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

## Advisory Committee's Notes

**Section (a). Scope of rule.** Rule 201, adopted verbatim from the corresponding Federal Rule of Evidence, deals with judicial notice of adjudicative facts only. No effort is made to set forth rules to govern the process of judicially noticing what authorities in the field have categorized as legislative facts. The latter form of judicial notice is left to continue its evolution and application under the common law.

As one author has observed: "In practice, the line between legislative facts and adjudicative facts is often indistinct. In theory, however, the two types of facts are quite different." W. Schroeder, *Judicial Notice in Alabama*, 34 Ala.L.Rev. 197, 228 (1983). Adjudicative facts, governed by this rule, are "simply the facts of the particular case."

Fed.R.Evid. 201 advisory committee's note. These facts are normally proven by putting a witness on the stand. Judicial notice, however, permits the judge to dispense with this procedure when the facts are beyond reasonable controversy and possess a high degree of indisputability. This process is well described as follows:

> "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.... 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." 2 K. Davis, Administrative Law Treatise § 15.03, at 353 (1958).

The concept of judicially noticing adjudicative facts has a long history of application in Alabama courts. See, e.g., *Peebles v. Miley*, 439 So.2d 137 (Ala.1983) (court judicially knows that great majority of collections are done on a contingent fee basis); *Edwards v. Edwards*, 333 So.2d 597 (Ala.Civ.App.1976) (upon petition to increase previously ordered child support, court judicially noticed that the buying power of the dollar had noticeably lessened since original order); *Callahan v. Booth*, 275 Ala. 275, 154 So.2d 32 (1963) (recognizing power to take judicial notice that there are 5, 280 feet in a mile); *Cox v. Board of Trustees*, 161 Ala. 639, 49 So. 814 (1909) (judicially noticing that Union troops burned buildings on the University of Alabama campus during the Civil War); *Pickens County v. Jordan*, 239 Ala. 589, 196 So. 121 (1940) (judicially noticing the location of a town). See also C. Gamble, McElroy's Alabama Evidence § 480.01 (4th ed. 1991).

Legislative facts, not covered by Rule 201, are those to which a court resorts as the basis for establishing a rule of law or interpreting a statute. That spousal testimony will destroy a marriage, historically noticed as the basis for declaring one spouse incompetent to testify against the other, would be a legislative fact. See *Hawkins v. United States*, 358 U.S. 74 (1958). The following two authoritative descriptions, much quoted in the evidence literature, give considerable guidance in identifying legislative facts:

> "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." K. Davis, A System of Judicial Notice Based on Fairness and Convenience 82 (1964).

> "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 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." E. Morgan, *Judicial Notice*, 57 Harv. L. Rev. 269, 270-71 (1944).

Alabama courts obtain knowledge of law, both judicial and legislative, outside the proof process. The Alabama Supreme Court has characterized this practice as more in the nature of "judicial knowledge" than "judicial notice." *Rayburn v. State*, 366 So.2d 708 (Ala.1979). This kind of judicial notice is not affected by Rule 201.

**Section (b). Kinds of facts.** Consistent with historic practice, a court is to dispense with the customary methods of proof "only in clear cases." Fed.R.Evid. 201 advisory committee's note. A court is to take judicial notice of adjudicative facts only when those facts are beyond reasonable dispute either because they are generally known within the court's territorial jurisdiction or because they can be accurately and readily determined by consulting sources that are acknowledged to be accurate. This limit upon judicial notice is consistent with historic Alabama law. See, e.g., *Peebles v. Miley*, 439 So.2d 137 (Ala.1983) (court judicially knows that great majority of collections are done on a contingent fee basis); *Strother v. Strother*, 355 So.2d 731 (Ala.Civ.App.1978) (judicial notice of increases in cost of living due to inflation); *Mutual Bldg. & Loan Ass'n v. Moore*, 232 Ala. 488, 169 So. 1 (1936) (facts found in reliable source).

**Section (c). When discretionary.** Power is vested in the trial judge to take judicial notice of adjudicative facts without having been requested to do so. The judge may take such notice upon the motion of a litigant or upon the judge's own initiative. This position is believed to reflect prior Alabama authority. See *Cullman Broadcasting Co. v. Bosley*, 373 So.2d 830 (Ala.1979); *Byrd v. State ex rel. Colquett*, 212 Ala. 266, 102 So. 223 (1924). Cf. W. Schroeder, *Judicial Notice in Alabama*, 34 Ala.L.Rev. 197 (1983).

