RULE OF EVIDENCE 201: JUDICIAL NOTICE OF ADJUDICATIVE FACTS

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I. Introduction. Evidence Rule 201 governs judicial notice of adjudicative facts – facts that bear directly on the parties and claims presented in a case. The Rule sets forth the procedure a trial court should follow when taking judicial notice of these facts. While Rule 201 is the only evidence rule concerning judicial notice, other statutory provisions, as noted at the conclusion of this chapter, address specific circumstances where a court may be required or permitted to take judicial notice of certain information.

The text of North Carolina Evidence Rule 201 is reproduced in Figure 1 below.

Figure 1. Rule 201

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. – In a trial court, 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 has been taken.

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

(g) Instructing 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.

II. Rule Applies Only to Relevant Adjudicative Facts. By its express terms, Rule 201 applies only to adjudicative facts. N.C. R. EVID. 201(a). In describing the application of Rule 201, and the concept of judicial notice more generally, common reference materials as well as the official commentary to Rule 201 distinguish between "adjudicative" and "legislative" facts. *See, e.g.*, 1 BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 24 (7th ed. 2011) [hereinafter BRANDIS & BROUN]; 2 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE Ch. 35 (7th ed. 2013) [hereinafter MCCORMICK]; N.C. R. EVID. 201, Commentary. The distinction also can be found in case law. *See, e.g.*, Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 38 (2002). Legislative facts are "those which have relevance to legal reasoning and the lawmaking process." N.C. R. EVID. 201, Commentary (quotation omitted). Adjudicative facts are those that bear directly on the parties to and the claims presented in a particular case. *Id*. Facts about "who did what, where, when, how, and with what motive or intent . . . [are] adjudicative facts." *Id.* (quotation omitted). Adjudicative facts tend to be the sort of facts that, in the absence of judicial notice, would normally go to the jury. *See* N.C. R. EVID. 201, Commentary.

To be the proper subject of judicial notice, an adjudicative fact must be relevant to the proceeding. *See, e.g.*, State v. Leyshon, 211 N.C. App. 511, 523 (2011) (trial court properly refused to take judicial notice of contents of Federal Register that had "no relevance to the North Carolina crime of driving while license revoked"); State v. Baskin, 190 N.C. App. 102, 106 (2008) (citation and quotation omitted) (trial court properly refused to take judicial notice of irrelevant fact); Little v. Little, __ N.C. App. __, 739 S.E.2d 876 (2013) (prejudicial error to take judicial notice of irrelevant material). For a discussion of relevancy under the evidence rules, see Jessica Smith, *Criminal Evidence: Relevancy* in this Benchbook, http://benchbook.sog.unc.edu/evidence/relevancy.

From the perspective of a trial court, determining whether a particular fact is adjudicative or legislative is less important than simply determining whether the fact at issue is both relevant and a kind of fact allowed to be noticed under the Rule as discussed below. This is because subsection (b) of the Rule, describing the "[k]inds of facts" subject to notice, has the practical effect of ensuring that only adjudicative facts come within the ambit the Rule.

III. Court May Not Take Notice of Fact That is Subject to Reasonable Dispute. Rule 201 prohibits a court from taking judicial notice of a fact that is "subject to reasonable dispute." N.C. R. EVID. 201(b). The Rule provides that a fact is not subject to reasonable to dispute if 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. *Id*.

Notwithstanding these explicit tests, some appellate cases simply look more generally at whether a fact is subject to reasonable dispute. *See, e.g.*, Hinkle v. Hartsell, 131 N.C. App. 833, 837 (1998) (the trial court abused its discretion by judicially noticing the fact that certain premises constituted a "high crime area"; the appellate court stated that "the prevalence of crime in and about the premises . . . and how this crime affects the safety of its residents, is no doubt a matter of debate within the community"); Thompson v. Shoemaker, 7 N.C. App. 687, 690 (1970) ("The unavailability of low income housing in Charlotte is undoubtedly subject to debate and in our opinion it is not a factor that can be judicially noticed by this court."); Peters v. Peters, __ N.C. App. __, 754 S.E.2d 437, 439 n.2 (2014) (taking judicial notice of existence of consent order regarding change of

venue where the order was not included in the record on appeal but "its existence [was] not disputed by the parties").

