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Memorandum 64-78

Subject: Study No. 34(L) - Uniform Rules of Evidence (Preprint Senate Bill No. 1--Division 4)

Attached are two copies of the revised Comments to Division 4. Mr. Keatinge is responsible for checking these Comments. Please mark any revisions you believe should be made on one copy of the Comments.

Respectfully submitted,

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Executive Secretary

## DIVISION 4. JUDICIAL NOTICE

### § 450. Judicial notice may be taken only as authorized by statute

Comment. Section 450 provides that judicial notice may not be taken of any matter unless authorized or required by statute, i.e., unless it is listed in this division or in some other statute. By way of contrast, the principal judicial notice provision found in existing law--Code of Civil Procedure Section 1875 (superseded by this division of the Evidence Code)--does not limit judicial notice to matters specified by statute. Judicial notice has been taken of various matters not so specified, principally matters of common knowledge which are certain and indisputable.

Section 450 should not be thought to prevent courts from considering whatever materials are appropriate in construing statutes, determining constitutional issues, and formulating rules of law. That a court may take note of legislative history, discussions by learned writers in treatises and law reviews, materials that contain controversial economic and social facts or findings or that indicate contemporary opinion, and similar materials is inherent in the requirement that it take judicial notice of the law. In many cases, the meaning and validity of statutes, the precise nature of a common law rule, or the correct interpretation of a constitutional provision can be determined only with the help of such extrinsic aids. Cf. People v. Sterling Refining Co., 86 Cal. App. 558, 564, 261 Pac. 1080, 1083 (1927) (statutory authority to notice "public and private acts" of legislature held to authorize examination of legislative history of certain acts). See also Perez v. Sharp,

32 Cal.2d 711, 198 P.2d 17 (1948) (texts and authorities used by court in opinions determining constitutionality of statute prohibiting interracial marriages). Section 450 will neither broaden nor limit the extent to which a court may resort to extrinsic aids in determining the rules of law it is required to notice.

The court is required to take judicial notice of the matters listed in Section 451. It may take judicial notice of the matters listed in Section 452 even when not requested to do so; it is required to notice them, however, if a party requests it and satisfies the requirements of Section 453. This statutory scheme is based on Rule 9 of the Uniform Rules of Evidence.

There is some overlap between the matters listed in the mandatory notice provisions of Section 451 and the matters listed in the permissive-unless-a-request-is-made provisions of Section 452. Thus, when a matter falls within Section 451, judicial notice is mandatory even though the matter would also fall within Section 452. The introductory clause of Section 452 makes this clear. For example, public statutory law is required to be noticed under subdivision (a) of Section 451 even though it would also be included under official acts of the legislative department under subdivision (c) of Section 452. And certain regulations are required to be noticed under subdivision (b) of Section 451 even though they might also be included under subdivisions (b) and (c) of Section 452. Indisputable matters of universal knowledge are required to be noticed under subdivision (f) of Section 451 even though such matters might be included under subdivisions (g) and (h) of Section 452.

There is also some overlap between the various categories listed in Section 452. However, this overlap will cause no difficulty because all of the matters listed in Section 452 are treated alike.

§ 451. Matters which must be judicially noticed

Comment. Judicial notice of the matters specified in Section 451 is mandatory, whether or not the court is requested to notice them. Although the court errs if it fails to take judicial notice of the matters specified in this section, such error is not necessarily reversible error. Depending upon the circumstances, the appellate court may hold that the error was "invited" (and, hence, is not reversible error) or that points not urged in the trial court may not be advanced on appeal. These and similar principles of appellate practice are not abrogated by this section.

Section 451 includes both matters of law and fact. The matters specified in subdivisions (a), (b), (c), and (d) are all matters that, broadly speaking, can be considered as a part of the "law" applicable to the particular case. The court can reasonably be expected to discover and apply this law, even if the parties fail to provide the court with references to the pertinent cases, statutes, regulations, and rules. Other matters that also might properly be considered as a part of the law applicable to the case (such as the law of foreign countries and certain regulations and ordinances) are included under Section 452, rather than under Section 451, primarily because of the difficulty of ascertaining such matters. Subdivision (e) of Section 451 requires the court to judicially notice "the true signification of all English words and phrases and of all legal expressions". These are facts that must be judicially noticed in order to conduct meaningful proceedings. Similarly, subdivision (f) of Section 451 covers "universally known" facts.

