

1 ■ **FRE 201 Judicial Notice**

- Applies only to judicial notice of “adjudicative facts,” that is, facts which are not subject to reasonable dispute in that they are either:
  - Generally known within the jurisdiction; (*e.g.*, who is the Mayor of Houston); or
  - Capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned. (*E.g.*, reference to a calendar for the day of the week of a particular date).

2 ■

- Court can always take judicial notice on a discretionary basis.
- Court has to take judicial notice if requested by a party and supplied with the necessary information.
- Party contesting has right to a hearing, but it can occur after judicial notice is taken.
- Judicial notice can be taken at any stage of the proceeding.
  - Theoretically, can be applied at appellate stage.
  - Careful of this, though. *See Tran v. Fiorenza*, 934 S.W.2d 740 (Tex. App. - Houston [1st Dist.] 1996). Court of appeals will not usually take judicial notice of facts that were not available to the trial court in reviewing trial court’s actions.
- The jury can be instructed on matters judicially noticed.
- If a criminal matter, jury can only be instructed it *can* infer, but is not required to accept judicially noticed adjudicative fact.

3 ■

- *Legislative Facts. US v. Hernandez-Fundora*, 2d Cir. 1995. Def. charged with “assault within the special maritime and territorial jurisdiction of the US.” Court took judicial notice that place of assault was within the special maritime and territorial jurisdiction of the US and instructed the jury that, if it found the assault occurred at the federal penitentiary, the gov’t had met the jurisdictional element of the case.
  - Problem was failure to instruct jury it could, but did not have to infer conclusiveness of fact. FRE 201(g).
  - Court distinguished between adjudicative and legislative facts. This was a fact about the court’s jurisdiction, not really an adjudicative fact. Therefore, the procedural protections of FRE 201(g) did not apply.

4 ■

- What is a “legislative fact”? Court held that geographic facts that establish jurisdiction are legislative, not adjudicative facts.
- Advisory Committee stated that adjudicative facts were simply the facts of the particular case, while legislative facts, “have relevance to legal reasoning and the lawmaking process.”
- Note that *Hernandez-Fundora* may not be good law, in its conclusion that geography constitutes a “legislative fact.” *See US v. Bello*, 194 F.3d 18 (1st Cir. 1999).

5 ■

- Rule 301. Presumptions in General Civil Actions and Proceedings
- In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

- Rule 302. Applicability of State Law in Civil Actions and Proceedings
- In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

## 6 ■ Burdens/Presumptions

- A presumption is a rule of law that once a base fact A is established, fact B, the presumed fact, must be taken as established, at least if there is no evidence of non-B. *E.g.*, presumption of mailing. Evidence that item was posted in the US mail raises statutory presumption of receipt.
- FRE 301 In civil actions, presumption shifts burden of going forward to other side, but does not shift burden of proof.
- FRE 302 In civil cases, effect of presumption concerning fact which is an element of a claim or defense as to which state law applies is determined in accordance with state law.

## 7 ■

- Two types of burdens:
  - Burden of proof, or burden of persuasion. Means one party has the burden to prove his case - the other side prevails if the burden is not met.
  - Burden of going forward with the evidence. Means the party on whom a presumption is cast has the burden of meeting the presumption at the risk that the presumption will otherwise be deemed conclusively proved.

## 8 ■

- Two types of presumptions:
  - 
  - Mandatory presumption, in which the jury is informed it must presume the fact; and
  - 
  - Permissive presumption, in which the jury is informed it may infer the fact.

## 9 ■

- If Thayerian, bursting bubble approach adopted, the court must evaluate whether plaintiff's testimony justifies a more likely than not inference of receipt, weighing all the evidence. If not, directed verdict for defendant.
- If modified Thayerian approach followed, defendant must produce "substantial" evidence of non-receipt or dir. vd. for plaintiff.
- If third approach followed, presumption would allow plaintiff to get to the jury, but plaintiff would retain burden of proof.
- If fourth approach followed, defendant would have both burden of going forward with evidence and proof or persuasion.

## 10 ■

- When does a party bear a pleading burden?
- In civil cases certain items plead (generally by the plaintiff), put the defendant to the burden to specifically plead a response -- sometimes verified -- on penalty of being deemed admitted for failure to do so. *E.g.*, satisfaction of conditions precedent, affirmative defenses, agency, genuineness of endorsement on negotiable instrument, sworn account, mandamus facts. Refer to Rules of Civil Procedure.

