Judicial Notice of Materials on Appeal

It is a cardinal rule of appellate practice that a litigant generally cannot expand the record on appeal with materials that were not presented to the trial court. Less well known are the exceptions to the rule:

We may correct inadvertent omissions from the record, see Fed. R. App. P. 10(e) (2)(c); cf. United States v. Garcia, 997 F.2d 1273, 1278 (9th Cir. 1993), take judicial notice, see Fed. R. Evid. 201(f); EEOC v. Ratliff, 906 F.2d 1314, 1318 n.6 (9th Cir. 1990), and exercise inherent authority to supplement the record in extraordinary cases, see Dickerson v. Alabama, 567 F.2d 1364, 1366–68 & n.5 (11th Cir. 1977). Consideration of new facts may even be mandatory, for example, when developments render a controversy moot and thus divest us of jurisdiction.


This article introduces the subject of when an appellate court can take judicial notice of materials not found in the trial court's record and provides strategies for making and opposing motions to strike such materials.

Categories of Non-Record Material that Can Be Cited on Appeal

Federal Rule of Evidence 201 provides that "[j]udicial notice may be taken at any stage of the proceeding," including an appeal. See In re Indian Palms Assoc., Ltd., 61 F.3d 197, 205 (3d Cir. 1995) ("Judicial notice may be taken at any stage of the proceeding..., including on appeal..., as long as it is not unfair to a party to do so and does not undermine the trial court's factfinding authority.") (Citations omitted.)

Colonel Frederick Bernays Wiener recognized that appellate litigants can "go outside the record" by using several types of materials, including materials in official governmental files, materials in the court's own files, materials showing that a controversy has become moot, and materials showing an administrative practice. See Frederick Bernays Wiener, Briefing and Arguing Federal Appeals 250–52 (Lawbook Exchange and Hein 2001) (1961) [hereinafter "Wiener"].

Materials in Governmental Files

Appellate courts may take judicial notice of materials in official governmental files. The
As Brandeis demonstrated, an appellate court can also take judicial notice of the statutes of other governments. For example, in Detroit Edison Co. v. NLRB, 440 U.S. 301, 318–19 & n.16 (1979), the Court relied on the existence of federal and state legislation as support for judicial notice of the fact that a "person's interest in preserving the confidentiality of sensitive information contained in his personnel files has been given forceful recognition" by laws governing the recordkeeping activities of public employers and agencies. In addition to taking judicial notice of statutory law, federal law requires judicial notice of regulations and other material published in the federal register. See 44 U.S.C.A. §1507 (2007) ("The contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number.").

Letters in Government Files

The government employed a less well-known method of presenting non-record material for judicial notice by an appellate court in Brown v. Board of Education, 347 U.S. 483 (1954). While delivering a recent commencement address at Columbia University School of Law, Justice Ruth Bader Ginsberg recounted:

In an amicus brief for the United States filed in Brown, the Attorney General urged:

The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination… raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.

The brief included a letter from Secretary of State Dean Acheson on the negative impact of race discrimination upon the conduct of U.S. foreign relations. Acheson wrote:

The United States is under constant attack in the foreign press, over the foreign radio, and in such international bodies as the United Nations because of various practices of discrimination against minority groups in this country… [T]he continuance of racial discrimination in the United States remains a source of constant embarrassment to this Government in the day-to-day conduct of its foreign relations; and it jeopardizes the effective maintenance of our moral leadership of the free and democratic nations of the world.


Licenses, Deeds, and the Terms of Public Officers

Other judicially noticed items from government files have included licenses, deeds, and the terms of service of public officers. See generally, e.g., Massachusetts v. Westcott, 431 U.S. 322, 323 n.2 (1977) ("The fact that respondent holds such a license has been ascertained from the records of the Merchant Vessel Documentation Division of the Coast Guard. These records may be judicially noticed."); McKay v. United States, 516 F.3d 848, 849 n.2 (10th Cir. 2008) ("This deed is not in the record [on appeal], but we may take judicial notice of it to inform our general understanding of the case, particularly as that understanding is consistent with our decision to affirm the district court’s disposition.") (citing 21B Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence 2d, §5110.1 at 306 & n.39 (2d ed. 2005)); Brown v. District of Columbia, 514 F.3d 1279, 1285 (D.C. Cir. 2008) ("We take judicial notice of the fact that Williams did not begin his first term of office as mayor until 1999…").

