

2.4 Judicial Notice

I have decided to accept as proved the fact that [*insert fact noticed*], even though no evidence was presented on this point [,] [because this fact is of such common knowledge]. You may accept this fact as true, but you are not required to do so.

Comment

An instruction regarding judicial notice should be given at the time notice is taken. “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.” Fed. R. Evid. 201(b) (addressing adjudicative facts). Although the court must instruct a jury in a civil case to accept as conclusive any fact judicially noticed, “[i]n a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.” Fed. R. Evid. 201(f). Thus, in *United States v. Chapel*, 41 F.3d 1338 (9th Cir. 1994), the trial court correctly took judicial notice of a bank’s FDIC status because the evidence established that its status “was not subject to reasonable dispute.” *Id.* at 1342. Moreover, the court did not “usurp the jury’s fact-finding role by taking judicial notice” when it instructed the jury that “you may accept the court’s declaration as evidence and regard as proved the fact or event which has been judicially noticed. You are not required to do so, however, since you are the sole judges of the facts.” *Id.*

Note that Rule 201 does not apply to legislative facts. For example, in *United States v. Zepeda*, 792 F. 3d 1103, 1114 (9th Cir. 2015) (en banc), the court held that whether an Indian tribe is federally recognized is “a question of law to be decided by the judge.” “[T]he court may consult . . . evidence that is judicially noticeable” such as the Bureau of Indian Affairs’ annual list of federally recognized tribes to decide the question. *Id.* Where the court takes judicial notice of a legislative fact, the court may simply instruct the jury to that effect: “You are instructed that [*insert legislative fact noticed, e.g., the Gila River Indian Community of the Gila River Indian Reservation, Arizona, is a federally recognized tribe*]).”

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