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Admitting Hearsay and Applying FRE 801(d)(2): Expanding the Scope of Party Admissions to Outside Counsel Statements

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The Proper Use and Misuse of FRE 801(d)(2)(D) & Expanding the Scope of Party Admissions to Outside Counsel Statements

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Timothy Tomasik is a founding member of Tomasik Kotin Kasserman, LLC. In his 28 years of practice, Tim has distinguished himself as one of Chicago's elite trial attorneys. He has tried over 100 jury and bench trials to verdict. Tim has handled and successfully resolved hundreds of millions of dollars in claims in a variety of practice areas, including complex premises liability, aviation litigation, medical negligence, medical liability, hospital liability, and mass disasters.

A Look at the Rule

Federal Rule of Evidence 801(c) defines hearsay as a statement that the declarant does not make while testifying at the current trial or hearing that a party offers in evidence to prove the truth of the matter asserted in the statement.

Admissions by a party opponent, however, are excluded from this definition on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility. (Notes of Advisory Committee on Proposed Rules).

There is a trend in some jurisdictions to admit out of court statements of outside counsel as admissions against their clients under Federal Rule of Evidence 801(d)(2). Federal Rule of Evidence 801(d)(2), which governs the admissibility of an opposing party's statement, states:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> > **(2)** ***An Opposing Party's Statement*****.** The statement is offered against an opposing party and:
> >
> > **(A)** was made by the party in an individual or representative capacity;
> >
> > **(B)** is one the party manifested that it adopted or believed to be true;
> >
> > **(C)** was made by a person whom the party authorized to make a statement on the subject;
> >
> > **(D)** was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
> >
> > **(E)** was made by the party's coconspirator during and in furtherance of the conspiracy.

Agents and the Hearsay Rule

While many trial courts use the verbiage of "party opponent admissions" in reference to Rule 801(d)(2), these statements are actually referred to in the rules as "An Opposing Party's Statement." Although the terms may be used interchangeably, the important thing to note is that an opposing party's statement is NOT hearsay – it an *exemption* to the hearsay rule, not an exception. As non-hearsay, any statement made by or on behalf of a party generally may be admitted into evidence as an admission by a party opponent if the statement is relevant to a trial issue. When relevant to the issues in a given case, admissions by a party or a party's agent are admissible as substantive evidence of the truth of the statements made or of the existence of any facts they have a tendency to establish[1]. *Nastasi v. United Mine Workers,* 209 Ill.App.3d 830 (5th Dist. 1991).

Significantly, unlike other rules of evidence, the rules on admissions are not based on reliability and do not require personal knowledge. *See e.g. Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill.App.3d 1060 (1st Dist. 2001); 4 Steven A. Saltzburg et al., *Federal Rules of Evidence Manual* §801.02[6][f][i] (Matthew Bender 10th ed.). Rather, admissions are a by-product of our adversarial system of justice. *See* Saltzburg.

Strategically navigating and implementing Rule 801(d)(2)(D) is critical when opposing the admissions of party opponent agents. Understanding the striking differences in the application of the rule in common-law jurisdictions and in federal courts is paramount to your success—whether you are on the offense or defense. Timothy S. Tomasik, *Gossiping Agents and the Hearsay Rule*, Published in Litigation, Volume 39, Number 2, Spring 2013, © 2013 by the American Bar Association.

Modern Consensus

Rule 801(d)(2)(D) does not require personal knowledge or the authority to speak on behalf of the principal. However, this was not always the case. In common law jurisdictions, a jury would never hear a damaging admission of an agent who had no personal knowledge of the facts giving rise to liability or who was not authorized to speak on behalf of the principal. Courts recognized that the common-law approach imposed an impossible burden on proponents because, as a practical matter, courts could not envision a set of facts where an employee was specifically authorized to make a statement detrimental to the employer's interest. *Pavlik,* 323 Ill. App. 3d 1060.

