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OFFICIAL NOTICE AND THE ADMINISTRATIVE PROCESS

Daniel B. Rodriguez ^{1/}

I. Introduction

While there is an emerging agreement, if not consensus, that the administrative process has become vastly over-judicialized, the explanations for this transformation from an essentially administrative structure to a judicial one are varied. Suggested cures include a greater emphasis on rulemaking and substitution of informal procedures for the truncated system of elaborate formal adjudication required by the Administrative Procedure Act and various substantive statutes.

Somewhat lost in the effort to explain the reasons behind the present structure of administrative procedure and in the correspondingly ambitious efforts to reconstruct the adjudicatory process is the more immediately pressing, and yet similarly intractable problem, how to live with the system we do have. In other words, is there any room for improvement in the present adjudicative system that does not, at the same time, call for a wholesale reconstruction, either by replacing complex adjudication with rulemaking or by "deregulating" the adjudicative process? Perhaps a certain sort of

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tinkering is required while systematic solutions swirl around, each competing for acceptance as the "New Administrative Procedure."^{2/}

Current attempts to refashion administrative evidence and, more broadly, the ways in which ALJ's should and must receive and evaluate facts, are the most notable form of this tinkering. The defining characteristic of modern administrative evidence law is that there is virtually none. Even the formal adjudication provisions of the Administrative Procedure Act provide for near to nothing by way of formal evidentiary requirements. Save for an amorphous proscription against the taking of "immaterial, irrelevant, or unduly repetitious evidence" in Sec. 556(d),^{3/} there are no other specific evidentiary requirements adumbrated in the APA for use in formal adjudications.^{4/}

That is, except for one: the official notice provision of 556(e). This paper concerns the use and utility of official notice in administrative proceedings, focusing in particular on the American Bar Association's suggestions for refashioning official notice law in its proposed uniform rules of evidence for agency adjudications. My narrow thesis is that the ABA's proposals are seriously flawed, transforming official notice from a useful administrative and judicial tool to a weak and complex procedural device. The broad thesis, sketched out in general terms in the conclusion, is that this attempted reconstruction of the official notice and the flaws in the ABA's efforts reflects a more serious shortcoming in recent efforts to rationalize administrative evidence and to regulate the adjudicative process in the federal agencies.

^{2/} See generally, W. Gellhorn, *et al.*, Administrative Law: Cases and Comments Ch. 7-8 (8th ed. 1987); Verkuil, The Emerging Concept of Administrative Procedure, 78 *Colum. L. Rev.* 258 (1978).

^{3/} 5 U.S.C. #556(d) (1946).

^{4/} This assertion is true of the formal adjudication structure of the Administrative Procedure Act. Of course, other agencies may, as some do, have their own separate sets of rules governing adjudications.

II. Official Notice and Administrative Adjudication

A. Definition

The APA, which governs formal adjudications, that is, hearings required by statute "to be determined on the record after opportunity for an agency hearing. . . .", ^{5/} lays out the standards for taking official notice in Section 556. The final sentence of 556(e) provides that "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." Official notice, related (though not identical) to the concept of judicial notice in ordinary proceedings, ^{6/} refers to the acceptance by the ALJ of a particular fact as "true" without considering independent evidence introduced by either party or, indeed, without providing either party with an a priori opportunity to introduce such evidence.

The a priori caveat is crucial. All official notice approaches accept that both parties must be provided with some opportunity, even if after the fact is noticed, to introduce contrary evidence. Accepting that the sun rose at 6:00 a.m. on the morning of January 1, 1989, is a relatively uncontroversial use of official notice. Nonetheless, an ambitious advocate might try--and must be provided with some opportunity--to disprove this fact. Accordingly, 556(e) provides a party with "an opportunity to show the contrary" of the fact noticed. ^{7/}

^{5/} 5 U.S.C. #554(a) (1946). Courts have tended to construe this provision broadly, holding that a requirement that agencies conduct an adjudicatory hearing indicates that such a hearing should be on the record and in accordance with the Administrative Procedure Act. See, e.g., Seacoast Anti-Pollution League v. Costle, 572 F.2d 876, cert. denied, 439 U.S. 824 (1978). Accord Steadman v. SEC, 450 U.S. 91, 96-97 n.13 (1981).

