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Judicial Knowledge

*William B. Fisch**

This paper reviews rules governing the use by judges in United States courts of their personal knowledge — as distinguished from that supplied by the parties — in the adjudication of a civil case, whether of the particular facts out of which the dispute arises, or of general information with which the particular facts must be processed, or of law which is to be applied to the particular facts.

A few salient features of the typical American civil lawsuit must be noted here. In every principal jurisdiction of the United States a substantial minority of civil cases¹ are tried with a jury (a group of up to 12 lay persons sitting separately from the judge, selected ad hoc for each case at the beginning of the evidentiary hearing) as fact-finder; the paper considers rules governing their use of extra-record information as well. Even when a jury sits on the case, the trial judge performs important proof-processing functions: supervising pretrial exchange of information and evidence between the parties ("discovery"), regulating the admissibility of evidence and the manner of its presentation, determining whether or not the evidence is sufficient to support a verdict for either party, and both directing and evaluating the performance of the jury. These rulings are ordinarily made only at the instance of one or more parties, however, and lawyers for the parties have the overwhelming share of responsibility for gathering, exchanging and presenting evidence. When the judge decides without a jury, most of the exclusionary rules of evidence designed for jury control are usually said to be inapplicable, and the rule of trial concentration can be relaxed; but the jury trial model retains its influence on many judges' handling of the admission of evidence as well as on the form of presentation. Except for some categories of minor cases in courts of limited jurisdiction, there is only one fact-instance, and appellate courts (sitting in panels of three or more) base their decisions on the evidentiary record developed at first instance.

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1. Davis, "A System of Judicial Notice Based on Fairness and Convenience", in *PERSPECTIVES ON LAW* 69, 69-72 (R. Pound, E. Griswold & A. Sutherland, eds., 1964), estimated that perhaps only one in six final trials involve juries, including criminal cases; but reliable statistics are not at hand for more precise estimates.

The paper will follow the General Reporter's categorization of judicial knowledge — "particular" (the specific facts of the case), "general" (background for drawing inferences from and applying presumptions to the particular facts), and "law". However, American courts do not always sharply distinguish them. The most widely accepted term for "particular facts" is "adjudicative facts", coined by Professor K.C. Davis in 1942² and incorporated into the Federal Rules of Evidence³ and the most recent version of the Uniform Rules of Evidence⁴, the latter now in effect in at least half of the states. In this terminology there is no clear counterpart for "general knowledge" as described by the General Reporter. The closest would be "legislative facts", defined by Professor Davis in a similarly negative way as "not adjudicative";⁵ as the term indicates, however, the category includes not only general facts used in the fact-finding process, but also (even principally) facts used in the law-finding/law-making process. These are dealt with under the heading of "law".

In view of the space limitations imposed on this paper, it will not be possible to reproduce exhaustively the law of each of the 52 principal American jurisdictions, which have separate judicial hierarchies and very wide autonomy in the formulation of rules of civil procedure. On most of the issues presented under this topic, however, there is a remarkable degree of uniformity in declared approach, so that a few examples will usually suffice.

I. PARTICULAR KNOWLEDGE

A. *The General Rule and its Enforcement*

The traditional and still dominant position in the United States is one of firm adherence to the adversary mode of civil procedure, a centerpiece of which is the requirement that the trier of fact base formal determination of the particular facts of the case on the proofs properly presented in the course of the proceedings and reflected in the record. The rationale for this position is captured in a widely quoted passage from Professor Davis:

"The reason we use trial-type procedure, I think, is that we make the practical judgment, on the basis of experience, that taking evidence subject to cross-examination and rebuttal, is the best way to resolve controversies involving disputes of adjudicative facts, that is, facts pertaining to the

2. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 Harv. L. Rev. 364, 404-407 (1942).

3. Rule 201(a), 28 U.S.C. (1974) (hereafter: "Federal Rules").

4. Uniform Rules of Evidence (hereafter: "Uniform Rules"), Rule 201(a), 13 Uniform Laws Annotated (Master Ed.) 209, 225 (1974).

5. E.g., in 3 K. Davis, *Administrative Law Treatise* § 15.3 (2d ed. 1980).

parties. The reason we require a determination on the record is that we think fair procedure in resolving disputes of adjudicative facts calls for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal's attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both)."⁶

The degree of commitment to this principle in the United States may be illustrated by rules of enforcement at three stages of the judge's or juror's involvement in the case: (a) initial qualification to sit on the case, (b) behavior during the proceedings, and (c) rendition of final verdict or judgment.

1. Initial Qualification

a. Judges

(1) *Personal Knowledge of Disputed Fact*. The Code of Judicial Conduct, formulated in 1972 by the American Bar Association, adopted by statute, court rule or judicial decision as disciplinary standards in all but a handful of states,⁷ and mirrored in this respect for federal judges by federal statute,⁸ provides as follows:

"A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . ."⁹

This provision, giving personal knowledge of disputed facts the same effect as actual bias or prejudice, had no precise counterpart in its predecessor Canons of Judicial Ethics,¹⁰ nor in pre-1974 versions of the federal disqualification statute,¹¹ all of which concerned them-

6. Davis, note 1 *supra* at 93, quoted, for example, in Advisory Committee Notes, Federal Rules of Evidence, to Rule 201(b).

