5-2016

The "Duh" Standard is the Basic Premise in Montana's Rules of Judicial Notice

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Judicial notice is a shortcut to proof of a fact at trial. If the judge does "notice" a fact, the parties need not (and sometimes may not) put on evidence of that fact at trial. Instead, the judge instructs the jury that the particular fact is true for the purposes of the case. This process, obviously, is a huge time-and-money saver for the lawyers, their clients, juries and court personnel.

The basic premise of judicial notice is that facts that are so clearly true that no reasonable person would dispute them. Justice Laurie McKinnon, writing for the Montana Supreme Court in 2014, said the same thing, better: "One function of judicial notice is to avoid a waste [of] time litigating about undeniable matters." Edward J. Imwinkelried, *Courtroom Criminal Evidence* vol. 2, § 3002, 30–2 (5th ed., Bender 2011) (internal citation and quotation marks omitted)." *In re Marriage of Carter-Scanlon & Scanlon*, 2014 MT 97, ¶ 17, 374 Mont. 434, 439, 322 P.3d 1033, 1037. I have reformulated the test into more prosaic terms: the "Duh!" test: If, after the necessary witness(es) and/or exhibit(s) put on proof of a fact, the jurors would say to themselves "duh," the court should shortstop the process and take judicial notice of that fact. If, on the other hand, the jurors would say, "Who knew?" the matter is better left to the crucible of proof and the court should deny judicial notice.

Both the Montana and Federal Rules of Evidence provide for judicial notice. However, whereas most of the MRE are substantially the same as their federal counterparts, our state rules on judicial notice vary dramatically from the FRE. In my opinion, the Montana version is much the better of the two. Below, I do a brief comparison of the two sets of rules, and then focus on types of facts which the Montana Supreme Court has held are and are not suitable for judicial notice. I will treat the procedure for obtaining judicial notice, and its effect if granted, in Part II of this article, to be published in the next Evidence Corner column.

MRE v FRE judicial notice provisions

Article II of the Montana Rules of Evidence is entitled "Judicial Notice." It contains two rules: Rule 201, "Judicial Notice of Facts," and Rule 202, "Judicial Notice of Law." Article II of the Federal Rules of Evidence bears the same title. However, there is only one rule in the article: FRE 201, entitled "Judicial Notice of **Adjudicative** Facts." There is no specific rule for judicial notice of law in the federal courts. Helpfully, FRE 201(a) defines the scope of the rule: "**(a) Scope.** This rule governs judicial notice of an adjudicative fact only, not a legislative fact." Unhelpfully, the rule nowhere defines "adjudicative fact" or "legislative fact." The rule also fails to discuss whether the federal courts may take judicial notice of a legislative fact or whether the exclusion of these facts from FRE 201 prohibits judicial notice of them. The cases discussing the application and effect of FRE 201 are in profound disarray.

As only one example, the federal circuits disagree on the classification of a relatively simple and frequently necessary type of jurisdictional fact: whether a particular piece of ground is "federal" within the meaning of 18 U.S.C. § 7(3) for purposes of a criminal assault charge against a prisoner incarcerated in a federal prison. In an assault case stemming from an incident in Puerto Rico, the trial judge took judicial notice under Rule 201 of the fact that the prison where the assault occurred was "within the special maritime and territorial jurisdiction of the United States, characterizing this fact as "adjudicative." The 1st Circuit affirmed, but noted disagreement by other circuits:

> Some other Courts of Appeals have held that Rule 201 is not applicable to judicial notice that a place is within the "special maritime and territorial jurisdiction of the United States," finding this to be a "legislative fact" beyond the scope of Rule 201. See *United States v. Hernandez–Fundora,* 58 F.3d 802, 811 (2d Cir.1995); *United States v. Bowers,* 660 F.2d 527, 531 (5th Cir.1981); *see also* II Kenneth Culp Davis & Richard J. Pierce, *Administrative Law Treatise,* § 10.6, at 155 (3d. ed.1994). *But see* Wright & Graham, *Federal Practice & Procedure* § 5103 n. 16 (1999 Supp.) ("One court has resolved the problem by a dubious holding that the fact that Fort Benning is under the jurisdiction of the United States is a legislative fact," citing *Bowers*).