^{6/} Judicial notice in non-administrative proceedings is governed by Fed. R. Evid. 201. See p. 5 infra. See generally, c. McCormick on Evidence #359, at 1028 n.1 (E. Cleary, et al. 3d ed. 1984) ("[t]he term 'official notice' is probably unfortunate in suggesting too much of a parallel to judicial notice. Much that is done and advocated to be done in the name of official notice might with less violence to the language be catalogued under presumptions").

^{7/} The precise scope of this post-notice hearing is unclear.
(Footnote Continued)

B. Complications

1. Adjudicative versus legislative facts

In an influential article written over a half century ago, ^{8/} Professor Kenneth Culp Davis posited a distinction between what he called adjudicative and legislative facts. Adjudicative facts are facts that concern only the parties before the court. For instance, in a negligence action brought by A against B for running a stop sign and running into him, whether there was in fact a stop sign at the particular street corner is an adjudicative fact. Non-adjudicative, or what Professor Davis also called "legislative" facts, are facts that have importance beyond the mere scope of the lawsuit. They are the sort of facts "utilized for informing a court's legislative judgment on questions of law and policy." ^{9/} In a suit for deceptive advertising brought by a French perfume manufacturer charging an American manufacturer with representing the American's perfume as French, the fact that consumers would, all things being equal, prefer French perfume to American is a legislative fact. ^{10/} The resolution of this fact will have a direct impact on the outcome of the lawsuit between these two parties, to be sure, but the underlying fact is not unique to these two parties. Moreover, the resolution of the fact would have a direct bearing on any similar lawsuit brought by any two other parties subsequently. The judge, by taking official notice of this fact, has decided something that transcends the dispute between these two parties.

(Footnote Continued)

Presumably, a reasonable opportunity to show the contrary would include some introduction of evidence including, perhaps, oral testimony. No court has suggested, however, that this opportunity must include oral testimony, cross-examination, or any other specific form of evidence. Cf. Goss v. Lopez, 419 U.S. 565, 584 (1975) (holding, in a case involving public school suspension, that due process is satisfied by "an informal give-and-take" between student and disciplinary authority).

^{8/} Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L. Rev. 364 (1942).

^{9/} Id. at 492. See also 3 K. Davis, Administrative Law Treatise 135 (2d ed. 1980).

^{10/} See, e.g., Harsam Distributors, Inc., 54 F.T.C. 1212 (1958), aff'd, 263 F.2d 396 (2d Cir. 1959); Fioret Sales Co., 26 F.T.C. 806, aff'd, 100 F.2d 358 (2d Cir. 1938).

2. Disputable versus indisputable facts

The central rationale behind the longstanding tradition of judicial notice in court proceedings was the recognition that certain matters were susceptible to resolution by mere common sense, the experience of day-to-day living possessed by the ordinary judge. Certain facts were true beyond dispute and hence providing for the receipt and consideration of evidence by either or both parties in a dispute would be superfluous.

The problem with limiting official notice to such facts is that there remain facts that, while not so indisputable as to be considered within every ordinary person's common sense, are nonetheless susceptible to resolution by an expert adjudicator. While the proverbial "reasonable person" might not be able to take judicial notice of a given fact as true, an expert judge would. This scenario was submerged under the weight of the general assumption that judges are merely specially-trained lay persons. While educated in the law, judges would not be presumed to know anything more than the well-educated citizen and, hence, could not claim a special expertise that would enable him to notice facts that would otherwise be disputed by others.

