User Name: Charlena Fuqua
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1. *Synopsis to CHAPTER 2 : ARTICLE II. TENNESSEE LAW OF EVIDENCE—JUDICIAL NOTICE*
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1 Tennessee Law of Evidence CHAPTER 2.syn

Tennessee Law of Evidence > CHAPTER 2 ARTICLE II. TENNESSEE LAW OF EVIDENCE—JUDICIAL NOTICE

CHAPTER 2 ARTICLE II. TENNESSEE LAW OF EVIDENCE—JUDICIAL NOTICE

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§ 2.01 Rule 201. Judicial Notice of Adjudicative Facts

[1] Text of Rule

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 is taken.

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

(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.

Advisory Commission Comment:

Judicial notice really does not involve admission and exclusion of evidence; rather, no evidence is necessary. Part (b) limits judicial notice to a relatively small class of adjudicative facts. The lawyer may have to supply the court with reference materials, such as an almanac.

[2] In General

[a] Functions of Judicial Notice

Sometimes a fact of importance in a case is so obvious that proof of it would be a waste of everyone's time and resources. Would anyone dare to dispute that in Tennessee, Wednesday is the day after Tuesday, or that people in an outdoor setting may sweat if they are in the sun on a typical July day in Memphis? *Judicial notice* is one way such obvious facts are established without the introduction of formal proof of the fact. Historically, judicially noticed facts have been given the same weight as facts proven through formal proof.[1]

Even prior to the enactment of the Tennessee Rules of Evidence, judicial notice was used by Tennessee courts as a mechanism for the introduction of facts for consideration by the trier of fact without the necessity of presenting proof in the traditional fashion. "Judicial notice is frequently taken of matters of general

[1] ***Gordon's Transp., Inc. v. Bailey, 294 S.W.2d 313, 333 (Tenn. Ct. App. 1956)***.

knowledge, as a substitute for the production of evidence … ."[2] It is "a method of dispensing with the necessity for taking proof."[3] Generally, if the court takes judicial notice of facts, court time is saved because a witness is not needed to establish those facts. Judicial notice also abbreviates the appellate record.[4] While judicial notice is designed to save time and resources, it also has a potential negative impact if used too readily so as to remove from consideration facts that are in dispute, causing doubt whether a party received a fair trial.[5]

There is some indication in Tennessee case law that a *jury* may also take judicial notice, although nothing in Rule 201 indicates this. In *State v. Ellis,*[6] the Tennessee Court of Criminal Appeals strongly suggested that a jury in Sumner County could take judicial notice of the fact that Gallatin is in Sumner County since the fact could not reasonably be disputed. The court held that the jurors could use their common knowledge and experience in making reasonable inferences from the evidence, some of which indirectly indicated Gallatin was in Sumner County.

[b] Judicial Notice under Prior Law

Judicial notice has traditionally been applied when the fact at issue is commonly known in the community or is within the general knowledge of most individuals.[7] This approach was adopted by the Tennessee Supreme Court, which held that facts "of such universal notoriety and so generally understood that they may be regarded as forming a part of the common knowledge of every person …" may be judicially noticed.[8]

Judicial notice, which has been frequently referred to in Tennessee decisions as "common knowledge,"[8.1] has been taken of such matters as the rules of arithmetic, the operation of automobiles, the use and nature of mechanical devices and powers, and the natural laws of the universe.[9]

Many Tennessee pre-rules cases involving judicial notice address scientific facts, such as that a car traveling at the rate of thirty miles per hour will travel four and four-tenths feet in one-tenth of a second,[10] that termite damage to wood occurs over a period of time,[11] that faulty electrical devices can cause fires,[12]

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[2] *Metropolitan Gov't of Nashville v. Shacklett, 554 S.W.2d 601, 605 (Tenn. 1977)*.

[3] *State v. Lawson, 291 S.W.3d 864, 868 (Tenn. 2009)* (judicial notice saves time and dispenses with the need to present proof); ***State ex rel. Schmittou v. City of Nashville, 345 S.W.2d 874, 883 (Tenn. 1961)***; *State v. Brooks, 2017 Tenn. Crim. App. LEXIS 132 (Tenn. Crim. App. 2017)*.

[4] *State v. Nunley, 22 S.W.3d 282, 287 (Tenn. Crim. App. 1999)*.

[5] *See General Elec. Capital v. Lease Resolution Corp., 128 F.3d 1074, 1083 (7th Cir. 1997)*.

[6] *89 S.W.3d 584 (Tenn. Crim. App. 2000)*. The weight of the holding is somewhat diluted because the court also noted that the record was incomplete and it was unclear whether the judge took judicial notice of the location of Gallatin.

[7] McCormick On Evidence 544 (6th ed. 2006).

[8] *Pemberton v. American Distilled Spirits Co., 664 S.W.2d 690, 693 (Tenn. 1984)* (dangers of alcohol usage). *State v. Brooks, 2017 Tenn. Crim. App. LEXIS 132 (Tenn. Crim. App. 2017)*.

[8.1] *Bowen v. Wiseman, 2018 Tenn. App. LEXIS 375 (Tenn. Ct. App. 2018)* (facts relating to human life, health and habits, management and conduct of businesses which are common knowledge may be judicially noticed).

[9] ***Gordon's Transp., Inc. v. Bailey, 294 S.W.2d 313, 333 (Tenn. Ct. App. 1956)***.

[10] ***Id. at 332***.

[11] *Glassman v. Martin, 269 S.W.2d 908, 910 (Tenn. 1954)*.

and that it would have been impossible for a third party to have tampered with a Coca-Cola bottle prior to its explosion, overcharged it with carbonic acid gas to have caused the bottle's explosion, and re-capped it by hand.[13]

Although judicial notice frequently encompasses extremely simple concepts, it has sometimes been used by Tennessee courts to address matters closely related to the ultimate issues of the case. For example, in dismissing a lawsuit against a university athletic department arising from the death of a student football player in a university airplane crash, a Tennessee appellate court took judicial notice of the fact that athletic programs are an integral part of educational programs.[14] Also found to be within the realm of common knowledge is the fact that children involved in ordinary play are subject to injuries, regardless of the degree of supervision.[15]

Tennessee courts have also taken judicial notice of the fact that when a family moves, its furniture typically comes with it;[16] that a golf course must be attractive;[17] and that a mentally deranged person should not be left unattended in a room with an upper level window through which he or she might fall or jump.[18] Also found to be within the scope of common knowledge is the fact that an alcoholic has an uncontrollable desire to drink,[19] that an individual on a train pulling out of the station might alight from a slowly moving train rather than miss his or her destination,[20] and that individuals who steal cars might have a propensity to drive those cars in an irresponsible manner, possibly injuring others.[21] Judicial notice has also been taken of other matters.[22]

Just as a fact has been judicially noticed because it is generally known, it has also been judicially noticed if is easy to ascertain by consulting materials of unquestioned accuracy. An example is the day of the week upon which a particular date fell, a fact that can easily be determined with a calendar.[23]

[3] Adjudicative and Legislative Facts

[a] Adjudicative Facts

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[12] *Odum v. Haynes, 494 S.W.2d 795, 806 (Tenn. Ct. App. 1972)*.

[13] *Winfree v. Coca-Cola Bottling Works, 83 S.W.2d 903, 906 (Tenn. Ct. App. 1935)*.

[14] *Greenhill v. Carpenter, 718 S.W.2d 268, 271 (Tenn. Ct. App. 1986)*.

[15] *Brackman v. Adrian, 472 S.W.2d 735, 739 (Tenn. Ct. App. 1971)*.

[16] *Shelby Mut. Ins. Co. v. Wilson, 383 S.W.2d 791, 801 (Tenn. Ct. App. 1964)*.

[17] *Cavallo v. Gatti, 392 S.W.2d 843, 853 (Tenn. Ct. App. 1965)*.

[18] *Rural Educ. Ass'n v. Anderson, 261 S.W.2d 151, 155 (Tenn. Ct. App. 1953)*.

[19] ***Wheeler v. Glens Falls Ins. Co., 513 S.W.2d 179 (Tenn. 1974)***.

