6-2016

A Blueprint for Obtaining Judicial Notice of a Fact that Need not be Proven at Trial

Cynthia Ford
Alexander Blewett III School of Law at the University of Montana, cynthia.ford@umontana.edu

A blueprint for obtaining judicial notice of a fact that need not be proven at trial

By Professor Cynthia Ford

June 2016 marks the 140th anniversary of the Battle of the Little Bighorn. It is thus fitting to continue our exploration of the doctrine of judicial notice by reference to several "facts" about the Battle:

- George Armstrong Custer was killed in the Battle of the Little Bighorn;
- The Battle of the Little Bighorn occurred on June 25-26, 1876;
- Custer "died for our sins."

If there were a modern trial in a Montana state court where these three facts were relevant, and it was your job to prove them, could you use judicial notice as a shortcut? As we will see below, the answer to that question is different for each of these three statements, because M.R.E. 201 (Judicial Notice of Fact) applies differently to each.

Last month, I discussed in some detail the types of facts which the Montana Supreme Court has held to be and not to be suitable for judicial notice. I also compared the Montana and federal versions of Article II of the Rules of Evidence, which differ significantly. Here, I will deal with the exact procedure for obtaining/opposing judicial notice of fact under the two arms of M.R.E. 201, and the effect of a court's ruling granting[1] judicial notice.

FIRST: HOW NOT TO TAKE JUDICIAL NOTICE

Before M.R.E. 201 was effective, the Montana Supreme Court analyzed a Worker's Compensation Proceeding in which the judge below took judicial notice of the contents of the claimant's medical file. Relying on F.R.E. 201, the Court observed that the federal rule allowed judicial notice of adjudicative facts only (a distinction eliminated in the 1978 M.R.E.) but did not expressly find whether or not the letters in the file from doctors who did not testify were adjudicative or not. Instead, the Court zeroed in on the need for indisputability before judicial notice can be taken. The Court's holding still applies today:

> Disputed medical conclusions by doctors contained in medical reports cannot be judicially noticed. It should be remembered judicial notice is intended to save time and expense by not requiring formal proof for Undisputed facts. **Judicial notice cannot supply evidence in the form of unsworn hearsay testimony in letters, absent agreement of the parties.** (Emphasis added).

Hert v. J. J. Newberry Co., 178 Mont. 355, 365, 584 P.2d 656, 662 (1978)[2].

This case, and warning, illustrate a common problem: lawyers who use judicial notice inappropriately to fill in gaps in their cases. In the *Hert* case, for example, the defense appears to have assumed its letters would get in without objection, not realizing that they were outright hearsay (or thinking opposing counsel would not know the hearsay rule?). When the plaintiff did in fact object, defense counsel tried a Hail Mary, invoking judicial notice. The pass went through at trial, but the review team in Helena reversed the victory. The only way to admit the doctors' opinions as to the claimant's prognosis is through live (or deposition) testimony, subject to cross-examination under oath, which of course is the whole point of the hearsay rule. Opinion testimony is by its very nature not "indisputable" as required by Rule 201, so is not properly judicially noticeable. Improper judicial notice cannot trump Rule 802.

GENERAL PROCEDURE FOR AVOIDING THE NEED TO PROVE A FACT AT TRIAL

At the very beginning of your case, you should begin a blueprint of the evidence you will need to adduce at trial, and continue to refine it as you prepare for trial. (I will spend a whole column on this blueprint approach this fall). Once you identify the applicable law, it will provide the elements you need to prove to prevail on your claim or defense. Then, under each element, you list the facts which show this element is met, and how you will prove each fact. There are three, and only three, options for proof of a fact at trial:

1. Witness testimony;
2. Exhibit(s);
3. Judicial notice.

When a fact on your list is "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 be reasonably questioned," Rule 201, you should pursue the third method of proof, judicial notice.

As with most things evidentiary, the best first step is to call your adversary and ask for a stipulation before you go to the

1 The effect of a denial of a request for judicial notice is simple: you have to prove the fact at trial, using witnesses and/or exhibits to do so, according to the M.R.E.

2 Hert's holding about the non-admissibility of letters from doctors was changed administratively, for Workers' Compensation proceedings only, in 1990 by the adoption of Rule 24.5.317, ARM. Miller v. Frasure, 264 Mont. 354, 365, 871 P.2d 1302, 1308 (1994).

trouble of a motion for judicial notice.[3] If the fact truly is indisputable, by definition your adversary would be unreasonable to refuse to stipulate to it. M.R.Civ.P. 16, "Pretrial Conferences," explicitly encourages parties to agree to facts in order to streamline trials:

> (2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters: ...
> (C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, ...
> (D) avoiding unnecessary proof ...