The underlying facts of a previous contested action tend not to be the sort of facts that are the proper subject of judicial notice. *See* Hensey v. Hennessy, 201 N.C. App. 56, 69 (2009) ("[j]udicial notice [was] entirely inappropriate" in this civil case where plaintiff asked trial court to take notice of testimony previously presented in a related criminal matter because the testimony reflected vigorous dispute between the parties regarding defendant's alleged domestic violence); *see also* United States v. Zayyad, 741 F.3d 452, 464 (4th Cir. 2014) (citation omitted) ("Facts adjudicated in a prior case, or in this instance, a prior trial in the same case, do not meet either test of indisputability contained in Rule 201(b)."). In certain circumstances, however, the doctrine of collateral estoppel may have an effect comparable to judicial notice in that the doctrine forecloses dispute of certain facts underlying previously adjudicated cases. A discussion of collateral estoppel is beyond the scope of this chapter, but a trial court should be aware that whether a certain fact may be properly considered as a matter of collateral estoppel is a distinct inquiry from whether the fact is the proper subject of judicial notice. For further discussion of the relationship between collateral estoppel and judicial notice, see KELLA W. HATCHER, JANET MASON & JOHN RUBIN, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA § 11.7 (UNC School of Government, 2011) (John Rubin discussing issue in context of juvenile cases, but providing generally applicable information).

Facts that are not the proper subject of judicial notice under Rule 201 may still be proved by the introduction of appropriate evidence. *See, e.g.*, *Hinkle*, 131 N.C. App. at 837 (whether an area was a "high crime area" was not a fact subject to judicial notice but could have been established by testimony).

A. Facts "Generally Known in the Territorial Jurisdiction of the Trial Court."

The first test of indisputability provided by Rule 201(b) permits judicial notice of facts that are "generally known within the territorial jurisdiction of the trial court." This category of facts figures less prominently in the case law of judicial notice compared to facts that are "capable of accurate and ready determination." *See* MCCORMICK at § 329 ("[T]here is a growing recognition that the common knowledge variety of fact plays only a very minor role on the judicial notice scene."). Readily determinable facts are discussed further in Section III.B. below.

Though certainly sufficient for purposes of the Rule, a judicially noticed fact need not be known universally. *See* MCCORMICK at § 329 n.2. *See also* Simpson v. Simpson, 209 N.C. App. 320, 328 (2011) (holding that a trial court is permitted but not required to "take judicial notice of the customary hourly rates of local attorneys performing the same services and having the same experience"); Smith v. Beaufort Cnty. Hosp. Ass'n, Inc., 141 N.C. App. 203, 211 (2000) (proper to take judicial notice of "the number of highly skilled plaintiffs' attorneys engaged in the trial of medical negligence actions in our state as that information is generally known within the jurisdiction of the trial courts of this state").

Likewise, it is not necessary that the general knowledge required by the Rule be faultlessly precise. *See, e.g.*, Ballenger v. ITT Grinnell Indus. Piping, Inc., 80 N.C. App. 393, 398 (1986) ("Although one may not know the precise or even the approximate temperature of cold water, one knows it when one feels it."), *aff'd as modified sub nom.*, 320 N.C. 155 (1987); State v. Thompson, 349 N.C. 483, 497 (1998) (taking judicial notice of "the commonly known fact" that superior courts "generally convene for the conduct of business somewhere in the 9:00-10:00 a.m. range"); *see also* Dippin' Dots, Inc. v. Frosty Bites Distribution,

LLC, 369 F.3d 1197, 1205 (11th Cir. 2004) (generally known among consumers that color of ice cream is indicative of flavor though there are exceptions).

By specifically identifying facts "generally known within the territorial jurisdiction of the trial court," Rule 201(b) recognizes that generally known facts may vary depending on locality. Thus, in *TD Bank, N.A. v. Mirabella*, __ N.C. App. __, 725 S.E.2d 29, 32 (2012), the Court of Appeals declined to take judicial notice of a South Carolina merger of two banks because the fact of the merger was not generally known within the territorial jurisdiction of the court. *See also* Simpson v. Simpson, 209 N.C. App. 320, 328 (2011) (emphasis added) (cautioning that trial court should not take judicial notice of facts "subject to debate *in the community*").

A trial judge must be careful to distinguish between facts that are subject to judicial notice because they are generally known within the territorial jurisdiction of the trial court, and facts that the trial judge personally knows. Facts known personally to the trial judge may be but are not necessarily subject to judicial notice. *See, e.g.*, Gov't of Virgin Islands v. Gereau, 523 F.2d 140, 147-48 (3d Cir. 1975) (judge's mere personal knowledge of a fact does not satisfy requirements of Rule 201); Greer v. Greer, 175 N.C. App. 464, 472-73 (2006) (judge's personal beliefs regarding natural bond between mothers and infants could not supplant General Assembly's determination that such beliefs were subject to reasonable debate as evidenced by legislative abolishment of tender years presumption).