Listed below are the matters that are included under Section 451.

California and federal law. The decisional, constitutional, and public statutory law of California and of the United States must be judicially noticed under subdivision (a). This requirement states existing law as found in subdivision 3 of Code of Civil Procedure Section 1875 (superseded by the Evidence Code). Subdivision (a) is similar to a portion of Rule 9(1) of the Uniform Rules of Evidence.

Law of sister states. The decisional, constitutional, and public statutory law in force in sister states must be judicially noticed under subdivision (a). California courts now take judicial notice of the law of sister states under subdivision 3 of Section 1875 of the Code of Civil Procedure. However, Section 1875 seems to preclude notice of sister-state law as interpreted by the intermediate-appellate courts of sister states, whereas Section 451 requires notice of relevant decisions of all sister-state courts. If this be an extension of existing law, it is a desirable one, for the intermediate-appellate courts of sister states are as responsive to the need for properly determining the law as are equivalent courts in California. The existing law also is not clear as to whether a request for judicial notice of sister-state law is required and whether judicial notice is mandatory. On necessity for request for judicial notice, see Comment, 24 CAL. L. REV. 311, 316 (1936). On whether judicial notice is mandatory, see In re Bartges, 44 Cal.2d 241, 282 P.2d 47 (1955), and the opinion of the Supreme Court in denying a hearing in Estate of Moore, 7 Cal. App.2d 722, 726, 48 P.2d 28, 29 (1935). Section 451 requires such notice to be taken without a request being made.

Law of territories and possessions of the United States. The decisional, constitutional, and public statutory law in force in the territories and possessions of the United States must be judicially noticed under subdivision (a).

See the definition of "state" in EVIDENCE CODE § 220. It is not clear under existing California law whether this law is treated as sister-state law or foreign law. See WITKIN, CALIFORNIA EVIDENCE § 45 (1958).

Regulations of California and federal agencies. Judicial notice must be taken under subdivision (b) of the rules, regulations, orders, and standards of general application adopted by California state agencies and filed with the Secretary of State or printed in the California Administrative Code or the California Administrative Register. This is existing California law as found in Government Code Sections 11383 and 11384. Under subdivision (b), judicial notice must also be taken of the rules and amendments of the State Personnel Board. This, too, is existing California law under Government Code Section 18576.

Subdivision (b) also requires California courts to judicially notice documents published in the Federal Register (such as (1) presidential proclamations and executive orders having general applicability and legal effect and (2) orders, regulations, rules, certificates, codes of fair competition, licenses, notices, and similar instruments, having general applicability and legal effect, that are issued, prescribed, or promulgated by federal agencies). There is no clear holding that this is existing California law. Although Section 307 of Title 44 of the United States Code provides that the "contents of the Federal Register shall be judicially noticed," it is not clear that this requires notice by state courts. See Broadway Fed. etc. Loan Ass'n v. Howard, 133 Cal. App.2d 382, 386, 285 P.2d 61, 64 (1955) (referring to 44 U.S.C.A. §§ 301-314). Compare Note, 59 HARV. L. REV. 1137, 1141 (1946) (doubt expressed that notice is required), with Knowlton, Judicial Notice,

10 RUTGERS L. REV. 501, 504 (1956) ("it would seem that this provision is binding upon the state courts"). Livermore v. Beal, 18 Cal. App.2d 535, 542-543, 64 P.2d 987, 992 (1937), suggests that California courts are required to judicially notice pertinent federal official action, and California courts have judicially noticed the contents of various proclamations, orders, and regulations of federal agencies. E.g., Pacific Solvents Co. v. Superior Court, 88 Cal. App.2d 953, 955, 199 P.2d 740, 741 (1948) (orders and regulations); People v. Mason, 72 Cal. App.2d 699, 706-707, 165 P.2d 481, 485 (1946) (presidential and executive proclamations) (disapproved on other grounds in People v. Friend, 50 Cal.2d 570, 578, 327 P.2d 97, 102 (1958)); Downer v. Grizzly Livestock & Land Co., 6 Cal. App.2d 39, 42, 43 P.2d 843, 845 (1935) (rules and regulations). Section 451 makes the California law clear.