(My trusty source in the Ravalli County Attorney's Office tells me that criminal trials usually also have a pretrial conference and stipulated facts, even though I was unable to find quickly any specific statewide rule on this aspect of criminal procedure, as to which my ignorance is boundless). Proposing agreement as to a clear fact is a win/win for you. If your opponent unreasonably refuses to agree, you can mention that in your motion for judicial notice and at the pretrial conference and at least get credit for trying to simplify the trial. If your opponent does agree to the fact, you simply insert the fact into the pretrial order section[4] entitled "Admitted Facts" and remove the task of proving it from your list. Then, you include the admitted fact in your proposed jury instructions, and "Viola!" as one of my former students used to say.

HOW TO TAKE JUDICIAL NOTICE IF NO STIPULATION

If your adversary refuses to stipulate to a fact you think meets the criteria of Rule 201, you should file a motion in limine identifying the exact fact and asking the court to take judicial notice of it. The procedure is the same as for all other motions, requiring you to support the motion with a brief addressing the legal criteria for judicial notice, starting with M.R.E. 201, and how your request meets it. You must include with your request the information necessary for the court to conclude that the fact is indisputable, because 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 be reasonably questioned." M.R.E. 201(b). Under M.R.E. 104, the information you submit to demonstrate indisputability need not itself be admissible at trial.

Let's take these one at a time. "Generally known within the territorial jurisdiction of the trial court," as to Montana's district courts, could mean either the judicial district or the state. Although I could not find any Montana cases on point, M.C.A. 3-5-312. "Jurisdiction of judges coextensive with the state," provides that "The jurisdiction of the judges of the district courts of the state of Montana in... shall be coextensive with the boundaries of the state of Montana as to all matters presented to or heard by them and of which they have jurisdiction." Thus, I read Rule 201 to mean something like "everyone in Montana knows that ..."

Everyone in Montana (if not the U.S.) for sure knows that "George Armstrong Custer was killed at the Battle of the Little Big Horn." This fact is "generally known" within Montana, and is indisputable. A party might be able to prove the fact at trial, but would waste substantial resource in doing so. This is a prime example of a fact eligible for judicial notice.

The Montana Evidence Commission (MEC) comment to the "generally known" subdivision of M.R.E. 201(b)(1) states:

> Facts to be judicially noticed under subdivision (b)(1) which are "generally known" have been judicially noticed in many cases in Montana using slightly different terminology that [than?] these facts are "common knowledge". See State ex rel. *Schultz-Lindsay v. Board of Equalization*, 145 Mont. 380, 401, 403 P2d 635 (1965) and *Clark v. Worrall*, 146 Mont. 374, 380, 406 P2d 822 (1965) for recent examples.

In the *Schultz-Lindsay* case cited by the MEC, the plaintiff challenged a state statute imposing a license fee on nonresident contractors, calculated by a percentage of the contractors' gross receipts. In holding the statute unconstitutional, the Supreme Court did not use the phrase "judicial notice" per se, but as part of its opinion stated baldly:

> It is a **matter of common knowledge** that there is a vast difference between profit and gross receipts. In the instance of profit all expenses have been paid, and it is net to the recipient; as to gross receipts nothing has been paid for expenses and there may be no profit. (Emphasis added).

145 Mont. at 401.[5]

Clark v. Worrall, the other case cited with approval by the MEC, was a slip-and-fall case arising at a bowling alley. The plaintiff alleged that floor beneath her seat was wet from spilled beverages, and that a piece of cellophane on that wet floor should have been cleaned up. She also claimed negligence in the failure of the bowling alley to warn her that floors are slippery when wet and/or covered with debris. The court accepted the defense view of the law, that "there is no obligation to protect the invitee against dangers which are known to her, or which are so apparent that she may reasonably be expected to discover them and be able to look out for herself." The court then went on to observe:

> ...it is a **matter of common knowledge** that a tile floor will be slippery when wet.... Concerning (3), we feel that the folding nature of chairs such as these, customarily found in auditoriums, etc., is so readily apparent that the plaintiff could reasonably be expected to recognize it. (Emphasis added).

