

EVIDENCE

BASED ON FEDERAL RULES OF EVIDENCE

Blue text = admissible Red text = inadmissible

JUDICIAL NOTICE

- Judicial notice** is the acceptance of a fact as true without the necessity of formal proof (i.e., indisputable facts of common knowledge in the community or facts capable of verification by easily accessible sources of unquestioned accuracy).
- May be taken for the first time on appeal.

LEGISLATIVE FACTS

- Advisory committee's notes** distinguish legislative facts from adjudicative facts.
- Legislative facts** are those relevant to "legal reasoning" and the "lawmaking process"; include statutory law and judicial decisions.

ADJUDICATIVE FACTS

- Adjudicative facts** are the facts of the particular case.
 - Who did what, where, when, how, with whom, and with what motive.
 - Facts that normally would go to jury, except that judicial notice may be taken because no reasonable person could dispute them because they are generally known or come from sources "whose accuracy cannot be reasonably questioned" (e.g., the reliability of radar speed tests, the boiling point of water).
- Federal Rules of Evidence (FRE)** govern only adjudicative facts.

MANDATORY JUDICIAL NOTICE

- Facts that are so universally known that they cannot reasonably be disputed (adjudicative), must be requested by a party [201(d)]; include:
 - Meaning of legal expressions (legislative).
 - Meaning of English words and phrases (legislative).
 - Federal and state law and official regulations of the forum state or federal government (legislative).
 - Federal and state rules of procedure (legislative).
- Items A-D reflect the court's reasoning process and not judicial notice [201(a) note].

PERMISSIVE JUDICIAL NOTICE

- On its own, the court may take judicial notice of certain matters [201(c)]:
 - Facts that are not reasonably subject to dispute and are capable of accurate determination from undisputable sources, such as almanacs and encyclopedias (e.g., time of sunset on a particular date).
 - Facts that are such common knowledge locally that they cannot be reasonably disputed (e.g., the location of a certain road).
- Records of state or federal court.
- Laws of other states or nations.
- Administrative regulations and orders.

EFFECT OF JUDICIAL NOTICE

- Civil case:** Binding on jury to accept as conclusive any fact judicially noticed.
- Criminal case:** Jury instructed that it may, but is not required to, accept any fact judicially noticed as conclusive [201(g)].

JUDICIAL RULINGS

RULINGS ON EVIDENCE [103]

- Errorless** only if substantial right of party is affected [see *U.S. v. Olano*] and the nature of the error was called to the attention of the judge (but subject to abuse of discretion of the trial court).
 - Conviction for perjury is reversed only if judge's error seriously affects trial's fairness [Johnson v. U.S.].
 - Timely objection or offer of proof to preserve record for appeal; no need to renew claim of error after the court's ruling [103(d)].
 - No objection is necessary if "plain error" or fundamental error that affects validity of verdict.
 - Habeas:** Trial error is **not harmless** when it affects verdict [O'Neal v. McAninch].
 - Suppression of material evidence favorable to defendant violates Due Process [Ryles v. Whitley].
 - Prosecution withholding exculpatory evidence violates Due Process "where the evidence is material either to guilt or to punishment" [Brady v. MD].
- Jury cases:** To prevent inadmissible evidence (e.g., confessions) from being suggested to the jury by any means.

PRELIMINARY QUESTIONS [104]

- The court determines questions regarding the following:
 - Qualification to be a witness.
 - Whether privilege exists.
 - Admissibility of evidence.
- The court should admit evidence conditionally subject to the introduction of fact to establish the relevancy of the evidence.
- The court holds hearings outside hearing of jury (usually in pretrial motion to suppress confession), as well as hearings on other preliminary matters, as justice requires.

BURDENS OF PROOF [301]

Burden of proof consists of burden of production (going forward with the evidence) and the burden of persuasion.

BURDEN OF PRODUCTION: "BURDEN OF GOING FORWARD"

- Provide evidence to show fact exists.
 - Must be sufficient to enable reasonable juror to support a verdict for the party with the burden (a.k.a. making a **prima facie** case).
 - Without evidence, fact does not go to jury; the court would direct a verdict against the party who bears the burden.
- Burden is on party who asserts fact; burden may shift once party has satisfied burden of going forward with evidence.
- Presumptions:** Deductions that the trier of fact is required to draw from the evidence in the absence of a contrary showing; a presumption shifts the burden to the opposing party to disprove the presumed fact.
 - Rebuttable presumptions** place the burden of going forward with the evidence on the opposing party, or a directed verdict is entered against it.
 - If the opposing party meets its burden of going forward with the evidence, the case goes to the jury or judge.
 - If the opposing party does not meet its burden, a directed verdict is entered against it.
 - "Bursting bubble" theory** (majority view):
 - A presumption is not evidence but rather a **preliminary assumption of fact** that disappears after the introduction of sufficient evidence to sustain a contrary finding.
 - Under this theory, the burden of persuasion as to the existence of a fact stays where it was at the beginning.
 - Conclusive presumptions:** Rules of substantive law that cannot be rebutted by producing evidence to the contrary.

BURDEN OF PERSUASION

- Present legally sufficient evidence to persuade trier of fact on all issues; burden on plaintiff to prove the allegations in the complaint, and burden on defendant to prove all affirmative defenses; burden does not shift.
- Standards of proof:
 - Preponderance of evidence:** Fact at issue is more probable or likely to exist than not to exist.
 - Clear and convincing evidence:**
 - Existence of fact at issue is highly probable or reasonably certain.
 - Higher standard than preponderance of evidence.
 - Beyond a reasonable doubt:**
 - Sufficient evidence to overcome presumption of innocence of defendant.
 - Standard used in criminal cases.
 - The court will instruct jury as to which party has burden.

KINDS OF PROOF

DIRECT EVIDENCE

- Proves a proposition **directly**; goes directly to material issue without inference (e.g., eyewitness testimony on issue of who killed victim, i.e., eyewitness saw defendant shoot victim).

CIRCUMSTANTIAL EVIDENCE

- Tends to prove issue **indirectly** through inference; evidence of a **collateral fact** from which, alone or in conjunction with other facts, existence of a material or ultimate fact can be inferred (e.g., on issue of who killed victim, defendant is seen standing over victim's body holding a gun in his/her hand).

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