Rules of court. Judicial notice of the court rules adopted by the Judicial Council is required under subdivision (c). These rules are as binding on the parties as procedural statutes. Cantillon v. Superior Court, 150 Cal. App. 184, 309 P.2d 890 (1957). See Albermont Petroleum, Ltd. v. Cunningham, 186 Cal. App.2d 84, 9 Cal. Rptr. 405 (1961). Likewise, the rules of pleading, practice, and procedure promulgated by the United States Supreme Court are required to be judicially noticed under subdivision (d).

The rules of the California and federal courts which are required to be judicially noticed under subdivisions (c) and (d) are, or should be, familiar to the court or easily discoverable from materials readily available to the court. However, this may not be true of the court rules of sister states or other jurisdictions nor, for example, of the rules of the various United States

Courts of Appeals or local rules of a particular superior court. See Albermont Petroleum, Ltd. v. Cunningham, 186 Cal. App.2d 84, 9 Cal. Rptr. 405 (1961). Judicial notice of these rules is permitted under subdivision (e) of Section 452 but is not required unless there is compliance with the provisions of Section 453.

Words, phrases, and legal expressions. Subdivision (e) requires the court to take judicial notice of "the true signification of all English words and phrases and of all legal expressions." This restates the same matter covered in subdivision 1 of Code of Civil Procedure Section 1875. Under existing law, however, it is not clear that judicial notice of these matters is mandatory, as is required under subdivision (e).

"Universally known" facts. Subdivision (f) requires the court to take judicial notice of indisputable facts and propositions universally known. "Universally known" does not mean that every man on the street has knowledge of such facts. A fact known among persons of reasonable and average intelligence and knowledge will satisfy the "universally known" requirement. Cf. People v. Tossetti, 107 Cal. App. 7, 12, 289 Pac. 881, 883 (1930). Subdivision (f) is substantialy the same as a portion of Rule 9(1) of the Uniform Rules of Evidence.

Subdivision (f) should be contrasted with subdivisions (g) and (h) of Section 452, which provide for judicial notice of indisputable facts and propositions that are matters of common knowledge or are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Subdivisions (g) and (h) permit notice of facts and propositions

that are indisputable but are not "universally" known.

Judicial notice does not apply to facts merely because they are known to the judge to be indisputable. They must fulfill the requirements of subdivision (f) of Section 451 or subdivision (g) or (h) of Section 452. If a judge happens to know a fact that is not widely enough known to be subject to judicial notice under this division, he may not "notice" it.

It is clear under existing law that the court may judicially notice the matters specified in subdivision (f); it is doubtful, however, that the court must notice them. See Varcoe v. Lee, 180 Cal. 338, 347, 181 Pac. 223, 227 (1919) (dictum). Since subdivision (f) covers universally known facts, the parties ordinarily will expect the court to take judicial notice of them; the court should not be permitted to ignore such facts merely because the parties fail to make a formal request for judicial notice.

§ 452. Matters which may be judicially noticed

Comment. Section 452 includes both matters of law and fact. The court may take judicial notice of these matters, even when not requested to do so; it is required to notice them if a party requests it and satisfies the requirements of Section 453.

The matters of law included under Section 452 may be neither known to the court nor easily discoverable by it because the sources of information are not readily available. However, if a party requests it and furnishes the court with "sufficient information" for it to take judicial notice, the court must do so if proper notice has been given to each adverse party. See EVIDENCE CODE § 453. Thus, judicial notice of these matters of law is mandatory

only if counsel adequately discharges his responsibility for informing the court as to the law applicable to the case. The simplified process of judicial notice can then be applied to all of the law applicable to the case, including such law as ordinances and the law of foreign countries.