7. Brooks, *How Judges Get Into Trouble*, 23 Judges' J. 4,7 (Summer 1984), puts the number at 46 jurisdictions (out of 51) which have adopted the Code.

8. 28 U.S.C. § 455(b)(1) (1974).

9. American Bar Association, Code of Judicial Conduct (hereafter: "the Code"), Canon 3(C)(1) (1972). 28 U.S.C. § 455(b)(1) (1974) is identical except that "should" is replaced by "shall".

10. American Bar Association, *Canons of Judicial Ethics*, 49 A.B.A.Rep. 760 (1924).

11. Judicial Code § 20, 36 U.S.Stat. 1090 (1911), derived from the Act of May 8, 1792, 1 Stat. 278, § 11: "concerned in interest in any suit therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial. . ."; *id.* § 21: "has a personal bias or prejudice either against [a party] or in favor of any opposite party. . ." These became 28 U.S.C. §§ 455 and 144, respectively, in 1948; the

selves principally with grounds of disqualification based on present or prior *associations* suggesting conflict of interest or potential partiality, or at most with the conflicting role of (usually partisan) material witness.¹² The draftsmen of the Code cited no authority in their notes, contenting themselves with the statement:

"The Committee also concluded that a judge cannot be, or cannot appear to be, impartial if he has personal knowledge of evidentiary facts that are in dispute. . . ."¹³

Reported decisions interpreting this language in the Code are scarce, and most of them address the impact of prior proceedings; it is consistently held that information acquired in the performance of judicial duties — even if in the form of evidence improperly admitted at a first trial¹⁴ or properly acquired in a separate litigation¹⁵ — does not require disqualification *ipso facto*.¹⁶

One of the rare reported decisions under the federal statute involved several problems of interpretation. In *W. Clay Jackson Enterprises, Inc. v. Greyhound Leasing & Financial Corp.*, 467 F.Supp. 801, 803 (D.P.R. 1979), the judge had represented one of the parties ten years earlier as a labor negotiator, and recused himself on an opposing party's motion after a hearing at which he concluded that facts which "may have come to his knowledge" in that prior representation "may be 'disputed evidentiary facts concerning [this] proceeding' ". The statute provides for disqualification, as does the Code,¹⁷ where the judge has served as a lawyer *in the matter in controversy*,¹⁸ but — unlike the conflict of interest rules for lawyers

latter remains essentially unchanged, while the former was replaced in 1974 with the present language referred to above.

12. It will be noted, for example, that Judicial Code § 20, note 11 *supra*, in force until 1948, spoke of having been a material witness "for either party". See also Frank, *Disqualification of Judges*, 57 Yale L. J. 605, 618-635 (1947), and *id.*, *Disqualification of Judges: In Support of the Bayh Bill*, 35 Law & Contemp. P. 42, 48f (1970), both of which discuss "bias or prejudice" in terms of partiality and do not include personal knowledge of disputed fact as such, although the "Bayh Bill" which Frank was supporting in fact prescribed disqualification "in any case in which he is or has been a material witness", 35 Law & Contemp. P. at 68.

These associational grounds are of course retained in the revised statute and in the code: service as lawyer or material witness in the matter by the judge or associated lawyer, financial interest in a party, marital or blood relationship to a party or counsel or witness, etc.

13. E.W. Thode, Reporter's Notes to Code of Judicial Conduct 63 (1973).

14. See *In re T.L.S.*, 481 A.2d 1037 (Vt. 1984).

15. *U.S. v. Coven*, 662 F.2d 162 (2d Cir. 1982).

16. See also *Withrow v. Larkin*, 421 U.S. 35 (1975), where the U.S. Supreme Court held that it does not violate due process of law for investigative and adjudicative functions to be combined in one person or body in the administrative process, it being presumed (absent a showing to the contrary) that adjudicators have the capacity and integrity to afford a fair hearing at each stage without bias or prejudice resulting from prior official exposure to the matter.

17. Canon 3(C)(1)(b).

18. 28 U.S.C. § 455(b)(2) (1974).

who have represented opposing parties at different times¹⁹ — that disqualification does not extend to separate matters which are “substantially related”; presumably for that reason the judge did not discuss this provision. The prior association did present a situation in which the judge’s impartiality might reasonably be questioned, even without a specific showing of personal bias or prejudice; but under the federal statute — unlike the Code — that general ground is subject to party waiver, and the relationship had been disclosed earlier to the presently complaining party without objection. The specific ground of personal knowledge, on the other hand, is not waivable (under either statute or Code), and disqualification under the federal statute is mandatory. Moreover, the judge noted that the statute makes no distinction between cases with juries, in which the judge will not be the principal trier of fact, and those without juries. Finally, while the language of the provision could be interpreted as requiring that the facts of which the judge has personal knowledge be *actually* disputed, the judge in this case clearly assumed that a substantial likelihood of dispute is sufficient to support disqualification.