Unlike the other rules of evidence, the rules on admissions are not based on reliability and do not require personal knowledge. Rather, admissions are a by-product of our adversarial system of justice. 4 Steven A. Saltzburg et al., Federal Rules of Evidence Manual § 801.02[6] [f][i] (Matthew Bender 10th ed.). Dissatisfaction with unjust outcomes led courts to abandon the old principles governing the admission of employee statements in favor of new ones that promoted the generous treatment of admissions.

[1] See *Sample Trial Brief* , attached as **Exhibit A**, on the use of Opposing Party Statements.

Courts are now in general agreement that the rule does not mandate personal knowledge—that "no guarantee of trustworthiness is required in a case of an [agent] admissions." Fed. R. Evid. 801(d)(2)(D) advisory committee's note. However, some remain unaware of the shift away from the old common-law principles. In motion and trial practice, many opponents remain steadfastly wedded to recycling old arguments asserting that such statements are inadmissible because the defendant lacked sufficient personal knowledge or was unauthorized by the principal to speak on the principal's behalf. *Mister v. Ne. Ill. Commuter R.R. Corp.*, 571 F.3d 696 (7th Cir. 2009).

Objections against agent admissions are often premised on the personal knowledge requirement of Rule 602 and its effect on the admissibility of party-opponent admissions under Rule 801(d)(2)(D). Those attacking the admissibility of such statements often claim the agent lacks sufficient knowledge, citing Rule 602, which provides that "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

Although the personal knowledge requirement of Rule 602 seemingly collides with Rule 801(d)(2)(D), the advisory committee's notes emphasize why such statements under 801(d)(2)(D) are more liberally admissible: [T]he freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in "statement against interest" circumstances, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue of admissibility. Fed. R. Evid. 801 advisory committee's note.

Modern Applications

Courts generally have applied the "traditional agency approach" or "the scope of employment" approach in determining whether a statement by an agent or employee constitutes an admission by his or her principal or employer. *Pavlik*, 323 Ill. App. 3d at 1060. Under the traditional common-law agency approach, the proponent of the statement must establish that the declarant was an agent or employee, the statement was made about a matter over which the declarant had actual or apparent authority, and the declarant spoke by virtue of authority as such agent or employee.

The traditional approach often led to the loss of valuable, relevant evidence, leading courts to adopt the "scope of employment" approach advanced by Federal Rule of Evidence 801(d)(2)(D). This application provides that statements by an employee concerning a matter within the scope of his or her employment constitute admissions by the employer if the statements are made during the employment relationship. No longer does a party seeking to introduce the evidence have to show that the proponent specifically was authorized by the employer to make the statement.

To illustrate, in *Pavlik*, the trial court barred statements made by the defendant's employee and granted summary judgment. The plaintiff testified in her deposition that while turning a corner in a store, she slipped on a liquid substance and fell, landing on her right knee. She explained that she thought the liquid that caused her to slip was hair conditioner. The defendant moved for

summary judgment, and the plaintiff relied on her testimony that, after she fell, one of the defendant's employees, someone "like a store clerk," stated that the puddle of conditioner "should have been cleaned up before." The plaintiff further testified that the employee remarked about the puddle, "Oh, she was supposed to clean that up and she didn't." The *Pavlik* court, in examining the circumstances surrounding the statement, reasoned that an employee's knowledge of a dangerous condition or spilled substance on the premises is considered sufficient to impute notice to the defendant employer because of the employee's responsibility to either correct the unsafe condition or report the problem to his or her superiors. Given that the defendant's employee should have either cleaned the spill or reported the condition to her superior, the statements at issue concerning her prior knowledge of the existence of the spill fell within the scope of her employment. In reversing summary judgment, the court determined that because the statements were made by the defendant's employee within the course of the employment relationship about a matter within the scope of employment, the statements fell within the party admission exception to the hearsay rule and therefore were admissible despite a lack of personal knowledge.