B. Facts "Capable of Accurate and Ready Determination." The second test of indisputability in Rule 201(b) permits judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. R. EVID. 201(b). There are two distinct considerations within this category of fact. First, the fact itself must be capable of accurate determination. *See* Wood v. J. P. Stevens & Co., 297 N.C. 636, 641 (1979) (judicial notice of the nature of a certain disease was not appropriate because the "causes and development of [the disease], and the structural and functional changes produced by the disease, [were] still the subject of scientific debate"). Second, if the fact is capable of accurate determination, the source to which the court is asked or chooses to resort for confirmation must be unquestionably accurate. For example, in *State v. Canady*, 110 N.C. App. 763, 766 (1993), the Court of Appeals recognized that the "exact time of sunset and the current phase of the moon" are facts "capable of accurate and ready determination" but found that the *Fayetteville Observer* was not a sufficiently accurate source for such information. The court noted that the newspaper did not "identify the source of its data" and expressed a preference for a "primary source" for this information such as the U.S. Naval Observatory. *See also* State v. Brown, __ N.C. App. __, 732 S.E.2d 584, 587 (2012) (taking judicial notice of the time of civil twilight on a certain day in Mebane based on information from the Astronomical Applications Department of the United States Naval Observatory); State v. Dancy, 297 N.C. 40, 42 (1979) (the *Ladies Birthday Almanac* was not "a document of such indisputable accuracy" as to support judicial notice of information in the publication regarding the phase of the moon on a particular night).

The subsections that follow identify and discuss certain types of facts which have been judicially noticed within this category. However, the list is not exhaustive and is not meant to supplant case-by-case application of the

principles of Rule 201. *See* MCCORMICK at § 330 (formulating "inventories of verifiable facts" disfavored because principle better illustrated by example; facts falling within this category subject to change over time); Hinkle v. Hartsell, 131 N.C. App. 833, 836 (1998) (quoting BRANDIS & BROUN) ("although our case law provides a laundry list of situations where judicial notice is appropriate, '[i]t is the spirit and example of the rulings, rather than their precise tenor, that is to be useful in guidance.'").

1. Judicial Records. Judicial notice of judicial records under Rule 201 is an issue that can be both straightforward and difficult, depending on what facts are being noticed.

At the easier end of the spectrum, a court may take judicial notice of the fact that a particular judicial record exists and can draw conclusions logically dictated by the fact of its existence. *See, e.g.*, In re Hackley, 212 N.C. App. 596, 602 (2011) (fact that a foreclosure sale occurred could be judicially noticed by reference to recorded deed); State v. King, __ N.C. App. __, 721 S.E.2d 327, 330 (2012) (taking judicial notice of Clerk of Superior Court records showing that the defendant paid monetary obligations of judgment); State v. Tyson, 189 N.C. App. 408, 410 n.1 (2008) (taking judicial notice of arrest warrant for defendant); State v. Thompson, 349 N.C. 483, 497 (1998) (taking judicial notice of Clerk of Superior Court records establishing district and superior court schedule and presiding judges on a particular day); Muteff v. Invacare Corp., __ N.C. App. __, 721 S.E.2d 379, 387 (2012) (that the Texas Supreme Court had in fact filed a certain opinion was "capable of demonstration by readily accessible sources of indisputable accuracy").

The situation is more difficult where a court takes judicial notice of the substantive content of a judicial record. Judicial notice of the content of a judicial record falls more squarely within Rule 201 where the content to be noticed is indisputable. For example, in *State v. Washington*, 192 N.C. App. 277, 287 (2008), the Court of Appeals took judicial notice that the defendant had been previously convicted of an unrelated crime on a certain date by referring to the Court of Appeals opinion and records regarding the previous conviction. The date of the previous conviction as reflected by the Court's opinion and records is the kind of fact that is itself capable of accurate determination. *Cf.* Gen. Elec. Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1082 n.6 (7th Cir. 1997) (recognizing that it is "conceivable" but rare that a finding of fact from a different proceeding would "satisfy the indisputability requirement of [Rule 201]")

In contrast, judicial notice of the content of judicial records seems to be in tension with Rule 201 when the content to be noticed was the subject of dispute. This is true even where the dispute was adjudicated to resolution. One treatise explains the situation as follows:

> A Court can take judicial notice that a pleading was filed or that a judgment was entered. Likewise, a Court can take judicial notice that court filings contained certain allegations, or that findings of fact were made by another Court. But the truth of these allegations and findings are not proper subjects of judicial notice.

STEPHEN A. SALTZBURG ET AL., 1 FEDERAL RULES OF EVIDENCE MANUAL § 201.02[3] (10th ed. 2011) [hereinafter FEDERAL EVIDENCE MANUAL].[1] *See also Gen. Elec. Capital Corp.*, 128 F.3d at 1082 n.6 ("[C]ourts generally cannot take notice of findings of fact from other proceedings for the truth asserted therein because these findings are disputable and usually are disputed."); Taylor v. Charter Medical Group, 162 F.3d 827, 830 n.18 (5th Cir. 1998) (expressing "difficulty conceiving of an adjudicative fact found in a court record that is not subject of reasonable dispute and, therefore, of which a court could take judicial notice").