The Model Code of Evidence declared the essential requirement of proper official notice when it pointed out that "[i]f a matter falls within the domain of judicial knowledge, it is beyond the realm of dispute."^{11/} Comment on R. 804(2) (3) (1942). And, significantly, the notion of "judicial knowledge" was carefully limited to that sort of knowledge that a judge would have by virtue of his training in the law--what Professor Thayer called his "necessary mental outfit."^{12/} The result was a system of judicial notice that allowed for notice in basically two sets of circumstances: first, in instances of indisputable adjudicative facts and, second, where a judge purported to notice existing laws, such as the existence of an international treaty.^{13/}

The structure of APA Section 556(e) reflects the separation of official notice from its judicial notice roots. While

^{11/} Advisory Committee's Comment on Fed. R. Evid. 804(2), (3) (1942).

^{12/} J. Thayer, Preliminary Treatise on Evidence 280 (1898).

^{13/} See generally Morgan, Judicial Notice, 57 Harv. L. Rev. 269 (1944).

indisputability was an indispensable requirement of judicial notice at common law, official notice began with a recognition of the special capacities of administrative law judges (then hearing examiners) to consider and evaluate facts that would be otherwise disputable among lay parties.

C. Judicial Notice and the Federal Rules of Evidence

Currently, judicial notice in the federal district courts is governed by Fed. R. Evid. 201. This rule provides for the taking of judicial notice of adjudicative facts that are "not subject to reasonable dispute." The rule defines an indisputable fact as one "(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." F.R.E. 201(a)(b). While a court may take judicial notice at any time, it is required to do so if requested by a party and supplied with the necessary information. F.R.E. 201(e). Significantly, a party is entitled to a hearing on the "propriety of taking judicial notice and the tenor of the matter noticed." F.R.E. 201(e). There is no federal rule addressing judicial notice of non-adjudicative facts.

D. Official Notice and the Administrative Procedure Act

The basic contents of the APA official notice provision are described above. There are a number of important differences between Sec. 556(e) and the analogous Federal Rule. First, the APA does not, by its express terms or otherwise, limit the taking of official notice to adjudicative facts. Second, official notice is discretionary; that is, there is no requirement that the ALJ take official notice of either an adjudicative or a legislative fact if requested by a party. Third, there is no provision for what I call a "propriety" hearing, meaning a requested hearing on the propriety of taking judicial notice. Instead, a party is entitled to challenge the ALJ's decision to take official notice by presenting rebuttal evidence. Fourth, and most significantly of all, the APA does not require, as a precondition for the taking of official notice, that the fact noticed be indisputable. This is not to suggest that the ALJ's authority to dispense with an evidentiary hearing is unlimited as a result of 556(e). Nonetheless, the ALJ is entitled to avail himself of special

expertise within his own knowledge or information, ^{14/} in a way that would be unacceptable if carried out by a trial judge.

III. The ABA's Proposed Official Notice Rule

The American Bar Association's Section on Administrative Law and Regulatory Practice has now completed its task of creating a set of uniform rules of practice and procedure for administrative hearings before the Office of Administrative Law Judges. The Department of Labor has, through notice-and-comment rulemaking, adopted the uniform rules for hearings before ALJ's hearing Department of Labor cases. Moreover, it is the ABA's aim to convince all agencies who have the statutory authority to adopt such rules to do so.

A. The Structure of the Official Notice Rule

The proposed rule is as follows:

#18.201 Official notice of adjudicative facts.

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

(b) Kinds of facts. An officially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the local area, (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or (3) derived from a not reasonably disputed scientific, medical or other technical process, technique, principle, or explanatory theory within the administrative agency's specialized field of knowledge.

(c) When discretionary. A judge may take official notice, whether requested or not.

(d) When mandatory. A judge shall take official notice if requested by a party and supplied with the necessary information.

^{14/} See Attorney General's Manual on the Administrative Procedure Act (1947).

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after official notice has been taken.

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

(g) Effect of official notice. An officially noticed fact is accepted as conclusive.

In its proposed rule, the Committee adopts the basic structure of the federal judicial notice rule with the significant addition of Section (b)(3), which section authorizes the ALJ to take official notice of an indisputable fact "derived from a not reasonably disputed scientific, medical, or other technical process," etc.

