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I. What is an admission?

Many people associate an admission with a confession of guilt given in court through testimony. However, in reality an admission relates to any material fact and can occur at any time during litigation in virtually any form. What is most ironic is that admissions are usually not made by the parties themselves but are made inadvertently through their attorneys via pleadings, briefs, or statements in open court.

In fact, since everything said or submitted to court is on some level an admission, an attorney must know what he or she is admitting and how it may affect his or her case. This Article will examine two cases that present common situations during litigation where an admission may occur. In doing so, it will examine the background of admissions under the Federal Rules of Evidence, the various modes in which admissions are presented, and whether the effect of an admission in the litigation is formal (binding) or informal (rebuttable). Armed with that information, this Article will then suggest answers to the questions posed in the following two case studies.

A. *Case Study #1*

The facts are as follows: A government agency ("Agency") was charged with monitoring the security and well-being of two young children placed under its care. The two children subsequently died in a tragic home accident. Following the accident, the children's next of kin

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filed suit against the Agency accusing it of negligence in performance of its duties. The Agency answered and asserted, among other things, the defense of immunity under the New York Social Services Law.[1] An internal investigation of the events leading up to the accident resulted in a finding of negligence on the part of the Agency and one of its employees. In a motion for summary judgment, counsel for the Agency cited the investigation conducted by the Agency and its finding that an employee of the Agency was negligent. It claimed that immunity should be granted because the finding of negligence failed to meet the statutory threshold of "gross" negligence required to deny it immunity under the statute. This motion was denied by the trial court, which found that issues of fact existed as to whether or not the Agency was "grossly" negligent.

Prior to trial, the next of kin argued that, by citing the results of the Agency's investigation and its finding of negligence on the part of the Agency in counsel's brief for summary judgment, the Agency admitted it was negligent in this case. The Agency disagreed. It argued that the brief did not constitute an admission of negligence and, since the motion was denied, they could still contest negligence at trial. Accordingly, the issue is whether the results of the investigation or reference to it in counsel's brief can be considered an admission and, if so, whether the Agency is bound to that admission at trial.

B. *Case Study #2*

The facts of case two are as follows: The case stems from an alleged assault and battery of a customer by an individual working at a restaurant. The restaurant was incorporated. One of the plaintiff's causes of action against the restaurant in a civil lawsuit was negligent hiring and retention of an employee based upon the previous criminal history of the accused assailant. Paragraph 17 of plaintiff's complaint stated unequivocally that the accused assailant was an employee of the restaurant, a claim that was neither admitted nor denied in the defendant's answer. The evidence showed that the accused assailant was a 50 percent shareholder in the restaurant, was solely responsible for its day to day operations, and received not only a salary but also quarterly draws from the corporation's profits. At the time of trial, the defendant

1. N.Y. SOC. SERV. LAW § 419 (McKinney 1996).

sought to argue that the accused assailant was an owner of the corporation and not an employee. This would defeat the negligent hiring cause of action asserted by the plaintiff against the corporation, which was the only source of money for recovery of damages. Accordingly, the question here is whether a failure to expressly deny an allegation in the pleading constitutes a binding admission of fact, which prohibits the defendant from arguing to the jury that defendant was an owner, not an employee.

II. History

Admissions by a party have been recognized by both common law and the federal and state rules of evidence and have always been a highly debated topic. Roughly defined as a statement made by a party that can be used against that party at trial,[2] an admission can be a highly prejudicial proclamation. Wigmore concedes that even though a party admission essentially has the same probative value as any other person's assertion, its significance is greatly increased when offered against the party so as to invalidate any inconsistent statements made in pleadings or testimony.[3] In fact, the weight of an admission is so great that it has often been held that a party may "plead themselves out of court." After all, if a defendant admits to everything in the complaint, there is no triable issue. Accordingly, whether a party's statement rises to the level of an admission, to the extent of removing the issue from trial, can be a highly contentious and imperative inquiry.

In codifying the Federal Rules of Evidence, the Advisory Committee addressed party admissions as an express exclusion of hearsay.[4] In order to qualify, the statement must be offered against the party and be the party's own statement, which includes statements of an authorized agent, or be a statement which the party has adopted as true.[5] Examining the language of Fed. R. Evid. 801(d)(2) reveals that a couple of inferences may be made. The first comes from the introductory language of the rule which requires that "[t]he statement is offered

2. KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 254 (6th ed. 2009) [hereinafter MCCORMICK].

3. *See id.*

4. FED. R. EVID. 801; *see also* Liberto v. Liberto, 507 N.Y.S.2d 39, 40 (App. Div. 1986); Fassett v. Fassett, 475 N.Y.S.2d 154, 155 (App. Div. 1984).