United States v. Bello, 194 F.3d 18, 23 (1st Cir. 1999).[1]

Mississippi, whose Judicial Notice rule is identical to the federal rule, made the following comment, which illustrates clearly why Montana did not (and should not) mirror the FRE treatment of judicial notice:

> ***COMMENT***
>
> ***(a)*** *The entire codification of the law of judicial notice is in Rule 201. Professor Kenneth Davis, in*

1 The federal split continues. In 2013, after it held that the prosecution had not adduced evidence of the jurisdictional element at trial, the 2nd Circuit itself took notice of this same jurisdictional fact on appeal, stating: "whether a particular plot of land falls within the special maritime and territorial jurisdiction of the United States is a 'legislative fact' that may be judicially noticed without being subject to the strictures of Rule 201." United States v. Davis, 726 F.3d 357, 367 (2d Cir. 2013).

his now famous article, "An Approach to Problems of Evidence in the Administrative Process", 55 Harv.L.Rev. 364 (1942), divided judicial notice into two parts, adjudicative and legislative. Adjudicative facts are easily understood; they are specific to the litigation. Legislative facts, on the other hand, are more amorphous. To determine legislative facts one must look at the public policy or policies involved in judge-made law. Despite the existence of two types of judicial notice, Rule 201 only governs judicial notice of adjudicative facts. A court's application of judicial notice of legislative facts is more an inherent part of the judicial process rather than an evidentiary matter.

Clear as mud? And most of the federal cases do use Professor Davis' Administrative Law treatise and article to muddle through the uncertain divide between adjudicative fact (judicially noticeable per F.R.E. 201) and non-adjudicative fact (not mentioned in the rule at all[2], and renamed "legislative fact" by Professor Davis).

Montana's Evidence Commission also observed the disarray in the federal system over judicial notice and wisely chose to sidestep it by providing clearer and more specific rules. The Commission Comment minces no words:

> The Commission believes that use of the terms "adjudicative" and "legislative" facts as is done with Federal Rule 201 is confusing and that they cannot be readily or easily applied to all factual situations. The Commission rejects the approach under the Federal Rule 201 of limiting judicial notice to adjudicative facts because this is a basis which is totally new, not clearly defined, and contrary to existing Montana practice. The confusion and litigation bound to result are clearly contrary to a rule which is meant to save time and expense.

Bless their hearts. Because this column is devoted to Montana-specific evidence subjects, I will follow the lead of the Montana Commission Comment and leave the federal confusion to the federal commentators and courts. Thus, the rest of this article focuses exclusively on Montana state court use of judicial notice.

Montana cases

WestlawNext lists 201 cases in its annotations to M.R.E. 201. I have scanned that list, and found that the large majority of Montana judicial notice cases there predate the current version of M.R.E. 201. Because the Evidence Commission explicitly commented that it "intend[ed] to preserve existing law in Montana" in M.R.E. 201, the older cases are still valuable but I have chosen here to concentrate on more recent jurisprudence applying the M.R.E. rules. The subject is quite vibrant; there are five cases in just the first three months of 2016. I have organized them below in technical categories of "OK" and "not OK" both for Rule 201 (fact) and Rule 202 (law). Obviously, this list is illustrative but not exhaustive.

Judicial Notice OK per Montana cases under MRE 201 (Fact)

The Montana Supreme Court recently has approved the taking of judicial notice of facts under M.R.E. 201 in several contexts.

In a highly contentious dispute between feuding family members as to an elderly Alzheimer's patient with significant assets, the court approved judicial notice of the fact of the competence of a particular attorney in a particular location to undertake the complex guardianship. *In re Guardianship of A.M.M.*, 2015 MT 250, §64.

The court has sanctioned use of judicial notice frequently in termination of parental rights proceedings. Its most explicit discussion of this tool in this context is in *In re A.S.W.*, decided in 2014. In that case in Flathead County in 2013, DPHHS filed a motion for judicial notice of the mother's two previous terminations of parental rights from Cascade County in 2005. The 2005 order from Cascade County stated that the mother completed three parenting classes, but she had not completed her treatment plan. She objected to judicial notice, arguing that the previous terminations were not relevant to the present proceeding because she was denied due process at the 2005 proceedings because of alleged ineffective assistance of counsel. Nonetheless, the Flathead County court granted the motion for judicial notice, and issued its own order terminating the mother's rights as to her third child, A.S.W. *In re A.S.W.*, 2014 MT 251N, ¶ 6, 376 Mont. 550, 347 P.3d 265.