B. A Critique

What is unclear at the outset is whether this official notice provision disturbs, in any important respect, the existing official notice provision of the Administrative Procedure Act (Sec. 556(3)). With the adoption of this provision, there are a number of scenarios possible:

- (1) 18.201 supersedes the final sentence of 556(e) and, therefore, an ALJ may take official notice only in accordance with the provisions of 201.
- (2) As 18.201 covers adjudicative facts only, there is no evidence rule that deals with non-adjudicative facts. But, unlike scenario #1, official notice could still be taken of legislative facts since no rule prohibits such notice. Unlike the current version of 556(e), however, the party against whom official notice is being taken has no right to introduce rebuttal evidence.
- (3) While 18.201 applies only to adjudicative facts, ALJ's would remain free to take official notice of non-adjudicative facts as long as such facts are "not subject to reasonable dispute."
- (4) 18.201 leaves 556(e) undisturbed. The former will apply in situations where the ALJ would notice "adjudicative facts" and the latter applies in other cases. Presumably, the judge would make a threshold determination regarding what

category the fact at issue falls into before she may determine which rule applies.

1. Scenario one: 18.201 as the exclusive official notice rule

The first scenario, where 201 supersedes 556(e), would replace a largely effective approach to official notice in administrative proceedings--represented by the current APA Sec. 556(e)--with an inadequate substitute. It is inadequate because it carves out one particular type of fact, the so-called "adjudicative" fact, for official notice treatment, leaving all other facts to the normal processes of proof. This "one step forward, two steps back" approach would be a most unwelcome development for several reasons.

The current APA approach which permits ALJ's to take official notice of non-adjudicative facts in formal adjudications makes good sense. Official notice is a powerful tool for ALJ's to craft efficient and fair hearings while, at the same time, bringing to bear their expertise on concrete statutory and regulatory issues with the aim of improving the regulatory process. A rule which would, in one fell swoop, disable ALJ's from taking notice of facts that have relevance and applicability beyond the dispute between the two parties before the agency, would defeat many of the purposes behind the administrative process generally. ^{15/}As Professor Davis stressed in his debate with Professor Morgan, ^{15/}and has been emphasized in the decades since then, the administrative process is different in important respects than the standard judicial process. ^{16/}

^{15/} See, e.g., 3 K. Davis, Administrative Law Treatise Ch. 15 (2d ed. 1980); Davis, A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69 (1964); Morgan, Judicial Notice, 57 Harv. L. Rev. 269 (1944).

^{16/} See, e.g., FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940) (difference in origins and functions of administrative agencies "preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts."). See also Verkuil, supra; Pedersen, The Decline of Separation of Functions in Regulatory Agencies, 64 Va. L. Rev. 991, 1005 (1978) ("[c]lothing nonaccusatory administrative hearings with more of the trappings of adjudicative proceedings may make better theater, but it probably reduces their substantive importance."); Boyer, Alternatives to Administrative Trial-Type
(Footnote Continued)

While the rationalization of administrative adjudication achieved by these Uniform Rules is a welcome development, the attempt to collapse the two regimes into one with respect to all the rules would be quite unwelcome. As for official notice, preserving the prerogative of the ALJ to take official notice of legislative facts reflects an important accommodation of the demands of evidentiary rationalization on the one hand and the realities of the quasi-17/ legislative functions of administrative agencies on the other. 17/ The official notice provision of 556(e) has worked pretty well since its adoption, and it would be a mistake to abandon it for the sake of maintaining some consistency between the Uniform Rules and the Federal Rules of Evidence.

The alternative to official notice of legislative facts is the consideration of such facts through the normal processes of proof. Of course, after the adoption of the Uniform Rules, these so-called normal processes take on an even more complicated cast. We would move from a situation in which there is some kind of a hearing where the ALJ purports to take official notice of a legislative fact, to a situation where, because the ALJ cannot take official notice at all, that legislative fact is subject to the general standards of proof. The costs of such proof are not unsubstantial. As the revisors of Professor McCormick's evidence treatise note: "The primary thrust behind official notice is to simplify or ease the process of proof. Where facts are known or can be safely assumed, the process of proving what is already known is both time consuming and unduly formal. When facts have been proven before, further proof becomes tiresome, redundant, and lacking in common sense." 18/ They discuss the example of the FTC's practice of taking official notice of the fact 19/ that American consumers prefer American to foreign-made goods. 19/ While this is only a presumption, since under 556(e) a

(Footnote Continued)

Hearings for Resolving Complex Scientific, Economic, and Social Issues, 71 Mich. L. Rev. 111, 137 (1972) ("forcing the task of administrative regulation into the ill-fitting mold of judicial procedure may be simply a stop-gap measure, symptomatic of a need to develop new and better decision-making methods.").