Establishing Agency

The proponent of the evidence must demonstrate the scope of employment by a preponderance of the evidence. To determine whether the declarant was an agent of the party, Rule 801 requires that the trial court not only consider the contents of the statements themselves but also find some independent evidence of agency, such as the circumstances surrounding the statement, the identity of the speaker, or the context in which the statement was made. Fed. R. Evid. 801 advisory committee's note; *Pappas v. Middle Earth Condo. Ass'n*, 963 F.2d 534 (2d Cir. 1992).

Counsel should encourage the court on the record to find by a preponderance of the evidence that the statement was made by an agent or employee against whom the statement is offered concerning a matter that was within the scope of the agency or employment relationship: "In making this finding, I've considered the contents of the statement and also the additional evidence relied upon by the parties. The statement therefore [is or is not] admissible as an agent's admission under Rule 801(d)(2) (D)." Saltzburg, supra, § 801.02[6][f][i].

Facing Objections

Once a trial court determines that a statement is not hearsay under Rule 801(d)(2)(D), "[t]he question remains whether there are other objections." *Mister*, 571 F.3d at 699. In *Mister*, the Seventh Circuit determined that the trial court erred in refusing to admit an investigator's statement on the grounds that it was inherently unreliable because the declarant lacked firsthand knowledge of the incident. The appellate court held that a determination that a statement of an agent is not hearsay does not automatically require that the reported statements be admitted into evidence. At oral argument, *Mister* argued that anything asserted by an investigative official and found in a report created within the scope of employment, even if extremely ridiculous, such as "the cow jumped over the moon," should come into evidence. Although there are rules that call for the generous treatment of party-opponent admissions, they "still do not stand for the proposition that Rule 801(d)(2)(D) trumps all other Federal Rules of Evidence." *Id.*

In finding that the trial court did not abuse its discretion, the *Mister* court held that Rule 403 requires that, if a district court determines that the prejudicial effect of admitting such evidence substantially outweighs its probative value, it thereby renders it inadmissible. Although it may be proper to admit certain statements, it was not improper to find statements unreliable based on the multiple levels of hearsay and lack of precise factual statements pursuant to Rule 403.

Statements of Outside Counsel as Party Admissions

Under the traditional law of agency, the statements of an agent made in the course of the agency serve to bind the principal. Thus, such statements are presumably reliable in the absence of cross-examination because they are considered as if they were statements of the principal himself. *See United States v. Harris*, 914 F.2d 927, 931 (7th Cir. 1990). In this context, numerous courts have considered whether statements by a party attorney may be admissible under Rule 801(d)(2).

An attorney *may be* the agent of his client for purposes of Rule 801(d)(2)(D). *See United States v. McClellan,* 868 F.2d 210, 215 n. 9 (7th Cir.1989). *See also United States v. Margiotta*, 662 F.2d 131 (2d Cir.1981). The unique nature of the attorney-client relationship, however, demands that a trial court exercise caution in admitting statements that are the product of this relationship. *See United States v. McKeon*, 738 F.2d 26, 30–33 (2d Cir.1984). "[T]he free use of prior [statements] may deter counsel from vigorous and legitimate advocacy" on behalf of his client. *McKeon,* 738 F.2d at 32. Thus, a more exacting standard must be demanded for admission of statements by attorneys under Rule 801(d)(2)(D), "in order to avoid trenching upon other important policies." *Id; Harris*, 914 F.2d 927, 931 (7th Cir. 1990) (statements of defense counsel inquiring whether witness might have mistaken defendant's brother for defendant were admissible under federal rule excepting from hearsay statement offered against party made by party's agent). Party admissions are a formidable weapon in a trial lawyer's arsenal and are liberally used due to their unique admissibility. Numerous courts have determined that such statements made by outside counsel may also be admissible as an opposing party's statement.