5. *See* FED. R. EVID. 801(d)(2).

against an opposing party . . .”[6] While this means that the statement must be contrary to a party’s position at trial, an admission, unlike a statement against interest, need not be against the party’s interest at the time it was made.[7]

In addition, the statement must be (A) “made by the party in an individual or representative capacity”; (B) “one the party manifested that it adopted or believed to be true”; (C) “made by a person whom the party authorized to make a statement on the subject”; (D) “made by the party’s agent or employee on a matter within the scope of that relationship and while it existed”; or (E) “made by the party’s coconspirator during and in furtherance of the conspiracy.”[8] Essentially, the Advisory Committee required that an admission not only be against the party’s position but also that it either come directly from the party or the party acknowledge the statement and accept it as true. More importantly, since an admission is an exclusion to the hearsay rule, it is not limited to in-court testimony, thereby broadening the time frame and format in which an admission can be made.[9]

In terms of the requirement that the statement come from the party, the language was expanded to include their authorized agent or representative.[10] To determine if a representative’s statement meets the criteria of an admission, one must examine whether the statement was made in the scope of employment.[11] As a guide to interpret what constitutes “scope of employment,” in an evidentiary setting, the Advisory Committee has stated that the only requirement is that the subject matter of the admission matches the subject matter of the employee’s job description.[12] This issue arises often where an executor of a decedent’s estate makes statements to creditors as to the value of the estate.[13] When it has been determined that such statements were not made

6. *Id.*

7. *See* Tamily v. Gen. Contracting Corp., 705 N.Y.S.2d 109 (App. Div. 2000).

8. FED. R. EVID. 801(d)(2).

9. *See id.* at 801(c). As hearsay is defined as, “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted,” it follows that an exclusion from hearsay would not need to be made while testifying at the trial. *Id.*

10. *See id.*

11. *See Tamily*, 705 N.Y.S.2d 109; *see also* Mich. Nat’l Bank-Oakland v. Am. Centennial Ins. Co. (*In re* Liquidation of Union Indem. Ins. Co.), 674 N.E.2d. 313 (N.Y. 1996).

12. *See* FED. R. EVID. 801(d)(2) advisory committee’s note.

13. *See, e.g.*, Commercial Trading Co. v. Tucker, 437 N.Y.S.2d 86 (App. Div.

by an executor in his capacity as such, the statements were not binding admissions against the estate.[14]

Noticeably absent from the requirements of an admission under Federal Rule 801(d)(2) is the condition of trustworthiness. According to the Advisory Committee Notes, "[a]dmissions . . . are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system" and "[n]o guarantee of trustworthiness is required in the case of an admission."[15] This position is furthered by the theory that since the admission is made by the party against whom it is being used; there is no need for them to cross-examine themselves.[16] Admissions can take virtually any form and tend to be categorized as either express or implied by conduct, and made by either the party directly or their representative.[17] With respect to the pleadings, it has long been held that statements in both the complaint and answer may constitute an admission.[18] However it is also true that an admission can take the form of statements in an original answer or complaint after amended versions were made,[19] as well as through a bill of particulars,[20] affidavits,[21] depositions,[22] and the results of an investigation.[23]

While direct testimony in court can obviously lead to an admission, testimony from a previous proceeding can as well. Such was the case in *Columbia County Support Collection Unit ex rel. Carreras v. Interdonato*, in which a New York court allowed the declarant's previous testimony in a hearing before a Support Magistrate to be admitted in his subsequent Family Court proceeding.[24] Even though no admission was made by the declarant in the Family Court, the voluntary and

1981).

14. *See id.*

15. *See* FED. R. EVID. 801(d)(2) advisory committee's note.

16. MCCORMICK, *supra* note 2, § 254; *see also* Knutson v. Sand, 725 N.Y.S.2d 350 (App. Div. 2001).

17. *See* MCCORMICK, *supra* note 2, § 254.

18. *Id.*; *see also* Coffin v. President of Grand Rapids Hydraulic Co., 32 N.E. 1076 (N.Y. 1893); Kwiecinski v. Chung Hwang, 885 N.Y.S.2d 783 (App. Div. 2009); Moncreiffe Corp. v. Heung, 740 N.Y.S.2d 321 (App. Div. 2002); Smith v. Limited, 655 N.Y.S.2d 418 (App. Div. 1997).