Materials in the Court’s Own Files

The Appellate Court’s Own Files

Appellate courts may also take judicial notice of "anything in the particular court’s own files." Wiener §82 p. 252; see also United States v. Ahidley, 486 F.3d 1184, 1192 (10th Cir. 2007) ("[W]e may exercise our discretion to take judicial notice of publicly-filed records in our court."); United States v. Rey, 811 F.2d 1453, 1457 n.5 (11th Cir. 1987) ("A court may take judicial notice of its own records and the records of inferior courts."). Based on that rule, records and briefs from other cases previously decided by the appellate court hearing a case might serve to determine whether an argument has been made that the appellate court did not accept, whether
there was a distinguishing fact that the opinion did not mention, or how the court of appeals ruled on a motion that was not the subject of a published order.

Other Courts’ Files
An appellate court may also take judicial notice of the materials in the files of other courts. See, e.g., Opoka v. I.N.S., 94 F.3d 392, 394 (7th Cir. 1996) (“This court, however, has the power, in fact the obligation, to take judicial notice of the relevant decisions of courts and administrative agencies, whether made before or after the decision under review. Determinations to be judicially noticed include proceeding[s] in other courts, both within and outside of the federal judicial system, if the proceedings have a direct relation to matters at issue.”) (internal quotation marks omitted); Aguilera v. U.S. Immigration and Customs Enforcement Div. of Dept. of Homeland Sec., 510 F.3d 1, 8 n.1 (1st Cir. 2007) (taking judicial notice of “copies of orders from immigration judges awarding continuances, changes of venue, and other ancillary relief to several of the petitioners”).

Judicially noticed materials from proceedings in other courts can be used to show a party’s notice of a claim, the occurrence of a judicial act, or the subject matter of related proceedings. See, e.g., Sands v. McCormick, 502 F.3d 263, 268 (3d Cir. 2007) (“We explained that a court may take judicial notice of another court’s opinion to use it as proof that evidence existed to put a party on notice of the facts underlying a claim.”) (citations omitted); Orix Credit Alliance v. Delta Resources (In re Delta Resources), 54 F.3d 722, 725–26 (11th Cir.) (“[T]his Court may take judicial notice of another court’s order... for the limited purpose of recognizing the judicial act that the order represents or the subject matter of the litigation and related filings... Although we may not take judicial notice of a finding of fact by the bankruptcy court, we may note that the bankruptcy court determined as a matter of law that the transformation rule is not the law of the Eleventh Circuit...”) (internal quotation marks and citations omitted), cert. denied, 516 U.S. 980 (1995).

Evidence of Mootness
Using non-record materials to establish mootness is generally acceptable. “It is the duty of counsel to bring to the federal [appellate] tribunal’s attention, without delay, facts that may raise a question of mootness.” Arizonans for Official English v. Arizona, 520 U.S. 43, 68 n.23 (1997) (internal quotation marks and citations omitted). See, e.g., ITT Rayonier, Inc. v. United States, 651 F.2d 343, 345 n.2 (5th Cir. 1981) (taking judicial notice of settlement in related proceeding rendering case at bar moot); see also, e.g., Moore v. Estelle, 526 F.2d 690, 694, 696 (5th Cir.) (taking notice of prior habeas judgment to identify issues already decided), cert. denied, 426 U.S. 953 (1976). If no case or controversy remains, the court wants to know.

