AGENT ADMISSIONS IN FEDERAL AND GEORGIA LAW

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Agent Admissions in Federal and Georgia Law

The Federal Rules of Evidence expanded the common law agent admission rule (which only allowed for statements that the agent was authorized to make to be admitted as nonhearsay agent admissions) to include statements offered against a party made by an agent or servant of the party during the existence of the relationship that concern a matter within the scope of the agency or employment.

The Georgia legislature recently adopted the the agent admission rule from the Federal Rules of Evidence, replacing the former pertinent Georgia code sections. The new rule will be codified at O.C.G.A. § 24-8-801. Previously, the rule remained closer to the common law, allowing admissions by an agent or attorney-in-fact during the existence of and in pursuance of his agency. But, Georgia law also indicated that the statement must be a part of the res gestae to be admissible, though there is confusion within Georgia courts on this point. While hearsay exceptions and clever use of case law could be used to manipulate the application of both the Federal and Georgia rules, the importance of understanding the differences will prove crucial in the coming months, as Georgia will take on the federal rule in January 2013.

This research guide provides the resources necessary to not only understand the Federal Rules of Evidence and Georgia law concerning agent admissions, but to understand the important differences between the two as Georgia courts transition from the old rule to the Federal Rule.
Disclaimer

This legal bibliography does not constitute legal advice and is not comprehensive. It has not been updated since April 2011. This annotation should serve as a starting point for researching agent admissions in federal and Georgia law. The materials below do not address all issues that will arise, and researchers should read the full text of the resources cited. If you have questions as to how to proceed with your research, please consult a legal reference librarian.

Primary Sources

Federal Rule of Evidence § 801

(d) Statements which are not hearsay. A statement is not hearsay if—

(2) Admission by party-opponent. The statement is offered against a party and is . . . (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . . The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D) . . .

Advisory Committee Notes to 801

The Advisory Committee Notes to the FRE are extremely helpful when trying to interpret the rules. The Notes (here provided by the Legal Information Institute) cite caselaw, treatises and journal articles in their explanations. The Supreme Court of the United States recognized the persuasive authority of the Advisory Committee Notes in Tome v. United States, 513 U.S. 150 (1995).

O.C.G.A. § 24-3-33

Admissions by an agent or attorney-in-fact, during the existence and in pursuance of his agency, shall be admissible against the principle.

O.C.G.A. § 10-6-64

The agent shall be a competent witness either for or against his principal. His interest shall go to credit. The declarations of the agent as to the business transacted by him shall not be admissible against his principal unless they were part of the negotiation constituting the res gestae, or else the agent is dead.

Unannotated Georgia code sections

http://www.lexisnexis.com/hottopics/gacode/default.asp

GeorgiaNet maintains an unannotated Code of Georgia that is free to access, even though it is powered by LexisNexis. Use the table of contents feature to navigate the Code. Title 24 is Evidence, and Chapter 3 of that title is Hearsay. Title 10 is Commerce and Trade, and Chapter 6 of that title is Agency.

The annotated version of the Code is available in print at the GSU Law Library or online with a paid subscription to LexisNexis or Westlaw. The annotations contain additional resources on point for each specific code section, as well as caselaw on specific points raised by each code section.

Crossover

The newly passed Georgia evidence code specifically defers to the judgment of the Eleventh Circuit on matters concerning interpretation and application of the FRE when the Supreme Court of the United States has not addressed the issue and there is no conflict with the Georgia Constitution. The Court of Appeals for the Eleventh Circuit's online homepage has an "Opinions" tab that links to a search option. However, the site only accesses opinions going back to 1995.

United States Court of Appeals for the Eleventh Circuit
Some Eleventh Circuit caselaw on FRE 801(d)(2)(D):

**City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548 (11th Cir. 1998)**

Company president, chairman and CEO was clearly company agent, and his statements about company's chlorine pricing practices was nonhearsay agent admission because evidence showed president did set chlorine prices during time of alleged conspiracy, therefore statements did concern a matter within the scope of his employment.