The Code phrases the obligation in the qualified form “should”. In smaller communities in which judges are likely to be acquainted socially with many potential litigants, the more common practice is surely to expect the judge to step aside only if he is unable to ignore the improper information.²⁰

The term “evidentiary fact” is not expressly defined in the code or in cases interpreting it. However, it would appear to be essentially coextensive with “adjudicative fact” as used in the rules governing judicial notice;²¹ the latter is defined as “the facts of the particular case” or “facts concerning the immediate parties”, for establishing which “the usual method. . . is through the introduction of evidence. . .”²²

It is impossible to assess the degree to which this disqualification, based as it is on the risk or appearance of non-impartiality rather than on actual bias, is honored in the breach. The rarity of reported cases may reflect a number of factors, suggested here in in-

19. American Bar Association, Model Rules of Professional Conduct, Rule 1.9(a) (1983).

20. See *Ausman v. Ausman*, 31 Wis. 2d 79, 141 N.W.2d 869 (1967) (decided before the Code).

21. See notes 2-4 above.

22. Federal Rules, Rule 201(a), Notes of Advisory Committee. See also the apparently somewhat broader definition in McCormick on Evidence (hereafter: McCormick) 920 (3d ed. Cleary, et al. 1984):

“[‘Adjudicative facts’ are] about the particular event which gave rise to the lawsuit and. . . (help) explain who did what, when, where, how, and with what motive and intent.”

creasing order of common-sense probability: (i) a high degree of actual, voluntary conformity with the duty to recuse; (ii) the rarity of actual instances of extra-judicial acquisition of dispositive information without any other tainting association with interested parties; (iii) the professional judge's confidence that improper sources will not influence one's own performance; (iv) the difficulty of proving possession of knowledge as such, and the reluctance of lawyers and litigants to offend judges by motions to disqualify — especially if it is not clear that the extraneous information will be prejudicial to any particular party. Nonetheless, there are no recognized exceptions which mitigate the duty not to rely on such information in rendering a decision.

(2) *Role of Material Witness*. Both the Code and the federal statute call further for disqualification of a judge not only when the judge *has been* a material witness²³ but also when he knows he is *likely to be* such.²⁴ The former disqualification applies also if a lawyer with whom the judge was then associated in practice has been a material witness; the latter applies if a spouse or close relative is likely to be a material witness. Curiously, the Code appears to permit party waiver of the latter disqualification, though not of the former; it is likely, however, that only waiver of *associational* disqualification was intended.²⁵ The statute clearly precludes waiver in either situation.²⁶

b. Jurors

(1) *Personal Knowledge of Disputed Fact*. By an overwhelming consensus of American jurisdictions, the judge is not required to disqualify a prospective juror from sitting on a particular case merely by reason of the juror's having personal knowledge of disputed facts in the case, but only on a showing that he has formed an opinion concerning the matter which is likely to influence his decision. In practice, however, trial judges have wide discretion in ruling on challenges for cause to particular jurors, and it is not uncommon to sustain challenges based on personal experience with the type of dis-

23. Code, Canon 3(C)(1)(b); 28 U.S.C. § 455(b)(2) (1974).

24. Code, Canon 3(C)(1)(d)(iv); 28 U.S.C. § 455(b)(5)(iv).

25. Canon 3(D):

"A judge disqualified by the terms of . . . Canon 3(C)(1)(d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified. . . ."

26. 28 U.S.C. § 455(e): "No justice, judge or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b)."

pute or situation involved in the case.²⁷

(2) *Role of Material Witness.* Since the juror with personal knowledge of fact is not automatically disqualified unless he has formed an opinion, and a material witness is virtually by definition a person who has formed an opinion as to relevant facts, separate discussion of the prospective-witness ground is unnecessary and hard to find. Nonetheless it is clear that the likelihood of being called as a material witness disqualifies a juror just as it does a judge.

2. Conduct During the Proceeding

a. *Ex Parte* Communications or Other Unauthorized Inquiry

(1) *Judges.* The Code of Judicial Conduct provides:

"A judge should. . . , except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. . . ." ²⁸

The prohibition is of long standing, and was embodied in the Canons of Judicial Ethics of 1924.²⁹

Reported cases applying this rule are infrequent, and most of those involve either fairly clear partiality³⁰ or inadequate opportunity to be heard.³¹ It will be noted that the judge is precluded from *initiating or considering* such communications or investigations; when the initiative comes from another person, it is presumed that the judge is capable of ignoring the information improperly presented, and disqualification or recusal should not be required merely by reason of such communications.

(2) *Jurors.* There is more frequent litigation of the effect of unauthorized communications or inquiries involving jurors, and a number of recent cases reiterate the traditional policy of strict control over the evidence presented to the jury, and the corollary prohibition against consideration of information improperly

27. E.g., Missouri, whose statute excludes from particular cases any person "who has formed or expressed an opinion concerning the matter, or any material fact in controversy", Mo. Rev. Stat. § 494.190 (1978). Compare *Genova v. Kansas City*, 254 S.W.2d 38 (Mo.App. 1953)(no prejudicial opinion formed) with *McCormick v. Smith*, 459 S.W.2d 272 (Mo. 1970)(common experience and prejudicial interest in the question).

28. Canon 3(A)(4).

29. Note 10 *supra*, Canon 17, 1st para.:

"He should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application."