Although Section 452 extends the process of jucicial notice to some matters of law which the courts do not judicially notice under existing law, the wider scope of such notice is balanced by the assurance that the matter need not be judicially noticed unless adequate information to support its truth is furnished to the court. Under Section 453, this burden falls upon the party requesting that judicial notice be taken. In addition, the parties are entitled under Section 455 to a reasonable opportunity to present information to the court as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed.

Listed below are the matters that are included under Section 452.

Resolutions and private acts. Subdivision (a) provides for judicial notice of resolutions and private acts of the Congress of the United States and of the legislature of any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220.

The California law on this matter is not clear. Our courts are authorized by subdivision 3 of Code of Civil Procedure Section 1875 to take judicial notice of private statutes of this State and the United States, and they probably would take judicial notice of resolutions of this State and the United States under the same subdivision. It is not clear whether such notice is compulsory. It may be that judicial notice of a private act pleaded in a criminal action pursuant to Peral Code Section 963 is mandatory, whereas

judicial notice of the same private act may be discretionary when pleaded in a civil action pursuant to Section 459 of the Code of Civil Procedure.

Although no case has been found, California courts probably would not take judicial notice of a resolution or private act of a sister state or territory or possession of the United States. Although Section 1875 is not the exclusive list of the matters that will be judicially noticed, the courts did not take judicial notice of a private statute prior to the enactment of Section 1875. Ellis v. Eastman, 32 Cal. 447 (1867).

Regulations, ordinances, and similar legislative enactments. Subdivision (b) provides for judicial notice of regulations and legislative enactments adopted by or under the authority of the United States and of any state, territory, or possession of the United States, including governmental agencies and subdivisions thereof. See the broad definition of "public entity" in EVIDENCE CODE § 200. The words "regulations and legislative enactments" include such matters as "ordinances" and other similar legislative enactments. Not all governmental entities legislate by ordinance.

This subdivision changes existing California law. Under existing law, municipal courts take judicial notice of ordinances in force within their jurisdiction. People v. Cowles, 142 Cal. App.2d Supp. 865, 867, 298 P.2d 732, 733-73 733-734 (1956); People v. Crittenden, 93 Cal. App.2d Supp. 871, 877, 209 P.2d 161, 165 (1949). In addition, an ordinance pleaded in a criminal action pursuant to Penal Code Section 963 must be judicially noticed. On the other hand, neither the superior court not a district court of appeal will take judicial notice in a civil action of municipal or county ordinances. Thompson v. Guyer-Hays, 207 Cal. App.2d 366, 24 Cal. Rptr. 461 (1962); County of Los Angeles v. Bartlett, 203 Cal. App.2d 523, 21 Cal. Rptr. 776 (1962); Becerra v.

Hochberg, 193 Cal. App.2d 431, 14 Cal. Rptr. 101 (1961). It seems safe to assume that ordinances of sister states and of territories and possessions of the United States would not be judicially noticed under existing law.

Judicial notice of certain regulations of California and federal agencies is mandatory under subdivision (b) of Section 451. Subdivision (b) of Section 452 provides for judicial notice of California and federal regulations that are not included under subdivision (b) of Section 451 and, also, for judicial notice of regulations of other states and territories and possessions of the United States.

Both California and federal regulations have been judicially noticed under subdivision 3 of Code of Civil Procedure Section 1875. 18 CAL. JUR.2d EVIDENCE § 24. Although no case has been found, it is unlikely that regulations of other states or of territories or possessions of the United States would be judicially noticed under existing law.

Official acts of the legislative, executive, and judicial departments. Subdivision (c) provides for judicial notice of the official acts of the legislative, executive, and judicial departments of the United States and any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220. Subdivision (c) states existing law as found in subdivision 3 of Code of Civil Procedure Section 1875. Under this provision, our courts have taken judicial notice of a wide variety of administrative and executive acts, such as proceedings and reports of the House Committee on Un-American Activities and records of the State Board of Education and a county planning commission. See WITKIN, CALIFORNIA EVIDENCE § 49 (1958), and 1963 Supplement thereto.