Plaintiff bringing gender discrimination claim did not lay proper foundation for statements to be admissible under 801(d)(2) by merely showing that statements were made by someone generally identified as an agent or employee. Because she failed to offer evidence that the statements concerned a matter within the scope of the declarant's agency or employment, the court did not consider the statements.

**Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560 (11th Cir. 1991)**

In tort case by passenger against cruise line, statement of cabin steward suggesting that cruise line had prior knowledge of problems with sliding glass door that injured passenger was not concerning a matter within the scope of steward's agency or employment and therefore inadmissible as an agent admission of the cruise line because cabin stewards were not permitted on deck where passenger was injured. Passenger had evidentiary burden of establishing steward's statement was agent admission of cruise line, so failure of cruise line to object to admission of statement at trial did not preclude review of issue on appeal.

**Lloyd v. Prof. Realty Servs., Inc., 734 F.2d 1428 (11th Cir. 1984)**

Plaintiffs bringing fraud and securities claims against company sought to introduce statements of alleged stock offer by defendant's employee to group of doctors, but were unable to show that the employee had some authority, therefore the statements were not admissions for the purpose of FRE 801(d)(2)(D).

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**Secondary Sources**

**FEDERAL RESOURCES**

  Call Number: KF8935 .S25 2006 v.4
  ISBN: 1558341935
  [http://gilfind.gsu.edu/vufind/Record/1512820](http://gilfind.gsu.edu/vufind/Record/1512820)
  The Federal Rules of Evidence Manual uses synopses of federal cases to illustrate how the FRE have been interpreted. Section 801.03(9) not only breaks down FRE § 801(d)(2)(D) into its separate prongs, but it also has a section on examples of agent admissions in specific contexts, like employment discrimination cases, government agents, attorneys and informants, and independent contractors. The Manual doesn't explain the rules the way the Advisory Committee Notes do, but it does use caselaw examples very effectively. This is a great starting point if you are looking for seminal cases about certain applications of or issues within the FRE.

- Handbook of Federal Evidence by Michael H. Graham
  ISBN: 0314253416
  [http://gilfind.gsu.edu/vufind/Record/1494324](http://gilfind.gsu.edu/vufind/Record/1494324)
  The following three entries in the Handbook of Federal Evidence give an overview of the law and cite to treatises, caselaw, and the Advisory Committee Notes to the FRE to flesh out nuances.

  § 801:22 Rule 801(d)(2)(C): Admissions; statements by persons authorized to speak

  § 801:23 Rule 801(d)(2)(D): Admissions; statements by agent or servant concerning matter within scope of his agency or employment; attorneys

  § 801:24 Rules 801(d)(2): The requirement of personal knowledge

- McCormick on Evidence by McCormick, Charles Tilford
  Call Number: KF8935 .M29 2006
  ISBN: 0314161279
  [http://gilfind.gsu.edu/vufind/Record/1518406](http://gilfind.gsu.edu/vufind/Record/1518406)
  Description: One of the two treatises commonly cited in the Advisory Committee Notes to the Federal Rules of Evidence, McCormick on Evidence is a comprehensive guide to evidentiary matters. While the treatise obviously was not conceived with the FRE in mind, the discussions concerning policy considerations behind agent admissions provide helpful language that would be quite useful to a brief writer who finds that the caselaw concerning his particular agent admission is not exactly on his side. Look to § 259 for representative admissions specifically, but keep in mind that some of the best historical/policy language is at the beginning of Chapter 24 Hearsay (§ 244).
Wigmore on Evidence by James H. Chadbourn
Call Number: KF 8935.W54 v.4 1972
ISBN: 0316939706
The other treatise most cited in the Advisory Committee Notes to the Federal Rules of Evidence, Wigmore on Evidence also provides wonderful language in its discussions of how evidentiary rules have been born mostly out of necessity. § 1078 addresses agent admissions and contains an interesting discussion of how agency principles and hearsay principles intersect in the case of tortious liability.

Legal Encyclopedia
Corpus Juris Secundum is a legal encyclopedia that provides a clear statement of the law, supported by case citations (both federal and state). The following entries are relevant to agent admissions as nonhearsay:

CJS Evidence § 580, Agents and Employees.
CJS Evidence § 581, Agents and Employees--Source of Declarant's Knowledge.
CJS Evidence § 583, Agents and Employees--Sufficiency of Evidence.
CJS Evidence § 586, Agents and Employees--Required Existence of Relation When Statement Made.