The Supreme Court held that judicial notice of prior terminations is proper:

> ¶ 12 Mother next argues that the District Court should not have taken judicial notice of her prior 2005 terminations under the Montana Rules of Evidence. However, judicial notice may be taken of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." M.R. Evid. 201(b)(2). Judicial notice must be taken "if requested by a party and supplied with the necessary information." M.R. Evid. 201(d). A district court may take judicial notice of "[r]ecords of any court of this state or of any court of record of the United States or any court of record of any state of the United States." M.R. Evid. 202(b)(6). Applying these rules to termination of parental rights proceedings, we have held that **"[a] district court, by necessity, must take judicial notice of prior terminations if it is to determine whether those terminations are relevant to the parents' ability to care for the child currently at issue.**" *In re T.S.B.*, ¶ 35. (Emphasis added.)
> In this case, the fact that the mother has prior terminations of parental rights is not clearly and reasonably disputed. To the extent that the District Court considered the circumstances of the prior termination as set forth in the Cascade County

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2 It turns out that the omission of non-adjudicative fact from F.R.E. is construed to liberate the use of judicial notice of these facts (if you can figure out what they are) from the strictures of Rule 201, rather than indicating that no judicial notice of non-adjudicative facts should be allowed. See, U.S. v. Gould, 536 F.2d 216, 219 (8th Cir. 1976): "...rule 201 is not all-encompassing. "Rule 201 * * * was deliberately drafted to cover only a small fraction of material usually subsumed under the concept of 'judicial notice.' " 1 J. Weinstein, Evidence P 201(01) (1975)."

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> District Court's Findings of Fact, we have previously held: **"[A] termination under § 41-3-609(1)(d), MCA, requires a court to take judicial notice of prior terminations *and the facts and circumstances surrounding those orders*.** *See* M.R. Evid. 201, 202." *In re T.S.B.*¶ 35 (Emphasis added.)
> ¶ 14 In this case, the circumstances of the mother's prior terminations were very similar to the situation with *A.S.W.* Clinical psychologists in both the 2005 Cascade County case, and in the 2013 Flathead County case testified to the mother's inability to care for her children due to her permanent mental deficiencies. As the Cascade County Court did in 2005, the District Court in this case concluded that no services exist that would allow the mother to learn to care for her children within a reasonable time. Therefore, the District Court did not abuse its discretion by taking judicial notice of her prior terminations.

In re A.S.W., 2014 MT 251N, ¶¶ 12-14, 376 Mont. 550, 347 P.3d 265. See also, *In re J.S.*, 2015 MT 59N, ¶ 8, 378 Mont. 540, 348 P.3d 672.

In another case terminating parental rights, the trial judge took judicial notice of another type of fact — that the contesting father had several recent felony convictions and had been sentenced for them to 100 years at the Montana State Prison, with 60 years suspended. The Montana Supreme Court found several "harmless" procedural errors in the termination process, but did not include the taking of judicial notice among them. The result was affirmed. *In re N.B.,* 2015 MT 88N, ¶ 7, 378 Mont. 542, 348 P.3d 673. See also, *In re J.B.. Jr.*, 2016 MT 68; *In re M.S.,* 376 Mont. 394, 336 P.3d 930, 2014 MT 265.

In *A.S.W*, the court explicitly distinguished another 2014 case involving the use of judicial notice of CSED income determinations in a trial for child support. Joe, the dad, had two children with his ex-wife, Lona. At the time of their divorce, he was earning more than $87,000 and the court set his monthly child support at $1,381.00. Joe resigned from his job and invested in a real estate development company, from which he expected to make his living. He twice petitioned for a reduction in child support. He was successful the first time, achieving a substantial reduction in his obligation. Before the hearing on the second petition for reduction of support, however, Joe had another child with another woman, Joann. Joann opened a case with the Child Support Enforcement Division to determine support for that child. On appeal from the initial ruling, the ALJ found Joe's income to be less than $25,000 and set his obligation for Joann's child at $83 per month.

In Joe's District Court action for modification for the support of Lona's children, he moved for judicial notice of the CSED's income determination. Lona opposed the motion on the grounds she wasn't present at and had no notice of the CSED proceeding and should not be bound by it. The Court ruled on the motion cryptically:

> "[T]he Court sees no problem with taking judicial notice of the fact that CSED made a determination as to what Joe's income is." It continued, "This in no way binds this court and does not limit Lona's ability to introduce evidence to the contrary." Citing the Commission Comments to Rule 201, the District Court stated that because the amount of Joe's income was in dispute, Lona was to be afforded the opportunity to contest the CSED income determination. The District Court concluded: "The Court will take judicial notice of CSED's determination of Joe's income, but does not intend to be bound by that determination. Lona will be given full opportunity at the hearing to present whatever evidence she has that might suggest that Joe is voluntarily underemployed."