Court records and rules of court. Subdivisions (d) and (e) provide for judicial notice of the court records and rules of court of (1) any court of this State or (2) any court of record of the United States and any state, territory, or possession of the United States. See the broad definition of "state" in EVIDENCE CODE § 220. So far as court records are concerned, subdivision (d) states existing California law. Flores v. Arroyo, 56 Cal.2d 492, 15 Cal. Rptr. 87, 364 P.2d 263 (1961). While the provisions of subdivision (c) of Section 452 are broad enough to include court records, specific mention of these records in subdivision (d) is desirable in order to eliminate any uncertainty in the law on this point. See the Flores case, supra.

Subdivision (e) may change existing law so far as judicial notice of rules of court are concerned, but the provision is consistent with the modern philosophy of judicial notice as indicated by the holding in Flores v. Arroyo, supra. To the extent that subdivision (e) overlaps with subdivisions (c) and (d) of Section 451, notice is, of course, mandatory under Section 451.

Law of foreign countries. Subdivision (f) provides for judicial notice of the law of foreign countries and governmental subdivisions of foreign countries. Subdivision (f) should be read in connection with Section 311 and Section 455. These provisions retain the substance of the existing law which was enacted in 1957 upon recommendation of the California Law Revision Commission. CODE CIV. PROC. § 1875. See 1 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES, Recommendation and Study Relating to Judicial Notice of the Law of Foreign Countries at I-1 (1957).

Subdivision (f) refers to "the law" of foreign countries and governmental subdivisions of foreign countries. This makes all law, in whatever form, subject to judicial notice.

Matters of "common knowledge" and verifiable facts. Subdivision (g) provides for judicial notice of matters of common knowledge within the court's jurisdiction that are not subject to dispute. This subdivision states existing California case law. Varcoe v. Lee, 180 Cal. 338, 181 Pac. 223 (1919); 18 CAL. JUR.2d Evidence § 19 at 439-440. The California courts have taken judicial notice of a wide variety of matters of common knowledge. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958). Subdivision (g) is based on a portion of Rule 9(2) of the Uniform Rules of Evidence.

Subdivision (h), which also is based on a portion of Rule 9(2) of the Uniform Rules, provides for judicial notice of indisputable facts immediately ascertainable by reference to sources of reasonably indisputable accuracy. In other words, the facts need not be actually known if they are readily ascertainable and indisputable. Sources of "reasonably indisputable accuracy" include not only treatises, encyclopedias, almanacs, and the like, but also persons learned in the subject matter. This would not mean that reference works would be received in evidence or sent to the jury room. Their use would be limited to consultation by the judge and the parties for the purposes of determining whether or not to take judicial notice and to determine the tenor of the matter to be noticed.

Subdivisions (g) and (h) include, for example, facts which are accepted as established by experts and specialists in the natural, physical, and social sciences, if those facts are of such wide acceptance that to submit them to the jury would be to risk irrational findings. These subdivisions include such matters listed in Code of Civil Procedure Section 1875 as the

"geographical divisions and political history of the world." To the extent that subdivisions (g) and (h) overlap with subdivision (f) of Section 451, notice is, of course, mandatory under Section 451.

The matters covered by subdivisions (g) and (h) are included in Section 452, rather than Section 451, because it seems reasonable to put the burden on the parties to bring adequate information before the court if judicial notice is to be mandatory. See EVIDENCE CODE § 453 and the Comment thereto.

Under existing California law, courts take judicial notice of the matters that are included under subdivisions (g) and (h), either pursuant to Section 1875 of the Code of Civil Procedure or because such matters are matters of common knowledge which are certain and indisputable. WITKIN, CALIFORNIA EVIDENCE §§ 50-52 (1958). Notice of these matters probably is not compulsory under existing law.

§ 453. Compulsory judicial notice upon request

Comment. Section 453 provides that the court must take judicial notice of any matter specified in Section 452 if a party requests that such notice be taken, provides the court with sufficient information to enable it to take judicial notice of the matter, and gives each adverse party sufficient notice of the request to prepare to meet it. Section 453 is based on Rule 9(3) of the Uniform Rules of Evidence.

