National Association of Hearing Officials

SESSION 13B
Are Internet Facts Judicially Cognizable?

Admissibility Factors & Ethical Concerns

Your Presenter . . .

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Objectives

- **I**dentify applicable Codes and Rules
- **D**iscuss the nature of “facts” used in judicial reasoning
- **E**xplore examples of judicial use of internet facts
- **A**rticulate best practices

What are we talking about with “internet facts”

- The original question to be addressed was focused on should ALJs and HOs consult and cite internet sources that purport to give us information or “facts” in our written decisions.
- To answer that question, it is necessary to explore the process of adjudication and decision making in our universe of facts.
- To quote Kimberly Wilkins a/k/a Sweet Brown, …

https://knowyourmeme.com/memes/sweet-brown-aint-nobody-got-time-for-that

Therefore, premises considered, …

- We will discuss the ethical rules or codes that set boundaries for what we may consider in formulating a decision, including things that we may know because of our training and experience ….
- We will look briefly at what legal scholars have told us about the challenges of dealing with facts and fact finding …
- And we will then look at the best practices when we decide it is useful and appropriate to refer to an internet source in our written decision …

Rule 2.9: Ex Parte Communications

- (C) A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.
- Comment [6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

- “[F]acts which are not judicially cognizable must be proved, even though known to the judge as an individual… …[T]he individual and extrajudicial knowledge on the part of the judge will not dispense with proof of facts not judicially cognizable and cannot be resorted to for the purpose of supplementing the record.” *Darnell v. Barker,* 179 Va. 86, 93, 18 S.E.2d 271, 275 (1942).

- A judge may not conduct an inquiry outside of the trial or hearing regarding a fact that is at issue in a pending case, nor can a judge have someone else conduct the inquiry. State v. Emanuel, 768 P.2d 196 (1989); Ryan v. Commission on Judicial Performance, 754 P.2d 724 (Cal. 1988); Price Bros. Co. v. Philadelphia Gear Corp., 629 F.2d 444 (6th Circuit, 1980).

Let’s discuss these phrases

- not judicially cognizable
- regarding a fact that is at issue in a pending case

Judicial Notice of Adjudicative Facts

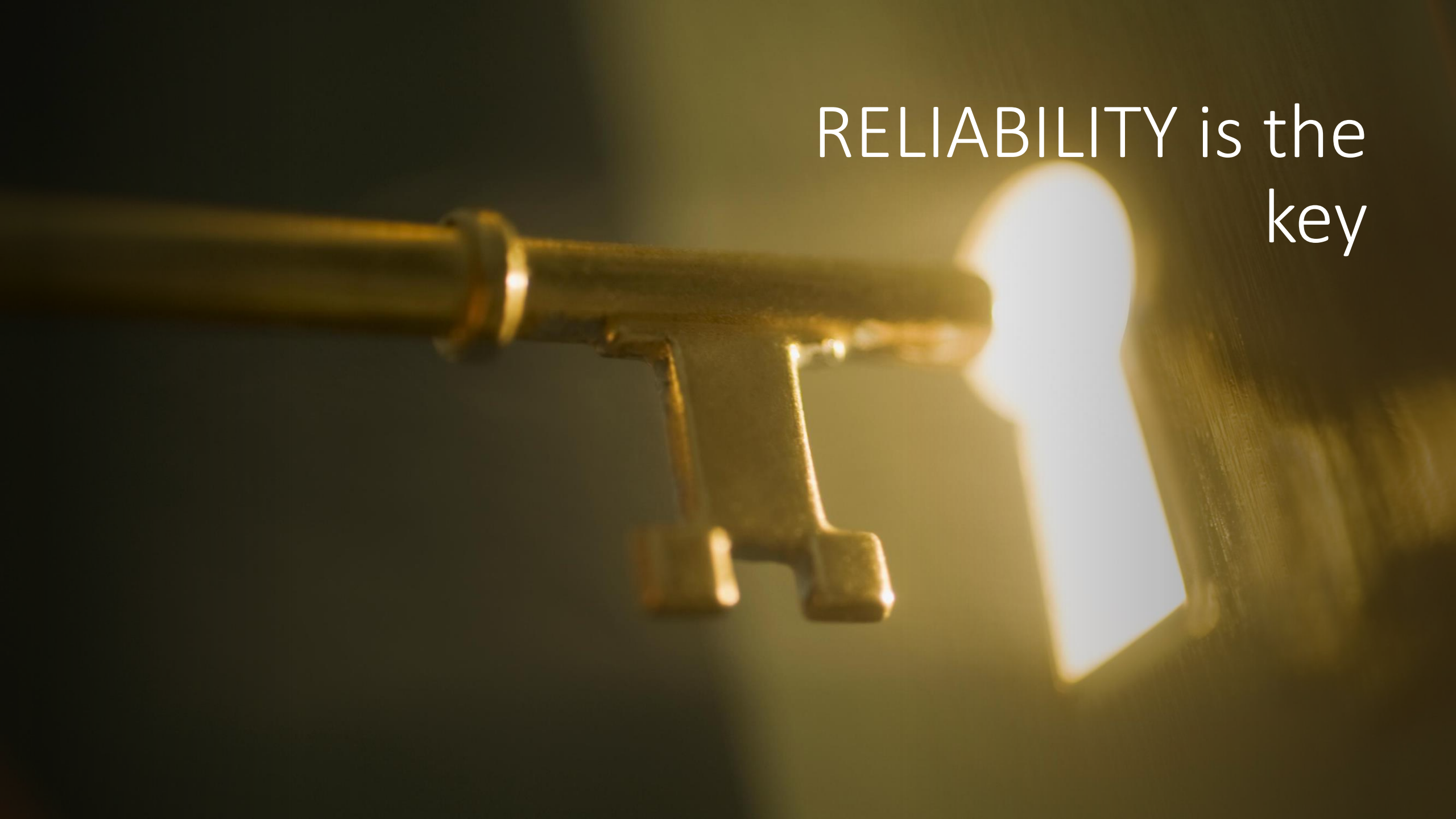
- The usual method of establishing adjudicative facts in through the introduction of evidence, ordinarily consisting of the testimony of witnesses.
- If particular facts are outside of reasonable controversy, this process is dispensed with as unnecessary.
- A high degree of indisputability is the essential prerequisite.