17/ See, e.g., FCC v. Nat'l Citizens Committee for Broadcasting, 436 U.S. 775 (1978).

18/ C. McCormick, supra, at 1029.

19/ Id. at 1030. See Brite Manufacturing Co., 65 F.T.C. 1067
(Footnote Continued)

party may introduce evidence which rebuts that fact in a particular case (e.g., where evidence indicates that consumers prefer French to American perfumes), the effect of it is to vastly streamline what would otherwise be a quite costly process. Moreover, to the extent that the burden of proving certain facts is usually on one party throughout the range of cases a particular agency considers (e.g., on the agency in FTC disputes), the costs of disabling the ALJ from taking official notice will be squarely imposed on those parties in each case.

Allowing official notice of legislative facts helps agencies to create and maintain a body of accumulated knowledge and experience. Where the FTC may take official notice of, say, the American preference for American goods, the agency is able to deploy its special expertise in the interests of efficiency as well as more accurate decisionmaking. This is consistent with the nature of the administrative, as opposed to the judicial, process. Indeed, it is quite understandable that the drafters of the Federal Rules of Evidence excluded legislative facts from the ken of judges since the traditional (albeit oversimplified) understanding of the judicial process is inconsistent with a view of the judge as lawmaker. But it would be anomalous to impose these very same understandings on the modern administrative agency. "[A]dministrative agencies," say the McCormick treatise authors, "were often created to become repositories of knowledge and experience. It would defeat their existence to require adherence to traditional methods of proof when alternative and equally fair methods are readily available." ^{20/}

2. Scenario two: dispensing with rebuttal hearing

A second scenario is one in which official notice of legislative facts is permissible but, significantly, there would no longer be a 556(e) requirement of notice and opportunity to be heard. Of course, 18.201 covers, by its own terms, only adjudicative facts. However, if the clear purpose of the Uniform Rules is to displace any existing rules of administrative evidence in the APA, of which the last sentence of 556(e) is one, then there is no longer any rule that expressly covers non-adjudicative facts. Perhaps, then, ALJ's would be free to take official notice of such facts without any notice and hearing requirements. This scenario would raise potential constitutional problems. There are procedural due process concerns present

(Footnote Continued)
(1964), aff'd, 347 F.2d 477 (1965); Savoy Watch Co., 63 aff'd, F.T.C. 473 (1963); Baldwin Bracelet Corp., 61 F.T.C. 1345 (1962), aff'd, 325 F.2d 1012 (1963).

^{20/} C. McCormick, supra, at 1029.

where an ALJ purports to take as conclusive a disputable legislative fact without any opportunity to respond.

These concerns animated the Supreme Court's decision in Ohio Bell Telephone Co. v. Public Utilities Comm'n of Ohio.^{21/} Ohio Bell involved a rate-making valuation proceeding in which the PUC took official notice of price trends during the period 1926 to 1933. They did so on the basis of price indices from a leading engineering magazine as well as from the findings of a Federal court in a similar case. Appellant was given no opportunity to respond to the PUC's information; nor was it instructed that the court had based its decision principally on the facts it had officially noticed rather than the voluminous record of the proceeding. Writing for the court, Justice Cardozo objected that this proceeding, because of the PUC's conduct, bore none of the required characteristics of a fair hearing. "To press the doctrine of judicial notice to the extent attempted in this case . . . would be to turn the doctrine into a pretext for dispensing with a trial."^{22/}