[20] ***Paschall v. Southern Ry., 208 S.W.2d 531, 536 (Tenn. 1948)***.

[21] ***Justus v. Wood, 348 S.W.2d 332, 338 (Tenn. 1961)***.

[22] *See, e.g., Omni Aviation v. Perry, 807 S.W.2d 276, 281 (Tenn. Ct. App. 1990)* (court will take judicial notice that Aspen, Colorado, is located in Colorado, but will not take judicial notice that an airplane would have to climb from 6500 feet to 17,500 feet in order to go from Chanute, Kansas, to Aspen, Colorado); *Hall v. Hall, 772 S.W.2d 432, 439 (Tenn. Ct. App. 1989)* (judicial notice of reasonable range of cost of rent and utilities for a single person accustomed to living in $100,000 home).

[23] McCormick On Evidence 544 6th ed. 2006).

Rule 201 is virtually identical to its federal counterpart.[24] As stated in Rule 201(a), this rule applies only to *adjudicative facts*, a term which is critical to the meaning of Rule 201, yet is not defined in either the rule or the Tennessee rules' Advisory Commission Comments. Several secondary sources, however, have offered definitions accepted by many courts. One such definition is that adjudicative facts help to "explain who did what, when, where, how, and with what motive and intent."[25] A more concise but similar definition is that an adjudicative fact is one that is relevant to a specific lawsuit.[26] Another definition is a fact "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 parties, their activities, their properties, their businesses."[27] By way of contrast, judicial notice should not be taken of a witness's opinions, general observations, perceptions of events, or long narratives.[28]

Perhaps the most interesting definition was provided by the Tennessee Court of Appeals:

> Adjudicative facts contemplated in *Tenn. R. Evid. 201* are typically those facts Detective Joe Friday, a character of the popular 1950's television series *Dragnet*, desired to elicit from a witness. His classic line—to encourage a witness who was being too verbose—was "Just the facts, ma'am."[29]

[b] Legislative Facts

Adjudicative facts are to be distinguished from *legislative facts*, which are facts of a much more general nature, typically involving social, scientific, economic or political matters, that are utilized by a court in developing policy or creating common law.[30] The distinction is made somewhat more clear by the use of the term "non-evidence facts" to describe legislative facts.[31] Rule 201 does not deal with judicial notice of legislative facts or legislation, although the latter is addressed under Tennessee law in Rule 202.[32] The evidence rule's failure to address legislative facts means that, on occasion, courts may rely on legislative facts that are disputed and even speculative.

[4] Judicially Noticeable Types of Adjudicative Facts

[a] In General

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[24] FED. *R. Evid. 201*.

[25] MCCORMICK ON EVIDENCE 544 (6th ed. 2006).

[26] *Counts v. Bryan, 182 S.W.3d 288, 291 (Tenn. Ct. App. 2005)*.

[27] Davis, *Judicial Notice*; 55 COLUM. L. REV. 945, 952 (1955). Professor Davis originated the term "adjudicative fact" in this seminal article. *See also* *Counts v. Bryan, 182 S.W.3d 288 (Tenn. Ct. App. 2005)*; *Dolman v. Donovan, 2015 Tenn. App. LEXIS 983 (Tenn. Ct. App. 2015)*.

[28] *Counts v. Bryan, 182 S.W.3d 288, 292–293 (Tenn. Ct. App. 2005)*.

[29] *Counts v. Bryan, 182 S.W.3d 288, 293 (Tenn. Ct. App. 2005)*.

[30] *See generally* MICHAEL H. GRAHAM, 1 HANDBOOK OF FEDERAL EVIDENCE 174 (6th ed. 2006); MCCORMICK ON EVIDENCE 544 (6th ed. 2006). In the Advisory Commission's Note to Federal Rule 201, legislative facts are defined as "those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." FED. *R. Evid. 201* Advisory Committee's Note.

[31] FED. *R. Evid. 201* Advisory Committee's Note.

[32] *See* *Tenn. R. Evid. 202*; *see also below* *§§ 2.02[2]–[4]*.

Rule 201(b) limits those adjudicative facts that can be judicially noticed to a relatively small group of facts not reasonably subject to dispute because they fall into one of two categories.[32.1]

[b] Facts Generally Known

Under Rule 201(b), the court may take judicial notice of facts that are generally known within the territorial jurisdiction.[33] This provision is consistent with prior Tennessee common law. Many pre-rules Tennessee cases have involved a trial or appellate court taking judicial notice of a fact within the common knowledge of the general public.[34] Thus, Tennessee courts have previously taken judicial notice that property used as a church would be the site of public gatherings,[35] that motorcycles are noisy,[36] that electric light bulbs burn out,[37] that alcoholic beverages can be dangerous,[38] and that the faulty installation of an electrical device can cause a fire.[39] Other examples under prior law include the fact that a city is located within a particular county, and the size and boundaries of incorporated towns, cities, and municipalities (but not of unincorporated villages).[40] There is no need to present proof of such generally known facts.

The term "generally known" is not defined in Rule 201(b)(1). According to one definition in a treatise:

> "General" knowledge is best understood to mean information widely known by well-informed persons in the district, or at least in the geographical subdivision of the district where the case is being tried. The standard does not require that every fact be known by any "person in the street" … or even by most persons in the street.[41]

Rule 201(b) extends to those adjudicative facts commonly known within the court's territorial jurisdiction. The geographic limitation exists to ensure reliability of the information. For example, the fact that in the

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[32.1] *See e.g.*, *In re Michael J., ___ S.W.3d ___, 2018 Tenn. App. LEXIS 52 (Tenn. Ct. App. Jan. 31, 2018)* (*Tenn. R. Evid. 201* limits judicial notice to adjudicative facts, which are those that help explain who did what, when, where, how, and with what motive and intent; the fact must be one that is not subject to reasonable dispute, that is, it must be capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned); *Vandergriff v. Parkridge East Hospital, 482 S.W.3d 545, 551 (Tenn. Ct. App. 2015)* (facts contained in medical records and letters from lawyers, not entered into evidence at trial, are not subject to judicial notice because they are not generally known or readily and accurately determined).

[33] Federal Rule 201(b) contains the identical "generally known" test. FED *R. EVID. 201(B)*. *See, e.g.*, *Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC, 369 F.3d 1197 (11th Cir. 2004)* (judicial notice proper to establish that color is indicative of the flavor of ice cream). *See also, Bowen v. Wiseman, 2018 Tenn. App. LEXIS 375 (Tenn. Ct. App. 2018)* (facts relating to human life, health and habits, management and conduct of businesses which are common knowledge may be judicially noticed); *Arnold v. Oglesby, ___ S.W.3d ___, 2017 Tenn. App. LEXIS 760, 760 n.3 (Tenn. Ct. App. Nov. 22, 2017)* (while it was implicit in a former state employee's complaint for compensation that allegedly was not paid to the employee, the appellate court took judicial notice of the fact that state employees such as the complainant were paid for the days they worked and for legal holidays)..

[34] *See above §§ 2.01[2], [3]*.

[35] *McDonald v. Chaffin, 529 S.W.2d 54 (Tenn. 1975)*.

[36] *Wallace v. Andersonville Docks, Inc., 489 S.W.2d 532 (Tenn. Ct. App. 1972)*.

[37] *Tennessee Elec. Power Co. v. Sims, 108 S.W.2d 801 (Tenn. Ct. App. 1937)*.

[38] *Pemberton v. American Distilled Spirits Co., 664 S.W.2d 690, 693 (Tenn. 1984)* (teenager died after ingesting a large quantity of grain alcohol).

[39] *Odum v. Haynes, 494 S.W.2d 795, 806 (Tenn. Ct. App. 1972)*.

[40] *State v. Chadwick, 750 S.W.2d 161, 165 (Tenn. Crim. App. 1987)*.