19. Bagoni v. Friedlander, 610 N.Y.S.2d 511, 517-19 (App. Div. 1994).

20. *See* Hill v. King Kullen Grocery Co., 581 N.Y.S.2d 378 (App. Div. 1992).

21. *See* Baje Realty Corp. v. Cutler, 820 N.Y.S.2d 57, 59 (App. Div. 2006).

22. *See* Ocampo v. Pagan, 892 N.Y.S.2d 452 (App. Div. 2009).

23. *See* Mich. Nat'l Bank -Oakland v. Am. Centennial Ins. Co. (*In re* Liquidation of Union Indem. Ins. Co.), 674 N.E.2d. 313 (N.Y. 1996).

24. 858 N.Y.S.2d 801 (App. Div. 2008).

unequivocal nature of the admission to the Support Magistrate was sufficient in both formality and conclusiveness to be deemed binding in the Family Court proceeding.[25]

Admissions through the conduct of a party, while not as prevalent, have also been accepted. Such admissions arise most commonly through silence. For example, silence as a response to an assertion, containing facts which the party would naturally be expected to deny has traditionally been received as an admission.[26] Additionally, in connection with a responsive pleading, silence by means of failing to expressly deny a statement has the effect of an admission.[27]

In a representative capacity, admissions commonly are introduced through the parties' attorneys, whether in the form of their written briefs[28] or as statements made in open court.[29] Notably, since it has the same effect as an admission made directly by the party, an admission by a representative can be devastating when based on incorrect information.

The question then becomes: when is an admission binding on the party so as to remove the issue from judgment? The answer may be found in the classification of the admission.

III. Classification of Judicial Admissions

A. *Formal Admissions*

When made in the context of a judicial proceeding, admissions in any form fall into one of two categories: formal, which are binding, and informal, which are rebuttable.[30] Accordingly, the ability to differentiate the two can have a profound effect on a case.

A formal judicial admission is a party's own, deliberate, clear, and unequivocal statement about a material fact.[31] Once made, the statement

25. *Id.*

26. *See* MCCORMICK, *supra* note 2, § 262.

27. *See* FED. R. CIV. P. 8(b)(6); N.Y. C.P.L.R. 3018(a) (McKinney 1980).

28. *See* Pok Rye Kim v. Mars Cup Co., 476 N.Y.S.2d 381 (App. Div. 1984).

29. *See* 29A AM. JUR. 2D *Evidence* § 784 (2011).

30. *See* Rahman v. Smith, No. 23495/03, 2005 WL 5118512, at *2 (N.Y. Sup. Ct. Nov. 29, 2005).

31. *See id.*; *see also* Markus May, *A Primer on Judicial Admission*, DCBA BRIEF: J. DUPAGE COUNTY B. ASS'N, Feb.–Mar. 2005, at 12, *available at* http://www.dcbabrief.org/vol170205art1.html.

cannot be contradicted and is therefore conclusively bound to the party.[32] Once a statement is deemed to be a formal judicial admission, the statement is no longer evidence but rather a concession that completely withdraws the fact from contention.[33] As a result, a formal judicial admission removes the need for the opposing party to further prove the admitted fact.[34]

In order to constitute a formal judicial admission, the statement must be one of fact not opinion and must be contrary to an essential fact or defense asserted by the party giving the testimony as well as being deliberate, clear, and unequivocal.[35] In addition, giving conclusive effect to the statement must not be inconsistent with public policy nor be detrimental to the opposing party's theory of recovery.[36] The determination of whether a statement reaches the standard of a formal judicial admission is a matter of law.[37]

B. *Informal Admissions*

Unlike the requirement that formal judicial admissions be unequivocal, informal judicial admissions are facts that are "incidentally" admitted during the judicial proceeding[38] and are simply regarded as a piece of evidence that is not binding or conclusive on the trier of fact.[39] Similar to any other form of evidence, informal admissions are subject to contradiction or explanation.[40] Accordingly, the classification of an admission as either formal or informal has a tremendous impact on how the issue is treated and has the potential to determine the outcome of the case.

32. *See Rahman*, 2005 WL 5118512, at *2.

33. *See id.*

34. *See id.*

35. *See Evidence*, *supra* note 29, § 783; *see also Raham*, 2005 WL 5118512, at *2.

36. *See Evidence*, *supra* note 29, § 783.