Notice, next page

3 Note that in civil cases, per M.R.Civ.P. 36, you can formally request the admission of any fact, whether it would qualify for judicial notice or not and, under Rule 37(c)(2), obtain the fees and expenses of proof for an unreasonable failure to admit.)

4 Montana Uniform District Court Rule 5 establishes the form for the Pretrial Order in contested civil cases, which includes at the very beginning a section entitled "AGREED FACTS: The following facts are admitted, agreed to be true, and require no proof: (Here enumerate all agreed facts, including facts admitted in the pleadings.).

5 It does not appear that either party asked for judicial notice of the definitions of "profit" v. "gross receipts;" under the current version of M.R.E. 201(c), "[a] court may take judicial notice, whether requested or not."

Notice, from previous page

Clark v. Worrall, 146 Mont. 374, 380-81, 406 P.2d 822, 825 (1965).

That "everyone knows" that Custer was killed at the Little Big Horn could be proven by submitting with the motion for judicial notice the results of a poll of Montanans, showing that most said they knew the fact. Obviously, though, acquiring this information would be expensive and time-consuming, exactly the opposite of the purpose of the doctrine of judicial notice. The cases cited by the Commission indicate that such proof would be unnecessary; it suffices to argue that the fact "is a matter of common knowledge."

There is a caveat: the requisite degree of knowledge is "general" in the jurisdiction. The judge's personal knowledge or opinion is not enough. In *Rose v. Myers*, 223 Mont. 13, 724 P.2d 176 (1986), an agister foreclosed on the statutory lien for keeping and feeding horses. Fifty-five horses were sold at auction and the proceeds applied to the amount due for the care and feeding of the horses. In her Order after trial, Judge Barz stated:

> The Court takes notice of two factors. The Court takes judicial notice that the sum of $12 per head per month cannot possibly include the cost of providing extra feed for the horses. The Court further notes that the Plaintiffs have shown knowledge of this fact by making $7,000 payment to the Defendant prior to March, 1985. (114 head X $12 per month X 8 months = $1,824) The Court takes note of this, not to rule on the merits of the contract dispute, but rather as a factor in the notice Plaintiffs had regarding the sale.

223 Mont. at 19. The horse owners appealed. The Supreme Court held that the judicial notice was (harmless) error: "Appellants are correct when they say the court incorrectly calculated the bill and took judicial notice of a fact not appropriate for judicial notice." Unfortunately, the Court did not explain its conclusion other than to recite the provisions of Rule 201, simply going on to observe there was other testimony to the same effect as the facts the court judicially noticed, so the error was wrong.

The alternative ground to finding a fact to be indisputable under M.R.E. 201 is that it is "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." In another case decided before M.R.E. 201 became effective, the defendants were convicted of selling "intoxicating liquor" to a 15-year-old boy. The drink in question was a "vodka and squirt." (Oh, to be 15…) On appeal, the defendants argued that the judge improperly instructed the jury that: "Vodka squirt and Vodka Collins as used in the testimony in this case are intoxicating liquors." The Supreme Court upheld this instruction (and the convictions), citing the statutory precursor to M.R.E. 201 and citing several extrajudicial authorities:

> Vodka is a well-recognized potent intoxicating liquor. It possesses much power and authority. Even when mixed with squirt it continues to pack somewhat of a wallop. Webster's New International Dictionary, 2d ed., defines 'vodka' as, 'A Russian distilled *alcoholic liquor* commonly made from rye, sometimes from potatoes, and rarely from barley. Sometimes, in Russia, any kind of whisky, brandy, etc.' (Emphasis supplied.)
>
> Funk & Wagnalls Standard Dictionary defines 'vodka' as, 'A distilled spirituous liquor, usually made from rye, sometimes from barley or potatoes; also, any spirituous liquor, as brandy, gin, etc.' And the same authority defines 'spirituous' as, 'Containing alcohol; especially, containing a large percentage of alcohol.' Funk & Wagnalls New Standard Encyclopedia, Vol. 24, p. 405, in defining 'vodka' said: 'Russian brandy, a strong spirituous beverage * * * Vodka as manufactured contains about 90 per cent of alcohol, but is diluted to 60 and 40.'
>
> As heretofore shown, R.C.M.1947, § 94-35-107, makes any beverage containing *one-half of one per centum* or more of alcohol, an intoxicating liquor. Under R.C.M.1947, § 93-501-1, the court may take judicial notice of the commonly accepted and generally understood definitions of the word 'vodka'…

State v. Wild, 130 Mont. 476, 492, 305 P.2d 325, 334 (1956).[6] This fact, that vodka is intoxicating, might have fit under the "matter of common knowledge" branch of Rule 201, but providing such authorities as the two dictionaries here for sure meets the "resort to sources" of undeniable authority.