The Court of Appeals applied an approach consistent with the FEDERAL EVIDENCE MANUAL where in *Peters v. Peters*, __ N.C. App. __, 754 S.E.2d 437, 439 n.2 (2014) the court took judicial notice of the existence of a particular consent order, and in *Am. Aluminum Products, Inc. v. Pollard*, 97 N.C. App. 541, 550 (1990) the court found that the trial court erred by taking judicial notice of a particular consent order's underlying facts. In *Am. Aluminum Products, Inc.*, the court rejected the argument that the facts found in the consent order constituted a judicial admission. *Id*. In rejecting the argument, the court found that the purpose of the consent order at issue was limited and was not to "dispose of any facts critical to disposition of the issues which were to be tried." *Id*. at 549. Though they are analytically distinct inquiries and a discussion of judicial admissions is beyond the scope of this chapter, a judicial admission has a similar effect to judicial notice in that an admission "removes the admitted fact from the field of evidence by formally conceding its existence." BRANDIS & BROUN at § 198. For a discussion of the relationship between judicial admissions and judicial notice, see KELLA W. HATCHER, JANET MASON & JOHN RUBIN, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA § 11.7 (UNC School of Government, 2011). As discussed in Section III. above, the doctrine of collateral estoppel may also foreclose dispute of certain facts underlying previously adjudicated cases, but the application of the doctrine is unrelated to judicial notice under Rule 201.

It appears that some North Carolina appellate cases in the juvenile context use the term "judicial notice" in situations where an alternative doctrine such as collateral estoppel or judicial admission may be more appropriate. The unique nature of juvenile proceedings limits the extent to which these cases provide useful guidance outside of the juvenile context. For a discussion of these cases and whether they should be understood as proper applications of Rule 201, see KELLA W. HATCHER, JANET MASON & JOHN RUBIN, ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS IN NORTH CAROLINA § 11.7 (UNC School of Government, 2011).

2. **Matters of Judicial Administration.** Factual matters regarding judicial administration are commonly noticed. *See, e.g.*, State v. Thomas, 132 N.C. App. 515, 517 (1999) (taking judicial notice of order of Chief Justice

[1] Note that the North Carolina and Federal Rules are identical in substance except that subsection (e) of the Rule (providing for an opportunity to be heard) is limited to trial courts in North Carolina. N.C. R. EVID. 201, Commentary. The language and structure of Federal Rule 201 was restyled in 2011, but the changes were not intended to substantively alter the Rule. *See* FED. R. EVID. 201, Commentary.

mandating that certain sessions of superior court were to be jury sessions for the trial of criminal land civil cases); *Thompson*, 349 N.C. at 497 (1998) (taking judicial notice by reference to records of Clerk of Superior Court that sessions of district and superior court convened on a certain day and presiding judges); State v. Collins, __ N.C. App. __, __ S.E.2d __ (June 17, 2014) (taking judicial notice of the schedule of a specific trial judge by reference to the calendar of superior courts for the spring 2013 term which was available online).

3. **Dates.** Courts commonly take judicial notice of dates based on reference to calendars. *See, e.g.*, Heaton-Sides v. Snipes, __ N.C. App. __, 755 S.E.2d 648, 650 n.1 (2014) (taking judicial notice of date of certain day of the month by reference to calendar); State v. Gatling, 202 N.C. App. 149, *2 (2010) (unpublished) ("[W]e take judicial notice of the fact that 19 April 2008 was a Saturday[.]").
4. **Geographical Facts.** Geographical facts are frequently noticed as they are capable of accurate and ready determination. *See* State v. Brown, __ N.C. App. __, 732 S.E.2d 584, 587 (2012) (driving distance between two residences); *see also* State v. Saunders, 245 N.C. 338, 343 (1957) (because of pervasive common knowledge and possibility of accurate determination, "the court may be presumed to know the distances between important cities and towns in this State and likewise in adjoining states"); ITS Leasing, Inc. v. RAM DOG Enterprises, LLC, 206 N.C. App. 572, 575 n.2 (2010) (all of the city of Charlotte is in Mecklenburg County).
5. **Natural Phenomena.** Facts about the physical world and natural phenomena may be judicially noticed. *See, e.g.*, State v. Brown, __ N.C. App. __, 732 S.E.2d 584, 587 (2012) (time of civil twilight on a certain day in Mebane based on information from the Astronomical Applications Department of the United States Naval Observatory); Addison v. Moss, 122 N.C. App. 569, 571 (1996) (that debris falling from the back of a truck was subject to the property of inertia).
6. **Reliable Records of Organizations.** Courts may take judicial notice of the records of organizations if the records are sufficiently reliable. *See e.g.*, Smith v. Beaufort Cnty. Hosp. Ass'n, Inc., 141 N.C. App. 203, 211 (2000) (proper to take judicial notice of "the number of times [a law firm] participated in litigation in North Carolina by relying on information supplied by the North Carolina State Bar Association as that information is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned").
7. **Historical Facts.** Courts may take judicial notice of historical facts. *See, e.g.*, Se. Jurisdictional Admin. Council, Inc. v. Emerson, 363 N.C. 590, 591 n.1 (2009) (taking judicial notice of the early twentieth century history of an organization because it was "helpful to an understanding of the issues in [the] case").
8. **Economic or Statistical Information.** Courts sometimes take judicial notice of verifiable economic or statistical information. *Compare, e.g.*, Blackburn v. Bugg, __ N.C. App. __, 723 S.E.2d 585, *4 (2012) (unpublished) (noting that Consumer Price Index figures from the United States Department of Labor website "would be capable of judicial notice"), *with* Falls v. Falls, 52 N.C. App. 203, 218 (1981) (court could not take judicial notice "that the Consumer Price Index [was] the most accurate