37. See *id.*

38. *See* Mich. Nat'l Bank-Oakland v. Am. Centennial Ins. Co. (*In re* Liquidation of Union Indem. Ins. Co.), 674 N.E.2d. 313 (N.Y. 1996).

39. *See* 9 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 2590 (James H. Chadborn ed., 1981 & Supp. 1991); *see also Mich. Nat'l Bank-Oakland*, 674 N.E.2d at 317.

40. *See Mich. Nat'l Bank-Oakland*, 674 N.E.2d at 317.

IV. Forms of Admissions

In the Author's experience, the two most common forms of admissions are statements made in pleadings and statements made in open court. These are formal admissions. Precedent was set by the United States Supreme Court in *Jones v. Morehead*,[41] when after hearing testimony, it refused to allow the defendant to retract an admission made in its answer, stating, "[i]t would be subversive of all sound practice, and tend largely to defeat the ends of justice, if the court should refuse to accept a fact as settled, which is distinctly alleged in the bill, and admitted in the answer."[42] Likewise, in *Zegarowicz v. Ripatti*,[43] the New York Supreme Court held that "[f]acts admitted by a party's pleadings constitute formal judicial admissions."[44]

While statements in open court can be taken as formal judicial admissions, the classification hinges on the formality of the statement, not the location of the declarant. Accordingly, in order for a statement in court to be deemed a formal judicial admission it must strictly adhere to the requirements that it be a statement of fact against the party's interest which is deliberate, clear, and unequivocal.[45]

As far as statements in briefs or memoranda constituting a formal judicial admission, courts are hesitant to classify them as such, reserving the determination for cases in which a "statement totally exculpated" the other party.[46] Again, guiding this decision are the same factors used in determining whether the admission was conclusive enough to constitute designation as a formal admission. Accordingly, courts adhere strictly to the requirement that the statement is one of material fact that is deliberately and unequivocally offered against the party's position before

41. 68 U.S. 155 (1863).

42. *Id.* at 165.

43. 911 N.Y.S.2d 69 (App. Div. 2010).

44. *Id.* at 72; *see also* Coffin v. President of Grand Rapids Hydraulic Co., 32 N.E. 1076, 1076 (N.Y. 1893). *But see* Empire Purveyors, Inc. v. Weinberg, 885 N.Y.S.2d 905, 905 (App. Div. 2009) (holding allegations in the pleadings made upon "information and belief" are not judicial admissions).

45. *See* Rahman v. Smith, 835 N.Y.S.2d 404, 405 (App. Div. 2007).

46. Pok Rye Kim v. Mars Cup Co., 476 N.Y.S.2d 381, 382 (App. Div. 1984) (deeming plaintiff counsel's clear and unequivocal statements in opposing defendant's motion for summary judgment binding and conclusive admissions). *But see* 1014 Fifth Ave. Realty Corp. v. Manhattan Realty Co., 490 N.E.2d 855, 856 (N.Y. 1986) (finding defendant counsel's clear and unequivocal statements in brief not binding on the defendant).

formally binding the party to an admission made in their brief.[47] Additionally, a court may use admissions in a brief to determine that there are no genuine issues as to any material fact.[48]

With this background, let us revisit our case studies.

A. *Case Study #1*

The issue is in this case is whether an admission of negligence made in an internal agency investigation and cited by counsel in a brief submitted to the court in support of a motion for summary judgment should be allowed at trial after the motion for summary judgment is denied. Furthermore, if the admission does carry over to trial, the issue becomes whether it is a formal or informal judicial admission.

Using the criteria set forward in Fed. R. Evid. 801(d)(2), to be considered an admission, the statement must be contrary to the party's position at trial and be the party's own statement.[49] Based upon the facts of the case study, the results of the internal investigation and the statements made in counsel's brief, which acknowledge negligence on the part of the agency, are contrary to the party's position. Likewise, since the investigation was conducted by the Agency internally, the result could be considered its own statement. Furthermore, assuming, arguendo, that the investigator's report of negligence is not considered a statement of the party, the inclusion of the result of the investigation in the attorney's brief allows it to still be considered an admission made by a representative.

The resolution of whether the admissions were made in a representative capacity depends upon whether the results of the investigation and counsel's brief for summary judgment were within the scope of employment.[50] As for the investigation, the New York Social Services Law specifically requires that an investigation be conducted and commenced within twenty-four hours of acceptance of a complaint.[51] Accordingly, the report finding that the Agency was negligent and that the negligence played a role in allowing the accident to occur satisfies

47. *See Rahman*, 835 N.Y.S.2d at 405.

