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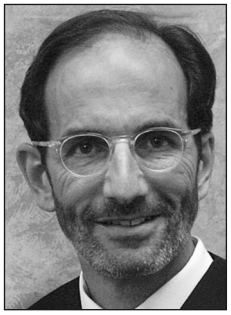
HEY, JUDGE, DID YOU HAPPEN TO NOTICE . . . ?



Judge Lawrence Riff

Most lawyers remember one thing about judicial notice from law school: Abraham Lincoln, as a lawyer in 1858, asked a judge in a murder trial to take notice of the accuracy of information in an almanac that identified the phases and timing of the moon's rising and setting. A prosecution witness had testified he saw Lincoln's client commit the murder from 150 feet away by the bright light of the full moon. The judge took judicial notice of the accuracy of the almanac's moon data. It showed the crescent moon was very low on the horizon at the exact time of the murder. The witness was thoroughly impeached, and Lincoln's client walked. In case you remember little else about judicial notice, here is, in Q&A, a brief refresher and some free advice.

Q: What exactly is the status of the proposition of which the court has taken judicial notice? Is it evidence or something else? **A:** Judicial notice is universally described as a substitute for formal proof. Some things are so indisputable that it makes no sense to require them to be proved at trial. For example, that Venice Beach is in Los Angeles County. Or the "true significance" of English words and phrases. Thus a judge properly takes judicial notice that "half a dozen" means "six." Or a mathematical proposition such as Distance = Rate x Time. Or that the plaintiff in this case in Los Angeles had earlier filed a declaration in a different case in the Tulare County Superior Court. The key concept is that once judicial notice is taken of the proposition, it is established for that proceeding. The fact finder is so directed, and no party may introduce evidence to dispute the proposition. Some cases and commentators refer to the proposition so noticed as evidence; some say it is a substitute for evidence. I say it doesn't much matter: The proposition is established. Period.

Q: Well, do the rules of evidence apply to judicial notice? **A:** Some do; some don't—and it is easy to make a mistake. In Lincoln's day, judicial notice existed as judge-made common law. Nowadays in the California state courts it is a creature of the Evidence Code (Code) at sections 450-460. (Further statutory citations are to that code.) So those rules of evidence apply by definition, and before you utter the words "judicial notice" out loud in a courtroom, you should have recently read those sections. Also the Code's rules on relevance, sections 350 and 352, apply. Thus while a judge could properly take judicial notice of an official government proclamation declaring a county a federal disaster area after a flood, the judge could refuse to do so on relevance grounds when the proclamation did not refer specifically to the area where plaintiff's property was located. (*Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578.) The Code's rules of privilege apply to exclude a source of information presented to the court to determine the propriety of the court's taking judicial notice of a matter. (§ 454.) And sometimes the hearsay rules apply and sometimes they don't. For example, under section 454, when a court consults reliable sources of information for the purpose of revealing the matter that is the subject of judicial notice, such as a calendar to determine a day of the week of a long past event, the hearsay rule plays no role. (*Ibid*. ["any source of pertinent information . . . may be consulted or used"].)

Q: Let's talk merits. What is the effect of the court's taking judicial notice of, say, a federal agency's big fat official report on the health effects of tobacco? **A:** Maybe less than you think. Here is the black-letter rule: Courts take

judicial notice of the existence of the document but not the truth of the contents. This is emphasized because so many of us get it wrong. (*E.g., Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1064, overruled on other grounds by *In re Tobacco Cases II* (2007) 41 Cal.4th 1257.) Thus a trial court could properly take judicial notice of the existence of an official report of the U.S. Senate's investigation of a particular pharmaceutical, but it could not take notice of the truth of various senators' criticisms of the manufacturer. (*Love v. Wolf* (1964) 226 Cal.App.2d 378, 403.)

Q: So the truth of matters contained in a judicially-noticed document is never established? **A:** Never say never in the law. There are two major exceptions to this rule. First, judicial notice may be taken "'of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law and judgments.'" (*Day v. Sharp* (1975) 50 Cal.App.3d 904, 914; *Weiner v. Mitchell, Silberberg & Knupp* (1980) 114 Cal.App.3d 39, 46 [facts recited in appellate decision concerning party's misconduct properly judicially noticed].) So in a family law contempt proceeding, the obligee spouse may establish that the obligor spouse in fact had the obligation of paying $550 per month in spousal support if the Court takes judicial notice of the underlying written court order. But what about an order from a prior proceeding that recites a judge's finding that the plaintiff is not worthy of belief because he is a serial liar? Can a court take judicial notice of that "fact"? Notwithstanding *Weiner* and *Day*, I'm going with "no." I am persuaded by the fine discussion of the point in *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1561-1569, which includes this insight: "Taking judicial notice of the truth of a judge's factual finding would appear to us to be tantamount to taking judicial notice that the judge's factual finding must necessarily have been correct and that the judge is therefore infallible. We resist the temptation to do so."

