

106. *See* FED. R. EVID. 2-01, 46 F.R.D. 161, 195 (1969)(proposed rule).

judge's directing the jury on the basis of judicial notice to accept as conclusive any adjudicative facts in the case.[107]

In its subsequent drafts of the rules, however, the federal Advisory Committee substituted a different version of rule 201(g), which provided for a peremptory instruction on judicially noticed facts in criminal cases as well as in civil cases.[108] In its Notes to these drafts, the Committee explained that it was "[p]roceeding upon the theory that the right of jury trial does not extend to matters which are beyond reasonable dispute," and described the authority on the point as "relatively meager."[109]

When the federal rules were reviewed and revised by Congress, the permissive-instruction treatment for criminal cases was restored. The House Committee on the Judiciary, which instigated the change in rule 201(g), explained that they were "of the view that mandatory instruction to a jury in a criminal case to accept as conclusive any fact judicially noticed is inappropriate because contrary to the spirit of the [s]ixth [a]mendment right to a jury trial."[110] Whether this decision was in fact compelled by the Constitution remains unknown.[111] The constitutional issue has been avoided, at least in the federal courts and in Texas, by the adoption of rule 201(g) in a form that disallows a peremptory instruction in criminal cases.

Rule 201 only applies to adjudicative facts, and the prohibition against peremptory instructions in criminal cases is accordingly applicable only to adjudicative facts. When the court instructs the jury on the law to be applied to the case, it may be necessary or appropriate for the court to make factual statements that are not adjudicative facts, but rather legislative or reasoning facts.[112] Since rule 201 is in-

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107. FED. R. EVID. 2-01(g) advisory committee's note, 46 F.R.D. 161, 205 (1969)(note to proposed rule).

108. *See* FED. R. EVID. 201(g), 51 F.R.D. 315, 330 (1971)(proposed rule); *see also* FED. R. EVID. 201(g), 56 F.R.D. 183, 201 (1972)(proposed rule).

109. FED. R. EVID. 201(g) advisory committee's note, 51 F.R.D. 315, 335 (1971)(note to proposed rule); *see also* FED. R. EVID. 201(g) advisory committee's note, 56 F.R.D. 183, 207 (1972)(note to proposed rule).

110. H.R. REP. NO. 650, 93d Cong., 1st Sess. 6-7, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7080.

111. *See* 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5111, at 531-33 (1977)(discussing case law which addresses constitutionality of judicial notice in criminal cases).

112. *See supra* text accompanying notes 20-48 (discussion of distinctions among adjudicative, legislative, and reasoning facts).

applicable to legislative or reasoning facts, it is not improper for the court to refer to them in peremptory rather than permissive terms.

An example of such an instruction to which rule 201(g) does not apply, cited in the federal Advisory Committee's Note to the 1969 draft of rule 201(g) (the version ultimately adopted in both the federal and Texas rules), is *State v. Dunn*.[113] In *Dunn*, the Supreme Court of Missouri affirmed a conviction for second degree murder and approved an instruction to the jury that a wooden club used in the killing, "a piece of 2 x 4 scantling about 2 feet in length,"[114] was "a deadly weapon."[115] *Dunn* is an example of a non-adjudicative reasoning fact; the Advisory Committee referred to it as illustrative of "matters falling within the common fund of information supposed to be possessed by jurors" which "are not, properly speaking, adjudicative facts but an aspect of legal reasoning."[116]

A clear example of a legislative fact to which rule 201(g) likewise does not apply is found in *United States v. Gould*.[117] In *Gould*, the trial court took judicial notice that cocaine hydrochloride is a derivative of coca leaves, and therefore is a schedule II controlled substance under the laws of the United States. The court proceeded to instruct the jury to that effect, without instructing them that they were not required to accept the fact. The court of appeals affirmed, holding that rule 201(g) was inapplicable because the fact that cocaine hydrochloride is a derivative of coca leaves is not an adjudicative fact, but rather a legislative fact relating to the meaning of the applicable law.[118]

Some confusion has arisen concerning the relationship between rule 201(g) in criminal cases and the power of an appellate court to take judicial notice as necessary to sustain a judgment, pursuant to rule 201(f).[119] In *United States v. Jones*,[120] the United States Court of Appeals for the Sixth Circuit was asked to judicially notice that South

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113. 120 S.W. 1179 (Mo. 1909), *cited in* FED. R. EVID. 201(g) advisory committee's note, 46 F.R.D. 161, 205 (1969)(note to proposed rule).