The second fact in our Little Bighorn example is that the battle was fought on June 25-26, 1876. Although most, if not all, Montanans know that Custer died at the Little Big Horn, I myself always have to look up the exact date of the battle and I expect that is true of most other normal Montanans.[7] If I had to prove the date at trial, I could call an expert historian (because there are no living survivors who could testify from their personal knowledge per Rule 602). It would be cheaper and easier to simply ask the court to take judicial notice of the fact that "the Battle of the Little Big Horn was fought on June 25-26, 1876." Because this fact is not "generally known," I would have to use the other half of Rule 201(a), and this time, as in the Wild case discussed above, submit to the court "sources whose accuracy cannot reasonably be questioned."

In the olden days (such as when I began practice), I would have presented the Encyclopedia Britannica or some similar tome to the court as a clearly accurate source. I probably would have had to go to the local public library to find the volume, or consulted with a local history professor to locate the most

6 It is not clear whether the judge below took judicial notice that vodka is intoxicating, or whether the Supreme Court itself took judicial notice of that fact on appeal, as part of its analysis of the contested jury instruction. It is clearly the language of the Supreme Court that vodka "even when mixed with squirt…continues to pack somewhat of a wallop."

7 It is my own cross to bear that my stellar husband has a master's degree in Western American History and actually does remember every single significant date of events like this.

authoritative historical source. Today, from my home office computer, I googled "Battle of the Little Bighorn." In 1.01 seconds, my search yielded "about 810,000 results." In order, the first 5 results were:

- https://en.wikipedia.org/wiki/**Battle_of_the_Little_Bighorn**
- www.history.com/topics/native-american-history/**battle-of-the-little-bighorn**
- www.eyewitnesstohistory.com/custer.htm
- https://www.nps.gov/libi/learn/.../**battle-of-the-little-bighorn**.htm
- www.historynet.com/**battle**-of-**little-bighorn**

That most people use Wikipedia occasionally is a "matter of common knowledge" and thus probably makes that fact itself judicially noticeable without resort to any source. However, without doing much research, I am confident that Wikipedia is not an appropriate basis for judicial notice (or any other courtroom use), precisely because its accuracy is very open to question:

> Over three hundred federal judicial opinions have cited Wikipedia as a source. Most opinions cite Wikipedia in footnotes to define terms used in the opinion. Some judges, however, like the BIA in the Badasa case, have used Wikipedia as a source on which to base decisions. Judicial use of Wikipedia as a source of evidence or a basis for making decisions is a serious problem, because the nature of Wikipedia undermines the common law system. Wikipedia is an online encyclopedia that contains articles that anyone can create, alter, or revise. Additionally, Wikipedia is not only merely a secondary source, but the articles are subject to change on a daily, sometimes hourly, basis. For these and other reasons this comment will explore, federal judicial opinions should not cite Wikipedia. Wikipedia may be a starting point for research, but this comment will discuss many of the reasons why federal judges and members of the federal bar should not cite Wikipedia as a source. Additionally, Wikipedia's reliability is questionable at best, and for this reason alone Wikipedia should not be cited as an authoritative source on any topic. (Footnotes omitted)

Amber Lynn Wagner, "Wikipedia Made Law? The Federal Judicial Citation of Wikipedia," 26 J. Marshall J. Computer & Info. L. 229, 231 (2008).

However, although they are online sources, the non-Wikipedia entries appear to be much more reliable, particularly the fourth listing, maintained by the National Park Service. Most importantly, all five of these sources (including Wikipedia) give the same dates for the battle: June 25-26, 1876. Taken together, they are "sources whose accuracy cannot reasonably be questioned" and they establish the indisputability of the fact that "the Battle of the Little Bighorn was fought on June 25-26, 1876." In support of my motion for judicial notice of this fact, I would submit an affidavit detailing my Internet search and its results, and attach as exhibits thereto the printouts of the face sheet of my search and of each of the first five results. (I would include the Wikipedia entry for completeness, but I would place it last in the pile.) I expect the judge will grant judicial notice of this fact under the second half of Rule 201(b). With this method, I have saved my client all time, energy, and money I would have needed to prove this date at trial through an expert historian.