Admissible Attorney Statements

Although an attorney does not have authority to make an out-of-court admission for his client in all instances, he does have authority to make admissions which are directly related to the management of litigation. *Hanson v. Waller,* 888 F.2d 806, 814 (11th Cir. 1989). Therefore, attorneys must exercise great caution in all correspondence. (*Id.*) In *Hanson,* Defendant put into evidence a letter from Appellants' first attorney Mr. Thompson to Defendant's attorney Mr. Dorsey. The letter contained factual statements discussing what occurred at an accident scene and was, as the court found, clearly related to the management of the litigation and fell within the hearsay exclusion provided by Rule 801(d)(2)(C). "The letter, not constituting an offer of compromise, was properly admitted as an admission by a party opponent, pursuant to Fed.R.Evid. 801. Rule 801(d)(2)(C) specifically excludes statements used against a party which were made by another person authorized by the party to make a statement concerning the subject, from the definition of hearsay." *Id.* at 814.

It is the general rule that "statements made by an attorney concerning a matter within his employment may be admissible against the party retaining the attorney." *Williams v. Union Carbide Corp.*, 790 F.2d 552, 555 (6th Cir. 1986), quoting *United States v. Margiotta*, 662 F.2d 131, 142 (2d Cir. 1981). Pleadings in a prior case may also be used as evidentiary admissions. *Id.* at 556. In *Williams*, the defendant sought to use the allegations contained in the complaint of an earlier lawsuit which had been filed by the plaintiff. *Id.* at 554. The earlier suit appeared to have claimed damages for the same injuries as alleged in this case but attributed them to another cause. *Id.* The court found that because there was no question that the plaintiff's attorney was fully authorized to act and speak for the plaintiff, the statements made in the previous lawsuit were proper for impeachment. *Id.* at 556.

In *Harris v. Steelweld Equipment Co, Inc.*, the court ruled that statements by plaintiffs' workers' compensation lawyer to a rehabilitation expert concerning the possibility that the injured plaintiff could be employable constituted admissions by a party opponent and were deemed admissible. 869 F.2d 396, 403 (8th Cir. 1989). At trial, plaintiff objected to the admission of the statements on the grounds of hearsay. The trial court overruled the objection, and the Eighth Circuit Court upheld the ruling, stating that if the district court had sustained appellants' objection regarding the admissibility of the statements, it would have been a clear abuse of discretion requiring reversal. *Id.*

Inadmissible Attorney Statements

Not all statements made by an attorney will be admissible under 801(d)(2)(D). Many courts have considered the scope of an attorney's authority on a case by case basis when examining whether or not a statement constitutes an evidentiary admission.

While an attorney may be an agent of his/her client for the purposes of Rule 801(d)(2), not all attorney statements are admissible under the rule. Extrajudicial statements made by an attorney in casual conversation are typically not admissible against his/her client as an admission under Rule 801(d)(2)(D). *Moody v. Twp. of Marlboro*, 885 F. Supp. 101, 104 (D.N.J. 1995). In *Moody*, where plaintiff's attorney made an alleged statement during a break in the deposition, he acted outside the scope of the attorney-client relationship. *Id.* at 104. The District Court held that: (1) the alleged statement was not admissible as admission of party-opponent, and (2) the statement was not admissible under residual exception to hearsay rule. Thus, for purposes of Rule 801(d)(2)(D), plaintiff's attorney did not act within the scope of his agency when he allegedly spoke to plaintiff. *Id.*

Similarly, in *United States v. Valencia*, the government sought, by pretrial motion, a ruling that defense counsel's statements during informal conversations with prosecutor could be admitted against criminal defendant as admissions by an agent. 826 F.2d 169 (2d Cir. 1987). The Court of Appeals held that defense counsel's statements were not admissible as they were made during informal conversations with prosecutor in efforts to secure bail for defendant. *Id.* at 173.