[41] CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 1 FEDERAL EVIDENCE 346–47 (3d ed. 2007).

month of December, darkness falls in the State of Tennessee prior to 9:00 p.m. is a matter within the common knowledge of anyone who has spent December within the state. However, the same could not be universally known to Tennesseeans with regard to December nightfall in Norway. Thus, the former is a proper subject for judicial notice under the requirement of generally known facts, while the latter is not.[42]

Facts within the common knowledge differ from facts within the judge's personal knowledge. It is not appropriate, either under Rule 201 or under prior law, for the court to judicially notice facts that are beyond the scope of knowledge of the general public but are known to the judge because of his or her personal experience.[43]

The leading case is *Vaughn v. Shelby Williams of Tennessee*,[44] where the trial judge based a worker's compensation award on the judge's personal observation of the plaintiff during the trial and on three other occasions: a week before trial, at a shopping mall, and in a parking lot. The Tennessee Supreme Court held that it was reversible error for the trial judge to base a decision on extrajudicial observations rather than facts in the record. The court explained:

> Judicial knowledge upon which a decision may be based is not the personal knowledge of the judge, but the cognizance of certain facts the judge becomes aware of by virtue of the legal procedures in which he plays a neutral role. No judge is at liberty to take into account personal knowledge which he possesses when deciding upon an issue submitted by the parties.
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> Significantly, a judge is not permitted to make an investigation of a case, even an inadvertent one, off of the record, and then base a holding on the information obtained incident thereto. Moreover, when a judge becomes a source of evidence, appellate courts are put in an awkward position in that the character of the evidence obtained through private inquiry or observation, as well as its probative value, is not shown in the record, making an evaluation of the information on appeal difficult, if not impossible.[45]

The *Vaughn* opinion also noted that judicial notice based on personal knowledge violates Rule 605, which bars a judge from being a witness.[46]

Vaughn also described another problem with a judge's use of personal knowledge. Since the trial judge in *Vaughn* first articulated the judicial notice when explaining his decision in the case, neither party had an

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[42] *See, e.g.,* United States v. Gumbs, 283 F.3d 128, 137 (3d Cir. 2002) (improper to take judicial notice that nearly all government contracts in U.S. Virgin Islands are federally funded; fact not generally known within trial court's territorial jurisdiction).

[43] *See, e.g.,* State v. Lawson, 291 S.W.3d 864, 869 n.5 (Tenn. 2009) (judge may not base judicial notice on knowledge gained in judge's personal capacity); State v. Henderson, 424 S.W.2d 186, 188 (Tenn. 1968); Green v. Lanier, 456 S.W.2d 345, 352 (Tenn. Ct. App. 1970). *See also* ***United States v. Lewis, 833 F.2d 1380, 1385 (9th Cir. 1987)*** (trial judge erroneously took judicial notice of effect of anaesthetic when information acquired through judge's own surgery). State v. Brooks, 2017 Tenn. Crim. App. LEXIS 132 (Tenn. Crim. App. 2017) (trial judge's reliance on her own memory of media reports of defendant's assault and her remarks at a commission meeting was improper, because the events were not subject to judicial notice under Tenn. R. Evid. 201); State v. Lacy, 2017 Tenn. Crim. App. LEXIS 375 (Tenn. Crim. App. 2017) (improper for the trial court to conduct independent research into facts outside the record and then rely on that evidence; although a trial court may take into account matters that are of common knowledge to every person, it may not base its decisions on the existence or nonexistence of facts according to its own personal beliefs or experiences).

[44] 813 S.W.2d 132 (Tenn. 1991).

[45] *Id. at 133*.

[46] *See below* § 6.05[2].

opportunity to cross-examine the judge, to convince him to change his perceptions, or to offer countervailing proof.

Some facts are not sufficiently well known to permit judicial notice of their existence. For example, in one case the defendant nurse allegedly committed a sexual battery on the plaintiff husband while the plaintiff wife watched.[47] In a cause of action for negligence and outrageous conduct, the Court of Appeals noted that it would be inappropriate to take judicial notice of "the effects upon a beholder of an unseemly display of affection." Such facts are not sufficiently well known to be the object of judicial notice.

In another Tennessee case illustrating improper judicial notice, the trial judge erroneously took judicial notice of the "common utilization of used car businesses in conjunction with illegal drug enterprises.[48] The Court of Criminal Appeals held that this judicial notice was inappropriate because it satisfied neither the "generally known" nor "easily ascertained" facets of Rule 201. There are many other illustrations of facts that do not satisfy the "general knowledge" test.[49]

Newspapers and Websites.

The courts will generally not take judicial notice of statements in newspapers, because the accounts are hearsay and such content is not "capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned," as required by Rule 106(b)(2).[49.1] In contrast, the *existence* of a newspaper article—as opposed to its contents—may be readily verifiable.[49.2]

[c] Facts Readily and Accurately Determined

The second category of adjudicative facts subject to judicial notice, set forth in Rule 201(b)(2), are those capable of ready and accurate determination by resort to sources whose accuracy cannot reasonably be questioned, even if the facts themselves are not generally known in the geographical area. For example, nightfall in Norway might properly be judicially noticed if additional information, such as a world almanac, were furnished to the court. Another example of this type of fact is the day of the week upon which a particular date fell, which can easily be determined by a calendar. Thus, coaxing a judge into noting that Topeka is the capital of Kansas will generally not be a problem, especially if armed with an almanac or even a fifth grade social studies text.

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[47] *Highfill v. Baptist Hosp., 819 S.W.2d 436, 439 (Tenn. Ct. App. 1991)*.

[48] *State v. Matheny, 884 S.W.2d 480 (Tenn. Crim. App. 1994)*.

[49] *See, e.g., United States v. Hawkins, 76 F.3d 545 (4th Cir. 1996)* (improper for judge to take judicial notice that Hawkins was the person who had been contemptuous when a witness in a criminal case; fact not generally known or easily ascertainable); *Cantrell v. Knoxville Community Dev. Corp., 60 F.3d 1177 (6th Cir. 1995)* (lawyer's mental condition); *York v. American Tel. & Tel. Co., 95 F.3d 948 (10th Cir. 1996)* (few women in Oklahoma City area could satisfy a two-year experience requirement); *In re Emmalee O., S.W.3d , 2018 Tenn. App. LEXIS 321 (Tenn. Ct. App. 2018)* (trial court properly declined to take judicial notice of facts relating to Canadian sex-offender risk assessments since the facts were not "generally known" as required by *Tenn. R. Evid. 201*).

[49.1] *See, e.g.*, *State v. Henretta, 325 S.W.3d 112, 2010 Tenn. LEXIS 888 (Tenn. 2010)*; *State v. Lacy, 2017 Tenn. Crim. App. LEXIS 375 (Tenn. Crim. App. 2017)* (trial court's independent research into facts outside the record and reliance on that evidence was improper, and to the extent that the trial court's independent research consisted of news reports, Rule 106 does not allow a court to take judicial notice of hearsay statements contained in newspaper articles); *State v. Martin, 1997 Tenn. Crim. App. LEXIS 791 (Tenn. Crim. App. 1997)*. The same analysis has been applied to websites. See *In re Emmalee O., 2018 Tenn. App. LEXIS 321 (Tenn. Ct. App. 2018)* (Canadian government's website was not so "unquestionably reliable" to the point that anything found there is incapable of reasonable dispute; accordingly, court properly declined to take judicial notice of its contents).

[49.2] *State v. Brooks, 2017 Tenn. Crim. App. LEXIS 132 (Tenn. Crim. App. 2017)*.

Similarly, simple laws of physics and other scientific facts,[50] geographic matters,[50.1] historical facts, statistics, government matters, public and court records,[51] and some religious facts can be the subject of judicial notice.[52] Other examples of judicially noticed facts under the identical federal provision include the fact that a certain day is a national holiday,[53] a dictionary definition,[54] the name of a certain housing project,[55] prevailing interest rates,[56] and the distance between cities.[57]

Website content.

Courts routinely take judicial notice of public records and government documents, and this includes public records and government documents available from reliable sources on the internet.[57.1] To the extent courts have taken judicial notice of private websites, the scope of such notice tends to be limited to the administration of, and access to the websites, rather than their actual content.[57.2] One court has gone so far

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[50] ***Gordon's Transp., Inc. v. Bailey, 294 S.W.2d 313, 333 (Tenn. Ct. App. 1956)***.