114. State v. Dunn, 120 S.W. 1179, 1180 (Mo. 1909).

115. *Id.* at 1182.

116. FED. R. EVID. 2-01(g) advisory committee's note, 46 F.R.D. 161, 205 (1969)(note to proposed rule).

117. 536 F.2d 216 (8th Cir. 1976).

118. *Id.* at 220.

119. Rule 201(f) permits judicial notice to be taken "at any stage of the proceeding," which includes appeal. *See supra* text accompanying notes 86-88.

120. 580 F.2d 219 (6th Cir. 1978).

Central Bell Telephone Company is a carrier engaged in transmission of interstate communications, in order to reinstate a guilty verdict in a wiretapping case.[121] The jury had received evidence that the defendant had tapped wires of South Central Bell and had returned guilty verdicts under a law requiring that the tapped carrier be engaged in interstate communications. The trial judge nevertheless entered a judgment of acquittal on the ground that there had been no proof by evidence that South Central Bell was engaged in interstate communications.[122] The court of appeals refused to reinstate the verdict. The government first argued that the fact that South Central Bell is a carrier engaged in interstate transmission of communications is a matter "falling within the common fund of information supposed to be possessed by jurors" that therefore "need not be proved," according to language in the federal Advisory Committee's Note to rule 201(g).[123] Rejecting that argument, the court of appeals held that the fact of interstate business by South Central Bell was an ajudicative fact, so that if it were not proved by evidence, it would have to be established by judicial notice under rule 201.[124] On that issue, the court held that rule 201(f) is circumscribed in criminal cases by rule 201(g), so that appellate judicial notice to sustain a conviction is impermissible.[125]

Commentators have justly condemned *Jones*.[126] Rule 201(g) was never implicated in the case, and the court's invocation of it in the context of voiding a jury verdict is perverse. The jury was not given a peremptory instruction; nor did the judge refuse a defense request for a permissive instruction. Those are the only actions that would violate rule 201(g). Contrary to the reasoning of the court, judicial notice on appeal to sustain a verdict does not violate the prohibition against instructed verdicts that is codified in the criminal version of rule 201(g). If anything, appellate judicial notice to sustain a jury

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121. *Id.* at 222.

122. *Id.* at 221.

123. *Id.* at 222 (citing FED. R. EVID. 201(g) advisory committee's note, 46 F.R.D. 161, 205 (1969)(note to proposed rule)).

124. *Id. But see* United States v. Bennett, 358 F. Supp. 580, 582-83 (S.D. Tex. 1973)(non-jury trial under same statute; held, no evidence required to establish that Southwestern Bell Telephone Company is carrier engaged in interstate communication).

125. United States v. Jones, 580 F.2d 219, 224 (6th Cir. 1978).

126. *See* M. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 201.7, at 83 & n.98 (1981); *see also* 1 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 201[06], at 201-48 to 201-49 (1985).

verdict is supportive of the same general notion of jury integrity in criminal cases that underlies rule 201(g).

As in civil cases, there are no cases in Texas prior to the adoption of the rules that address the matter covered by rule 201(g).[127] Therefore, it is impossible to say whether this part of the rule is a change in or a codification of Texas law.

H. *Rule 202: Determination of Law of Other States*

Rule 202 is based upon one of the Texas Rules of Civil Procedure that was in effect at the time the Texas Rules of Evidence were first promulgated. The provision, then numbered Texas Rule of Civil Procedure 184a, was first promulgated by the Texas Supreme Court in 1943 and amended in 1946.[128] In 1983, the court amended the provision again and promulgated it as both Texas Rule of Evidence 202 and Texas Rule of Civil Procedure 184. In 1984, the court made further amendments in evidence rule 202 but neglected to amend procedure rule 184 accordingly. Clearly, this was an oversight that the court will correct in due course.

The 1946 amendments to former Rule of Civil Procedure 184a were criticized for eliminating provisions permitting judicial notice of sister-state law by the trial court on its own motion and by appellate courts even where the matter was not noticed below.[129] The present rule restores both those powers.

Former rule 184a covered only "common law, public statutes and court decisions." Other forms of sister-state law, such as ordinances and regulations, not being subject to judicial notice, had to be shown by evidentiary proof. Rule 202 extends judicial notice to every form of sister-state law.