That leaves the last "fact": "Custer died for your sins." This is drawn from the title of a book published in 1969 by Vine Deloria, Jr.; its subtitle is "An Indian Manifesto." Again using the amazing Internet, I found that Amazon sells the book in hardcover, paperback, and "board book" formats. Besides the book itself, I found another Wikipedia entry about it, and numerous "study guides." The book is clearly influential and widely read, 11 years after its author died. However, wide distribution does not satisfy Rule 201(b)'s standard for indisputable fact—the very subtitle "manifesto" disqualifies its premise from judicial notice. Merriam Webster Dictionary, cited as an unquestionably accurate source in the vodka case (*State v. Wild*) discussed above, defines "manifesto" as "a written statement declaring publicly the intentions, motives, or views of its issuer.[8]" Thus, the book simply promotes the author's opinion that "Custer died for y/our sins" rather than establishes an incontrovertible fact. Just as the Montana Supreme Court observed in the Hert case discussed at the beginning of this column, under "How Not to Take Judicial Notice:" "Disputed … conclusions by [authors] contained in [books] cannot be judicially noticed."

Therefore, I cannot establish that "Custer died for your sins" via judicial notice. No judge in the land would grant such a motion because it is a controversial opinion, not an indisputable fact. I still can get this contention before the jury, but without the imprimatur of the court's finding that it is a true fact. I would have to call an expert to give this opinion, assuming it is relevant to a claim or defense in the fictional case. The expert will have to meet the requirements of expertise in her/his field, helpfulness of that field to the jury, and reliability of the underlying methodology. If the judge as gatekeeper allows this testimony, the opponent is entitled to put on controverting evidence, most likely from another expert with similar qualifications and a different conclusion. The jury will have to weigh this competing testimony and credit one over the other in reaching its verdict. This is what trial is meant to do, and it is the default whenever judicial notice is questionable.

The scorecard on the three "facts" presented at the beginning of this column is 2 out of three, not bad. The issue now is what effect the judicial notice of the first two facts is on the jury. The answer to that question depends on whether the case is civil or criminal.

THE JURY INSTRUCTIONS: CIVIL V. CRIMINAL

Obtaining judicial notice of a fact under Rule 201 is a victory, but it means nothing unless you convert that pretrial victory into capital at trial. The way to ensure that the jury knows it can consider the fact as established, even though no proof was adduced at trial, is through an instruction from the judge to the

Notice, next page

8 The online version of the dictionary, found at http://www.merriam-webster.com/dictionary/manifesto.

NOTICE, from previous page

jury. You may want to ask the judge to give the judicial notice instruction at the beginning of the trial, so the jury will have the fact in mind as the rest of the evidence is received. For sure, you want to include the judicial notice instruction as part of your proposed final instructions, so that the jury will remember it as they deliberate.

The Montana Civil Pattern Jury Instructions 2d[9], Instruction 1.10, confusingly entitled "Judicial Notice (Agreed Facts[10])" states:

> A court may take "judicial notice" of some facts, and if it does, no evidence is required to prove them. In this case, the court has taken judicial notice of the fact that …

The Criminal Pattern Jury Instructions, helpfully, are posted online for free by the Montana Attorney General's Office.[11] However, free or not, I could not find any criminal corollary in the Criminal Pattern Instructions on the subject of judicial notice.

Notice that the proposed civil instruction does not tell the jurors whether or not they are bound by the judicially noticed fact. This is a big deal, and should be clarified in the pattern instruction. Rule 201(g) provides different effects of this instruction for civil and criminal cases:

> (g) Instructing the 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**.

The Montana 201(g) is substantially the same as F.R.E. 201(f). The Montana Evidence Commission recognized that this difference between the effect of judicial notice in civil and criminal cases was not part of Montana law prior to the adoption of the M.R.E. The MEC consciously chose to follow the federal version of the rule, and thus this difference:

> The Commission feels that there is no strong reason to ignore the civil-criminal distinction of the Federal Rule while there are these reasons to adopt it: first, it will be uniform with the Federal Rule, and second, it insures that all facts necessary to prove each element of a crime will be proven beyond a reasonable doubt, not dictated to be found through judicial notice in instructing the jury. This view is consistent with the reason for Congressional changes in this subdivision to its present form because mandatory instructions in criminal cases are "contrary to the spirit of the Sixth Amendment right to a jury trial".