One could read Ohio Bell consistently with the scenario in which 18.201 disallows any official notice of non-adjudicative facts. The subsequent history of the case and the APA enacted ten years later, however, refutes such a construction. The APA drafters certainly had Ohio Bell in mind when they crafted the official notice provision. Moreover, the legislative history of 556(e) along with the intervening caselaw suggests that the APA drafters read Ohio Bell to allow official notice of the type of facts considered in that case as long as some sort of notice and "opportunity to show the contrary" was provided. This understanding is reflected in the influential Attorney General's Manual on the APA which made clear that, as long as these notice and hearing requirements were met, there was no particular limitation of the adjudicative-legislative fact sort on what the agency could legitimately notice.^{23/}

Ohio Bell and its progeny may reflect a procedural due process requirement that some notice and hearing be provided where disputable legislative facts are officially noticed. If so, interpreting 18.201 to preempt 556(e) and, in turn, to leave ALJ's

^{21/} 301 U.S. 292 (1937).

^{22/} Id. at 300.

^{23/} Attorney General's Manual at 79.

unconstrained in taking official notice of legislative facts would raise significant constitutional concerns. ^{24/}

Why, if the Constitution requires notice and hearing where an ALJ takes notice of legislative facts, are there no such due process problems created by FRE 201 (and the new 18.201)? The answer is two-fold: First, there are some safeguards in 201, namely, notice and the opportunity for a hearing on at least the propriety of taking notice. While a "propriety" hearing is not the same as a substantive opportunity to adduce facts refuting the ALJ's officially-noticed fact, at least notice and some hearing is provided. If an ALJ is unconstrained in taking official notice of non-adjudicative facts, as I am assuming here, not even a propriety hearing would be required. Second, 18.201 is expressly limited to facts that are "not subject to reasonable dispute" What are at issue here are facts about which the usual elements of a hearing would be irrelevant. Of course, the traditional procedural due process doctrine does not require hearings when such hearings would be largely futile. ^{25/} I would think, therefore, that there would be no due process problems with taking notice of indisputable adjudicative facts.

3. Scenario three: official notice of only indisputable adjudicative facts

This latter point raises a third alternative: Perhaps official notice can be taken of non-adjudicative facts only where such facts are indisputable. The absurdity of imposing an "indisputability" requirement on the taking of official notice of legislative facts was described well by Professor Davis who explains that imposing such a requirement "would virtually emasculate the administrative process." ^{26/} Because of their very character, so-called legislative facts are almost by definition subject to reasonable dispute. The real question is whether they are subject to the type of dispute that can be resolved, or at least illuminated, best through the traditional processes of proof or, alternatively, through a carefully-crafted official notice provision. The effect of an indisputability

^{24/} For judicial suggestions that some sort of notice and comment is required, see United States v. Abilene & Southern R. Co., 265 U.S. 274 (1924); ICC v. Louisville & Nashville R. Co., 227 U.S. 88 (1913). Neither case rested its rejection of official notice on procedural due process grounds, however.

^{25/} See, e.g., Matthews v. Eldridge, 424 U.S. 319 (1976).

^{26/} Davis, Official Notice, 42 Harv. L. Rev. 537, 539 (1949).

requirement on official notice of non-adjudicative facts is rather simple: Such facts will rarely if ever be subject to official notice.

4. Official notice of adjudicative facts

Considering the ABA's proposed rule on its own terms, as an official notice provision dealing solely with adjudicative facts, I believe that the structure of the rule is analytically inconsistent. The rule is limited to indisputable facts (which, of course, is the thrust of Professor Morgan's position codified in FRE 201). Furthermore, Section (b)(3) of the proposed rule provides that an ALJ may take official notice of facts "derived from a not reasonably disputed scientific, medical or other technical process, technique, principle, or explanatory theory within the administrative agency's specialized field of knowledge." These two references to indisputable facts are importantly different. The latter refers to an indisputable process, principle, or theory while the former requires that the basic fact subject to proof must be indisputable. A clarifying example: X, a plaintiff in a paternity suit, wants to prove that her child has been fathered by Y. She seeks to do so through the usual chemical tests. The scientific process used to determine the genetic connection between the child and Y is indisputable but of course the underlying fact--the identity of the father--is quite controversial. Accordingly, the judge cannot take official notice of the fact but must, instead, leave this up to the normal proof process. This makes obvious sense in the traditional judicial proceeding. While the scientist who administers the test is an expert, the judge who would officially notice the fact is not. In the administrative process, however, things may be quite different. An ALJ is a judge, to be sure, but she may also be an administrative expert. She may, and probably does, have a "specialized field of knowledge" that would enable her to resolve squarely a factual dispute in a way an ordinary judge could not. Indeed, the ALJ's unique twin abilities to bring her expertise both as an administrator and as a judge to bear on an administrative dispute highlights one of the important distinctions between an administrative law judge and a trial judge and, more generally, between the administrative and ordinary trial processes.