It is not necessary to plead sister-state law.[130] The law of another state may be invoked by a timely motion requesting judicial notice. The ideal time for the motion is prior to trial, so that the matter of law may be determined at a pretrial conference.[131] The motion

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127. *See* 1 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 154, at 199 (Texas Practice 3d ed. 1980).

128. *See id.* § 173, at 210.

129. *See id.*

130. *See* Wickware v. Session, 538 S.W.2d 466, 469 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.); *see also* Thomas, *Proof of Foreign Law in Texas*, 25 SW. L.J. 554, 558-60 (1971).

131. *See* 4 W. DORSANEO, TEXAS LITIGATION GUIDE § 110.03[4][f][i] (1986).

should be filed and served, and a conference should be requested for a date that allows the opposing party sufficient time for preparation.[132] The moving party is required to present "sufficient information" concerning the law to be noticed. What constitutes "sufficient information" must depend upon the circumstances, including the resources of the libraries available to the particular judge to whom the motion is addressed. At a minimum, the law supporting the claims or defenses invoked should be particularly set forth, with accurate citations to cases, statutes, and constitutions.[133] If a rule, regulation, or ordinance is invoked, accurate copies, as well as citations, should accompany the motion and notice.

In the absence of a timely, properly supported request and notice, judicial notice of sister-state law may nevertheless be taken as a matter of the trial court's discretion.[134] In the absence of a proper request, however, judicial notice is not mandatory, and a party who fails to perfect a request may not complain if the court does not take judicial notice of another state's law.

If no party timely requests judicial notice of applicable sister-state law, or if the request is not accompanied by sufficient information to establish the law, and the court in its discretion chooses not to judicially notice the sister-state law, it is well settled in Texas that the absent law will be determined by applying the common-law presumption of identity. That is, if the law of another state is not established as permitted under this provision, Texas courts will simply presume that the law of the other state is identical to Texas law.[135]

I. *Rule 203: Determination of the Laws of Foreign Countries*

Unlike rule 202, rule 203 has no ancestor in the Texas Rules of Civil Procedure. Rule 203 is loosely based upon Federal Rule of Civil Procedure 44.1 and Federal Rule of Criminal Procedure 26.1, to which models the Texas drafters added a good deal of language spell-

132. *See id.* § 110.03[4][f][i], at 110-18.

133. *See* Thomas, *Proof of Foreign Law in Texas*, 25 Sw. L.J. 554, 560 (1971).

134. *See* Doppke v. American Bank & Trust, 402 S.W.2d 317, 319 (Tex. Civ. App.—Houston [1st Dist.] 1966, writ ref'd n.r.e.); *see also* Gard v. Gard, 244 S.W.2d 884, 886-87 (Tex. Civ. App.—El Paso 1951, no writ).

135. *See, e.g.*, Gevinson v. Manhattan Constr. Co., 449 S.W.2d 458, 465 n.2 (Tex. 1969); Ogletree v. Crates, 363 S.W.2d 431, 435 (Tex. 1963); Green v. State, 165 Tex. Crim. 46, 47, 303 S.W.2d 392, 393 (1957); Thomas, *Proof of Foreign Law in Texas*, 25 Sw. L.J. 554, 568 (1971).

ing out procedural and mechanical matters. The resulting provision is quite self-explanatory.

Prior to the adoption of rule 203, Texas courts did not make use of the process of judicial notice concerning the laws of foreign countries. They required pleading and strict evidentiary proof of foreign law, with unhappy results.[136]

As with sister-state law, if no party establishes the content of applicable foreign law in accordance with the provisions of the rule, the absent law will be supplied by the common-law presumption of identity. That is, Texas courts will presume that the unproved foreign law is identical to Texas law.[137]

Although it is not covered by rule 203, international law is subject to judicial notice as a matter of common law, because international law is "part of our law."[138] In addition, in Texas, Spanish and Mexican law, when and to the extent that they are applicable as the law of the former sovereign, have always been subject to judicial notice for that purpose.[139]

J. *Rule 204: Determination of Texas City and County Ordinances, the Contents of the Texas Register, and the Rules of Agencies Published in the Administrative Code*

Rule 204 was added to the Rules of Evidence by amendment in 1984. It extends the principles and procedures of judicial notice to Texas municipal and county ordinances and administrative rules and regulations. At one time none of these materials was regarded as susceptible to judicial notice in Texas; they were all required to be proved as facts.[140] With regard to ordinances, it appears that they became

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136. *See* 1 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 173, at 215 (Texas Practice 3d ed. 1980)("All in all this seems a most expensive, dilatory, and unsatisfactory method of making proof of foreign law. It is little short of tragic that the process of judicial notice so admirably suited to this type of situation is not available."); *see also* Thomas, *Proof of Foreign Law in Texas*, 25 SW. L.J. 554, 561-70 (1971).