30. E.g., *In re Turner*, 421 So.2d 1077 (Fla. 1982) (abusive visits to child custody claimant's home to monitor her behavior).

31. E.g., *Franks v. Franks*, 181 Neb. 710, 150 N.W.2d 252 (1967) (independent investigation followed by overriding of agreed settlement in divorce case).

communicated to the jury. Indeed it has been held that *ex parte* communication with a juror during the trial by the attorney for one of the parties requires a mistrial (discharging the jury and starting all over again with a new jury) unless the party can show that the communication was harmless.³² The same rule has been applied to conversations between jurors and witnesses,³³ and between jurors and judge.³⁴

Numerous recent cases deal with unauthorized individual juror "views", in which a verdict is challenged on the ground that a juror has gone to the scene of the accident which is the subject matter of the litigation, or made other independent inquiry into the particular facts of the case. Such conduct is "invariably. . . regarded as improper",³⁵ although it may be found not harmful enough to require retrial.

When such misconduct on the part of one or more jurors is shown, and it is also shown that it provided an opportunity to acquire independent evidence on disputed fact questions, the case must be retried with a new jury unless it can be established that no prejudice has resulted to the objecting party, which means that it is not reasonably possible that the improperly acquired information will influence or has influenced the verdict.³⁶

In virtually all jurisdictions a judge does have the discretionary power — often embodied in statute but regarded in any event as inherent in the judicial function — to authorize a jury inspection of places or objects located away from the courtroom.³⁷ There is debate on whether such a view constitutes an independent source of evidence — that is, whether a verdict can stand which is not supported by any evidence in the record other than what might have been seen at a view — or is merely an opportunity to facilitate the

32. *Printed Terry Finishing Co. v. City of Lebanon*, 372 A.2d 460 (Pa. Super. 1977).

33. *Langston v. Hileman*, 284 Ark. 140, 680 S.W.2d 89 (1984).

34. *Argo v. Goodstein*, 424 Pa. 612, 228 A.2d 195 (1967).

35. 4 J. Wigmore, *Evidence* (hereafter: Wigmore) § 1166 (Chadbourn rev. 1972). For recent examples of prejudicial misconduct see *Hallmark v. Allison*, 451 So.2d 270 (Ala. 1984) and *Keyes v. Amundson*, 343 N.W.2d 78 (N.D. 1983) (unauthorized views of scene); *Andrews v. County of Orange*, 130 Cal.App.3d 944, 182 Cal.Rptr. 176 (juror's disclosure to others of conversation with realtor on home value) and *Simmons v. State of Maine*, 222 A.2d 366 (Me. 1966) (juror's use of own real estate appraisal book).

36. See *Keyes*, *supra*. For examples of cases in which the absence of prejudice was established (the most common, since the granting of a new trial by the trial judge is normally not appealable and ruling of state trial judges are not reported), see *Stackiewicz v. Nissan Motor Corp. in U.S.A.*, 686 P.2d 925 (Nev. 1984); *Fantin v. Mahnke*, 113 Wis.2d 92, 334 N.W.2d 564 (App. 1983) (facts observable at unauthorized view of accident scene not in dispute); *Bostic v. Mitchell*, 363 So.2d 1356 (Miss. 1978); *Erickson v. Perrett*, 572 P.2d 518 (Mont. 1977).

37. McCormick § 216; 4 Wigmore § 1163.

jury's understanding of evidence presented in other forms; the more accepted position is that observations made at a view do constitute "evidence", even though they cannot be incorporated into the record for purposes of review.³⁸ There is also disagreement over whether any other evidence may be presented to the jury during a view — such as witness testimony — which can be presented in court, although if the judge and party representatives attend there should be no objection to that.³⁹ In any event, the view must be authorized by the judge or it is improper, even if all jurors attend and no other evidence is offered in conjunction therewith.⁴⁰

Proof of misconduct on the part of jurors may be complicated in a number of jurisdictions by application of the traditional rule, designed to prevent harassment of jurors and wholesale duplication of their effort, that jurors will not be heard to impeach their own verdict. However, the more common view is that jurors may testify as to the improper introduction of extraneous prejudicial information into the deliberations, even if their testimony is excluded concerning their individual mental processes.⁴¹

b. Judge or Juror as Witness

We have noted that a judge is disqualified from sitting on a case if he is likely to be a material witness. This prohibition against performing the dual role is also expressed, in the federal courts and many state courts, by declaring the judge's testimony inadmissible so long as he remains as judge,⁴² although the earlier common law view was otherwise.⁴³ The same rule applies in those jurisdictions to jurors, reversing earlier rules to the contrary.⁴⁴

3. Consistency of Verdict or Judgment with Evidence

a. Juries

Civil juries may consider only the properly admitted evidence, along with reasonable inferences therefrom, in resolving disputed issues of fact. The judge determines, as a matter of law, what factual issues must be decided and which party has the burden of persuasion (i.e., the risk that the trier of fact is undecided, or the "risk of nonpersuasion") on each. As indicated above, judges are commonly called upon to evaluate the sufficiency of the evidence to support a

38. 4 Wigmore § 1168.