[50.1] *Bowen v. Wiseman, ___ S.W.3d ___, 2018 Tenn. App. LEXIS 375 (Tenn. Ct. App. 2018)* (trial court properly took judicial notice of the distance from the child's school to father's house and the timing of "rush-hour" traffic when determining best interests of child in custody and visistation dispute; the distance was capable of accurate and ready determination from sources whose accuracy could not be reasonably questioned, and it is common knowledge that children travel to school during the same time when many people commute to work, and that there is often heavy traffic during rush-hour).

[51] *See, e.g., Kowalski v. Gagne, 914 F.2d 299 (1st Cir. 1990)* (prior criminal record); ***Kavowras v. New York Times, 328 F.3d 50 (2d Cir. 2003)*** (judicial notice of public filings); *Caldwell v. State, 917 S.W.2d 662, 666 (Tenn. 1996)* (post-conviction court may take judicial notice of prior proceedings in the same case); *In re Ashton, 2017 Tenn. App. LEXIS 184 (Tenn. Ct. App. 2017)* (CASA report was not an appropriate subject for judicial notice); *State v. Nunley, 22 S.W.3d 282, 288 (Tenn. Crim. App. 1999)* (court records of the nature and number of indictments rendered in a particular court over two years are included as facts readily and accurately determined); *Counts v. Bryan, 182 S.W.3d 288 (Tenn. Ct. App. 2005)* (judicial notice of date first action was commenced and date of its voluntary dismissal, both ascertained from trial court's records; judicial notice is also appropriate for facts in books and reports and rules of arbitration, such as Commercial Rules of the American Arbitration Association); *State v. Lawson, 291 S.W.3d 864, 869–70 (Tenn. 2009)* (judge may take judicial notice of records of own court; citing cases approving judicial notice of court's docket sheet, documents establishing the fact of litigation and filings, waiver forms, hearing transcript, and minutes of trial court; approving judicial notice of outstanding indictment; *Harris v. State, 301 S.W. 3d 141, 147 n.4 (Tenn. 2010)* (court may take judicial notice of its own records; records showed direct appeal of conviction, post-conviction petition and appeal, and court's own opinion in previous case); *In re Bernard T., 319 S.W.3d 586, 591 n.3 (Tenn. 2010)*(judicial notice of Juvenile Court order concerning parentage; there was no question about genuineness of certified copy of the order). *Moncier v. Bd. of Prof'l Responsibility, 406 S.W.3d 139, 143 n.1 (Tenn. 2013)* (Tennessee Supreme Court refuses to take judicial notice of documents in other cases when the documents were not introduced as exhibits in proceedings below); *Moore v. State, 436 S.W.3d 775 (Tenn. Ct. App. 2014)* (judicial notice that senate district used to include part of three counties).

[52] *See, e.g.,* MICHAEL H. GRAHAM, 1 HANDBOOK OF FEDERAL EVIDENCE 191 (6th ed. 2006).

[53] *Lloyd v. Cessna Aircraft Co., 430 F. Supp. 25 (E.D. Tenn. 1976)*.

[54] *Nestle Co. v. Chester's Mkt., Inc., 571 F. Supp. 763 (D. Conn. 1983)*. *See also Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569 n.13, 127 S. Ct. 1955, 1972 n.13, 167 L. Ed. 2d 929, 948 n.13 (2007)* (trial judge may take judicial notice of full contents of published articles referenced in a complaint filed in court).

[55] *Malone v. City of Fenton, 592 F. Supp. 1135 (E.D. Mo. 1984)*.

[56] *Transorient Navigators, S.A. v. M/S Southwind, 788 F.2d 288 (5th Cir. 1986)*.

[57] *Church of Scientology Int'l v. Elmira Mission, 614 F. Supp. 500 (W.D.N.Y. 1985)*.

[57.1] *Koenig v. USA Hockey, Inc., 2010 U.S. Dist. LEXIS 122809 (S.D. Ohio 2010)*; *United States ex rel. Dingle v. BioPort Corp., 270 F.Supp. 2d 968 (W.D. Mich. 2003)*;

as to say that information available from private websites is "no[t] remotely akin to the type of facts which may be appropriately judicially noticed."[57.3] When the information comes exclusively from a website that has been maintained and created by one of the parties to the case, as in Koenig v. USA Hockey, Inc.,[57.4] the courts are especially cautious:

> Federal courts should be very reluctant to take judicial notice of information or documents that appear exclusively on websites which have been created and are maintained by one of the parties to a case, unless that party is a governmental body and the website is maintained not to further the business interests of the party but to provide a source of public information. The potential for fabrication or for inaccurate information is simply too great to be reconciled with the language in Rule 201 to the effect that judicial notice may be taken only if the information comes from "sources whose accuracy cannot reasonably be questioned." As the Advisory Committee notes to Rule 201 state, "[a] 'high degree of indisputability' is an essential prerequisite for a court to take judicial notice of a particular fact."[57.5]

Courts have expressed special concern about taking judicial notice when the website content can be altered freely, such as Wikipedia.[57.6]

[d] Not Subject to Reasonable Dispute

Rule 201(b) only permits judicial notice of facts not subject to reasonable dispute.[57.6.1] Because of this provision, there should be few situations where a party objects to the taking of judicial notice but the court nevertheless takes judicial notice. Almost by definition, if a party offers anything other than dilatory or pretextual reasons for opposing the taking of judicial notice, the court should view the fact as subject to reasonable dispute and decline to take judicial notice of it. This refusal will simply require a party to prove the fact at issue and should have virtually no impact on the case.[57.7] This principle can be illustrated by a

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[57.2] *See, e.g.*, *Energy Automation Sys., Inc. v. Saxton, 618 F. Supp. 2d 807 (M.D. Tenn. 2009)* (taking judicial notice of fact that a Tennessee resident had visited a website, but not of the author-generated content on that website); *Gerritsen v. Warner Bros. Entm't Inc., 112 F. Supp. 3d 1011 (C.D. Cal. 2015)* (the court declined to take judicial notice of information published on private websites, including information that appearred on defendant's website); *Scanlan v. Texas A&M University, 343 F.3d 533, 536 (5th Cir. 2003)* (holding it was improper for court to take judicial notice of a "defendant-created report" appearing on the internet); *But see*, *Total Benefits Planning Agency v. Anthem Blue Cross & Blue Shied, 630 F. Supp. 2d 842 (S.D. Ohio 2007)*, where the court took judicial notice of defendant's publicly-filed annual statement and its corporate disclosure statement to establish that defendants were wholly-owed subsidiaries of Wellpoint, Inc. Although the court received the documents from the defendant and did not rely on a website as the source of the information, the court noted that the parent-subsidiary relationship was also "spelled out" on Wellpoint's website and that "under Rule 201, *these* [emphasis added] are sources whose accuracy cannot reasonably be questioned." The plural reference to "sources" seems to suggest that the court regarded the website and the documents themselves as equally accurate. It remains an open question whether the court would have taken judicial notice if the website were the only source for the information.

[57.3] *Ruiz v. Gap, Inc., 540 F.Supp.2d 1121, 1124 (N.D. Cal. 2008)*.

[57.4] *Koenig v. USA Hockey, Inc., 2010 U.S. Dist. LEXIS 122809 (S.D. Ohio 2010)*.

[57.5] *Id., at 8–9*.

[57.6] *Stewart v. Stoller, 2014 U.S. Dist. LEXIS 39516 (D. Utah Mar. 25, 2014)*; *Koenig v. USA Hockey, Inc., 2010 U.S. Dist. LEXIS 122809 (S.D. Ohio 2010)*.

[57.6.1] *See, e.g., Bowen v. Wiseman, 2018 Tenn. App. LEXIS 375 (Tenn. Ct. App. 2018)* (trial court properly took judicial notice of distance between father's house and child's school, since it was capable of accurate and ready determination from sources whose accuracy could not be reasonably questioned).