gauge of inflation" as index was "only one of several measures of the cost of living").

IV. Court's Discretion With Respect to Judicial Notice.

A. Discretionary Judicial Notice. When the requirements of Rule 201 are otherwise satisfied, "[a] court may take judicial notice, whether requested or not." N.C. R. EVID. 201(c). In the absence of a sufficiently supported request, *see* Section IV.B. below, a court is not required to take judicial notice whenever it is possible to do so. *See* State v. Vogt, 200 N.C. App. 664, 669 (2009) (recognizing that the court had the authority to judicially notice interim sex offender guidelines but declining to "exercise our discretion to do so given that the parties did not bring these guidelines to our attention or discuss them in their briefs"). One consideration that may factor into a court's decision about whether to judicially notice a fact is the degree to which noticing the fact will limit adversarial testing of issues critical to the case. In *Vogt*, for example, the Court of Appeals was reluctant to take notice of facts that would "not have the effect of filling a gap in the record or supplying a missing, essentially undisputed fact," but rather would "introduce[] a large volume of additional information which [had] not been subjected to adversarial testing." *Id*. Such a result, the court worried, would put the court "in the position of trier of fact." *Id*. This concern may not be as great for trial courts as subsection (e) of the Rule, discussed further in Section V.A. below, allows for an opportunity to be heard whenever judicial notice is taken at the trial level.

B. Mandatory Judicial Notice. When a party requests that the court take judicial notice and supplies the court with the "necessary information," judicial notice is mandatory. N.C. R. EVID. 201(d). Though the term is undefined, "necessary information" presumably refers to information that establishes that the fact to be noticed is either "generally known" or "capable of accurate and ready determination" as required by subsection (b) of the rule. With respect to readily determinable facts, appellate courts have required that the party requesting judicial notice furnish "'a document of such indisputable accuracy as [would] justif[y] judicial reliance.'" State v. Canady, 110 N.C. App. 763, 766 (1993) (quoting State v. Dancy, 297 N.C. 40, 42 (1979) (*Fayetteville Observer* not sufficiently reliable regarding phases of the moon).

It is, of course, incumbent on the party requesting notice to actually supply appropriate information to the court. *See* TD Bank, N.A. v. Mirabella, __ N.C. App. __, 725 S.E.2d 29, 33 (2012) (though requested, judicial notice was not mandatory because the supporting documents were not properly filed before either the trial or appellate court but rather were simply attached as an appendix to an appellate brief); Tedder v. CSX Transp., Inc., 216 N.C. App. 184, *5 (2011) (unpublished) (trial court's judicial notice decision was discretionary where plaintiff requested notice but failed to provide any information); Tri-Arc Food Sys., Inc. v. Towns, 211 N.C. App. 647, *3 (2011) (unpublished) (declining to take judicial notice of the nature of a criminal conviction where party failed to supply the court "with the necessary information" and instead suggested that court look up the nature of the conviction on the NC DOC "offender search" webpage).

V. Procedural Issues.

A. Opportunity to be Heard. "In a trial court, 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 has been taken." N.C. R. EVID. 201(e). North Carolina case law does not appear to directly address a party's opportunity to be heard at the appellate level. At least one appellate court has declined to take judicial notice at the request of a party in part because the party's failure to present documents supporting judicial notice to the trial court deprived the party's opponent of an opportunity to "respond fully" to the documents. TD Bank, N.A. v. Mirabella, __ N.C. App. __, 725 S.E.2d 29, 33 (2012). The court noted, however, that the non-moving party made an argument to the appellate court questioning the authenticity of the documents that had been offered in support of judicial notice. *Id*. As noted above, North Carolina Rule 201 differs from its federal counterpart in that the North Carolina rule specifically limits opportunities to be heard to trial courts, *see* N.C. R. EVID. 201, Commentary, whereas the federal rule contains no such limitation, *see* FED. R. EVID. 201(e).