Shortly after the M.R.E. became effective, the Supreme Court noted with approval a criminal jury instruction given by the trial court in accordance with Rule 201(g). The defendant was convicted of theft by accountability, and part of the evidence before the jury consisted of the trial judge's judicial notice of pleadings charging the two principals with theft. The Supreme Court held:

> We can find no error in the District Court's decision to take judicial notice of the fact of the pleadings against Harris and Gunsch, especially in light of the court's instruction on judicial notice. We consider initially just what was judicially noticed the charges against Harris and Gunsch. The fact of the charges against these women was not "subject to reasonable dispute" and, moreover, the fact of the charges was capable of "accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned" namely, the District Court files which contained the original copies of the charges against the two principals. It is important to note that we are discussing the fact of the charges here and not their validity.
> **Even if the taking of judicial notice in any way tainted the fairness of defendant's trial, any taint would be eliminated by the instruction given to the jury. The District Court instructed the jury that it was allowed to accept as conclusive any fact judicially noticed but that it was not required to do so.** See Rule 201(g), Mont.R.Evid. Having drawn the jury's attention to the pleadings which had been judicially noticed, the court made it clear that the court's decision was not binding on the jury and that they could disregard the fact of the pleadings against Harris and Gunsch. It was then the jury's prerogative to accept or reject the judicially noticed facts as evidence, and we will not disturb its decision. State v. McKenzie, supra; State v. Stoddard (1966), 147 Mont. 402, 412 P.2d 827.

State v. Hart, 191 Mont. 375, 388-89, 625 P.2d 21, 29 (1981) (Emphasis added). The Court later cited Hart with approval:

> Finally, this Court has ruled that taking judicial notice of proceedings against a codefendant does not taint the fairness of the defendant's trial if the court instructs the jury that it has the prerogative to accept or reject the judicially-noticed facts as evidence. *State v. Hart* (1981), 191 Mont. 375, 389, 625 P.2d 21, 29, *cert. denied,* (1981) 454 U.S. 827, 102 S.Ct. 119, 70 L.Ed.2d 102. The jury was so instructed at Oatman's trial.

Notice, page 33

9 The Civil Pattern Instructions are not available anywhere online, and even in this age where Amazon provides all things, can be purchased only through the State Bar of Montana. (Amazon lists the Montana Civil Pattern Instructions as "currently unavailable.") I was able to get this language without paying an inordinate sum by simply calling the Jameson Law Library at the ABIII School of Law in Missoula. As always, Library Director Stacey Gordon graciously found the instruction, scanned it and emailed it to me.

10 Although the Pattern Instruction does not actually cover "agreed facts" as to which judicial notice is not required, a minor alteration to the preface should suffice: "The parties may agree that some facts are true, and if the parties so agree, no evidence is required to prove those facts. In this case, the parties have agreed that the following facts are true:…"

11 https://dojmt.gov/agooffice/criminal-jury-instructions/

Notice, from page 16

State v. Oatman, 275 Mont. 139, 145, 911 P.2d 213, 217 (1996).

Neither *Hart* nor *Oatman* set out the exact language of the jury instructions approved by the Supreme Court as to the effect of the judicial notice in those criminal cases. However, the paraphrases by the Court support the inference that the judges gave instructions which were drawn directly from the language of Rule 201(g). Helpfully, because of the similarity between the M.R.E. and the F.R.E. 201 provisions on this point, the Ninth Circuit has online Model Criminal Jury Instructions[12] which directly address judicial notice, last updated in March 2016:

> 2.5 JUDICIAL NOTICE
>
> The court has decided it is not necessary to receive evidence of the fact that [insert fact noticed e.g., the city of San Francisco is north of the city of Los Angeles] [because this fact is of such common knowledge]. You may, but are not required to, accept this fact as true.

The comment to this model instruction is also helpful, citing both F.R.E. 201(g) and *United States v. Chapel*, 41 F.3d 1338 (9th Cir.1994). Finally, note that the Ninth Circuit Criminal Model Jury Instructions also include an instruction (2.4) on stipulations of fact, which in marked contrast to judicial notice **are** binding on the jury.[13] In light of the comprehensive analysis of the Ninth Circuit Model Instructions and the lack of a Montana Criminal Pattern Instruction on judicial notice, I recommend that criminal lawyers adopt the Ninth Circuit model for Montana state cases. I also recommend that a judicial notice instruction identical to the Ninth Circuit Model be added to the Montana Criminal Pattern Jury Instructions.