Evidence of Administrative Practice
Appellate courts may take judicial notice of official letters that set forth an administrative practice, such an agency’s practice of taking certain legal positions. Weiner §82(ii), p. 251 & n.129 (stating that the Supreme Court took judicial notice of the government’s administrative practice of recognizing the right of a claimant to bring suit under the Trading with the Enemy Act in Rodiek v. United States, 315 U.S. 783 (1942)). See, e.g., Romine v. Diversified Collection Servs., Inc., 155 F.3d 1142, 1146–47 & n.3 (9th Cir. 1998) (“We take judicial notice of a 1996 Federal Trade Commission (FTC) letter indicating that a service similar or identical to Western Union’s AVT service amounted to an indirect form of debt collection.”); American Fed’n of Gov’t Emp’rs v. Acree, 475 F.2d 1289, 1292 (D.C. Cir. 1973) (“We may take judicial notice of the fact that while this appeal was pending the director of the Civil Service Commission’s Bureau of Policies and Standards, in a letter to the president of the American Federation of Government Employees, stated that the Commission would not require an agency to provide a hearing where, as here, the regulations do not require one.”).

Miscellaneous Materials
Appellate courts have taken judicial notice on an array of topics that are found to constitute common knowledge—geography, weather, population, governmental functions, and items found on the Internet. See, e.g., Arizona v. California, 283 U.S. 423, 425 (1931) (“A court may take judicial notice that a river within its jurisdiction is navigable.”); Fullerton v. State Water Res. Control Bd., 153 Cal. Rptr. 518, 528 (Cal. Ct. App. 1979) (“The recent drought, of which we may take judicial notice, is only an example of the many constantly changing and unpredictable conditions in the context of which the competing beneficial uses of water must be balanced.”); Citizens Fin. Group, Inc. v. Citizens Nat’l Bank, 383 F.3d 110, 127 (3d Cir. 2004) (“According to the United States Federal Census of 2000, of which we take judicial notice, all of Armstrong County had only a population of 55,818 persons...”). cert. denied, 544 U.S. 1018 (2005); Sullivan v. City of Augusta, 511 F.3d 16, 36 (1st Cir. 2007) (“We take judicial notice that traffic control is a major responsibility of local police departments around the nation.”); City of Monroe Employees Retirement Sys. v. Bridgestone Corp., 399 F.3d 651, 653 n.1 (6th Cir.) (taking judicial notice of a definition located on the National Association of Securities Dealers, Inc. (“NASD”) website, http://www.nasd.com/resources/glossary), cert. denied, 546 U.S. 936 (2005).

In contrast to judicial notice, where a schedule, chart, or diagram in a brief is not contained in the record, but is based on facts in the record, the appellate court can review it as an illustration or communication of record facts as opposed to an attempt to expand the record with judicially noticed non-record facts. See, e.g., Weymouth v. Colorado Interstate Gas Co., 367 F.3d 84, 99 (5th Cir. 1966) (noting “illustrative schedules prepared in response to this Court's post-argument memoranda calling for supplemental briefs”); Booker v. Williams, 87 So. 2d 426, 428 (Ala. 1956) (“An engineer’s diagram is attached to appellant’s brief as an...”)

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aid in the interpretation of the description of the land... It is not a part of the record, but we can look at it as a part of the argument to see that the description is adaptable to a supposed situation and, therefore, not void on its face for uncertainty.

**Strategies for Motions to Strike and Oppositions**

Not every appellate court is consistent on when it takes judicial notice. Compare, e.g., *Ex parte Ebbers*, 871 So. 2d 776, 794 (Ala. 2003) (“None of the articles now proffered by RSA were among those submitted to the trial judge, and we know of no legitimate basis for taking ‘judicial notice’ of copies of news articles...”), *with Ex parte James*, 713 So. 2d 869, 877 (Ala. 1997) (citing a newspaper article “‘Hunt: No appeal of school ruling,’ Montgomery Advertiser, April 6, 1993, at 1A, included in Brief of Harper, ACE, ADAP, and John Doe Appellees (1950240 and 1950241) App. A.”); and compare *Petition of Lauer*, 788 F.2d 135, 137 (8th Cir. 1985) (“[T]his court takes judicial notice of numerous letters appearing in the metropolitan newspapers of Minneapolis and St. Paul...”), *with *Gicinto v. United States*, 212 F.2d 8, 11 (8th Cir. 1954) (“[T]his court cannot take notice of a newspaper article which was not put in evidence...”). Accordingly, an appellate litigant should take care how he or she presents judicially noticeable materials to an appellate court.