The Seventh Circuit has also weighed in on the issue and reaffirmed that a decision regarding the admission of evidence is within the broad discretion of the trial judge and will be overturned only upon a clear abuse of that considerable discretion. *United States v. Jung*, 473 F.3d

837, 841 (7th Cir. 2007). In *Jung*, the court stated that, "[t]he unique nature of the attorney-client relationship ... demands that a trial court exercise caution in admitting statements that are the product of this relationship." *Id.* In that spirit, the court found that the district court failed to apply the "more exacting standard [that] must be demanded for admission of statements by attorneys under Rule 801(d)(2)(D)." *Id.* at 842. The court found that defendant's attorney's statements did not fit in neatly with the defense's theory of the case, but directly contradicted their argument. Moreover, from a policy perspective, evidence of this nature should only be offered "in rare cases and when absolutely necessary, in order to avoid impairing the attorney/client relationship, chilling full disclosure by a defendant to his lawyer, and deterring defense counsel from vigorous and legitimate advocacy." *Id.* at 841.

Conclusion

There is no hardline rule governing the admissibility of outside counsel statements. Rather, courts take varying approaches to Rule 801(d)(2) in considering the admissibility of statements by a party's counsel. Litigants should be cognizant of the contexts in which rival attorneys have used statements as a party opponent admission and be prepared to introduce statements of opposing counsel to their advantage when appropriate.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

KEVIN CLAFFEY, Plaintiff, v. VIRGINIA HUNTLEY and MARK HUNTLEY, Defendants.	No. 17 L 4613

BRIEF IN SUPPORT OF ILLINOIS LAW MANDATING THE PUBLICATION OF PARTY-OPPONENT ADMISSIONS FROM VIRGINIA HUNTLEY'S DISCOVERY DEPOSITION TO THE JURY

Plaintiff, KEVIN CLAFFEY, his attorneys, TOMASIK KOTIN KASSERMAN, LLC, for his brief in support of permitting of publishing party-opponent admissions made Virginia Huntley, states:

Illinois law is clear that this Court is mandated to permit plaintiff to publish evidentiary admissions contained in the discovery deposition of Virginia Huntley. Furthermore, this Court should find that portions of Ms. Huntley's deposition testimony constitute judicial admissions. Illinois law is equally clear that the availability of the witness is immaterial. Ill. R. Evid. 801(d)(2)(A); *Security Sav. And Loan Ass'n. v. Commissioner of Sav. And Loan Associations*, 77 Ill.App.3d 606, 610 (3d Dist. 1979). (The admissions plaintiff intends to publish are attached as **Exhibit 1**).

A. Excerpts from Virginia Huntley's Deposition Testimony are Admissible as Party-Opponent Admissions

Supreme Court Rule 212(a)(2) provides that "discovery depositions taken under the provisions of this rule may be used . . . (2) **as an admission made by a party or by an officer or agent of a party in the same manner and to the same extent as any other admission made by that person** . . ." For the purposes of Rule 212, admissions are defined as deliberate testimony relating to a concrete fact, not an inference or uncertain summary. *Derby Meadows Utility Co., Inc. v. Intercontinental Real Estate*, 202 Ill.App.3d 345, 355 (1st Dist. 1990). When excerpts from a deposition are offered as admissions, no predicate or foundation is required for their use as direct and substantive evidence. *Security Sav. and Loan*, 77 Ill.App.3d at 610. Furthermore, it is not necessary that the person making an admission be unavailable as a witness. *Id*. at 612, citing *Home Life Insurance Co. v. Franklin*, 303 Ill.App. 146 (1st Dist. 1940); *Rose v. Chicago*, 317 Ill.App. 1 (1st Dist. 1942); *see e.g. Adams v. Family Planning Associates Medical Group, Inc.*, 315 Ill.App.3d 533, 551-52 (1st Dist. 2000)(in medical malpractice case, noting "the deposition testimony of a party may contain admissions which are an exception to the rule excluding hearsay, and are admissible under Rule 212(a)(2)").