## 11 ■

- Prob. 10-A. Harpsichord entrusted to mover, arrives damaged. Plaintiff offers evidence instrument was undamaged on delivery to shipper. Shipper's evidence controverts. Is the plaintiff entitled to an instruction to the jury that, if it finds the instrument was undamaged on delivery then it must find shipper responsible for the damage?
- Yes in most jurisdictions.
- However, not in Texas. Here, a presumption is a "bursting bubble," i.e., it disappears and is of no evidentiary effect once contrary evidence is admitted. However, the facts giving rise to the presumption remain evidence and the jury can consider those facts to reach the same conclusion.
- In Texas, if the presumption in a bailment case is not controverted, the plaintiff is entitled to a directed verdict. Thus, the effect of an un rebutted presumption in Texas is that it becomes a mandatory, rather than permissive, presumption.

12 

- 3 other important presumptions in Texas law.
- Spoliation/failure to produce evidence presumption: "You are instructed that, when a party has possession of a piece of evidence at a time he knows or should have known it will be evidence in a controversy, and thereafter he disposes of it, makes it unavailable, or fails to produce it, there is a presumption in law that the piece of evidence, had it been produced, would have been unfavorable to the party who did not produce it."
- Statutory presumption in informed consent medical malpractice cases.
- Res ipsa loquitur instruction. Must show instrumentality exclusively under control of defendant prior to injury, and that injury would be unlikely to occur in the absence of negligence. A permissive presumption.

13 

- Criminal cases. *Sandstrom v. Montana* US 1979. Sandstrom confesses to killing Jensen, but denies death was intended. Trial court instructs jury that: "the law presumes that a person intends the ordinary consequences of his voluntary acts," and jury convicts. Was this proper?
- No, because it created an irrebuttable presumption that the jury was to find intent to kill if it found the act was not involuntary. Also, effectively shifted both the burden of production and persuasion to defendant. Violates due process clause.

14 

- County of Ulster v. Allen, U.S. SCt. 1979. 3 adult men and a 16 year old girl convicted of possessing weapons in a car, under NY statute that presumes every occupant of a vehicle guilty of possession of weapons. Majority says okay because permissive, not mandatory. Focuses on fact that handguns were in plain sight in cab of vehicle, and thus evidence of guilt.
- But dissent notes that conviction was allowed under the presumption, even if the only thing proved by the prosecution was presence in the auto.
- Can Sanderson and Allen be reconciled?

15 

- Prob. 10-D. Alden innocently in car with Burnell. Stopped by police and weapons found. Weapons were not visible in vehicle. Same instruction given as in Allen. Does this satisfy Allen?
- Probably not, because weapons not in plain sight, thus no other evidence of knowledge of possession of guns.
- Does this make sense as a distinction if the problem with presumptions in criminal cases is the failure to require prosecution to prove all facts beyond a reasonable doubt?

16 

- 
- Prob. 10-D. Alden innocently in car with Burnell. Stopped by police and weapons found. Weapons were not visible in vehicle. Same instruction given as in Allen. Does this satisfy Allen?
- Probably not, because weapons not in plain sight, thus no other evidence of knowledge of possession of guns.
- Does this make sense as a distinction if the problem with presumptions in criminal cases is the failure to require prosecution to prove all facts beyond a reasonable doubt?
- 

17 

- Privileges. Fed. R. Evid. 501. General Rule
- Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the *privilege* of a witness, person, government, State, or political subdivision thereof *shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience*. However, *in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law*.
- *In other words, in federal case, privilege decided by federal common law. In diversity cases, privilege determined by law of the forum state.*

18 

- Philosophic considerations on creation and protection of privileges
  - Based on peculiar relationship between the communicating parties; priest, lawyer, doctor, spouse, etc.
  - Communications must be made in confidence they will not be disclosed
  - Element of confidentiality must be essential to maintenance and effectiveness of relationship
  - Greater harm than good from disclosure
  - General injury that would result to the relationship via the disclosure must outweigh harm resulting to search for justice by blanket exclusion; *however*,
  - With some minor exceptions, no such balancing done with regard to particular assertion of privilege. In other words, if for example attorney-client privilege applies, court generally must exclude and cannot weigh harm of disclosure against benefit of same to determine whether to exclude.

19  **The Attorney-Client Privilege**

- Privilege is of the client or potential client to refuse to disclose or to prevent others from disclosing:
- *Confidential* communications between the client or his representatives and the lawyer or her representatives which were:
  - Made for the purpose of facilitating the rendition of legal services; and
  - not voluntarily disclosed to any third parties.

20  **The Attorney-Client Privilege**

- Privilege extends to communications between:
  - The lawyer and his representatives.
  - The client and the client's representatives in connection with rendition of legal services.

