

# White Collar & Criminal Litigation

American Bar Association Litigation Section

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## Why Trial Lawyers Should Take Greater Notice of Rule 201

[Kenneth E. Notter III](#)

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A trial lawyer's chief task is to convince the jury to accept his or her version of the facts. Practical and procedural hurdles like the Federal Rules of Evidence often complicate that task. At the same time, an underused rule, Rule 201, offers trial lawyers a handy and potent shortcut: judicial notice.

### The Rule

Rule 201 allows courts to take judicial notice of certain facts that are “not subject to reasonable dispute” because they either (1) are “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.” Fed. R. Evid. 201(b).

### Types of Facts Subject to Judicial Notice

Rule 201 applies to “adjudicative” facts, not “legislative” facts. Adjudicative facts relate to the particular facts of a specific case while legislative facts relate to universal facts that do not vary from case to case, though the line between the two can be blurry. Non-adjudicative facts outside Rule 201’s scope may still be subject to common-law judicial notice. Examples of adjudicative facts under Rule 201 include census data, court records, corporate earnings, geographical boundaries, maps, patent and trademark registrations, product labels, and more.

### Using Judicial Notice at Trial

Judicial notice can be invaluable at trial. Ordinarily, establishing any given fact requires a witness to testify to the fact, which itself involves a series of logistical and strategic difficulties. Calling a witness to testify to one fact and nothing else can sap momentum or require presenting the fact out of sequence, for example. But judicial notice requires no

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testifying witness and can be used at any time. And for criminal defendants, judicial notice can be a particularly attractive option given the risks inherent in calling defense witnesses who will then be subject to cross-examination.

Best of all, “the court must instruct the jury to accept the noticed fact as conclusive” in a civil case and the jury “may or may not accept” it “as conclusive” in a criminal case. Fed. R. Evid. 201(f). Even in the criminal context, an instruction from a judge that a fact has been established and may be treated as conclusive can be powerful. Having the judge appear to validate even a minor point can bolster an advocate’s credibility with the jury. And if nothing else, the break in testimony when the judge instructs the jury can help ensure that the jury is listening.

These advantages make judicial notice a tool that every trial lawyer should have at the ready.