[57.7] *Mayfield v. Mayfield, 395 S.W.3d 108 (Tenn. 2012)* (no judicial notice of fact that husband needs alimony, a fact which must be established by proof of nature and extent of need for alimony); *In re Michael J., ___ S.W.3d ___, 2018 Tenn. App. LEXIS 52 (Tenn. Ct. App. Jan. 31, 2018)* (although the juvenile court erred in taking judicial notice of a paternity test report previously

federal decision, *Weeks v. Scott*,[58] where the court refused to take judicial notice of the concept that saliva could transmit HIV. This fact, as established by conflicting expert witnesses, was not free from reasonable dispute and was therefore inappropriate for judicial notice.

[5] Initiation of Judicial Notice

[a] In General

Rules 201(c) and 201(d) permit judicial notice to be taken either *sua sponte* by the court or after a request by counsel.

[b] On Initiative of Court

Under Rule 201(c) the trial court has the discretion to take judicial notice *sua sponte*, without being requested by a party. This discretion is so broad that the court apparently may take judicial notice of facts, even against the wishes of one or all parties. However, the rule places no affirmative obligation upon the court to exercise its discretion when no request has been made. Furthermore, Tennessee appellate courts have discretion to take judicial notice of facts.[59]

[c] On Request of a Party

Rule 201(c) clearly allows a party to request that judicial notice of a fact be taken. If a request is made and sufficient information is supplied to the court to demonstrate the appropriateness of such notice, judicial notice *must* be taken, Rule 201(d). If judicial notice is inappropriate, the court has discretion to refuse the request.[59.1]

[d] Timing of Request

Rule 201 provides no single procedure that must be invoked in order to make such a request. The adverse party is entitled to be heard in opposition to a request, either before or after notice is taken, and notice can be taken at any stage of the proceeding.[60] A good approach would involve, prior to trial, a party seeking judicial notice of a fact to give prior notification to opposing counsel, who might then request the opportunity to be heard. If unsuccessful at the pretrial hearing, the initiating party would have the opportunity to present proof of the fact in question at trial in lieu of judicial notice.

Frequently, the need to request the court's judicial notice of a fact is unanticipated prior to trial and the request is made in the midst of the hearing, with no prior notification having been given to the opposing

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entered as an exhibit in proceedings before a magistrate, the error was harmless because the mother's copy of the report was admissible; because the report showed a statistical probability of paternity of ninety-nine percent or greater, the putative father had an extremely high burden of proof to rebut the statutory presumption of paternity, but he failed to meet that burden).

[58] *55 F.3d 1059, 1063 n. 5 (5th Cir. 1995)*.

[59] *See below § 2.01[7]*.

[59.1] *See, e.g.*, *Keeble v. Keeble, 2020 Tenn. App. LEXIS 264 (Tenn. Ct. App. June 3, 2020)* (Court of Appeals refused to take judicial notice of facts appellant introduced in his appellate brief and appendices, since he had offered no evidence establishing those facts in the trial court, and the facts did not constitute post-judgment facts that the Court could consider under *Tenn. R. App. P. 14*). Describing judicial notice, the *Keeble* court noted that it "is a method of dispensing with the necessity for taking proof … [and] is generally defined as a judge's utilization of knowledge *other than that derived from formal evidentiary proof in the pending case*. Historical facts, such as who, what or when, are more likely to satisfy this criteria, as opposed to opinions, which are more likely to be subject to dispute (emphasis added)." *Id.*, footnote 1.

[60] *See Tenn. R. Evid. 201(f)*.

party. Under these circumstances, the opposing party may request the opportunity to be heard outside of the jury's presence even after judicial notice has been taken.[61]

In rare situations, a court may refuse to take judicial notice because of a party's dilatory request that such notice be taken. In *Knop v. Johnson*,[62] a federal suit by prisoners alleging a host of constitutional infractions, a federal district judge refused to take judicial notice of certain court records because the request to do so was filed so late in the trial that the other side would not have a reasonable opportunity to offer rebuttal proof. The court noted that judicial notice, like other types of evidence, was subject to the discretionary exclusion authorized by Rules 403 and 611(a).

[6] Opportunity to Be Heard

[a] In General

Rule 201(e) provides that a party is entitled to be heard on the propriety and tenor of judicial notice, whether discretionary or mandatory. No procedures are detailed, however.

[b] Timely Request for Hearing

Rule 201(e) states that a party is entitled *upon timely request* to a hearing on the taking of judicial notice. This request can be made by the party either seeking[63] or opposing judicial notice, and can be made orally or in writing. Of course the request should be on the record.

The request must be "timely," but Rule 201(e) establishes no particular time limit. Presumably, the request can be made before trial in a motion *in limine* or anytime before the court actually takes judicial notice. On those rare occasions when it is unclear whether the trial court took judicial notice, a party's lack of opportunity to be heard may lead to appellate reversal.[64] If the party does not have prior notification that the court will take judicial notice, the request for a hearing may be made after judicial notice is taken. If after this post-notice hearing the court reverses its decision and now refuses to take judicial notice, the parties are entitled to offer admissible proof on the fact at issue. Failure to request a hearing can bar later appellate review of the taking of judicial notice.[65]

[c] Hearing Procedure

Rule 201(e) is silent on the procedures to be used in a hearing to assess whether judicial notice should be taken. Clearly both sides should be permitted to speak and to present evidence and argument. The hearing

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[61] *See* Tenn. R. Evid. 201(e).

[62] 667 F. Supp. 467, 485 (W.D. Mich. 1987).

[63] *But see* American Stores Co. v. Commissioner, 170 F.3d 1267 (10th Cir. 1999) (hearing requirement for judicial notice protects the opponent of judicial notice; hearing not necessary each time a proponent of judicial notice demands one; court properly considered request for judicial notice by reading party's briefs on the issue); Amadasu v. Christ Hosp., 514 F.3d 504 (6th Cir. 2008) (citing *American Stores Co. v. Commissioner* for the proposition that Federal Rule 201(e) does not require a formal hearing in all circumstances; the court held that since plaintiff had an opportunity to be heard on the issue of judicial notice through the filing of his objections to the magistrate judge's report and recommendation and the filing of his request for a hearing, a formal hearing was not necessary).

[64] *See* Rose v. Hartford Underwriters Ins. Co., 203 F.3d 417 (6th Cir. 2000) (unclear whether denial of motion was based on judicial notice of criminal indictment; party was denied an opportunity to contest possible judicial notice).

[65] *See, e.g.,* Nationalist Movement v. Cumming, 913 F.2d 885 (11th Cir. 1990); State v. Nunley, 22 S.W.3d 282, 287 (Tenn. Crim. App. 1999) (if a request is not made under Rule 201(e), "the noticed fact is taken as given for purposes of both the trial and appellate proceedings").

should be conducted outside the presence of the jury. Since this is a hearing to determine the admissibility of evidence, the rules of evidence (except for privileges) do not apply, Rule 104(a). Therefore, treatises and similar proof, otherwise inadmissible, may be used. The hearing should be on the record to facilitate appellate review.

The procedures to be used when an appellate court takes judicial notice are especially troublesome. One noted treatise has recommended the following sensible procedure:

> An appellate court contemplating original judicial notice should notify the parties so that the propriety of taking notice and the tenor of the matter to be noticed can be argued. If oral argument has already been completed, the court should, at a minimum, afford the parties an opportunity to submit supplemental briefs.[66]

[7] Timing of Judicial Notice

[a] In General

Rule 201(f) expansively provides that judicial notice may be taken at any stage of the proceeding. This means that both appellate[67] and trial courts ordinarily may take judicial notice.

[b] Trial Court

This may occur before or during trials and related proceedings, including post-trial proceedings.[68] If a judge does not take judicial notice at one stage of a proceeding, he or she may do so at another stage. If the trial involves a jury, however, ordinarily judicial notice should be taken before the jury retires to render its verdict. Otherwise, the jury will be denied the opportunity to consider the facts judicially noticed.[69] This is especially important in criminal cases when the constitutional guarantee of a jury trial is applicable.[70]

[c] Appellate Court

If a trial court erroneously does not take judicial notice, the appellate court may do so on review.[71] Technically, Rule 201 does not apply to appellate courts because the Rules of Evidence apply only to "trial courts," Rule 101. However, Tennessee appellate courts have long recognized their inherent authority to

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[66] WEINSTEIN'S FEDERAL EVIDENCE 201-78.2 (McLaughlin 2d ed. 2000).