Of course, the proposal recognizes this distinction when it includes this "specialized field of knowledge" proviso. But, by leaving in place the peculiarly judicial requirement that the facts subject to official notice be indisputable, it offers an unsatisfactory solution. It imposes the strictures of the judicial process, complete with its assumption of a judge who is a "jack-of-all-trades-master-of-none" onto the administrative process. And, with (b)(3), it acknowledges the special abilities of the administrative agency as expert without at the same time letting the agency be expert.

Consider the anomaly: A reviewing court will be given the authority to decide whether a fact that an expert agency has taken official notice of is "subject to reasonable dispute" based upon criteria which it, the reviewing court, is far less familiar with than the expert agency who sought to take official notice of the fact in the first place. Another example, this time from Professor Schwartz's excerpt in the Reporter's Note: ^{27/} Claimant maintains that an inguinal hernia was traumatic in origin. ALJ, expert in diagnosing hernias, sees that employee gave no indication of pain and continued work for a month after the alleged accident. Under 556(e), the fact would be noticeable as long as agency allows employee opportunity to rebut. Under proposal as Reporter's Note would have it, the fact would be noticeable and employee would have no opportunity to rebut. Under the current proposal as I read it, however, the fact would not be noticeable. All the employee would need to show is that fact is disputable, which he apparently could do by introducing doctor's report. Just because agency is "as expert in diagnosing [hernias] as any doctor would be" does not indicate that agency's diagnosis is indisputable. On the contrary, the fact that doctor is at least as expert as the agency suggests precisely the opposite. The problem is that in those situations, like Schwartz's example, where we would want the ALJ to bring his expertise to bear on a factual question in the form of official notice, the proposed rule would in all likelihood prohibit him from doing so as long as one party is prepared to show that the fact is disputable.

IV. Conclusion

Everyone associated with the administrative process wants a rational evidentiary system. The principal questions concern the costs of a more or less formal system and the workability of systematic reconstruction of the way in which ALJ's currently receive and process evidence and determine facts.

The ABA is to be congratulated for its attempts to rationalize the evidentiary process in administrative adjudications. As with any such holistic effort, however, some parts are better than others. I have suggested that the proposed official notice rule is fundamentally misguided. By expressly excluding legislative facts from its coverage, it disables ALJ's from employing official notice as a potent tool to improve administrative policy through the medium of case-by-case adjudication. And, with respect to adjudicative

^{27/} See Reporter's Note to #18.201, Fed. Reg. 2324 (citing B. Schwartz, Administrative Law #7.16, at 375 (2d ed. 1984).

facts, the rule imposes an unworkable indisputability requirement on experienced and specially trained ALJ's.

More generally, the ABA projects the traditional judicial procedure model, a model particularly suited to jury trials, onto the administrative process. Of course, the administrative process is different in important ways. While we work to construct alternative adjudicative models of administrative procedure, we should think long and hard before adopting ill-fitting models in the face of an admitted need to improve upon existing administrative procedure. Even where the values of evidentiary rationalization are high, there are costs attached to such regulatory efforts. Insofar as these costs are borne by the individual ALJ's struggling to carry out their duties in the ever-growing administrative bureaucracy, we should take a close look at these costs as they arise in context of particular proposals. While this paper addresses one particular proposal, much work is left to be done.