FRE Rule 201.
Judicial Notice of Adjudicative Facts

- (a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.
- (b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:
  - (1) is generally known within the trial court’s territorial jurisdiction; or
  - (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

Current events

- The Florida Legislature has voted in support of CS/HB 677, which will create a new subsection of the Florida Evidence Code on the subject of judicial notice. Specifically, when it goes into effect on July 1, 2022, Section 90.2035, Florida Statutes, will now allow permissible judicial notice of an "image, map, location, distance, calculation, or other information taken from a widely accepted web mapping service, global satellite imaging site, or Internet mapping tool," as long as the image, map, etc. "indicates the date on which the information was created."


RELIABILITY is the
key

Notes to Rule 201

- Subdivision (a). This is the only evidence rule on the subject of judicial notice. It deals only with judicial notice of “adjudicative” facts. No rule deals with judicial notice of “legislative” facts.

Fundamental differences …

- Adjudicative facts are simply the facts of the particular case.
- Legislative facts are 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.

- The terminology was coined by Professor Kenneth Davis in his article An Approach to Problems of Evidence in the Administrative Process, 55 Harv.L.Rev. 364, 404–407 (1942).
- Judicial Notice, 55 Colum.L. Rev. 945 (1955);
- A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69 (1964)

Morgan, Judicial Notice, 57 Harv.L.Rev. 269, 270–271 (1944).

- Edmund M. Morgan said …
- “In determining the content or applicability of a rule of domestic law, the judge is unrestricted in his investigation and conclusion. He may reject the propositions of either party or of both parties. He may consult the sources of pertinent data to which they refer, or he may refuse to do so. He may make an independent search for persuasive data or rest content with what he has or what the parties present.
- * * * [T]he parties do no more than to assist; they control no part of the process.”

- “My opinion is that judge-made law would stop growing if judges, in thinking about questions of law and policy, were forbidden to take into account the facts they believe, as distinguished from facts which are ‘clearly * * * within the domain of the indisputable.’ Facts most needed in thinking about difficult problems of law and policy have a way of being outside the domain of the clearly indisputable.”
- A System of Judicial Notice Based on Fairness and Convenience, supra, at 82.

- “In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved; and the capacity to do this with competent judgement and efficiency, is imputed to judges and juries as part of their necessary mental outfit.”
- Thayer, Preliminary Treatise on Evidence 279–280 (1898).

- This is the view which should govern judicial access to legislative facts. It renders inappropriate any limitation in the form of indisputability, any formal requirements of notice other than those already inherent in affording opportunity to hear and be heard and exchanging briefs, and any requirement of formal findings at any level. It should, however, leave open the possibility of introducing evidence through regular channels in appropriate situations.
- See Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 55 S.Ct. 187, 79 L.Ed. 281 (1934), where the cause was remanded for the taking of evidence as to the economic conditions and trade practices underlying the New York Milk Control Law.