48. *See* Kurten v. R.D. Werner Co., 527 N.Y.S.2d 455, 456 (App. Div. 1988).

49. FED. R. EVID. 801(d)(2).

50. *See* Tamily v. Gen. Contracting Corp., 705 N.Y.S.2d 109, 112 (App. Div. 2000).

51. N.Y. SOC. SERV. LAW § 424(6)(a) (McKinney 2010).

the requirement that the subject matter of the admission match the subject matter of the job description.[52] Therefore the findings of the Agency report should be deemed an admission made by a representative.

Turning to the attorney's brief filed with the summary judgment motion, the same scope of employment analysis is required. The attorney's job description would be to represent the Agency in litigation and to present the best defense against liability. As such, the question is whether submitting the brief with a motion for summary judgment matches the job description. Clearly, filing a motion during litigation is part of an attorney's job when representing a client. Likewise, the statements made in a brief are well within an attorney's authority in connection with properly representing the client. The wisdom of the attorney's strategy is not part of the analysis. Accordingly, the statements in the brief sufficiently match the attorney's job description and should be deemed an admission made by a representative of a party.

Finding that the statements in the brief constitute a judicial admission, the focus next turns to whether the admission is formal or informal. While admissions in the pleadings are more likely to be judged as formal, admissions in briefs require more analysis.

Specifically, the first criteria of a judicial admission—that a statement be one of fact not opinion, contrary to an essential fact or defense asserted by the party giving the testimony, and be deliberate, clear, and unequivocal—requires closer examination.[53] First, it is evident that the admission of negligence is not only contrary to an essential fact or defense asserted by the Agency but it was also deliberately made. The issue to examine, however, is whether the admission of negligence is an unequivocal statement of fact. In a similar determination, in *Walter v. Wal-Mart*,[54] the court found that "because negligence consists of both law (whether a duty exists and what that duty is) and facts (whether the duty was breached), there was no [formal] admission of negligence."[55] Furthermore, it can be argued that an admission of negligence is merely an opinion and not a statement based in fact and thus not unequivocal.

Consequently, in this case, the Agency's admission of negligence during its investigation and in its motion for summary judgment brief fails to reach the strict level of adherence to the requirements for a

52. FED. R. EVID. 801(d)(2) advisory committee's note.
53. *See* Rahman v. Smith, 835 N.Y.S.2d 404, 405 (App. Div. 2007).
54. 748 A.2d 961 (Me. 2000).
55. *Id.* at 967.

formal judicial admission. As a result, it is submitted that the statements most likely will be deemed informal admissions and therefore rebuttable through contrary evidence.

B. *Case Study #2*

The issue here is whether silence in a pleading binds a party as a judicial admission even though that admission is contrary to the weight of evidence as a matter of law. Specifically, since an admission made in a pleading is deemed a judicial admission,[56] the issue is whether a "silent" admission in a pleading will be considered a formal admission binding on the party.

The New York Civil Practice Laws and Rules (NY CPLR or the "Code") make clear that an allegation in a responsive pleading not expressly denied is deemed admitted.[57] As a result, the NY CPLR essentially requires a finding that failing to deny an allegation in an answer constitutes a non-rebuttable formal judicial admission. Such was the result in *Fleischmann v. Stern*,[58] in which the court stated that "[t]he Code . . . gives to such omission the force of a formal admission and makes it conclusive as such upon the parties and upon the court."[59] In this case, the defendant produced sufficient evidence to establish that the assailant was a 50 percent stockholder of the corporation which owned the restaurant and, therefore, an owner not an employee of the restaurant. However, by failing to deny the allegation in his answer, the defendant is bound by that admission preventing further review even though this admission is against the weight of the evidence.

V. Conclusion

Admissions are a volatile part of the litigation process at every stage—from the pleadings to the closing statements. As minor admissions can have drastic results, it beseems the competent attorney to know the effect of everything introduced, either purposefully or inadvertently. Knowing what constitutes an admission and whether it is binding or rebuttable may assist in avoiding a pitfall or finding success.

56. Zegarowicz v. Ripatti, 911 N.Y.S.2d 69, 72 (App. Div. 2010).
57. *See* FED. R. CIV. P. 8(b)(6); N.Y. C.P.L.R. § 3018(a) (McKinney 1980).
58. 90 N.Y. 110, 115 (1882).
59. *Id.* at 115.