**Clearly Identify Material and Provide Authority for Taking Judicial Notice**

Judges, for good reason, take a dim view of attorneys who try to slip into the record on appeal evidence that is not in the trial court record. For example, the Ninth Circuit explained the following sanction that it imposed:

“[I]t is a basic tenet of appellate jurisprudence... that parties may not unilaterally supplement the record on appeal with evidence not reviewed by the court below.” *Tonry v. Sec. Experts, Inc.*, 20 F.3d 967, 974 (9th Cir. 1994). Litigants should proceed by motion or formal request so that the court and opposing counsel are properly apprised of the status of the documents in question...

Appellees never moved to supplement the record. They merely designated the letter an excerpt of record and referred to it as such in their brief...

Circuit rules authorize monetary sanctions, see 9th Cir. R. 30-2(d), and we believe this is the appropriate remedy in this case. *Lowery*, 329 F.3d at 1024-26.

To avoid this pitfall, appellate counsel should first clearly identify new factual material included in record excerpts or an appendix as not being in the trial court record and state that the party seeks judicial notice of such materials. Second, while this practice is not always followed, if your court requires it, make a motion to supplement the record with the non-record material. Third, provide the appellate court with legal authority for taking judicial notice.

Cite Legal Authority for Taking Judicial Notice

**Adjudicative vs. Legislative Facts**

Legal authority for judicial notice begins with Federal Rule of Evidence 201 and the Advisory Committee Notes that distinguish between adjudicative facts and legislative facts. The text of Rule 201 provides for judicial notice of “adjudicative facts,” and the Advisory Committee Notes to the Rule recognize that courts take judicial notice of “legislative facts.” As the Notes state, “adjudicative facts are those 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 the parties, their activities, their properties, their businesses.” Fed. R. Evid. 201(a), Adv. Comm. Notes (internal quotation marks omitted). A judicially noticeable adjudicative 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).

“Legislative facts, on the other hand, are those which have relevance to legal reason-
ing 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(a), Adv. Comm. Notes. The Advisory Committee provides an example of an appellate court taking judicial notice of a legislative fact in Hawkins v. United States, 358 U.S. 74, 78 (1958), where the Court retained the common law rule that a spouse could not testify against the other, stating: "Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage." The Advisory Committee states that this conclusion has a large mixture of fact, but the factual aspect is scarcely "indisputable." Fed. R. Evid. 201(a), Adv. Comm. Notes. The Advisory Committee Notes that, in reaching a decision, a judge may look to legislative facts without "any limitation in the form of indisputability" and may "make an independent search for persuasive data or rest content with what he has or what the parties present." Id. (quotation marks omitted).

The distinction between legislative and adjudicative facts can play a significant role in an appellate court's use of judicially noticeable material. In Muller, 208 U.S. 412, Brandeis used various governmental reports as legislative facts for the Supreme Court's consideration in formulating a rule of law. By contrast, when a government report provides adjudicative facts—such as in a report to an antitrust case that detailed the amount of certain types of ore located in various regions of the country—the use of such adjudicative facts at the appellate level is more limited. See United States v. Aluminum Co. of America, 148 F.2d 416, 444 (2d Cir. 1945) (L. Hand, J.) ("[f]acts which a court may judicially 'notice' do not for that reason become indisputable... At most we could do no more than treat the report as newly discovered evidence, and send the issue back for another trial, which in the present case we should under no circumstances be willing to do. For these reasons we refuse to take 'notice' of facts relevant to the correctness of the findings; but we do take 'notice' of those relevant to remedies."). If your opponent has sought judicial notice of adjudicative facts, your motion to strike could direct the court's attention to appropriate limitations on the use of such facts.