Section 453 is intended as a safeguard and not as a rigid limitation on the power of the court to take judicial notice. The section does not affect the discretionary power of the court to take judicial notice under Section 452 where the party requesting that judicial notice be taken fails to give the requisite notice to each adverse party or fails to furnish sufficient

information as to the propriety of taking judicial notice or as to the tenor of the matter to be noticed. Hence, when he considers it appropriate, the judge may take judicial notice under Section 452 and may consult and use any source of pertinent information, whether or not provided by the parties. However, where the matter noticed is reasonably subject to dispute and of substantial consequence to the action--even though the court may take judicial notice under Section 452 when the requirements of Section 453 have not been satisfied--the party adversely affected must be given a reasonable opportunity to present information as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed. See EVIDENCE CODE § 455 and the Comment thereto.

The "notice" requirement. The party requesting the court to judicially notice a matter under Section 453 must give each adverse party sufficient notice, through the pleadings or otherwise, to enable him to prepare to meet the request. In cases where the notice given does not satisfy this requirement, the court may decline to take judicial notice. A somewhat similar notice to the adverse parties is required under subdivision 4 of Section 1875 when a request for judicial notice of the law of a foreign country is made. Section 453 broadens this existing requirement to cover all matters specified in Section 452.

The notice requirement is an important one since judicial notice is binding on the jury under Section 458. Accordingly, the adverse parties should be given ample notice so that they will have an opportunity to prepare to oppose the taking of judicial notice and to obtain information relevant to the tenor of the matter to be noticed.

Since Section 452 relates to a wide variety of facts and law, the notice requirement should be administered with flexibility in order to insure that the policy behind the judicial notice rules is properly implemented. In many cases, it will be reasonable to expect the notice to be given at or before the time of the pretrial conference. In other cases, matters of fact or law of which the court should take judicial notice may come up at the trial. Section 453 merely requires reasonable notice, and the reasonableness of the notice given will depend upon the circumstances of the particular case.

The "sufficient information" requirement. Under Section 453, the court is not required to resort to any sources of information not provided by the parties. If the party requesting that judicial notice be taken under Section 453 fails to provide the court with "sufficient information," the judge may decline to take judicial notice. For example, if the party requests the court to take judicial notice of the specific gravity of gold, the party requesting that notice be taken must furnish the judge with definitive information as to the specific gravity of gold. The judge is not required to undertake the necessary research to determine the fact, though, of course, he is not precluded from doing such research if he so desires.

Section 453 does not define "sufficient information"; this will necessarily vary from case to case. While the parties will understandably use the best evidence they can produce under the circumstances, mechanical requirements that are ill-suited to the individual case should be avoided. The court justifiably might require that the party requesting that judicial notice be taken provide expert testimony to clarify especially difficult problems.

Burden on party requesting that judicial notice be taken. Where a request is made to take judicial notice under Section 453 and an adverse party disputes the propriety of taking judicial notice or disputes the tenor of the matter to be noticed, the court may decline to take judicial notice unless the party requesting that notice be taken persuades the judge that the matter is one that properly may be noticed under Section 452 and also persuades the judge as to the tenor of the matter to be noticed. The degree of the judge's persuasion regarding a particular matter is determined by the subdivision of Section 452 which authorizes judicial notice of the matter. For example, if the matter is claimed to be a fact of common knowledge under paragraph (g) of Section 452, the party must persuade the judge that the fact is of such common knowledge within the territorial jurisdiction of the court that it cannot reasonably be subject to dispute, i.e., that no reasonable person having the same information as is available to the judge could rationally disbelieve the fact. On the other hand, if the matter to be noticed is a city ordinance under paragraph (b) of Section 452, the party must persuade the judge that a valid ordinance exists and also as to its tenor; but the judge need not believe that no reasonable person could conclude otherwise.

Without regard to the evidence supplied by the party requesting that judicial notice be taken, the judge's determination to take judicial notice of a matter specified in Section 452 will be upheld on appeal if the matter was properly noticed. The reviewing court may resort to any information, whether or not available at the trial, in order to sustain the proper taking of judicial notice. See EVIDENCE CODE § 459. On the other hand, even though a party requested that judicial notice be taken under Section 453 and gave

notice to each adverse party in compliance with subdivision (a) of Section 453, the decision of the judge not to take judicial notice will be upheld on appeal unless the reviewing court determines that the party furnished information to the judge that was so persuasive that no reasonable judge would have refused to take judicial notice of the matter.