In re Marriage of Carter-Scanlon & Scanlon, 2014 MT 97, ¶ 11, 374 Mont. 434, 437, 322 P.3d 1033, 1035.

Lona was allowed to present expert testimony about Joe's employability and imputed income. The judge did impute annual income of $52,000 and denied any reduction in child support. (The Findings of Facts and Conclusions of Law confusingly indicated that the father had requested judicial notice, but that the court had denied the motion).

On appeal, the Supreme Court noted the apparent inconsistency in the trial judge's statements about judicial notice, and took the opportunity to discuss the purpose of judicial notice and the differences between Rule 201 and 202. Ultimately, it held:

> [A]s Rule 201 clearly states, and a substantial body of federal case law holds, a court may not take judicial notice of fact from a prior proceeding when the fact is reasonably disputed, as it is here. M.R. Evid. 201(b); see *Wyatt v. Terhune,* 315 F.3d 1108, 1114 (9th Cir.2001) ("[T]aking judicial notice of findings of fact from another case exceeds the limits of Rule 201."); *Lee v. City of Los Angeles,* 250 F.3d 668, 690 (9th Cir.2001) ["[W]hen a court takes judicial notice of another court's opinion, it may do so not for the truth of the facts recited therein, but for the existence of the opinion, which is not subject to reasonable dispute over its authenticity" (internal quotation marks and citation omitted)]; *Hennessy v. Penril Datacomm Networks,* 69 F.3d 1344, 1354 (7th Cir.1995) ("In order for a fact to be judicially noticed, indisputability is a prerequisite."). Thus, although Joe requested judicial notice of fact, and arguably supplied the necessary information pursuant to M.R. Evid. 201(d), judicial notice of fact was not mandatory because the fact was clearly and reasonably disputed.
> ¶ 24 We conclude that the District Court did not abuse its discretion by taking judicial notice of the existence of the CSED's administrative order, or by refusing to take judicial notice of the truth of its underlying facts.

In re Marriage of Carter-Scanlon & Scanlon, 2014 MT 97, ¶¶ 23-24, 374 Mont. 434, 441-42, 322 P.3d 1033, 1038. The Court took pains to distinguish this case from the parental termination

cases, and to reiterate that trial courts may continue to take judicial notice of the felony convictions and sentences of the parents in those cases.

Judicial Notice Not OK Under MRE 201 per Montana cases

Shortly before M.R.E. 201 went into effect, the Montana Supreme Court analyzed a Workers' Compensation Proceeding in which the judge below took judicial notice of the contents of the claimant's medical file. Relying on F.R.E. 201, the court observed that it allowed judicial notice of adjudicative facts only (a distinction eliminated in the 1978 M.R.E.) but did not expressly find whether or not the letters in the file from doctors who did not testify were adjudicative or not. The court's holding still applies today:

> Disputed medical conclusions by doctors contained in medical reports cannot be judicially noticed. It should be remembered judicial notice is intended to save time and expense by not requiring formal proof for Undisputed facts. **Judicial notice cannot supply evidence in the form of unsworn hearsay testimony in letters, absent agreement of the parties.** (Emphasis added).

Hert v. J. J. Newberry Co., 178 Mont. 355, 365, 584 P.2d 656, 662 (1978)[3].

The plaintiffs in *Morrow v. Monfric*, a wage dispute, sought certification as a class of laborers on two construction projects in Kalispell. The district judge denied the class certification. On appeal, the Montana Supreme Court affirmed, observing that the "proposed class in this case includes 24 to 28 persons, seven of whom are named plaintiffs and class representatives. This is near the number below which class certification is likely to be considered inappropriate." *Morrow v. Monfric, Inc.*, 2015 MT 194, ¶ 11, 380 Mont. 58, 62, 354 P.3d 558, 562. The court allowed that geographic dispersion of the class members might tip the balance to certification, but held that the plaintiffs had the burden of proving this factor and that their judicial notice request did not carry that burden:

> Plaintiffs argue that there is no evidence the proposed class members still reside in the Kalispell area, and ask the court to take judicial notice of the fact that many Montana laborers work in the oil fields of North Dakota. Plaintiffs have offered no evidence suggesting that the laborers who worked on the Monfric projects have left the Kalispell area. Indeed, at the hearing on Plaintiffs' motion for class certification, it was made clear that counsel had not attempted to locate the remaining proposed class members, and the idea that they may have left for North Dakota was based entirely on an off-the-cuff suggestion by the District Court. Plaintiffs have not produced facts in support of their argument that the geographical dispersion of the proposed class members makes their joinder in a single action impracticable. The District Court did not abuse its discretion when it concluded that joinder was not impracticable because the proposed class members were in the same geographic area.