**Section (d). When mandatory.** This section makes it mandatory for the court to take judicial notice of adjudicative facts subject to judicial notice under section (b) whenever a party requests it to do so and, with its request, supplies the court with the necessary information. It is believed that this principle is a departure from former Alabama practice, under which the taking of judicial notice has been vested largely in the trial judge's discretion. *Byrd v. State ex rel. Colquett*, 212 Ala. 266, 102 So. 223 (1924). It remains fully within the trial court's discretion, of course, as to whether it takes judicial notice upon its own initiative. See Ala.R.Evid. 201(c).

**Section (e). Opportunity to be heard.** Procedural fairness dictates that a party has the right to be heard regarding the court's judicially noticing facts – both as to the propriety of taking notice and as to the nature of the facts to be noticed. This right, however, arises only upon a timely request. No formal scheme is established for determining timeliness. A party often will receive prior notice that the court may take judicial notice of a fact by being served with a copy of an opponent's request for the court to do so or by hearing the opponent's oral request. In other instances, such prior notice will arise from statements of the trial judge. Section (e) recognizes, however, that a party may learn only after the fact that the judge has taken judicial notice; in such a situation the "timely request" can be made after the party learns that the judge has taken judicial notice.

The procedure set up by section (e) has never been formally established by Alabama appellate decisions. This procedure, however, is fully within the spirit of Alabama's historic principle governing judicial notice of adjudicative facts. If facts must be beyond dispute, as a condition precedent to the exercise of judicial notice, one would assume that such an issue is open to argument before the judge. See *O'Barr v. Feist*, 292 Ala. 440, 296 So.2d 152 (1974); W. Schroeder, *Judicial Notice in Alabama*, 34 Ala.L.Rev. 197, 204 (1983) (drawing this same

conclusion based upon implication from the preexisting Alabama rule that on appeal a party cannot assign as error the court's taking judicial notice unless at trial the party objected to the court's doing so).

**Section (f). Time of taking notice.** In accordance with prior Alabama practice, judicial notice may be exercised at any stage of the proceeding. Alabama case law is replete with examples of judicial notice having been taken at both the trial and the appellate level. See, e.g., *Green v. Mutual Benefit Health & Accident Ass'n*, 267 Ala. 56, 99 So.2d 694 (1957); *Byrd v. State ex rel. Colquett*, 212 Ala. 266, 102 So. 223 (1924).

Rule 201(d) makes judicial notice of adjudicative facts mandatory when properly requested. Section (f) makes such judicial notice exercisable at any stage of the proceeding, including on appeal. The combination of these two sections raises the question of whether an appellate court must take judicial notice of an adjudicative fact for the first time on appeal. Clear Alabama authority indicates only that the appellate courts may notice facts for the first time on appeal. *Byrd v. State ex rel. Colquett*, 212 Ala. 266, 102 So. 223 (1924); W. Schroeder, *Judicial Notice in Alabama*, 34 Ala.L.Rev. 197, 205 (1983) (cases cited therein). Other authority, however, indicates that the appellate court has the power to refuse to take judicial notice if the party requesting the court to do so failed to ask the trial court to do so. In all likelihood, this power is based upon the rule of appellate practice, separate and apart from the present evidence principle, that matters not complained of at the trial generally may not be assigned as error on appeal. See *O'Barr v. Feist*, 292 Ala. 440, 296 So.2d 152 (1974). Section (f) is in no way intended to limit appellate authority in this regard.

**Section (g). Instructing jury.** Much national debate has centered upon the question of whether a court should admit evidence offered to disprove the facts that have been judicially noticed. See, e.g., J. Thayer, Preliminary Treatise on Evidence 308 (1898) (for admissibility); J. McNaughton, *Judicial Notice -- Excerpts Relating to the Morgan-Whitmore Controversy*, 14 Vand.L.Rev. 779 (1961) (against admissibility). At least as regards civil cases, section (g) precludes such evidence. It precludes it by requiring that the trial judge instruct the jury as to the conclusiveness of the judicially noticed facts. Compare Unif.R.Evid. 201. The committee has found no appellate authority in Alabama dealing with this issue, and no Alabama pattern jury instruction has been published concerning it.

A different rule, however, applies in criminal cases. The trial judge is to instruct the jury regarding judicial notice, but the judge is to tell the jurors that facts judicially noticed are not necessarily conclusive upon them. This distinction in treatment is due largely to the feeling that a mandatory instruction as to conclusiveness, circumscribing the jury in a criminal case, would be contrary to the spirit of the Sixth Amendment right to a jury trial. House Comm. on Judiciary, Fed. Rules of Evid., H.R. Rep. No. 650, 93d Cong., 1st Sess. 6 (1973). There is at least one appellate criminal case in Alabama indicating that a jury does not have to accept a judicially noticed fact as conclusive. *Smith v. State*, 373 So.2d 350 (Ala.Crim.App.1979).