The second exception involves the hearsay exception for party admissions. The court properly takes notice of the existence of a prior declaration or answers to interrogatories or requests for admission in another proceeding, and if now offered against that party in this case, the court may take judicial notice of the truth of those assertions if "the admission cannot reasonably be controverted." (*Tucker v. Pacific Bell Mobile Services* (2012) 208 Cal.App.4th 201, 218, fn. 11, internal quotation marks omitted.) I'd suggest the caveat is important. The declarant's subsequent statement, "yeah, I see now I was wrong and I'd like to explain" is probably the end of taking judicial notice of the truth of earlier declared facts. Note the distinction: A court surely will permit the party's credibility to be attacked by confronting him with his prior declaration, but it may be reluctant to determine the matter conclusively established by judicial notice.

Q: So why is it useful to have a court take judicial notice of the existence of a document if its contents are not established? **A:** Think notice, claim preclusion and statutes of limitations.

Q: What if a lawyer does not ask that a proposition be judicially noticed during trial because she thought it wasn't even an issue and now she finds on appeal that her opponent says there is a hole in her case? **A:** No problem—ask the Court of Appeal to take judicial notice. Appellate courts can (and sometimes must) take judicial notice of a proposition for the first time on appeal. Speaking of appellate judicial notice, appellate courts are famous for taking judicial notice of "legislative facts" such as economic or social conditions. Thus, I think the Court of Appeal could take judicial notice with no party so requesting that there is a housing shortage in Los Angeles County in 2018.

Q: A court must take judicial notice as to some things but may as to others? Can the court take judicial notice without anybody asking? **A:** Yes and sometimes. Here's the point: there are rules and they are set out clearly in the Code. Again, read Sections 450-460. It will take you five minutes and might avert a catastrophe.

Q: It seems like a lot of demurrers and motions for judgment on the pleadings and for summary judgment have requests for judicial notice. How come? **A:** Because a proposition judicially noticed is established and a party may not subsequently seek to controvert it. Thus if the judicially-noticed proposition is case-dispositive, despite what's alleged (or not alleged) in the complaint or a declaration, game over. (*First English Evangelical Lutheran Church v. County of Los Angeles* (1989) 210 Cal.App.3d 1353, 1368 [appellate court reviewing

judgment on the pleadings went outside the confines of the complaint to take judicial notice of interim flood control ordinance].) Likewise, a party may not avoid a demurrer by omitting facts that a court will judicially notice. (*Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 130.)

Q: On that point, we often see parties requesting the court to take judicial notice (an "RJN"—request for judicial notice) of previous filings from that same case and then filing and serving full copies of all of those documents. That seems wasteful. Any advice? **A:** It can be wasteful and is largely a problem of old technology. Once all courts permit or require electronic filing and service—and the Los Angeles Superior Court sees that as likely within 12 months for civil litigation—this issue should largely disappear. But in the meantime, I caution against shortcuts, because a judge may decide not to grant a request for judicial notice if he or she does not have ready access to the subject documents.

Q: There are a lot of things to have to remember. Any tips? **A:** It's useful to recognize the three different kinds of knowable facts that might be the subject of judicial notice (tip of the hat to Justice Bernard Jefferson's California Evidence Benchbook, 4th ed., for this insight):

1. *Universally known facts*—section 451(f). "Universal" means reasonably universal. A party opposing judicial notice by producing Rip Van Winkle to testify he wasn't aware that Facebook is in the social media business will not work. A real-life example: It is universally known that the number of eligible voters in any political subdivision of the state is just a fraction—less than half—of the eligible voters in the state. (*Preserve Shorecliff Homeowners v. City of San Clemente* (2008) 158 Cal.App.4th 1427, 1434.)

2. *Locally known common knowledge*—section 452(g). I believe a judge in Los Angeles could take judicial notice that Interstate 405 between Wilshire and Sunset is jam-packed with slow-moving traffic on a Friday at 5:15 p.m. during a rainstorm. There may be thousands of residents of rural Vermont and North Dakota who would not know this, but millions of Southern Californians would. A real-life example: An appointed attorney was at the time of a particular trial also the City Attorney for the City of Hanford. Universally known? Hardly. Commonly known in Los Angeles County? No. But in Kings County, of which Hanford is the County seat? Yes. (*People v. Rhodes* (1974) 12 Cal.3d 180.)

3. *Verifiable facts*—section 452(h). This includes the phases and timing of the moon's rising and setting on a particular night. Or that the plaintiff in this case already has a judgment entered against her on this very cause of action after a trial on the merits in another case. Something you can look up in a source of indisputable accuracy.

Once you have the category of fact in mind, identify the proposition with as much specificity as possible. The more narrow it is, the more likely the court will take judicial notice. Next, think through and anticipate why a court or the opposing party may resist your request. Especially as to verifiable facts, amass materials that you can place before the court for verification of the proposition. And give plenty of advance notice to the other side, which is entitled to try to show that the indisputable fact is in fact disputable. (§ 455.)

Q: This all sounds easy to mess up. Any bottom-line advice? **A:** My best advice about judicial notice is don't count on judicial notice. If the proposition is important to your case, don't wait until the midst of trial to learn how your judge may deal with these technical rules. Instead, long before trial, send a request for admission during discovery. Or better yet, long before trial, ask for a stipulation. Do not worry that doing so gives away a trial secret: As noted, a party must give reasonable notice in advance of seeking judicial notice anyway. Most important, have a plan to prove up the proposition the old-fashioned way: with evidence. It may be inconvenient, but after all, if it's really indisputable, how hard can it be to prove?

Lawrence Riff is a judge of the Los Angeles Superior Court.