2015 MT 194, ¶ 13, 380 Mont. 58, 63-64, 354 P.3d 558, 562-63.

The court repeated the colloquy which occurred during the trial court's hearing:

> The District Court asked counsel for Plaintiffs why the remaining 17 to 21 individuals could not simply be joined as parties. Counsel responded, "I can try to do that. I didn't have their names ... and I don't have all their addresses." The District Court observed that the proposed class was "a relatively small group of ... local employees, although I suppose if this work happened ... prior to 2008 anyway that they're probably all over in North Dakota now."

2015 MT 194, ¶ 5, 380 Mont. 58, 60, 354 P.3d 558, 560.

As I will discuss in more detail next month, this case illustrates a common attempted use of judicial notice: to fill in a gap the attorney could have, and should have, identified and filled with actual evidence. As here, this usually does not work.

Judicial Notice OK under MRE 202 (Law)

The Court's most recent use of judicial notice occurred on Feb. 25, 2016, in its decision in *Montana Cannabis Industry Association v. State*, 2016 MT 44, regarding the 2011 Montana Marijuana Act. Justice Baker, writing for the majority, stated:

> After this case was argued, Plaintiffs called the Court's attention to a recent Congressional Appropriations Act that prohibits the Justice Department from spending funds that would prevent states — including Montana — from implementing their own laws authorizing the use, distribution, possession, or cultivation of medical marijuana. Consolidated Appropriations Act, 2016, Pub. L. 114-113, § 542 Div. B, tit. V, 223 (2015). **We take judicial notice of this action pursuant to M. R. Evid. 202(b).**

¶ 28. Oral argument occurred on Nov. 4, 2015. The plaintiffs (challenging the act) filed a Motion for Judicial Notice of recent enactment of the federal law which prohibited the DOJ from interfering with Montana law regarding medical marijuana[4]. The state had previously opposed judicial notice of the pending federal bill on the grounds that it had not become law; once it was enacted, the state did not oppose the motion for judicial notice. However, the judicially noticed softening of federal law on the cannabis issue did not sway the majority: "While the measure does evince developing attitudes in Congress, the substantive criminal prohibitions in federal law remain intact."

Almost as recently, the court clarified the distinction between Rules 201 and 202 when it approved the trial court's judicial

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3 Hert's holding about the non-admissibility of letters from doctors was changed administratively, for Workers' Compensation proceedings only, in 1990 by the adoption of Rule 24.5.317, ARM. Miller v. Frasure, 264 Mont. 354, 365, 871 P.2d 1302, 1308 (1994).

4 https://supremecourtdocket.mt.gov/view/DA%2015-0055%20Other%20--%20Motion%20-%20Opposed?id=%7BC0446052-0000-C410-BBC7-2483FF9FF20D%7D

notice of previous court proceedings in a long and complex dispute:

> ¶26 The Montana Rules of Evidence allow a District Court to take **judicial notice** of facts, M. R. Evid. 201, or **judicial notice** of law, M. R. Evid. 202. Under Rule 202, the District Court may take **judicial notice** of the "[r]ecords of any court of this state." M. R. Evid. 202(b)(6). We have held that this rule "includes prior proceedings in other cases, *Farmers Plaint Aid v. Fedder,* 2000 MT 87, ¶¶ 26-27, 299 Mont. 206, 999 P.2d 315, and prior proceedings in the same case, *State v. Loh,* 275 Mont. 460, 477-78, 914 P.2d 592, 603 (1996)." *State v. Homer,* 2014 MT 57, ¶ 8, 374 Mont. 157, 321 P.3d 77. In this case, the District Court noted in its order granting the bank's motion for summary judgment that the "factual and procedural backgrounds are based on the record in this case, as well as court records the Court is entitled to take **judicial notice** of under Rule 202." The District Court then listed the opinions and records of which it was taking **judicial notice**, including our opinion in the Foreclosure Action, and the District Court records of the Interpleader Action and the Foreclosure Action. Rule 202 allows a District Court to take **judicial notice** of the prior proceedings in this case and in other cases, and the District Court did not abuse its discretion in so doing.
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> ¶27 Further, in order to properly consider the bank's argument that the estate's claims were barred by the compulsory counterclaim rule or by claim preclusion, the District Court would have needed to review the record in the Foreclosure Action to determine if the issues presented in that action were the same as the issues presented in this action, and to determine if the facts alleged in the Estate's complaint in this action were in existence during the pendency of the previous action. The District Court did just that: reviewed the discovery produced in the Foreclosure Action and determined that the facts central to the Estate's present claims were in existence during the Foreclosure Action. The District Court did not take improper **judicial notice** of facts under Rule 201, but rather properly exercised its discretion under Rule 202 to take **judicial notice** of the record in previous actions. (Emphasis added.)