There is little to be said about a party's opportunity to be heard at the trial level that is not explicitly stated in the Rule. Though not required by the Rule, even in the absence of a specific request, a careful trial judge may wish to provide an opportunity to be heard as a matter of course given that judicial notice excuses facts from traditional adversarial testing. *Cf. Vogt*, 200 N.C. App. at 669 (recognizing that judicial notice precludes adversarial testing). *See also* Lussier v. Runyon, 50 F.3d 1103, 1114 (1st Cir. 1995) (among various other errors, trial court did not give parties "real opportunity to address" judicially noticed evidence). *But see* Smith v. Beaufort Cnty. Hosp. Ass'n, Inc., 141 N.C. App. 203, 211 (2000) (rejecting argument that trial court erred by taking judicial notice without providing opportunity to be heard where plaintiffs did not make a timely request under Rule 201(e)).

1. **Rules of Evidence at Hearing.** It is common practice in North Carolina courts for the hearsay rules to be relaxed "when the parties are litigating the propriety of judicial notice." ROBERT P. MOSTELLER ET AL., NORTH CAROLINA EVIDENTIARY FOUNDATIONS § 12-3(A) (2d ed. 2006). Relying on N.C. R. EVID. 104(a), "the judge often permits the parties to use affidavits, declarations, and letters that would usually be considered inadmissible hearsay." *Id*. *See also* N.C. R. EVID. 104(a) (determination of "[p]reliminary questions concerning . . . the admissibility of evidence . . . is not bound by the rules of evidence except those with respect to privileges"); N.C. R. EVID. 1101 (evidence rules inapplicable to "determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a)").

Practice Pointer: Advise Parties That Notice Has Been Taken.

A trial judge should explicitly inform the parties that he or she is taking judicial notice of a fact and ensure that such an announcement is on the record. *See, e.g.*, *In re M.N.C.*, 176 N.C. App. 114, 121 (2006) ("Though not required, we believe the better practice would be to explicitly give all parties notice by announcing in open court that it is taking judicial notice[.]");*In re D.S.A.*, 181 N.C. App. 715, 719 (2007) (same). This practice ensures that the parties are able to exercise their option to request an opportunity to be heard regarding the propriety of taking notice and preserves the record for appellate review.

B. Notice May be Taken at Any Stage of Proceeding. "Judicial Notice may be taken at any stage of the proceeding" including on appeal. *See* N.C. R. EVID. 201(f). *See also* Murray v. Nationwide Mut. Ins. Co., 123 N.C. App. 1, 8 (1996) (when deciding motion for summary judgment court can properly consider evidence of which judicial notice may be taken); State v. McCormick, 204 N.C. App. 105, 113 (trial court took judicial notice of fact at conclusion of state's case-in-chief); *Vogt*, 200 N.C. App. at 669 (2009) (appellate court has authority to take judicial notice). Rule 16 of the Rules of Civil Procedure lists "[m]atters of which the court is to be asked to take judicial notice" as among those issues which are the proper subject of the discretionary pretrial conference provided for by the Rule. *See* N.C. R. CIV. P. 16; *see also* State v. Dancy, 297 N.C. 40, 42 (1979) ("It is desirable and certainly contemplated by G.S. 1A-1, Rule 16(6), that counsel bring to the court's attention, in pre-trial conference, those matters of which it will be asked to take judicial notice.").

1. Special Considerations for Judicial Notice on Appeal. Though there appears to be no North Carolina case on the issue, some federal courts have recognized inherent tension between the provisions of subsection (f) of the Rule, which allows judicial notice to be taken on appeal, and subsection (g) which provides that in criminal cases juries are permitted but not required to accept judicially noticed facts as conclusive. *See* FEDERAL EVIDENCE MANUAL at § 201.02[8] (discussing issue). In *United States v. Jones*, 580 F.2d 219, 224 (6th Cir. 1978), for example, the Sixth Circuit found that because federal Rule 201(g) "plainly contemplates that the jury in a criminal case shall pass upon facts which are judicially noticed," subsection (f) of the Rule permitting judicial notice at the appellate level "must yield in the face of the express congressional intent manifested in 201(g) for criminal jury trials." *But see* MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 201-7 n.15 (7th ed. 2012) (characterizing *Jones* as "incorrectly decided").