39. McCormick p. 680; 4 Wigmore pp. 385f.

40. 4 Wigmore § 1166.

41. Federal Rules and Uniform Rules, Rule 606(b); F. James and G. Hazard, Civil Procedure § 7.19 (2d ed. 1977).

42. Federal Rules and Uniform Rules, Rule 605.

43. McCormick § 68.

44. Federal Rules and Uniform Rules, Rule 606(a).

verdict (before submission of the case to the jury), and the consistency of the jury's verdict with the evidence (after verdict). The verbal formulas employed by courts to define the scope of this review vary somewhat, but there is agreement on the core idea that the jury will be foreclosed from deciding any issue — by means of a directed verdict before submission, or entry of a judgment notwithstanding any contrary verdict thereafter — if the judge is persuaded that the properly presented evidence, along with reasonable inferences therefrom, permit only one conclusion thereon in the light of the burden of persuasion.

b. Judges

Where a judge sits without a jury, the final judgment may be supported by specific findings of fact and conclusions of law, as in the federal system,⁴⁵ or may be rendered in more summary form. In either event, the judgment is subject to review on appeal for its consistency with the evidence. While the precise formula may vary from jurisdiction to jurisdiction, it is clear that if a judgment is not supported by any evidence in the record, it will be overturned.

B. *Judicial Notice of Adjudicative Fact*

The term "judicial notice" in the American cases can be seen to refer to virtually the entire range of our topic, namely the judicial use of knowledge acquired by means other than formal evidentiary proof. If one limits it to adjudicative fact, however, and defines it as the judicial assumption of the truth of a material fact about the parties or their particular dispute, which one of the parties would otherwise be required to establish by evidence, the range of disagreement among major American commentators about the basic rules narrows considerably. The most visible debate has been over the degree of indisputability required before proof of the fact may be dispensed with. One view, advocated by Thayer⁴⁶, Wigmore,⁴⁷ and Davis,⁴⁸ would permit a judge to notice facts which "can safely be assumed by him to be true until disputed by contrary evidence"⁴⁹ — that is, which seem to the judge to be unlikely to be disputed. That view favors judicial notice in the interest of expediting litigation. The other view, associated with Morgan,⁵⁰ is that, because of limita-

45. Federal Rules of Civil Procedure, Rule 52(a), 28 U.S.C. (1978).

46. J. Thayer, *A Preliminary Treatise on Evidence at Common Law* 309 (1898).

47. 9 Wigmore § 2567 (3d ed. 1940); J. Wigmore, *Code of Evidence*, Rule 240 (3d ed. 1942).

48. Note 1 *supra*.

49. J. Wigmore, *Code of Evidence*, Rule 240 (3d ed. 1942).

50. Morgan, *Judicial Notice*, 57 Harv. L. Rev. 269 (1944); E. Morgan, *Basic Problems of Evidence* 8f. (1962).

tions on judicial access to relevant information, evidence of a fact should be dispensed with only if its probability is "so great as to make the truth of the proposition notoriously indisputable among reasonable men".⁵¹ Judicial notice is thus discouraged in the interest of fairness. The difference in views would appear to resolve itself technically into a procedural one, namely the admissibility of formal evidence tending to disprove a fact once judicially noticed.

At least prior to the adoption of the 1974 Federal and Uniform Rules, the cases and statutes seemed to be "in cloudy confusion"⁵² on this point. With the adoption of those rules by a majority of states, the prevailing position should be that of Morgan; they permit judicial notice of adjudicative fact only if it is "not subject to reasonable dispute", either as common knowledge or as "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned".⁵³

1. Matters of Common Knowledge

The 1953 version of the Uniform Rules of Evidence, adopted in four states⁵⁴, distinguished between facts which are universally known and those which are generally known in the court's territorial jurisdiction: the former are required to be noticed without any request by a party, whereas the latter may be noticed but are required to be noticed only on request of a party supplying sufficient information.⁵⁵ In the 1974 version of the Uniform Rules (adopted in at least 26 states)⁵⁶ — as in the Federal Rules of Evidence on which it was based — this distinction is eliminated;⁵⁷ it is not clear that it was ever significant in the cases. The test under the present version is always indisputability within the territorial jurisdiction of the trial court; notice of such facts is permissible without request, and is required if requested and supported by sufficient information. Whether a fact is so commonly known as not to be "subject to reasonable dispute" must inevitably be decided on a case-by-case basis.

On the one hand, the truth of the asserted fact may be disputable, as in a child custody case where the court improperly took judicial notice (i.e., assumed without proof in the record) that a lesbian

51. 57 Harv. L. Rev. at 274.

52. McNaughton, *Judicial Notice — Excerpts Relating to the Morgan-Wigmore Controversy*, 14 Vand. L. Rev. 779, 796 (1961). Cf. Davis, note 1 supra at pp. 88f., who disputes this characterization of the cases.

53. Federal and Uniform Rules, Rule 201(b).

54. California, Kansas, New Jersey, and Utah: 13 Uniform Laws Annotated 209 (Master Ed. 1980).

55. Uniform Rules of Evidence, Rule 9(1,2(c)), 9A Uniform Laws Annotated 599 (1965).

56. 13 Uniform Laws Annotated, Supp.Pamphl. 18 (1985).