The Court's and Parties' Prior Practices

In making and opposing motions to strike non-record material, citation to the appellate court's own practices and those of the Supreme Court of the United States can be effective. For example, the Supreme Court of the United States takes judicial notice of, or at least acknowledges, publicly available information outside the record when it cites and quotes publicly available articles in its opinions. See, e.g., Ashcroft v. ACLU, 535 U.S. 564, 567 n.2 (2002) ("When this litigation commenced in 1998, there was approximately 70.2 million people of all ages use[d] the Internet in the United States."); App. 171. It is now estimated that 115.2 million Americans use the Internet at least once a month and 175.6 million Americans have Internet access at home or at work. See More Americans Online, New York Times, Nov. 19, 2001, at C7.); Arizona Governing Comm. for Tax Deferred Annuity and Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1096 n.1 (1983) (citing United States Department of Labor, Study of the Impact of an Equal Benefits Rule on Pension Benefits 4 (1983), which was completed after the District Court issued its opinion in Norris v. Arizona Governing Committee, 486 F. Supp. 643 (D.C. Ariz. 1980)) (emphasis added). Taking judicial notice of a publicly available article and a Department of Labor study outside of the trial records provided the Supreme Court context for its opinions.

At oral argument, litigants before the Supreme Court of the United States and the justices themselves have referred to publicly available information that did not appear in the record. See, e.g., Oral Argument, Glickman v. Wileman Bros. & Elliott, Inc., 1996 WL 700369 at *32 (Dec. 2, 1996) ("Despite what the Wall Street Journal said last week, we're not saying that the beef program has to be thrown out or the milk program has to be —."); Oral Argument, Holmes v. Securities Investor Prot. Corp., 1991 WL 636245 at *52 (Nov. 13, 1991) ("In today's Wall Street Journal, there's an article about the SEC... saying they're concerned about the excesses of RICO civil abuse.") Such statements are not improper because they provide context for the Court's decision.

It is not surprising that the Solicitor General of the United States has cited to publicly available newspaper and magazine articles outside the record that provided context or background for a case. For example, in the reply brief for the federal petitioners and brief for the federal cross-respondents, Federal Communications Commission v. Iowa Utilities Board (June 1998), which is available at http://www.usdoj.gov/osg/briefs/199733mer/2mer/97-08311.rap.mer.html, the Solicitor General cited two articles:

See generally Alarm Bells: Is This Really What Congress Had in Mind with the Telecom Act?, Wall St. J., May 12, 1998, at A1 ("Two years ago, the federal government enacted a law designed to crack local telephone monopolies and bring consumers the benefits of competition. By sweeping away decades of regulation, Washington thought it was paving the way for a free-for-all among the Baby Bells, long-distance carriers, cable operators and other telecommunications providers. Instead, the urge to merge has overwhelmed the compulsion to compete."); A Bid Too Far?, The Economist, May 16, 1998, at 63 ("Like it or not, there is precious little competition in America's $100 billion local telephone market.").

Sol. Gen.'s Br. at *10 n.15.

The 1998 articles were not in the record on appeal before the Eighth Circuit in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), rev'd sub nom., AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999), but they did provide the Supreme Court with useful publicly available background information.

Conclusion

The general rule that an appellate court is confined to the trial court record does not always apply. Appellate courts take judicial notice of a variety of materials. To be successful in seeking judicial notice of non-record materials or in seeking to strike such materials, study the recognized sources of judicially noticeable materials, the difference between legislative and adjudicative facts, and the legal authorities for determining the appropriate scope of judicial notice. Because the breadth of judicial notice policy varies widely among courts, appellate counsel first should research their particular appellate court's decisions to determine its preferences and pet peeves. If used correctly, judicial notice can provide information to an appellate court that is useful and, as Brandeis demonstrated, persuasive.