Citation to web sources have become more frequent …

- The Bluebook now includes a citation format for social media.
  - Be sure to get the 20th Edition.
- Web Source Examples in Chicago Style
  - 1. Firstname Lastname, “Title of Web Page,” Name of Website, Publishing Organization, publication or revision date if available, access date if no other date is available, URL.
    - 1. Donald Davidson, Essays on Actions and Events (Oxford: Clarendon, 2001), https://bibliotecamathom.files.wordpress.com/2012/10/essays-on-actions-and-events.pdf.
  - Weston, Anthony. A Rulebook for Arguments, 4th ed. Indianapolis: Hackett, 2010. Kindle.

Judicial use of internet sources

- These cites often relate to non-dispositive matters or are included in string citations.
- Some courts have taken judicial notice of Wikipedia Content.
- Scholars have commented that relying on that source “wouldn’t be right to use it in a critical issue.”
- Others say that Wikipedia is most appropriate for “soft facts,” when courts want to provide context to help make their opinions more readable.”
- It may be “a good source for definitions of new slang terms, for popular culture references, and for jargon and lingo including computer and technology terms.”
- Of the many concerns expressed about Wikipedia use, **lack of reliability is paramount** and may often preclude its use as a source of authority in opinions.

Examples in Supreme Court Opinions

- 1. Our opinion in Roman Catholic Diocese was published on November 25, 2020. COVID–19 vaccines outside of clinical trials weren't available to the public until the following month. See P. Loftus & M. West, First Covid-19 Vaccine Given to U. S. Public, Wall Street J., Dec. 14, 2020, https://www.wsj.com/articles/covid-19-vaccinations-in-the-u-s-slated-tobegin-monday-11607941806.
- 2. Over 200 million Americans, nearly seven in ten, have received at least one dose of these vaccines. Nearly six in ten Americans have been fully vaccinated, including about 85% of those older than 65. See CDC, COVID–19 Vaccinations in the United States, COVID Data Tracker (Oct. 28, 2021), http://covid.cdc.gov/covid-data-tracker/#vaccinations_vacctotal-admin-rate-total.

Online Sources Cited In Supreme Court Opinions

20-303	**United States v. Vaello Madero** • https://www.doi.gov/oia/islands/palmyraatoll • https://www.census.gov/content/dam/Census/library/publications/2020/acs/acsbr20-04.pdf
20-826	**Brown v. Davenport** • http://ssrn.com/abstract=3899955
20-1800	**Shurtleff v. Boston** • https://www.bostonherald.com/2008/11/15/boston-city-hall-named-worlds-ugliest-building • https://www.boston.com/news/history/2018/07/25/boston-city-hall-brutalism • https://www.boston.gov/departments/tourism-sports-and-entertainment/symbols-city-boston • https://www.boston.gov/departments/tourism-sports-and-entertainment/symbols-city-boston

5 TIPS FOR CITING WEB-BASED SOURCES IN LEGAL WRITING

NOVEMBER 10, 2017 BY JOHN PASSMORE

- (https://lawschooltoolbox.com/5-tips-for-citing-web-based-sources-in-legal-writing)
- KNOW YOUR AUDIENCE
- IF THERE IS AN ALTERNATIVE, USE IT
- USE WEB-BASED SOURCES INTENTIONALLY
  - A traditional source may not cover some technical terms related to Bitcoin or NFTs
  - Getting the reader to the cited authority that may otherwise be inaccessible
- USE THE CORRECT CITE!
- USE THEM SPARINGLY

Another Caution from the ABA

- Also, you must remember that online content—especially webpages—can change or vanish at any moment. Indeed, we've all experienced clicking on a link only to see **"Error 404. File not found."**
- In fact, after a year, more than 20 percent of links have "link rot," which means that the linked webpage is no longer available. After five years, link rot increases to 50 percent.

- To avoid link rot, consider providing a backup link obtained through a service that archives online content, such as Harvard Law School's Perma.cc or the Internet Archive's Wayback Machine. As shown below, per Bluebook Rule 18.2.1(d), you should reference your archived link (aka "permalink"), in brackets immediately after the current URL.
- EXAMPLE: Mila Sohoni, Opinion analysis: Court refuses to resurrect nondelegation doctrine, SCOTUSblog (Jun. 20, 2019, 10:32 PM), https://www.scotusblog.com/2019/06/opinion-analysis-court-refuses-to-resurrect-nondelegation-doctrine/[https://web.archive.org/web/20190621170635/https://www.scotusblog.com/2019/06/opinion-analysis-court-refuses-to-resurrect nondelegation-doctrine/].

Additional Resources

- **The Writing Center – Georgetown University Law Center**
  - Bluebook Rule 18: Citation to Internet and Electronic Resources
- **Vanderbilt Journal of Entertainment and Technology Law**
- **Cornell University Law School – Legal information Institute**

QUESTIONS or COMMENTS