[67] *See, e.g.*, United States v. Males, 715 F.2d 568 (11th Cir. 1983); State v. Lawson, 291 S.W.3d 864 (Tenn. 2009) (appellate court may take judicial notice whether requested or not, and may do so at any stage of the proceeding; if a trial court fails to take judicial notice, the appellate courts may do so upon review); Dolman v. Donovan, 2015 Tenn. App. LEXIS 983 (Tenn. Ct. App. 2015) (citing State v. Lawson and Tenn. R. App. P. 13(c), which gives appellate courts the authority to "consider … any additional facts … judicially noticed").

[68] *See, e.g.,* Grason Elec. v. Sacramento Mun. Util. Dist., 571 F. Supp. 1504, 1521, 1983-2 Trade Cas. (CCH) P65650 (E.D. Cal. 1983), *cert. denied*, ***474 U.S. 1103 (1986)*** (judicial notice taken during hearing on motion for summary judgment); Murty v. Aga Khan, 92 F.R.D. 478, 482 (E.D.N.Y. 1981) (judicial notice taken during hearing on motion to dismiss).

[69] *Cf.* Colonial Leasing Co. v. Logistics Control Group, Int'l, 762 F.2d 454 (5th Cir. 1985).

[70] *Cf.* United States v. Jones, 580 F.2d 219 (6th Cir. 1978) (appellate court should not take judicial notice of element of crime; Congress enacted Rule 201(g) which states that a jury need not accept judicially noticed facts in criminal cases). *See below § 2.01[8].*

[71] *See, e.g.*, Central Green Co. v. United States, 531 U.S. 425, 121 S.Ct. 1005, 148 L.Ed.2d 919 (2001) (Supreme Court takes judicial notice about geographical facts); Scotty's Contracting and Stone v. United States, 326 F.3d 785, 789 n.1 (6th Cir. 2003) (appellate court takes judicial notice of page of brief filed in same court in another case); In re Bernard T, 319 S.W.3d 586, 591 n.3 (Tenn. 2010) (Tennessee Supreme Court takes judicial notice of Juvenile Court consent order concerning parentage).

take judicial notice even if the issue of judicial notice was not raised in the trial court or on appeal.[72] This departs from the usual rule that an appellate court will not consider evidence or issues unless first presented below. Although *Tenn. R. App. P. 14* allows a court to take judicial notice of post-judgment facts, Rule 6 of the Tennessee Rules of the Court of Appeals requires that the appellate brief include a reference to the page or pages of the record where evidence of such fact is recorded.[72.1] The unique procedural problems presented when an appellate court takes judicial notice are discussed in another section of this book.[73]

[8] Impact of Judicial Notice

[a] In General

Rule 201(g) states the effect of a judicially noticed adjudicative fact. Because of constitutional considerations, the rules are different for civil and criminal cases.

[b] Civil Cases

Rule 201(g) requires that in a civil trial, the jury shall be instructed to accept judicially noticed facts as conclusive. It follows that no evidence controverting these facts should be admitted in a civil trial because it would be irrelevant and would waste time. This does not violate the constitutional right to a jury trial in a civil case where undisputed facts may be found by the judge alone.[74] Presumably, if the judicially noticed facts are disputed, the complaining party will exercise the opportunity to be heard set forth in Rule 201(e). At this hearing, evidence countering the facts to be judicially noticed is presented in an effort to convince the court not to take judicial notice.

[c] Criminal Cases

In a criminal trial, the jury may, but is not required to, treat judicially noticed facts as conclusive and must be so instructed.[75] The origin of this rule is the *Sixth Amendment's* guarantee that a criminal accused has a right to have a jury determine the facts of the case.[75.1] A federal appellate court observed:

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[72] *See* *State v. Lawson, 291 S.W.3d 864, 869 (Tenn. 2009)* (appellate courts may take judicial notice at any stage of the proceedings, even if trial court failed to take judicial notice); *cf.* *In re Bernard T, 319 S.W.3d 586, 591 n.3 (Tenn. 2010)*(Supreme Court "may take judicial notice of evidentiary issues in proper circumstances"); *Dolman v. Donovan, 2015 Tenn. App. LEXIS 983 (Tenn. Ct. App. 2015)* (even when a trial court fails to take judicial notice, the appellate courts may do so upon review); *See also* *T.R.A.P. 13(c)*, which also gives the appellate court authority to take judicial notice; *Hughes v. New Life Dev. Corp., 387 S.W.3d 453 n.1 (Tenn. 2012)* (Supreme Court may take judicial notice of facts from earlier proceedings in the same action); The *Tennessean v. Metro. Gov't of Nashville & Davidson Cnty., 485 S.W.3d 857, 862 n.1 (Tenn. 2016)* (Tenn. Supreme Court may take judicial notice of the records of Tennessee Courts).

[72.1] *Tenn. R. App. P. 14*; *Tenn. R. Ct. App. 6(b)*. *See also* *Keeble v. Keeble, 2020 Tenn. App. LEXIS 264 (Tenn. Ct. App. June 3, 2020)* (where husband appealed the division of marital assets in divorce decree and asked the Court of Appeals to take judicial notice of mortgage payments he made with separate property; the Court of Appeals held that whether husband contributed separate funds toward marital property was a question subject to reasonable dispute under *Tenn. R. Evid. 201(b)*, since the supporting documents contained in the appendices to the husband's appeal brief were not established by evidence in the trial court and set forth in the record, as required under *Tenn. R. Ct. App. 6(b)*; additionally, the evidence did not constitute post-judgment facts eligible for judicial notice under *Tenn. R. App. P. 14*).

[73] *See above* *§ 2.01[6]*.

[74] *See* 1 WEINSTEIN'S FEDERAL EVIDENCE 201-9 (McLaughlin 2d. ed. 2000).

[75] *Tenn. R. Evid. 201(g)*. Counsel must ensure that the jury instructions clearly state that the criminal jury need not accept the judicially noticed facts as conclusive. *See, e.g.,* *United States v. Mentz, 840 F.2d 315 (6th Cir. 1988)*; *State v. Allen, 2020 Tenn.*

> A trial court commits constitutional error when it takes judicial notice of facts constituting an essential element of the crime charged, but fails to instruct the jury according to Rule 201(g). The court's decision to accept the element as established conflicts with the bedrock principle that the government must prove, beyond the *jury's* reasonable doubt, every essential element of the crime.[76]

Since the judicially noticed fact is not conclusive in a criminal case, evidence in contradiction of the judicially noticed facts may be presented, though it may be hard to find. This, in turn, opens the door for the introduction of evidence supporting the judicially noticed facts.[77] The impact of judicial notice in such cases is to create what amounts to a permissive inference. The criminal jury may draw the same factual conclusion as the judge did in taking judicial notice, but the jury is free to make its own evaluation of the facts and to reach a conclusion that differs from one reached by the judge. Of course the court retains the power to overturn a conviction when the judge disagrees with the criminal jury's verdict.[78]

Obviously, the entire concept of judicial notice to save court time and simplify trial is lost in this situation, suggesting that judicial notice would be inappropriate under such circumstances. Judicial notice may also be used to establish facts that are a basis for selection of a sentence.[79]

[9] Relationship to Procedural Rules

[a] In General

Judicial notice under Rule 201 must be distinguished from several procedural rules that have somewhat similar effects and will often make judicial notice unnecessary.

[b] Request for Admission

Under Rule 36.01 of the Tennessee Rules of Civil Procedure, a party may make a request for admission of certain discoverable facts. The matter is deemed to be admitted unless the other side files a written answer or objection. This admission is called a *judicial admission*. A matter admitted under Civil Rule 36.01 is "conclusively established" unless the court permits an amendment or withdrawal of the admission.[79.1]

Admissions should facilitate the proof at trial by weeding out the facts and items of proof over which there is no dispute. Thus all issues as to which there can be no controversy in good faith should be eliminated.[80]

Crim. App. LEXIS 131 (Tenn. Crim. App. Feb. 21, 2020) (no indication in record that the trial judge took judicial notice of venue or instructed the jury in accord with Rule 201(g)).