57. Rule 201(b).

household (which the mother maintained) would have an adverse effect on the child.⁵⁸ On the other hand, the facts in question may be known not commonly, but only to the judge personally. A widely cited example involved a landowner's suit to enjoin a city from flooding his land by interfering with the natural water flow in impounding its water supply, and to require the city to restore his land to its natural state. The trial judge ruled at the outset that a mandatory injunction (requiring the city to drain the land) would not be ordered and that only damages could be recovered. In so ruling, the judge asserted that the land could not be drained without prohibitive expense, referring to his own observation of the specific land by air 40 years earlier, to his own experience as a lawyer litigating such issues, and to his own experience as an owner of adjacent land who found draining it economically unfeasible. The appellate court ordered a full trial of the claim for injunctive relief, saying that "many of the judicial comments were factual statements within the extrajudicial knowledge of the judge and these are not to be judicially noticed nor an ingredient in the determination of any phase of the litigation."⁵⁹

Although the Rules permit notice to be taken at any stage of the proceedings,⁶⁰ it is often said that appellate courts, whose decisions are normally to be based solely on the record produced at trial, should be especially reluctant to take judicial notice of facts not already established in the record, for fear of depriving a party of a fair opportunity to be heard.⁶¹

2. Readily Ascertainable Facts

If at one time it was thought that notice could be taken only of facts which could be supposed to be in every reasonably informed person's head, the "more modern test"⁶² permits reference to sources of indisputable accuracy.⁶³ If a source is of disputed accuracy, or if it expresses debatable expert opinion of the sort — because of the hearsay rule — normally to be offered in court through properly qualified witnesses,⁶⁴ judicial notice of the fact will be de-

58. *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980).

59. *Fox v. City of West Palm Beach*, 383 F.2d 189, 195 (5th Cir. 1967).

60. Federal Rules and Uniform Rules, Rule 201(f).

61. E.g., *Masters v. Rodgers Development Group*, 321 S.E.2d 194, 197 (S.C.App. 1984). But see *Administrators of the Tulane Educational Fund v. Cooley*, 462 So.2d 696 (Miss. 1984) (appellate judges supplemented record evidence of defendant's contacts with the state for jurisdictional purposes, with personal exposure to its activities in the state).

62. 1 J. Weinstein & M. Berger, *Weinstein's Evidence* (hereafter: Weinstein) p. 201-26 (1982).

63. E.g., *Beardsley v. Irving*, 81 Conn. 489, 71 A. 580 (1909) (error to allow jury to decide whether a specific date was a Sunday).

64. Federal Rules and Uniform Rules, Rule 803(18), limit the admissibility of

nied, even if in the absence of a jury the hearsay objection might be overcome for purposes of admission of the source into evidence when offered by a party.⁶⁵

It is generally said that the meaning of words in foreign languages is not a proper subject for judicial notice,⁶⁶ it being supposed that it is not common knowledge in the jurisdiction. However, if a particular proposition concerning the meaning of a foreign word were to satisfy the standards of indisputability specified in the Rules, there would not be any reason to refuse it. It remains clear, however, that the judge's *personal, extrajudicial* knowledge of foreign languages is ordinarily to be excluded.

3. Procedural Incidents of Judicial Notice

While the substantive requirement for judicial notice of adjudicative facts is that they not be subject to reasonable dispute, the Rules also specify some procedural rules for the process. First, under Rule 201(e) a party who requests it must be given an opportunity to be heard with respect to the propriety of judicial notice, if not before then after notice is taken; in making the determination of noticeability, the court may utilize any appropriate source of information without regard to formal rules of evidence, and may go beyond the information supplied by the parties. It has been held that when both parties are present at the reading of a memorandum decision by the judge, the opportunity to object to factual assumptions therein is afforded and therefore the requirement of Rule 201(d) is met.⁶⁷ Obviously a determination that the proposed fact is reasonably subject to dispute restores to the party asserting it the normal burden of introducing proper evidence. Second, if notice is taken, under Rule 201(g) the jury (if any) must be instructed to accept as true the fact noticed.

In some jurisdictions which have not adopted the Rules, the courts purport to follow the Thayer-Wigmore approach which treats judicial notice as only a provisional determination, leaving the party disadvantaged by notice free to introduce countervailing evidence.⁶⁸ The precise impact of this position with respect to adjudicative facts is unclear. Most of the reported cases involve non-adjudicative uses of judicial notice in jury trials, and relate to the admissibility of evi-

learned treatises — otherwise excluded as hearsay — to their use by experts testifying on the stand, or by counsel in cross-examining such experts.

65. On the general relaxation of exclusionary rules in judge-tried cases, see McCormick § 60.

66. E.g., *Rosman v. Trans World Airlines, Inc.*, 40 A.D.2d 963, 338 N.Y.S.2d 664 (1972); *Herman v. Trans World Airlines, Inc.*, 40 A.D.2d 850, 337 N.Y.S.2d 827 (1972).

67. *Hadland v. Schroeder*, 326 N.W.2d 709, 713 (N.D. 1982).