Although it seems that the North Carolina appellate courts have not expressly addressed the issue, there are at least three published criminal cases where the appellate courts have judicially noticed a fact that appears, at least superficially, to be the type of fact that it would normally be necessary for the jury to find. In both *State v. Garrison*, 294 N.C. 270, 280 (1978), and *State v. Jordan*, 186 N.C. App. 576, 583 (2007), the respective courts took judicial notice in burglary cases of the time at which it became dark on particular nights. In *Garrison*, the defendant signed a statement indicating that he entered the home at "about 9:00 p.m." and the court took judicial notice that on the March day in question "the sun set at 6:10 p.m. and it was nighttime before 7:00 p.m." 294 N.C. at 280. In *Jordan*, the court took judicial notice that, on the December day in question, "the end of civil twilight occurred at 5:21 p.m." and noted that "the evidence clearly show[ed] that the breaking happened shortly before 6:49 p.m." 186 N.C. App. at 583. Similarly, in *State v. Brown*, __ N.C. App. __, 732 S.E.2d 584, 587 (2012), the court took judicial notice that civil twilight began at 5:47 a.m. on the July morning following a burglary and deduced, based on the driving distance between the victim's home and the defendant's girlfriend's apartment, that it would have been impossible for the defendant to have returned to the apartment by 6:00 a.m. (the time at which his girlfriend testified he

returned after leaving sometime after 10:00 p.m.) unless the break-in occurred while it was dark. None of these cases directly resolve the question of the propriety of taking judicial notice on appeal of a fact that should go to the jury. In each case evidence was actually introduced regarding either the time of day or the natural lighting conditions (or both) obtaining when the house breakings occurred. *See Garrison*, 294 N.C. at 280 (defendant's written statement indicated that he entered home about 9:00 p.m.); *Jordan*, 186 N.C. App. at 583 (victims testified to contacting police "immediately after the perpetrators left the residence" and police received victims' call at 6:49 p.m.; one victim "testified that it was turning dark before she went over to [the house that was burglarized]"); *Brown*, __ N.C. App. at __, 732 S.E.2d at 587-88 (defendant's girlfriend testified that defendant left her apartment after 10:00 p.m. and returned around 6:00 a.m. at which time "[i]t was getting light"; victim testified that it was dark when he went to bed before break-in had occurred). On the one hand it could be argued that taking judicial notice of the fact that it was dark at the time at which a breaking and entering occurred constitutes taking notice of the essential "nighttime" element of the crime of burglary. On the other, it could be argued that because there was evidence before the jury regarding the time of year and day at which the crimes occurred, the jurors could use their experience in everyday life to find that the nighttime element of the crime was satisfied, and the reviewing appellate court simply made explicit that which was implicit in the returned guilty verdict in each case. *See* BRANDIS & BROUN at § 28 (explaining that it is "well-settled" that jurors may "exercise their own reason and common sense, and use the knowledge acquired by their observation and experience in everyday life"). Additionally, it should be noted that in *Garrison* and *Jordan* the issue before the court was the defendant's argument that the trial courts should have instructed the jury on the lesser included offense of felonious breaking and entering. *Garrison*, 294 N.C. at 279-80; *Jordan*, 186 N.C. App. at 582-83. Each court ultimately resolved that issue by finding that there was no conflict in the evidence with regard to the time at which the crimes occurred and, thus, no instruction on the lesser included offense was warranted. *Id*. In *Brown*, the trial court, "out of an abundance of caution," instructed the jury on felonious breaking and entering as a lesser included crime of burglary, and the appellate court noted that in so doing "[t]he trial court properly left the determination of whether the offense occurred in the nighttime to the jury." __ N.C. App. at __, 732 S.E.2d at 588.

Regardless of the foregoing, it is particularly important for an appellate court to be careful with respect to taking judicial notice of an essential element of a criminal offense because doing so with respect to an element that was not proved to the jury may violate a defendant's constitutional rights under the Sixth Amendment and the Due Process Clause. *See, e.g.*, Alleyne v. United States, __ U.S. __, 133 S.Ct. 2151, 2156 (2013) (Sixth Amendment right to jury trial and Due Process Clause require that "each element of a crime be proved to the jury beyond a reasonable doubt"); United States v. Hawkins, 76 F.3d 545, 551 (4th Cir. 1996) (citing Fourth Circuit precedent of refusing to take judicial notice at appellate level of unproven essential element of criminal offense). For

discussion of a trial court taking judicial notice of an essential element of a crime, see Section V.C.1.b. below.