137. *See* Davis v. Davis, 521 S.W.2d 603, 606 (Tex. 1975); *see also* Thomas, *Proof of Foreign Law in Texas*, 25 SW. L.J. 554, 568 (1971).

138. *See, e.g.*, Skiriotes v. Florida, 313 U.S. 69, 72-73 (1941); The Paquete Habana, 175 U.S. 677, 700 (1900); E. CLEARY, MCCORMICK ON EVIDENCE § 335, at 944 (3d ed. 1984).

139. *See* 1 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 173, at 213 (Texas Practice 3d ed. 1980).

140. *See, e.g.*, Jones v. State, 172 Tex. Crim. 100, 101, 354 S.W.2d 160, 160 (1962)(city ordinance); City of Manvel v. Texas Dep't of Health Resources, 573 S.W.2d 825, 826 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.)(agency regulations); Chambers v. Lee, 566

subject to judicial notice only by the adoption of rule 204. With regard to administrative regulations and rules, they had become subject to judicial notice not long before the adoption of rule 204. One Texas court of civil appeals, departing from precedent, held in 1979 that it would take judicial notice of tariffs of the Public Utility Commission.[141] In 1981, the legislature amended the Administrative Procedure and Texas Register Act and the Administrative Code Act to require that the contents of the Texas Register and the Texas Administrative Code be judicially noticed.[142] Therefore, rule 204 as to administrative materials merely incorporates existing statutory law.

The rule refers only to Texas laws. The Federal Register Act provides that "the contents of the Federal Register shall be judicially noticed."[143] It would appear that this provision binds state courts.[144] In any case, Texas courts, even during the period when they refused to take judicial notice of Texas administrative rules and regulations, appear to have consistently taken judicial notice of federal regulations.[145]

Rule 204 also makes no mention of any other domestic laws, such as the constitutions of the United States and of Texas, federal and Texas statutes, and federal and Texas cases. Obviously, the significance of these vast "omissions" is not that these sources are not proper subjects of judicial notice and must therefore be proved by evidence. Rather, the effect is simply that the process of judicial notice of these sources is not regulated by rule 204 or by any other evi-

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S.W.2d 69, 72 n.1 (Tex. Civ. App.—Texarkana 1978, no writ)(municipal ordinance); Byrd v. Trevino-Bermea, 366 S.W.2d 632, 635 (Tex. Civ. App.—Austin 1963, no writ)(Railroad Commission rules); 1 R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 171, at 206-07 (Texas Practice 3d ed. 1980)(municipal and county ordinances); *id.* § 178 (administrative rules and regulations).

141. *See* Southwestern Bell Tel. Co. v. Nash, 586 S.W.2d 647, 648-49 (Tex. Civ. App.—Austin 1979, no writ).

142. *See* TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 4(c) (Vernon Supp. 1986)("The contents of the Texas Register are to be judicially noticed . . . ."); *see also id.* art. 6252-13b, § 4 (Vernon Supp. 1986)("The codified rules of the agencies published in the Texas Administrative Code . . . are to be judicially noticed . . . .").

143. Federal Register Act, 44 U.S.C. § 1507 (1982).

144. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 335, at 939 n.8 (3d ed. 1984).