§ 454. Information that may be used in taking judicial notice

Comment. Since one of the purposes of judicial notice is to simplify the process of proofmaking, the judge should be given considerable latitude in deciding what sources are trustworthy. This section, which is based on Rule 10(2) of the Uniform Rules of Evidence, permits the court to use any source of pertinent information, including the advice of persons learned in the subject matter. It probably restates existing California law as found in Section 1875 of the Code of Civil Procedure. See Estate of McNamara, 181 Cal. 82, 89-91, 183 Pac. 552, 555 (1919); Rogers v. Cady, 104 Cal. 288, 38 Pac. 81 (1894) (dictum); Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Article II. Judicial Notice), 6 CAL. LAW REVISION COMM'N, REP., REC. & STUDIES 801, 850-851 (1964).

§ 455. Opportunity to present information to court

Comment. Section 455 provides procedural safeguards designed to afford the parties reasonable opportunity to be heard both as to the propriety of taking judicial notice of a matter and as to the tenor of the matter to be noticed.

Subdivision (a). This subdivision guarantees the parties a reasonable opportunity to present information to the court as to the propriety of taking judicial notice and as to the tenor of the matter to be noticed. The subdivision is limited in its application to those matters specified in Section 452 that are reasonably subject to dispute and of substantial consequence to the determination of the action,

for it would not be practicable to make the subdivision applicable to Section 451 or to matters listed in Section 452 that are of inconsequential significance. Subdivision (a) is based on Rule 10(1) of the Uniform Rules of Evidence.

What constitutes a "reasonable opportunity to present . . . information" will depend upon the complexity of the matter and its importance to the case. For example, in a case where there is no dispute as to the existence and validity of a city ordinance, no formal hearing would be necessary to determine the propriety of taking judicial notice of the ordinance and of its tenor. But where there is a complex question as to the tenor of the law of a foreign country applicable to the case, the granting of a hearing under subdivision (a) would be mandatory. The New York courts have so construed their judicial notice statute, saying that an opportunity for a litigant to know what the deciding tribunal is considering and to be heard with respect to both law and fact is guaranteed by due process of law. Arams v. Arams, 182 Misc. 328, 182 Misc. 336, 45 N.Y.S.2d 251 (Sup. Ct. 1943).

Subdivision (b). If the judge resorts to sources of information not previously known to the parties, this subdivision requires that such information and its source be made a part of the record when it relates to taking judicial notice of a matter specified in Section 452 that is reasonably subject to dispute and of substantial consequence to the determination of the action. This requirement is based on a somewhat similar requirement found in Code of Civil Procedure Section 1875 regarding the law of a foreign country. Making the information and its source a part of the record assures its availability for examination by the parties and by a reviewing court. In addition, subdivision (b) requires the court to give the parties reasonable opportunity to meet such additional information before judicial notice of the matter may

be taken.

§ 456. Noting for record matter judicially noticed

Comment. Section 456, which is based on a portion of Rule 11 of the Uniform Rules of Evidence, requires the judge to indicate for the record at the earliest practicable time a matter which is judicially noticed if the matter is one that is reasonably subject to dispute and of substantial consequence to the determination of the action. However, matters of law judicially noticed under subdivision (a) of Section 451, as well as the meaning of English words and phrases under subdivision (e) of Section 451, are not included within this requirement. The requirement is imposed in order to provide the parties with an adequate opportunity to try their case in view of the judicially noticed law and facts applicable to the case. In addition, needless dispute sometimes results from the failure of the court to put in the record matters which have been judicially noticed. No comparable requirement is found in existing California law.

§ 457. Noting for record denial of request to take judicial notice

Comment. Section 457 requires the judge to advise the parties and indicate for the record at the earliest practicable time the denial of a request to take judicial notice of a matter. The requirement is imposed in order to provide the parties with an adequate opportunity to submit evidence on any matter as to which judicial notice was anticipated but not taken. No comparable requirement is found in existing California law. Compare EVIDENCE CODE § 456 and the Comment thereto.