68. See cases collected in McNaughton, note 52 *supra*, at 796-804 (1961).

dence of general facts which must be connected to the particular parties by other evidence; cases contemplating (or indeed rejecting) on-the-record evidence directly contradicting a noticed fact are scarce.⁶⁹ Since the Rules require an opportunity to be heard before the judge concerning the propriety of taking notice, the issue becomes precisely one of whether the countervailing information is on-the-record evidence or a less formal presentation to the judge as on questions of law. In a non-jury trial, where the formal rules of evidence are frequently relaxed and the judge is the finder of fact, the distinction should be "of little significance" for adjudicative facts.⁷⁰

II. GENERAL KNOWLEDGE

A. *Judicial Notice of Non-Adjudicative Fact*

In two earlier attempts at codifying the law of evidence, the American Law Institute's Model Code of Evidence⁷¹ and the 1953 version of the Uniform Rules of Evidence,⁷² judicial notice of fact — both "specific fact" and "generalized knowledge" — was limited to propositions beyond reasonable dispute. The Federal Rules (followed here by the 1974 Uniform Rules) do not purport to say anything at all about "generalized knowledge", and the Advisory Committee's note explains this omission on the ground that neither policy nor practice limits the use of generalized knowledge to indisputables.⁷³ Rather, most of the actual judicial uses of generalized knowledge in a jury trial, says the Committee, are non-adjudicative in nature: "determining the validity and meaning of statutes, formulating common-law rules, deciding whether evidence should be admitted, assessing the sufficiency and effect of evidence", which cannot practically be limited to indisputables;⁷⁴ moreover, both judges and juries as triers of fact utilize much non-adjudicative fact of a generalized character — most often without explicit statement — simply as part of the reasoning process, to which formalized rules of judicial notice, such as a requirement of a right to be heard on the

69. E.g., *Scheufler v. Continental Life Ins. Co.*, 169 S.W.2d 359, 365 (Mo. 1943) (citing J. Thayer, note 46 supra; but it is clear that the problem was not the truth of the material judicially noticed but its sufficiency to support the court's judgment). Cf. *Jackson v. Cherokee Drug Co.*, 434 S.W.2d 257, 264 (Mo. App. 1968) (mortality tables to show life expectancy, mentioned for the first time in final argument to the jury, improper to overrule objection because opponent had no opportunity to introduce countervailing evidence — the appellate court found no prejudice, however, and in any event the mortality tables, merely showing statistics about populations as a whole, do not constitute "adjudicative facts" about the particular parties).

70. See 1 Weinstein at p. 201-50.

71. American Law Institute, Model Code of Evidence, secs. 801-804 (1942).

72. Uniform Rules of Evidence, Rules 9(1,2), 10(3), 9A Uniform Laws Annotated 599-600 (1965).

73. Federal Rules, Rule 201(b), Advisory Committee's note.

74. Id. The insight is traceable at least to J. Thayer, note 46 supra, at 279 (1898).

propriety of using them, are inappropriate.⁷⁵

Many courts in jurisdictions governed by the Federal or Uniform Rules cite the written rule in connection with judicial notice of non-adjudicative facts, without recognizing the Rule's inapplicability.⁷⁶ One may well wonder if such courts sometimes refrain from taking notice or assuming the truth of non-adjudicative facts which they would otherwise accept as true, in the belief that the formal requirements of the Rule — indisputability and opportunity to be heard — apply and are not met. It seems likely, however, that most rejections of non-adjudicative facts proposed for notice result from non-persuasion. In jurisdictions having no codified rule on judicial notice the distinction between adjudicative facts and non-adjudicative or legislative facts is often not explicitly acknowledged, but the flexible Thayer/Wigmore view concerning disputability and the right to be heard is often accepted and probably produces similar results to those contemplated by the Advisory Committee.

For general knowledge used in the fact-finding process, then, if the court becomes aware of the issue at all, it is believed that most courts would afford an opportunity to be heard informally if there seems a potential for dispute, and require formal proof only if convinced that there is a reasonable basis for dispute and that the proposition is susceptible to evidentiary treatment.⁷⁷

B. Requirement of Expert Testimony

Although the historical position of American law, that witnesses may testify only to facts observed by them and not to inferences or opinions based on facts, has been modified in most jurisdictions to a requirement that opinions must be based on the witness' perception and be helpful to the trier of fact,⁷⁸ most of the literature on the subject has been concerned with when such opinion is permitted. Expert opinion, which may involve the expression of opinion concerning facts not personally known to the witness but based on specialized knowledge, is said in the Rules to be permissible when the opinion would "assist" the trier of fact — possessing the common knowledge of ordinary persons — "to understand the evidence or to determine a fact in issue" (Rule 702). Many state courts, however, have read an "only" into the Rule, and have excluded expert testi-

75. *Id.*, notes to Rule 201(a).

76. Indeed Prof. Davis asserts that "(a)lmost all cases that cite [Federal] Rule 201 improperly use it", and gives examples in 3 K. Davis, *Administrative Law Treatise* § 15.6 (1980).