145. *See, e.g.*, Tippett v. Hart, 497 S.W.2d 606, 613 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.)(Department of Commerce regulation); Mosqueda v. Albright Transfer & Storage, 320 S.W.2d 867, 876-77 (Tex. Civ. App.—Fort Worth 1958, writ ref'd n.r.e.)(I.C.C. regulation); Dallas General Drivers, Warehousemen & Helpers v. Jax Beer Co., 276 S.W.2d 384, 389-90 (Tex. Civ. App.—Dallas 1955, no writ)(N.L.R.B. rule).

dence rule.[146]

IV. CONCLUSION

A perspective upon Article II of the Texas Rules of Evidence against the background of prior Texas law concerning judicial notice reveals a fairly complex pattern. First, there are many points upon which the rules are merely a restatement, albeit sometimes in a different vocabulary, of pre-existing doctrines. For example, the formulation in rule 201(b) of what kinds of adjudicative facts are proper for judicial notice is strikingly similar to the formulation found in Texas case law.[147] Although Texas had not previously employed the terms "adjudicative" and "legislative" to designate different categories of judicially noticed facts, examples from both categories are plentiful among pre-rules Texas cases.[148]

On other points, the rules clearly alter prior Texas law. For example, prior Texas law did not permit judicial notice of foreign country laws or of Texas municipal and county ordinances, all of which may now be judicially noticed under rules 203 and 204.[149] Nor did Texas law contain the concept of mandatory judicial notice provided in rule 201(d).[150]

In some instances, the rules provide positive doctrines where there was simply no prior law at all. Rule 201(g), concerning the procedural effect of judicial notice and jury instructions, is an example of this group.[151] In other areas, the rules spell out procedural details that were unclear in prior law, such as the hearing provisions in rules 201(e) and 202.[152]

By expanding judicial notice to new areas of law and by clarifying the processes of judicial notice of both facts and law, the rules make

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146. *See* E. CLEARY, MCCORMICK ON EVIDENCE § 335, at 938 (3d ed. 1984). Professor Cleary observes:

> In the ordinary process of finding the applicable law, the normal method then is by informal investigation of any sources satisfactory to the judge. Thus this process has been traditionally described in terms of the judge taking judicial notice of the law applicable to the case at hand.

Id.

147. *See supra* text accompanying notes 49-58.

148. *See supra* text accompanying notes 20-48.

149. *See supra* text accompanying notes 135-38, 139-45.

150. *See supra* text accompanying notes 61-74.

151. *See supra* text accompanying notes 89-126.

152. *See supra* text accompanying notes 75-85, 127-34.

substantial beneficial contributions to our jurisprudence. In addition, the mere fact of codification, by itself, should be helpful to Texas courts and lawyers in this difficult area, because it provides them with a common doctrinal framework and vocabulary that have been missing in the past.

APPENDIX

Texas Rules of Evidence
Texas Rules of Criminal Evidence

ARTICLE II. JUDICIAL NOTICE

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.

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

(g) [civil rule] **Instructing jury.** The court shall instruct the jury to accept as conclusive any fact judicially noticed.

(g) [criminal rule] **Instructing jury.** The court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Rule 202. Determination of Law of Other States

A court upon its own motion may, or upon the motion of a party may, take judicial notice of the constitutions, public statutes, rules, regulations, ordinances, court decisions, and common law of every other state, territory, or jurisdiction of the United States. A party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. 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. Judicial notice of such matters may be taken at any stage of the proceeding. The court's determination shall be subject to review as a ruling on a question of law.

Rule 203. Determination of the Laws of Foreign Countries

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice, and at least thirty days prior to the date of trial such party shall furnish all parties copies of any written materials or sources that he intends to use as proof of the foreign law. If the materials or sources were originally written in a language other than English, the party intending to rely upon them shall furnish all parties both a copy of the foreign language text and an English translation. The court, in determining the law of a foreign nation, may consider any material or source, whether or not submitted by a party or admissible under the rules of evidence, including but not limited to affidavits, testimony, briefs, and treatises. If the court considers sources other than those submitted by a party, it shall give all parties notice and a reasonable opportunity to comment on the sources and to submit further materials for review by the court. The court, and not a jury, shall determine the laws of foreign countries. The court's determination shall be subject to review as a ruling on a question of law.

Rule 204. Determination of Texas City and County Ordinances, the Contents of The Texas Register, the Rules of Agencies Published in the Administrative Code.

Judicial notice may be taken of the ordinances of municipalities and counties of Texas, of the contents of the Texas Register, and of the codified rules of the agencies published in the Administrative Code. Any party requesting that judicial notice be taken of such matter shall furnish the court sufficient information to enable it properly to comply with the request, and shall give all parties such notice, if any, as the court may deem necessary, to enable all parties fairly to prepare to meet the request. 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. The court's determination shall be subject to review as a ruling on a question of law.