§ 458. Instructing jury on matter judicially noticed

Comment. Section 458, which is based on a portion of Rule 11 of the

Uniform Rules of Evidence, makes matters judicially noticed binding on the jury and thereby eliminates any possibility of presenting to the jury evidence disputing the fact as noticed by the court. The section is limited to instruction on a matter that would otherwise have been for determination by the jury; instruction of juries on matters of law is not a matter of evidence and is covered by the general provisions of law governing instruction of juries. The section states the substance of the existing law as found in Code of Civil Procedure Section 2102. See People v. Mayes, 113 Cal. 618, 625-626, 45 Pac. 860, 862 (1896); Gallegos v. Union-Tribune Publishing Co., 195 Cal. App.2d 791, 797-798, 16 Cal. Rptr. 185, 189-190 (1961).

§ 459. Judicial notice in proceedings subsequent to trial

Comment. Section 459 sets forth a separate set of rules for the taking of judicial notice in proceedings subsequent to trial and in appellate proceedings.

Subdivision (a). This subdivision provides that the failure or even the refusal of the court to take judicial notice of a metter at the trial does not bar the trial judge, or another trial judge, from taking judicial notice of that matter in a subsequent proceeding, such as a hearing on a motion for new trial or the like. Although no California case has been found, it seems safe to assume that the trial judge has the power to take judicial notice of a matter in subsequent proceedings, since the appellate court can properly take judicial notice of any matter that the trial court could properly notice. See People v. Tossetti, 107 Cal. App.7, 12, 289 Pac. 881, 883 (1930). Subdivision (a) is the same in substance as Rule 12(1) of the Uniform Rules of Evidence.

Subdivision (b). Subdivision (b) requires that a reviewing court take judicial notice of any matter that the trial court was obliged to notice. This means that the matters specified in Section 451 must be judicially noticed by the reviewing court even though the trial court did not take judicial notice of such matters. The matters specified in Section 452 also must be judicially noticed by the reviewing court if an appropriate request was made at the trial level and the party making the request satisfied the conditions specified in Section 453. However, if the trial court erred, the reviewing court is not bound by the tenor of the notice taken by the trial court.

Having taken judicial notice of such a matter, the reviewing court may or may not apply it in the particular case on appeal. The effect to be given to matters judicially noticed on appeal, where the question has not been raised below, depends on factors that are not evidentiary in character and are not mentioned in this code. For example, the appellate court is required to notice the matters of law mentioned in Section 451, but it may hold that an error which the appellant has "invited" is not reversible error or that points not urged in the trial court may not be advanced on appeal, and refuse, therefore, to apply the law to the pending case. These principles do not mean that the appellate court does not take judicial notice of the applicable law; they merely mean that, for reasons of policy governing appellate review, the appellate court may refuse to apply the law to the case before it.

In addition to requiring the reviewing court to judicially notice those matters which the trial court properly noticed or was required to notice, the

subdivision also provides authority for the reviewing court to exercise the same discretionary power to take judicial notice as is possessed by the trial court.

Subdivision (c). The reviewing court may consult any source of pertinent information for the purpose of determining the propriety of taking judicial notice or the tenor of the matter to be noticed. This includes, of course, the power to consult such sources for the purpose of sustaining or reversing the taking of judicial notice by the trial court. As to the rights of the parties when the reviewing court consults such materials, see subdivision (e) and the Comment thereto.

Subdivision (d). Subdivision (d) provides the parties with the same procedural protection when judicial notice is taken in proceedings subsequent to trial as is provided by Section 455(a). Subdivision (d) is based on Rule 12(4) of the Uniform Rules of Evidence.

Subdivision (e). This subdivision assures the parties the same procedural safeguard at the appellate level that they have in the trial court. If the appellate court resorts to sources of information not included in the record in the action or proceeding, or not received in open court at the appellate level, either to sustain the tenor of the notice taken by the trial court or to notice a matter in a tenor different from that noticed by the trial court, the parties must be given a reasonable opportunity to meet such additional information before judicial notice of the matter may be taken. See EVIDENCE CODE § 455(b) and the Comment thereto.