Estate of Kinnaman v. Mountain West Bank, 2016 MT 25.

The rendering of an order by the U.S. District Court for the District of Montana, dismissing a plaintiff's federal case: "We take **judicial notice** of the United States District Court's Order pursuant to M. R. Evid. 202(4), (6) (allowing a court, whether requested by a party or not, to take **judicial notice** of official acts of the judicial departments of the United States and of records of any court of record of the United States)." *Townsend v. Glick*, 2015 MT 329N, §4;

The Supreme Court noted, without criticism, the fact that one district court had taken judicial notice of related proceedings already pending in another district court. The Court affirmed the noticing court's dismissal of the declaratory judgment action:

> ¶ 7 On Sept. 22, 2014, the 18th Judicial District Court in Gallatin County dismissed Murray's declaratory relief action for lack of a justiciable controversy and declined to rule on the COPP's motion for summary judgment. Noting its authority under M.R. Evid. 202, the court took judicial notice of the pending proceedings in the 1st Judicial District Court and concluded that Murray already had "an adequate alternative remedy available to him in that he may assert—and may already have asserted—the issues sought to be declared here as a defense," in the Enforcement Action. The court also concluded that any decision it might make would not bind the First Judicial District Court and would otherwise result in an advisory opinion.

Murray v. Motl, 2015 MT 216, ¶ 7, 380 Mont. 162, 164, 354 P.3d 197, 198.

Estate of Gopher raised the issue of Montana state court subject matter jurisdiction over cases involving Indian litigants. The decedent and heirs were all enrolled members of the Blackfeet Nations. The primary asset of the estate was a historic flag, which was located at the decedent's house in Great Falls, off the reservation. In affirming the state judge's decision to assume subject matter jurisdiction, the Court extended the use of Rule 202 to include tribal law, even though the phrase does not explicitly appear in the text of the rule:

> ¶ 13 At issue is whether the District Court's assumption of subject matter jurisdiction infringed on tribal self-government. To resolve the issue, we look to the Blackfeet Tribal Court's February 26, 2013, order. Judicial notice of laws may be taken at any stage of the proceedings. M.R.Evid. 202(f)(1), MCA. Our Rules of Evidence include a non-exhaustive list of the kinds of law appropriate for judicial notice and provide that a court may take judicial notice of "[r]ecords of any court of this state or of any court of record of the United States or any court of record of any state of the United States." M.R.Evid. 202(b)(6), MCA. A tribal court order, though not expressly listed in the rule, is a record analogous to those listed in M.R.Evid. 202(b)(6), MCA, and is thus law of which we may take judicial notice. We note that the order was not filed until after the siblings had filed their opening brief. However, as the siblings do not take issue with the genuineness of the order, we take judicial notice of the tribal court order.
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> ¶ 14 In its order, the Blackfeet Tribal Court unequivocally declined to assert subject matter jurisdiction with respect to the flag, the subject of this appeal.

In re Estate of Gopher, 2013 MT 264, ¶¶ 13-14, 372 Mont. 9, 12-13, 310 P.3d 521, 523.

In a long-contested dissolution proceeding, at this stage

centered on mutual child support arrearages, the Court held that Rule 202 authorized judicial notice of an Order of the federal Bankruptcy Court:

> ¶ 30 Finally, Luna claims that the marital debt owed to her by Steab "could not be released via bankruptcy." Essentially, Luna is asking the District Court and this Court to overturn, or simply ignore, a federal bankruptcy court ruling. We are not authorized to do so.
> ¶ 31 M.R. Evid. 201(d) authorizes the District Court to take judicial notice of facts when "requested by a party and supplied with the necessary information." Moreover, M.R. Evid. 202(b)(6) allows a court to take judicial notice of law, including, "[r]ecords of any court of this state or of any court of record of the United States or any court of record of any state of the United States." *See Farmers Plant Aid, Inc. v. Fedder,* 2000 MT 87, ¶ 27, 299 Mont. 206, 999 P.2d 315. Steab requested that the court take notice of the bankruptcy action and supplied the District Court with the necessary information. Luna's claim of error is against the U.S. Bankruptcy Court, not the District Court. The District Court did not abuse its discretion by taking judicial notice of the U.S. Bankruptcy Court order.