Generally, testimony in a discovery deposition is held to be an evidentiary admission. *Lindenmeier v. City or Rockford*, 156 Ill.App.3d 76 (2d Dist. 1987). Illinois Rule of Evidence 801(d)(2)(A) provides that "a statement is not hearsay if the statement is offered against a party and is the party's own statement, in either an individual or a representative capacity." As this court well knows, **as non-hearsay, any statement made by or on behalf of a party generally may be admitted into evidence as an admission by a party opponent if the statement is relevant to a trial issue**. *First Assist, Inc. v. Indus. Comm.*, 371 Ill.App.3d 488 (4th Dist. 2007); *Vojas v. Kmart Corp*., 312 Ill.App.3d 544 (5th Dist. 2000); *People v. Bryant*, 391 Ill.App.3d 228 (5th Dist. 2009).

When relevant to the issues in the case, admissions by a party are admissible as substantive evidence of the truth of the statements made or of the existence of any facts they have a tendency to establish. *Nastasi v. United Mine Workers*, 209 Ill.App.3d 830 (5th Dist. 1991).

Significantly, unlike other rules of evidence, the rules on admissions are not based on reliability and do not require personal knowledge. *See e.g. Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill.App.3d 1060 (1st Dist. 2001); 4 Steven A. Saltzburg et al., *Federal Rules of Evidence Manual* §801.02[6][f][i] (Matthew Bender 10th ed.). Rather, admissions are a by-product of our adversarial system of justice. *See* Saltzburg.

The well-settled principles articulated above make it clear that plaintiff is entitled to introduce into evidence admissions from defendant's discovery deposition.

B. Excerpts of Testimony from Ms. Huntley's Deposition are Admissible as Judicial Admissions

Furthermore, Ms. Huntley's deposition testimony is unequivocal and the subjects contained therein are within her personal knowledge so as to constitute judicial admissions that prohibit contradiction at trial. A judicial admission is a deliberate, clear, unequivocal statement of a party about a concrete fact within that party's peculiar knowledge. *Hansen v. Ruby Const. Co.*, 155 Ill.App.3d 475, 480 (1st Dist. 1987). A party cannot create a factual dispute by contradicting a previously made judicial admission. *Id*. The frequently stated purpose of the doctrine of judicial admissions is to eliminate the temptation to commit perjury. *Id*. Assertions made in a deposition constitute binding judicial admissions only if they are unequivocal. *Id*. The issue of equivocalness is a question of law. *Id*. For testimony to be binding as a judicial admission, it must be peculiarly within the knowledge of the deponent. *Id*. at 482. Significantly, unlike evidentiary admissions, a judicial admission may not be contradicted at trial. *Dayan v. McDonald's Corp*., 125 Ill.App.3d 972, 983 (1st Dist. 1984).

In *Hansen*, the First District found that where a plaintiff testified in his deposition that he tripped over a rubber bumper and there were no other witnesses, his deposition testimony to that effect amounted to a judicial admission. The Court found that his testimony that he "clearly believed he tripped over the bumpers" was unequivocal and within his personal knowledge as the sole witness to the occurrence.

Ms. Huntley's testimony is similarly unequivocal. For instance, Ms. Huntley testified that she did not see Mr. Claffey deliver the mail that day. (*See* Discovery Deposition of Virginia Claffey at 9:7-9). Ms. Huntley stating that she owned Chelsea is similarly unequivocal. (*Id.* at 6:10-16). Thus, plaintiff submits that, under the law set forth under *Hansen*, Ms. Huntley's unequivocal deposition testimony contains judicial admissions which may be published without contradiction to the jury. Any other result would contradict the stated purpose of the doctrine of judicial admission by allowing Ms. Huntley an opportunity to commit perjury or otherwise equivocate on her testimony.

WHEREFORE, Plaintiff requests that this Court enter an order granting the relief sought herein.

s/ Patrick J. Giese
One of Plaintiff's Attorneys

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