C. Effect of Notice.

1. Jury Instructions. At the trial level, the primary practical consequence of taking judicial notice of an adjudicative fact is that the court must instruct the jury about the effect of judicial notice on the fact finding process. N.C. R. EVID. 201(g). Pattern jury instructions exist for both civil and criminal cases.

a. Civil Actions: Judicially Noticed Facts are Conclusive. In civil actions, the court must instruct the jury that judicially noticed adjudicative facts are conclusive. *Id*. The pattern jury instruction for civil cases is N.C.P.I. Civil 101.14.

b. Criminal Cases: Jury Permitted to Accept Judicially Noticed Fact. "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." N.C. R. EVID. 201(g). The pattern jury instruction for criminal cases is N.C.P.I. Crim. 104.97.

i. Judicial Notice by Trial Court of an Essential Element of Offense. In at least one case, the North Carolina Court of Appeals has rejected a defendant's argument that by taking judicial notice of an essential element of a criminal offense the trial court "lower[ed] the State's burden of proof, and amount[ed] to an unfair weighing in by the Court." State v. McCormick, 204 N.C. App. 105, 113 (2010) ("nighttime" element of burglary). The court referenced North Carolina precedent on the issue, that the trial court had provided the defendant an opportunity to be heard, and that the trial court had properly instructed the jury that it was permitted but not required to accept the noticed fact. *Id*. Note that the concerns discussed above in Section V.B.1. regarding taking judicial notice of an essential element of a crime on appeal do not apply to a trial court because the jury will have the opportunity to pass on the issue and should be instructed that it is not required to accept the noticed fact as conclusive. *See* N.C. R. EVID. 201(g); N.C.P.I. Crim. 104.97.

2. Rebuttal Evidence. While there appears to be no North Carolina case law directly on point, the Official Commentary to N.C. R. EVID. 201 indicates that rebuttal evidence is not allowed with respect to facts judicially noticed in civil cases but is allowed with respect to facts noticed in criminal cases. As a matter of practice, it may be advisable for a trial judge in a criminal case to be wary of taking judicial notice when the party opposing notice stands ready to offer meaningful rebuttal evidence. *See, e.g.*, MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 201-7 (7th ed. 2012) (because trial court can consider inadmissible evidence when taking judicial notice and because jury is likely to be confused when presented with evidence rebutting judicially noticed fact, "resort to judicial notice in criminal cases where the opposing party is prepared to introduce contrary evidence [is] highly undesirable"). Note, however, that if it is proper to take judicial notice of a fact, then it likely will be difficult for a

party opposing judicial notice to find relevant rebuttal evidence. *See* FEDERAL EVIDENCE MANUAL at § 201.02[6] (indicating that indisputable nature of fact properly subject to judicial notice should necessarily make relevant rebuttal evidence scarce).

VI. Other Statutory Provisions. While Rule 201 is the only evidence rule concerning judicial notice, other statutory provisions also address the issue as identified below.

A. G.S. 8-4. Judicial Notice of Laws of United States, other states and foreign countries.

> **G.S. 8-4.**
>
> When any question shall arise as to the law of the United States, or of any other state or territory of the United States, or of the District of Columbia, or of any foreign country, the court shall take notice of such law in the same manner as if the question arose under the law of this State.

Case law from both before and after enactment of the evidence rules suggests that North Carolina courts also will take judicial notice of regulations that have the force of law. *See, e.g.*, State v. Vogt, 200 N.C. App. 664, 669 (2009) (recognizing court's authority to judicially notice Sex Offender Management Interim Policy of the North Carolina Department of Corrections). In contrast, case law suggests that courts will not take notice of municipal ordinances and also will not take notice of regulations that do not have the force of law. *See, e.g.*, Glenn-Robinson v. Acker, 140 N.C. App. 606, 634 (2000) (internal quotation omitted) ("[O]ur courts may not take judicial notice of municipal ordinances . . . much less police department regulations.").

B. G.S. 8-50.2. Results of speed-measuring instruments; admissibility.

> **G.S. 8-50.2(d).**
>
> *Subsections (a) – (c) omitted.*
>
> (d) In every proceeding where the results of a radio microwave, laser, or other speed measuring instrument is sought to be admitted, judicial notice shall be taken of the rules approving the use of the models and types of radio microwave, laser, and other speed measuring instruments and the procedures for operation and calibration or measuring accuracy of such instruments.

C. N.C. R. CIV. P. 9. Pleading special matters.

> **Rule 9(h). Private statutes.**
>
> *Subsections (a) – (g) omitted.*
>
> (h) In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or the day of its ratification if ratified before January 1, 1996, or the date it becomes law if it becomes law on or after January 1, 1996, and the court shall thereupon take judicial notice of it.

D. G.S. 150B-21.22. Effect of inclusion [of a Rule] in [the North Carolina administrative] Code.

> **G.S. 150B-21.22. Effect of inclusion in Code.**
>
> Official or judicial notice can be taken of a rule in the North Carolina administrative Code and shall be taken when appropriate.