In re Marriage of Steab and Luna, 2013 MT 124, ¶¶ 30-31, 370 Mont. 125, 300 P. 3d 1168, 1173-1174.

Judicial notice not OK under 202

In *State v. Homer*, the defendant was charged with exploiting an older person, by inducing her elderly mother to enter into a reverse mortgage. The daughter used all of the proceeds, $141,000, to pay off her own debts. Prior to trial, the judge held a hearing to determine whether the victim was competent to testify. The victim was sworn and testified briefly; both sides conducted limited questioning of her. After that hearing, the court found the witness competent. Unfortunately, between the hearing and trial, the victim deteriorated and was not available to testify at trial. At the bench trial, "Homer requested during her case-in-chief that the District Court **take judicial notice of the testimony of the victim**, given at the prior hearing held to determine whether the victim was competent to testify." *State v. Homer*, 2014 MT 57, ¶ 7, 374 Mont. 157, 159, 321 P.3d 77, 80 (emphasis added). Huh? What rule? 201 or 202? It gets worse, straying even further from judicial notice:

> The State objected because the prior proceeding had dealt only with the victim's competency and that they would have examined the victim more thoroughly and on other issues if they had known that the testimony would be offered at trial. The District Court denied the request to include the competency hearing transcript as evidence in the trial on the merits of the charge, concluding that the testimony at the competency hearing "does not really go sufficiently to the issues that are before this Court."

2014 MT 57, ¶ 7, 374 Mont. at 159, 321 P.3d at 80. Whatever the reasoning, the District Court was clear: the transcript was not admitted, and the defendant was convicted. On appeal, the Supreme Court noted:

> ¶ 8 A court may take judicial notice of the records of any court of this state, M.R. Evid. 202(b)(6). That includes prior proceedings in other cases, *Farmers Plant Aid v. Fedder,* 2000 MT 87, ¶¶ 26–27, 299 Mont. 206, 999 P.2d 315, and prior proceedings in the same case, *State v. Loh,* 275 Mont. 460, 477–78, 914 P.2d 592, 603 (1996). In the *Loh* case, this Court upheld admission in a bench trial of the evidence from a prior suppression hearing in the same case. The State had "presented its case-in-chief at the suppression hearing," and the defendant was present with counsel. *Loh,* 275 Mont. at 477–78, 914 P.2d at 603.
> ¶ 9 Both sides in the present case agree that the testimony at the prior competency hearing was hearsay under M.R. Evid 802....

2014 MT 57, ¶¶ 8-9, 374 Mont. at 159, 321 P.3d at 80.

The court went on to discuss the hearsay component of the testimony, ultimately concluding the trial judge correctly applied the hearsay rule and its exceptions. My conclusion is that the defense was on the ropes and "judicial notice" was a desperate but valiant last gasp. The hearsay issue was the real problem, and the real basis of the Supreme Court's decision.

Unfortunately, the dicta the court used in its cursory discussion of judicial notice in *Homer* muddies, rather than clarifies, judicial notice of earlier court proceedings. *Homer* cites *Loh* for the proposition that judicial notice of testimony from an earlier suppression hearing in the same case is proper. In fact, Loh explicitly refused to rule on this issue:

> On the basis of the record before us, and irrespective of the trial court's taking judicial notice of the testimony in the suppression hearing, we conclude that the State presented sufficient evidence at trial on which the fact finder could conclude beyond a reasonable doubt that Loh was guilty of the offenses charged. What is apparent from the record is that **if the court was without authority to take judicial notice of the evidence at the suppression hearing for purposes of proof at trial, the error was harmless at most.**
> **...we decline to address the propriety of the trial court's taking judicial notice at trial of the evidence and testimony from the suppression hearing. This opinion should not be read as either approving or disapproving of that procedure.**

State v. Loh, 275 Mont. 460, 478-79, 914 P.2d 592, 603-04 (1996) (emphasis added).

Ouch! I have included both *Homer* and *Loh* in the "not OK" section to provide a warning that the use of Rule 202 to admit evidence from earlier proceedings is not clear in any way. For opponents facing such a request, be sure to include the actual language from *Loh* in your argument, and object both on the basis of improper judicial notice and on hearsay grounds.

Evidence, page 36

Gray, from page 27

no need for government limits on core political speech. The media corporations *exempted* from regulation by BCRA, however, have emerged as problematic in this 24-hour news cycle world, choosing who to gift with free media, and who to ignore, based on what is best for their ratings. Nevertheless, any attempt by Congress to regulate this latest reality would require a rewrite of the First Amendment's "Freedom of the Press" language.