Also, conditional relevance is a key issue with agent admissions. The following contains federal case cites on issues of FRE 104 determinations.

Evidence Current Events Websites
The Federal Evidence Review
The Federal Evidence Review is a fantastic online resource for finding recent caselaw relating to the Federal Rules of Evidence.

Some highlights:
Under the "Tools" tab you find the general search function.
The "Federal Rules" tab directs you to the rules themselves, the Advisory Committee Notes, and rule amendments.
The "Evidence Blog" highlights recent cases involving the FRE and other topical evidence matters.

Use of the site is free, though the comprehensive monthly newsletter is available for $25/mo.
The ABA Section of Litigation
The ABA Litigation Section of Litigation News page includes news and analysis regarding litigation issues, especially pertaining recent court decisions. ABA Section of Litigation publications are also available.

Bar Journal and Newsletter Articles
These periodical entries provide analysis of relevant cases and emerging issues in evidence.

This article touches on how FRE 801(d)(2)(D) and the issue of admissibility of electronic evidence (such as e-mails) intersect.

Analysis of the Eleventh Circuit decision United States v. Docampo, 573 F.3d 1091 (11th Cir. 2009) which held that the proponent of an authorized admission or an agent admission bears the burden to lay the appropriate foundation.

Discussing the admissibility of counsel's statements against clients following Gill v. Maciejewski, 546 F.3d 557 (8th Cir. 2008).

GEORGIA RESOURCES
• Courtroom Handbook on Georgia Evidence by Paul S. Milich
The articles below, though dealing with specific issues in agent admissions, also provide excellent general background material on agent admissions in general.


While the Bourjaily decision initially applied only to coconspirator statements, the 1997 amendments to the FRE expanded the Bourjaily holding to apply to 801(d)(2)(C) and (D) as well. Therefore, knowledge of that case is essential to an in-depth understanding of 801(d)(2)(D). This Note examines how Bourjaily changed determinations of admissibility of coconspirator statements by allowing courts to look at the contents of the statements in question themselves.


This Casenote examines the different standards by which courts have evaluated whether statements by attorneys can be agent admissions offered against their clients. Trends in admissibility of “regular” agent admissions are compared to both admissibility of attorney admissions generally and admissibility of defense counsel admissions in criminal cases specifically.

Michael Martin, Party Admissions by an Attorney, 213 N.Y. L.J. 3 (June 9, 1995).

This article compares how attorney statements have been examined under both the FRE and New York law, which retains the common law agent admission rule (which is closer to the current Georgia rule). The discussion concerning the state courts’ treatment of Second Circuit decisions on agent admissions may prove particularly enlightening as Georgia courts begin to interpret Eleventh Circuit decisions.


A very interesting journal article about how the rule governing party admissions has been applied less liberally to statements made by the government or prosecution. The article provides background on party admissions before the Federal Rules of Evidence, the Rules themselves, and how they have been applied to government statements as compared with application to other declarants.

Please note that this links to HeinOnline. Users accessing the link through the GSU server will be able to see the full article, but those
**Special Interest Groups, Specific Circumstances**

**Special Interest Groups**

ABA Section of Litigation

The ABA Section of Litigation homepage has links to CLE information, news and publications, and litigation products.

State Bar of Georgia

The State Bar of Georgia headed up the movement to have Georgia update its rules of evidence to closely match the Federal Rules of Evidence. The homepage contains links to directories, a host of educational programs and resources, public information, and ways to contact the State Bar of Georgia.

**Specific Circumstances**

The following are unique FRE agent admission circumstances that pop up from time to time. As Georgia has not addressed them yet applying the federal agent admission rule, Georgia courts will have to look to other court decisions. The selective case reporters and guides listed below provide overviews of the specific issue then supply specific cases by jurisdiction. The journal articles on the "Secondary Sources" page also deal with some of these issues and cite several resources specifically on point.

**Interpreters:**


**Attorneys:**