[75.1] *See, e.g.*, *State v. Allen, 2020 Tenn. Crim. App. LEXIS 131 (Tenn. Crim. App. Feb. 21, 2020)* (under the Tennessee Constitution venue is a question for the jury to determine from the evidence in the case, and a trial court taking judicial notice of venue does not relieve the jury from the necessity of finding that venue was proven by a preponderance of the evidence).

[76] *United States v. Mentz, 840 F.2d 315, 322 (6th Cir. 1988)* (emphasis in original).

[77] MICHAEL H. GRAHAM, 1 HANDBOOK OF FEDERAL EVIDENCE 211 (6th ed. 2006).

[78] *See Tenn. R. Crim. P. 29* (court may give judgment of acquittal if evidence is insufficient to sustain a conviction); 33(d) (trial court may grant a new trial after guilty verdict if court disagrees with the weight of the evidence).

[79] *State v. Nunley, 22 S.W.3d 282 (Tenn. Crim. App. 1999)* (number and nature of indictments rendered in trial court over two-year period may be subject of judicial notice but may not establish need for a deterrent-based sentence).

[79.1] *Tenn. R. Civ. P. 36.02*. *See also, Ross v. Orion Fin. Grp., Inc., 2019 Tenn. App. LEXIS 113 (Tenn. Ct. App. 2019)* (the discretion afforded the trial court by *Tenn. R. Civ. P. 36.02* to permit withdrawal or amendment provides a modicum of flexibility to avoid any potential injustice that might occur; to be entitled to withdraw or amend an admission under Rule 36.02, a party must establish 1) that the merits of the action will be served thereby, and 2) that the opposing party has failed to prove that doing so will result in prejudice).

[80] *Tennessee Dep't of Human Servs. v. Barbee, 714 S.W.2d 263, 266 (Tenn. 1986)*.

A request for admission and a judicial notice have several common features. In a civil case, both create conclusive facts and eliminate the need and opportunity to offer proof on those facts. In addition, both can be triggered by a request from counsel.

The two procedures differ in several important respects. Judicial notice involves a judge's ruling, while a request for admission can be completed by counsel alone. Second, judicial notice can embrace only facts generally known within the jurisdiction or easily ascertainable by resort to sources that cannot be reasonably challenged.[81] Judicial admissions, on the other hand, can involve any discoverable facts, even if known only to the parties and even if of doubtful accuracy.

[c] Stipulation

A stipulation is a voluntary agreement by the parties on a certain matter. It often involves an agreement that specific facts are undisputed and are to be considered as proved. Since a stipulation requires an agreement, one party's offer to stipulate a fact does not create a stipulation; both parties must agree before a stipulation occurs.[82] No further proof of these facts is needed or permitted. The parties may not stipulate to questions of law.[83]

A stipulation can resemble a request for admission, but does not have the procedural requirements of *Rule 36.01 of the Tennessee Rules of Civil Procedure*. Neither requires the approval of a judge to be effective. Unlike judicial notice, a stipulation can encompass any subject.[84] By definition, of course, facts that have been judicially noticed or stipulated are not reasonably disputed.

Tennessee case law indicates that stipulations should be rigidly enforced by the courts, unless the stipulation is inappropriate.[84.1] In *State v. Bragan*,[85] the parties stipulated that a copy of the defendant's book could be introduced as substantive evidence. The appellate court upheld the trial court's exclusion of portions of the book that had been previously ruled irrelevant or were otherwise inadmissible. The stipulation did not override the appropriate exclusion of inadmissible evidence.

Similarly, in *Overstreet v. Shoney's, Inc.*,[86] the parties stipulated that copies of documents in a personnel file were records of a regularly conducted business activity and were true and accurate copies of the original. Nevertheless, the Tennessee Court of Appeals held that some statements in the records were inadmissible hearsay. The stipulations did not resolve the issue of whether the documents were admissible.

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[81] *Tenn. R. Evid. 201(b)*. *See above § 2.01[4]*.

[82] *See State v. West, 767 S.W.2d 387, 394 (Tenn. 1989)* (one party offered to stipulate a fact in order to prevent the other party from proving that fact; stipulations require mutual agreement; an offer to stipulate cannot deprive other party of the opportunity to prove its case); *Duke v. Duke, 563 S.W.3d 885 (Tenn. Ct. App. 2018)* (though a stipulation need not follow a particular form, its terms must be definite and certain in order to form a proper basis for judicial decision).

[83] *Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 701 (Tenn. Ct. App. 1999)*; *Duke v. Duke, 563 S.W.3d 885 (Tenn. Ct. App. 2018)*.

[84] *See, e.g., Overstreet v. Shoney's, Inc., 4 S.W.3d 694 (Tenn. Ct. App. 1999)* (stipulation that an agent was acting within the scope of his or her employment); *Tamco Supply v. Pollard, 37 S.W.3d 905, 909 (Tenn. Ct. App. 2000)* (stipulation in open court by attorneys in the case constitutes a binding stipulation).

[84.1] Factors to consider in determining whether a stipulation was entered into properly are whether the party had competent representation of counsel, whether extensive and detailed negotiations occurred, whether the party agreed to the stipulation in open court, and whether, when questioned by the judge, the party acknowledged understanding the terms and that they were fair and equitable. *Duke v. Duke, 563 S.W.3d 885 (Tenn. Ct. App. 2018)*.

[85] *920 S.W.2d 227, 246 (Tenn. Crim. App. 1995)*.

[86] *4 S.W.3d 694 (Tenn. Ct. App. 1999)*.

[d] Collateral Estoppel

In some ways, judicial notice and collateral estoppel are similar. Both remove the need to offer certain specific proof to establish a fact. When a fact cannot be established by collateral estoppel, judicial notice may also be precluded, depending on the circumstances.[87]

[87] *See* *General Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1083 (7th Cir. 1997)* (court cannot take judicial notice of fact found in previous case against another party and apply that fact to this party; collateral estoppel inapplicable because of difference in the parties in the two cases).

§ 2.02 Rule 202. Judicial Notice of Law

[1] Text of Rule

Rule 202 Judicial Notice of Law

(a) Mandatory Judicial Notice of Law.The court shall take judicial notice of (1) the common law, (2) the constitutions and statutes of the United States and of every state, territory, and other jurisdiction of the United States, (3) all rules adopted by the United States Supreme Court or by the Tennessee Supreme Court, and (4) any rule or regulation of which a statute of the United States or Tennessee mandates judicial notice.

(b) Optional Judicial Notice of Law.Upon reasonable notice to adverse parties, a party may request that the court take, and the court may take, judicial notice of (1) all other duly adopted federal and state rules of court, (2) all duly published regulations of federal and state agencies and proclamations of the Tennessee Wildlife Resources Agency, (3) all duly enacted ordinances of municipalities or other governmental subdivisions, (4) any matter of law which would fall within the scope of this subsection or subsection (a) of this rule but for the fact that it has been replaced, superseded, or otherwise rendered no longer in force, and (5) treaties, conventions, the laws of foreign countries, international law, and maritime law.

(c) Determination by Court. All determinations of law made pursuant to this rule shall be made by the court and not by the jury. In making its determination the court is not bound by the rules of evidence except those with respect to privileges.

Advisory Commission Comment:

Note that judicial notice of ordinances is discretionary and requires notice to adverse parties. *See also* the Uniform Judicial Notice Act, *T.C.A. §§ 24-6-201 through 24-6-207*.[88]

1991 Advisory Commission Comment:

The Tennessee Wildlife Resources Agency issues proclamations to regulate hunting seasons and limits. These are published in the Administrative Register. Under the amended rule, a court could judicially notice such proclamations.