On the civil side, although there is a Montana Pattern Instruction on judicial notice, discussed above, it does not give the jury any guidance as to what to do with the judicially noticed fact. Again, the combination of the clear language of M.R.E. 201(g), its similarity to F.R.E. 201(f) on the same issue, and the fact that the Ninth Circuit does have model language argues for use of the Ninth Circuit language on the conclusiveness of judicial notice in a civil case. In fact, the Ninth Circuit Civil Model Jury Instructions[14] set the stage for judicial notice (and agreed facts) in the preliminary instructions:

> **1.6 WHAT IS EVIDENCE**
>
> The evidence you are to consider in deciding what the facts are consists of:
> 1. the sworn testimony of any witness;
> 2. the exhibits that are admitted into evidence;
> 3. any facts to which the lawyers have agreed; and
> 4. any facts that I [may instruct] [have instructed] you to accept as proved.

The specific model for judicial notice, with its accompanying comment, provides:

> **2.3 JUDICIAL NOTICE**
>
> The court has decided to accept as proved the fact that [*state fact*]. You must accept this fact as true.
> Comment
> An instruction regarding judicial notice should be given at the time notice is taken. In a civil case, the Federal Rules of Evidence permit the judge to determine that a fact is sufficiently undisputed to be judicially noticed and requires that the jury be instructed that it is required to accept that fact. Fed. R. Evid. 201(f). In a criminal case, however, the court must instruct the jury that it may or may not accept the noticed fact as conclusive. *Id.*; *see United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir.1994) (in a criminal case, "the trial court must instruct 'the jury that it may, but is not required to, accept as conclusive any fact judicially noticed'"); Ninth Circuit Model Criminal Jury Instruction 2.5 (2010) (Judicial Notice).

A Montana lawyer in state court on a civil case should use the MPI 1.10 (discussed above), but add to it the sentence recommended by the Ninth Circuit: "You must accept this fact as true." A more global fix would be for the Montana Civil Pattern Instructions to add this same sentence to its Instruction 1.10.

CONCLUSION

It is indisputable that this Evidence Corner article has dragged on far too long. Although there are several other interesting subtopics about judicial notice under the M.R.E., as a matter of common knowledge, it is time to stop for this month. I hope to conclude judicial notice in the next issue of the Montana Lawyer. In the meantime, be sure to take a moment June 25 to remember those who died on the battlefield in 1876.

Cynthia Ford teaches Civil Procedure, Evidence, Family Law, and Remedies. She coached the Trial Team for 20 years, and regularly serves on the faculty of the Advanced Trial School at the School of Law.

12 http://www3.ce9.uscourts.gov/jury-instructions/node/423

13 "2.4 STIPULATIONS OF FACT
The parties have agreed to certain facts that have been stated to you. You should therefore treat these facts as having been proved."
Comment
"Stipulations freely and voluntarily entered into in criminal trials are as binding and enforceable as those entered into in civil actions." United States v. Gwaltney, 790 F.2d 1378, 1386 (9th Cir.1986). "When parties have entered into stipulations as to material facts, those facts will be deemed to have been conclusively established." United States v. Houston, 547 F.2d 104, 107 (9th Cir.1976) (citations omitted). "[W]hen a stipulation to a crucial fact is entered into the record in open court in the presence of the defendant, and is agreed to by defendant's acknowledged counsel, the trial court may reasonably assume that the defendant is aware of the content of the stipulation and agrees to it through his or her attorney. Unless a criminal defendant indicates objection at the time the stipulation is made, he or she is ordinarily bound by such stipulation." United States v. Ferreboeuf, 632 F.2d 832, 836 (9th Cir.1980). In any event, a trial judge need not make as probing an inquiry as is required by Fed. R. Crim. P. 11 when considering whether a defendant's factual stipulation is knowing and voluntary. United States v. Miller, 588 F.2d 1256, 1263-64 (9th Cir.1978). See also Old Chief v. United States, 519 U.S. 172, 186 (1997) (acceptance of a stipulation regarding prior conviction may be appropriate even where government objects under Fed. R. Evid. 403); JURY INSTRUCTIONS COMMITTEE OF THE NINTH CIRCUIT, A MANUAL ON JURY TRIAL PROCEDURES § 1.1.B (2013).

14 http://www3.ce9.uscourts.gov/jury-instructions/node/50