- The client and her representatives to a lawyer representing another party in the same proceeding and covering a matter of common interest (a/k/a the "joint defense privilege").
- 
- 
- 

21 

- There is no confidential attorney-client communication privilege with respect to:
  - Communications if the lawyer's services were sought out for the perpetration of a fraud;
  - As to a communication relevant to an issue between parties who claim through the same deceased client;
  - As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;
  - As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or
  - As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

22 

- Waiver of Privilege
  - Can only be waived by the client, not the lawyer
  - Inadvertent waiver generally not favored, except when no care made to ensure no third party overheard
  - No partial waivers
  - Waived as a matter of law, whether intended or not, in cases in which communication was made, in whole or in part, to enable or aid anyone to commit or plan to commit a crime or fraud.

23 

- *American Nat'l Watermattress Corp. v. Manville*, AK 1982. Manville injured when waterbed mattress rolls over her. Calls her lawyers, who send Ward, an investigator for the law firm, to take a recorded statement. Later suit. Defendant seeks discovery of statement, resisted as attorney-client communication.
  - Since Manville had not yet hired the lawyers, was the communication covered?
    - Yes.
    - Privilege must cover someone seeking out legal advice or no one would disclose confidential information to a lawyer in doing so, and the lawyer's ability to give valid advice to the potential client would be vitiated.

24 

- Since Ward was not a lawyer, is the communication privileged?
  - Yes. Alaska rule extends to communications to the lawyer's representative.
  - Texas rule expressly covers as well. TRE 503(a)(4)(A) and 503(b)(1)(A)
- Could this cover an accountant hired by the lawyer?
- What about a doctor to whom the patient was sent by the lawyer?
- Ward could not give legal advice. Should the privilege apply anyway?
  - Yes. Question is not whether confidential legal advice was given, but whether the communication was to facilitate the provision of legal services.

25 

- Prob. 12-B. Client charged with bail jumping, for failure to show up at trial. Lawyer called to testify whether he advised client of trial setting. Is this protected by the attorney-client privilege?
- No. This is just a scheduling matter. Not legal advice, legal inquiry, or a communication to facilitate provision of legal advice.
- Prob. 12-C. Client goes to appointment with attorney drunk. Admits he had a few drinks, appointment rescheduled. Client runs into a car and flees the scene. Car owner files discovery suit against lawyer, and seeks to find out: (1) whether client appeared drunk; and (2) what client said about drinking during appointment. Must lawyer disclose either?
- Very likely as to 1. Also likely as to 2, but could make a better argument that disclosures of drinking were made as a part of client's attempt to secure legal services.

26 

- *People v. Meredith*. Client charged with murder. Essentially confessed to his lawyer and told lawyer where to find victim's wallet. Lawyer sends investigator to scene and finds wallet, turns over to prosecution but refuses to say anything about how or where he found it. Must the lawyer disclose what the client told him?
- No. Clearly privileged.
- Must the investigator testify where the wallet was found?
- Yes, but only because he removed the wallet. By doing so, he actually altered the evidence that might otherwise have been found by the police. No privilege attaches to allow destruction or alteration of evidence.

27 

- Corporation as the client. *Upjohn v. US*, USSCT 1981. Thomas, General Counsel for Upjohn, conducts internal investigation into alleged illegal payments to foreigners. Questionnaires submitted to Upjohn employees by Thomas state that responses were confidential, etc. Upjohn later voluntarily submits some findings to SEC and IRS. IRS then subpoenas all notes, responses, reports, etc.
- Court of Appeals uses the "control group test." Meaning that communications by corporate agents only covered if the agents have a substantial role in deciding and directing corporation's response to legal questions. Communications with lower level employees not protected. What rationale?
- USSCT reverses, adopting the "subject matter test." This means that communications with any agent of corporation that are intended to be confidential for the purpose of obtaining legal representation for the corporation are privileged. What rationale?

28 

**In 1981, the U.S. Supreme Court rejected the control group test and adopted what is now referred to as the subject matter test. *Upjohn Co. v. United States*, 449 U.S. 383 (1981). Although expressly declining to "lay down a broad rule or series of rules to govern all conceivable future questions in the [corporate attorney-client privilege] area," the *Upjohn* court recognized five fundamental elements that a corporation must prove in order to secure the attorney-client privilege:**

29 

- What if Thomas took the statements in his capacity as a corporate officer, rather than as GC?
- Are factual reports covered? No, not communications. However, may be "work product." FRCP 26 allows disclosure of work product if opponent can show a "substantial need" and "undue hardship." Similar rule in Texas.

30 

- *National Tank Co. v. Brotherton*, Tex. 1993.

- Adopts "control group test."
- Bound to do so by language of existing rule, TRE 503(a).

31 

- See changes to TRE 503(a)
  - A "client" is a person, public officer, or corporation, association, or other organization or entity either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from that lawyer.
  - A "representative of the client" is (i) a person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client or (ii) any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.
- Has the Texas rule changed? Do we now follow the *Brotherton* "control group test" or the *Upjohn* "subject matter test"?