[2] In General

Rule 202 of the Tennessee Rules of Evidence has no federal counterpart.[89] The Advisory Committee's note to Federal Rule 201 cites Rule 44.1 of the Federal Rules of Civil Procedure and Rule 26.1 of the Federal Rules of

[88] Note that Chapter 273 of the Tennessee Public Acts of 1991 repealed a number of statutes in order to remove duplication and inconsistencies between the Tennessee statutes and the Tennessee Rules of Evidence. The repealed statutes included *Tenn. Code Ann. §§ 24-6-201* through 206. TENN. CODE ANN. § 24-6-207, which deals with procedural aspects of judicial notice of foreign law at the appellate level, was left intact. § 24-6-207 is now § 24-6-201.

Criminal Procedure and deems the issue of judicial notice of laws to be a procedural matter. In adopting Rule 202, Tennessee recognizes that the bench and bar benefit from the guidance and simplification that result from an easily accessible, written rule.

It is clear under Rule 202(c) that the judge, not the jury, resolves all questions of judicial notice of law. In determining whether judicial notice of law should be taken and, if taken, what law should be judicially noticed, the court is not bound by the rules of evidence, except with regard to privileges.[90]

[3] Mandatory Judicial Notice of Law

Rule 202(a) requires a court to take judicial notice of certain laws: the common law; statutes and constitutions of the United States, the states[91] and territories; rules and regulations of which a federal or Tennessee statute requires judicial notice; and rules adopted by the United States or Tennessee Supreme Courts.[91.1] All of these are easily ascertained and not subject to reasonable dispute.

The Advisory Commission Comment to Rule 202 makes reference to the Uniform Judicial Notice Act, contained in *T.C.A. §§ 24-6-201 through 24-6-207*. However, all but section 207 were repealed in 1991. § 24-6-207 has been renumbered and is now § 24-6-201.

Judicial notice of law may also be required by statute.[91.2]

[4] Discretionary Judicial Notice of Law

[a] In General

Rule 202(b) states that courts may, but are not required to, take judicial notice of five categories of laws upon reasonable notice given to adverse parties.[91.3]

[b] Other Court Rules

The first group of optional judicial notice laws consists of duly adopted federal and state court rules other than those subject to mandatory judicial notice under Rule 202(a). This category allows judicial notice of court rules adopted by federal and Tennessee courts lower than the United States or the Tennessee Supreme Court, and by any court (including the state supreme court) in a state other than Tennessee. This includes the court rules of trial courts, which are commonly referred to as "local rules,"[92] and the internal

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[89] In drafting Rule 202, the Tennessee Advisory Commission on Civil Procedure drew heavily on Rule 202 of the Hawaii Rules of Evidence.

[90] This is consistent with procedures used generally when the court alone decides the admissibility of evidence. *See* *Tenn. R. Evid 104(a)*.

[91] *See, e.g.,* *Indus. Dev. Bd. of Tullahoma v. Hancock, 901 S.W.2d 382, 384 (Tenn. Ct. App. 1995)* (Court of Appeals took judicial notice of provision in Tennessee Constitution and specific Tennessee statute).

[91.1] *See, e.g.,* *Johnston v. Johnston, ___ S.W.3d ___, 2014 Tenn. App. LEXIS 124 (Tenn. Ct. App. Mar. 6, 2014)*, *appeal denied*, *___ S.W.3d ___, 2014 Tenn. LEXIS 506 (Tenn. June 20, 2014)*, *cert. denied*, ***574 U.S. 995, 135 S. Ct. 482, 190 L. Ed. 2d 365, 2014 U.S. LEXIS 7451 (U.S. 2014)*** (judicial notice of specific rules of civil procedure and statutes does not require a motion, since notice is mandated by *Tenn. R. Evid. 202(a)*).

[91.2] *See, e.g.*, *Tenn. Code Ann. § 50-6-115(c)(4)* (Supp. 2014) (judicial notice of worker's compensation laws of another state).

[91.3] *Tenn. R. Evid. 202(b)*. *See, e.g.*, *411 P'ship v. Knox Cty., 372 S.W.3d 582 (Tenn. Ct. App. 2011)* (where Court of Appeals declined to take judicial notice of zoning ordinances in the parties' briefs, since (1) neither party informed the other party that it intended to rely on county zoning ordinances; (2) neither party requested that the trial court take judicial notice of any ordinance or submit a copy of that ordinance to the trial court; and (3) the appellate record did not contain an authenticated copy of the ordinances).

rules of intermediate appellate courts, such as the Rules of the Court of Appeals of Tennessee. The rules of the Tennessee and United States Supreme Courts are included in the mandatory notice provisions of Rule 202(a).

[c] Federal and State Agency Regulations

The second category of optional judicial notice is duly published regulations of federal and state agencies. This is consistent with prior Tennessee law.[93] Whether a regulation was duly published would depend on the administrative laws governing agency procedures in that jurisdiction. Note that the rule specifically includes proclamations of the Tennessee Wildlife Resources Agency. The Tennessee Claims Commission may take notice of state statutes and the rules and regulations of state agencies.[93.1]

[d] Municipal and Other Local Ordinances

Rule 202(b), which gives courts the discretion to take judicial notice of municipal ordinances, significantly changes the law in Tennessee. Historically, judicial notice has been prohibited in this area on the theory that such ordinances are not readily available, sometimes are poorly indexed, and are frequently modified. It is also sometimes difficult to determine whether such ordinances are still valid since they may have been totally or partially altered or repealed by subsequent ordinances. Under prior law the court could consider an ordinance only if it were stipulated by the parties, proven by public official, or certified pursuant to *Rule 44 of the Tennessee Rules of Civil Procedure*,[94] which has since been deleted, having been superseded by the Tennessee Rules of Evidence.

This rule applies only to *duly enacted* ordinances. Whether an ordinance satisfies this test is a question of law for the trial court.

[e] Replaced and Superseded Laws

Rule 202(b) also permits a court to take judicial notice of superseded or replaced laws that would have been subject to mandatory judicial notice under Rule 202(a) had they still been in effect. This includes such laws as common laws replaced by statute, statutes that have been repealed, and Supreme Court rules no longer in force.

[f] Non-American and International Laws

Rule 202(b) authorizes a court to take discretionary judicial notice of treaties, conventions, laws of foreign countries, international law, and maritime law. This departs from prior Tennessee law.[95]

[g] Procedures

Discretionary judicial notice under Rule 202(b) may be taken upon request of a party, but the adverse party must be given reasonable notice of the request.[96] Notice could be accomplished in the pleadings, in a

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[92] Under *Tennessee Supreme Court Rule 18*, all trial courts are required to adopt local rules dealing with such issues as setting cases for trial and disposing of pretrial motions. The trial court is also required to file a copy of its local rules with the Supreme Court's administrative office, thus making them readily available. They can also be accessed on the Supreme Court's website, *www.tsc.state.tn.us/courts/court-rules2/local-rules-practice*.

[93] *See* *Acuff v. Commissioner of Tenn. Dep't of Labor, 554 S.W.2d 627 (Tenn. 1977)*.

[93.1] *Tenn. Code Ann. § 9-8-305* (2015).

[94] *See* *Metropolitan Gov't of Nashville v. Shacklett, 554 S.W.2d 601, 605 (Tenn. 1977)*; *Adams v. Dean Roofing Co., 715 S.W.2d 341, 342 (Tenn. Ct. App. 1986)*.

[95] *See* TENN. CODE ANN. § 24-6-205 (1980) (repealed) (laws of foreign country not subject to judicial notice provision).

motion, or even orally in court. Since notice must be reasonable, presumably the party receiving it must be given a fair opportunity to research the issue and contest the judicial notice. This standard is flexible. It may require little time for notice of a federal appellate rule, or a great amount of time for judicial notice of Liberian corporate law.

End of Document

[96] *Williams v. Epperson, 2020 Tenn. App. LEXIS 88 (Tenn. Ct. App. Feb. 27, 2020)* (*Tenn. R. Evid. 202(b)* requires reasonable notice to adverse parties; because no copy of the municipal code was included in the record, the Court of Appeals had to confine its application of the municipal code to a section as it appeared in the record).