77. This is roughly Professor Davis' proposal for the entire field of judicial notice, see note 1 *supra*.

78. Federal and Uniform Rules, Rule 701.

mony where common knowledge is considered sufficient.⁷⁹

Whether an expert witness is required, on the other hand, will be tested in terms of the sufficiency of the evidence, absent such testimony, to support a finding in favor of a party bearing the burden of proof on the particular fact. If the ordinary non-expert, which the trier of fact (whether jury or judge!) is presumed to be, could not properly draw the necessary inferences from the evidence, the evidence will be insufficient and the finding cannot stand. While the courts are not quick to identify such cases, it is commonly held that proof of professional malpractice — both the establishment of the standard of care and the proof of causal relationship between breach and damage — requires the testimony of a qualified member of the profession in question.⁸⁰ On the other hand, it is often said that the judge, being a lawyer, has sufficient expertise to decide certain questions of lawyer's professional competence, particularly the reasonable value of lawyers' services.⁸¹

III. LAW

A. *In General*

The obligation of a judge to know the law of his own state, including federal law, to take notice of its content whether brought to his attention by the parties or not, and to use whatever sources are appropriate to the purpose, is now well established in the United States.⁸² While judges normally rely on counsel for help in finding the law, they are not required to do so, nor are they required in every instance to notify counsel in advance when they propose to rely on law not submitted by them, so long as the parties have an opportunity afterwards either to request reconsideration or to appeal.⁸³ In most states this extends to federal and state administrative regulations and executive orders; a majority of states appear to retain the rule that judicial notice will not be taken of private laws and municipal ordinances, subjecting them to the rules of evidence.⁸⁴

The traditional rule that the law of sister states will not be noticed, but must be proved, has been abandoned in most states, usually through the adoption of the Uniform Judicial Notice of Foreign

79. E.g., *Shore v. Mohave County, State of Arizona*, 644 F.2d 1320 (10th Cir. 1981); *Syrowik v. City of Detroit*, 119 Mich.App. 343, 326 N.W.2d 507 (1982).

80. W.Prosser & W.Keeton, *Torts* 118 (5th ed. 1984).

81. E.g., *Newman v. Silver*, 553 F. Supp. 485, 497 (S.D.N.Y. 1982); *In re Marriage of Cueva*, 86 Cal.App.3d 290, 149 Cal.Rptr. 918 (1979).

82. E.g., McCormick 938-939; 1 Weinstein at pp. 200-6,7.

83. 1 Weinstein at p. 200-7 (1982).

84. McCormick 939-940.

Law Act⁸⁵ or a similar statute; the more progressive of these statutes extends the notice to regulations, ordinances and rules as well as common law and statutes, either permissively⁸⁶ or mandatorily.⁸⁷

In several states⁸⁸ and the federal courts⁸⁹ the law of foreign nations is removed from the traditional regime of evidentiary proof, either by judicial notice or by simply treating the issue as one of law for the court. Often, as in the federal rule, the party seeking to rely on foreign-country law is required to give notice of that fact in order to trigger the court's duty. The majority of states, however, treat foreign-country law as a fact to be proved in the normal way (ideally by expert testimony) by the party seeking to rely on it.⁹⁰

B. Judicial Notice of Legislative Fact

Facts "utilized for informing a court's legislative judgment on questions of law and policy",⁹¹ like generalized knowledge used in fact-finding, are not covered by the Rules on judicial notice. It is clear, however, that in a system such as the United States where all courts have power not only to make ordinary law ("common law", subject to legislative control) but also to determine the consistency of judicial, legislative and executive acts with federal and state constitutions, the assumption of social, political and economic facts relevant to determining the content of the law plays a major role in judging. It is equally clear that the process cannot be subjected generally to formal requirements of indisputability or right to a hearing, or to limitations on the sources on which the judge relies⁹² — although judges in their discretion may act under such restraints in particular cases.⁹³ Since it is the court's duty to know the law, it is not subject to rules allocating burdens of proof to the parties, and factual premises underlying the law must be determined by the judge whether disputed or not. Rather, judicial dependence on per-

85. 9A Uniform Laws Ann. 550 (1965).

86. E.g., Delaware Uniform Rules of Evidence, Rule 202(d), 16 Dela. Code Ann. 497 (1981).

87. E.g., Ore. Rev. Stat. § 40.090(2,4) (1983).

88. E.g., Ore. Rev. Stat. § 40.090(6) (1983); Mass. Gen. Laws Ann. c. 233, sec. 70 (1959); N.Y. Civ.Pr.L. & R. 4511(b) (1963).

89. Federal Rules of Civil Procedure, Rule 44.1, 28 U.S.C. (1966).

90. McCormick at pp. 942-943.

91. Davis, note 2 *supra*, at 402.

92. See, e.g., 1 Weinstein at pp. 200-13f.; McCormick 928f.; Davis, note 1 *supra*, at 81-88.

93. For a relatively rare judicial use of the "legislative fact" terminology, where the court spoke of "generally known or easily ascertainable facts" but sustained a trial judge in taking judicial notice of the "legislative fact" that "no malpractice crisis existed in 1981", for purposes of determining the constitutionality of discriminatory legislation, see *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983).

suasiveness, the appellate judicial machinery and the normal legislative process must be relied on to correct errors of legislative fact.