The current darling of the campaign reform movement is a constitutional amendment proposed by former Supreme Court Justice John Paul Stevens – the author of the *Citizens United* dissent – which reads as follows: Neither the First Amendment nor any other provision of this Constitution shall be construed to prohibit the Congress or any state from imposing reasonable limits on the amount of money that candidates for public office or their supporters may spend in election campaigns.[33]

This suggested amendment is quite troubling, and as is true with most reform efforts, is aimed at yesterday's problems, not today's (much less whatever tomorrow's might be). Do we really want to let government limit political speech on blog posts, Twitter exchanges, Facebook walls, or whatever new methods of political communication next come down the technology pike? Is it wise to let the party currently in power decide what is "reasonable" for the party out of power to be able to spend in its attempt to get back into power? Should we let media conglomerates hand out free media to boost their ratings, with opportunities for candidates to counter with paid media curtailed by Congress? Do we want to give incumbents the power to limit crowd-funded expenditures aimed at unseating them? My take is "no" on all of these questions. History should be our guide here. The censor is generally friendly to the rich and powerful, not to the 99 percent. Just ask Socrates.[34]

Back to the opening question: is campaign finance reform needed? The latest evidence seems to show that the ACLU has this exactly right: Disclosure rules should be tightened to cover dark money; the speed of disclosure of contributors and contributions should be increased; and laws against "coordination" should be better enforced.[35] At this point, anything more would be overkill in a war, which thanks to improving technology, we may no longer even need to fight.

33 http://joshblackman.com/blog/2014/03/04/what-are-justice-stevenss-proposed-six-amendments/

34 http://www.beaconforfreedom.org/liste.html?tid=415&art_id=475

35 https://www.aclu.org/aclu-and-citizens-united and http://www.aclu.org/issues/free-speech/campaign-finance-reform

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Ellingson, from page 24

match the power of big money in our elections today.

Afterthoughts

As this article was being written, the nominating campaigns for the presidency were proceeding. Has the recent experience with these campaigns demonstrated that fears created by *Citizens United,* et al. are unfounded? Super PACs and their 501(c)(4)s have been impotent despite spending tens of millions in support of Jeb Bush and against Donald Trump. Bernie Sanders has shunned Super PACs and has raised tens of millions without them. We cannot yet draw lessons from the 2016 campaign.

On a positive local note, Montana's new Disclose Act takes full advantage of the one regulatory avenue that remains after *Citizens United.* Once again, Montana is taking the lead.

Conclusion

Some may doubt the existence of a problem. Governing by an elite, be it intellectual or economic, has long appealed to some. But this is not the ideal that animates the exceptionalism of our Republic. We must find a path back to that ideal, and to a government "of, by and for the people."

Evidence, from page 21

I would like to end this column on a positive note, and a recent Missoula case serves the purpose perfectly. Michael Claude Urziceanu was convicted in Missoula Municipal Court of misdemeanor possession of marijuana. The District Court affirmed. On appeal, the defendant argued that the District Court erred in refusing his request to take judicial notice of the marijuana laws and court decisions in California and Nevada in support of his contention that he was entitled to use marijuana in Montana as a matter of medical necessity. *City of Missoula v. Urziceanu*, 2015 MT 79N, ¶ 4, 378 Mont. 541, 348 P.3d 673. The Supreme Court affirmed the conviction, apparently on the ground not that the law of California and Nevada was an inappropriate subject for judicial notice but on the ground that it was irrelevant to the question of marijuana use in Montana. Perhaps the better lesson from this case (and life?) is that "There is no fundamental right to possess and use marijuana." 2015 MT 79N, ¶10.

See you next month.

Disbarment, from page 15

account.[170]

In mitigation, Beccari was diagnosed with "adjustment disorder with mixed disturbance of emotions and conduct."[171] Nonetheless, the COP unanimously recommended disbarment.[172]

170 *Id.*

171 COP's FOF, COL and Recommendations (filed July 16, 2001), FOF 7, *In re Beccari*, Case Nos. 01-164 and 01-165.

172 COP's FOF, COL and Recommendations (filed July 16, 2001), p. 6, *In re Beccari*, Case Nos. 01-164 and 01-165

Shaun Thompson was appointed Chief Disciplinary Counsel by the Montana Supreme Court in 2005. The Office of Disciplinary Counsel is responsible for the intake, investigation and prosecution of ethics complaints against lawyers."