Gossiping Agents and the Hearsay Rule

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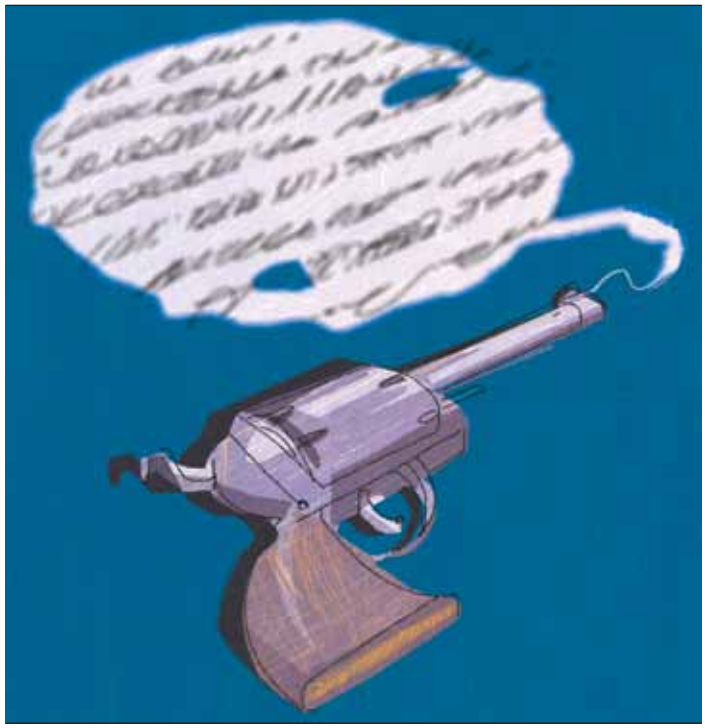
Principals beware: A gossiping agent can doom your case. In high-stakes litigation, loose lips sink ships. Damning admissions from an agent's mouth can have an overwhelmingly persuasive force on a jury, and the admission or exclusion of an agent's statement can often mean the difference between victory and defeat.

Here is a classic illustration, based on an actual case: The date is March 2002. The place is a large skyscraper in Chicago. It's a stormy day.



As the winds reach 70 miles per hour, a 10,000-pound scaffold rips from its moorings and careens from the skyscraper's 42nd floor. As the truck-sized platform crashes to the ground, multiple innocent bystanders are killed or catastrophically injured. The deadly event is tragic. Fault must be measured. Responsibility must be assigned. Litigation ensues.

The corporate building owner proclaims innocence: "We never inspected the scaffold and had no idea there was a danger. The scaffold was manufactured by someone else. Legions of contractors, architects, and engineers designed and installed the equipment holding the scaffold aloft. They are responsible, not us."

Targeted discovery is served to get to the bottom of this. Among the volumes of information produced is a collection of audiotapes. The tapes reveal a series of meetings between representatives of the building owner and project managers involved in the construction of the scaffold. Hundreds of hours of review yield little in the way of substantive evidence. Then, buried deep within the tapes, the faint odor of gunpowder is discerned.

It is the smoking gun.

Illustration by Richard Allen

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Just a few months before the collapse, representatives of the owner met with the project architect and others—one of many meetings caught on tape. The project architect made a simple request for updated engineering specifications for the roof equipment supporting the scaffolding. The ensuing dialogue is remarkable:

Project Manager (Owner): "When they take it down off the building, you'll get them."

Construction Manager (Owner): "It's like building a Pinto."

Project Manager: "It's like building what?"

Construction Manager: "Pinto."

Architect: "I'm almost afraid to ask what he means by that."

Project Manager: "Put the gas tank in first and worry about it later."

Construction Manager: "It's only a $50 part."

Architect: "Oh, my goodness!"

Yes, dreams can come true in discovery. Months before a deadly incident, a gossiping agent is caught on tape referring to the instrumentality of death as a "Pinto." Now the critical question: Can the admission be used at trial?

Successfully capturing these statements for admission at trial requires lawyers to master Federal Rule of Evidence 801(d)(2)(D), which governs admissibility of an agent's admission. By the same measure, 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. Rule 801(d)(2)(D) provides that a statement is not hearsay if "the statement is offered against an opposing party and was made by the party's agent or employee on a matter within the scope of that relationship and while it existed."

A New Consensus

Courts have now come to a virtual consensus that Rule 801(d)(2)(D) does not require personal knowledge or the authority to speak on behalf of the principal. Not so simple in common-law jurisdictions. Long ago, many of us were instructed in law school that it was impermissible under common law for a jury to hear a damaging admission of an employee who had no personal knowledge of the facts giving rise to liability or who was not authorized to speak on behalf of the employer. Courts reasoned that it was unfair to bind the principal by statements of dubious reliability—watercooler gossip, for example.

The majority of courts applying the common-law rule found damaging statements to be outside the scope of authority, even in cases involving relatively high-level executives, because employees are seldom hired to make damaging statements. Application of the common-law rule often resulted in dispositive motions being granted and relevant and valuable evidence being barred. 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 v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060 (2001).

Courts have increasingly held that such a concern is misconceived when it comes to party statements. 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.

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. Despite the modern recognition of this rationale by courts applying both the federal rule and the common-law rule, many remain unaware that the old common-law principles that once applied have essentially been abandoned. 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).

It is essential that trial lawyers be well equipped to overcome these misguided objections to ensure that all relevant statements are considered by the jury. Most often, the objection is premised on the tension in the Federal Rules of Evidence between the personal knowledge requirement of Rule 602 and its effect on the admissibility of party-opponent admissions under Rule 801(d)(2)(D). When attacking the admissibility of statements, opponents 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."

On its face, the personal knowledge requirement of Rule 602 seemingly collides with Rule 801(d)(2)(D), which states that a statement is not hearsay if "[the] statement is offered against an opposing party and was made by the party's agent or employee on a matter within the scope of that relationship and while it existed." The advisory committee's notes emphasize the rationale behind this more liberalized approach to admissibility:

> [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.

Common-Law and Modern Applications

To prevail in advocating or opposing the admission of such statements, it is incumbent on trial lawyers to understand the distinction between the common-law and modern applications of the rule. 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.

Common sense dictates that few principals engage agents for the purpose of making damaging statements. Historically, the usual result was the exclusion of the statement. Dissatisfaction with the loss of valuable and helpful evidence has resulted in most courts rejecting the traditional agency approach in favor of the "scope of employment" approach advanced by Federal Rule of Evidence 801(d)(2)(D). The modern 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. The modern approach has jettisoned the requirement that the proponent of the statement specifically was authorized by the employer to have made 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.

> In motion and trial practice, many opponents remain steadfastly wedded to recycling old arguments.

In most instances, your ability to succeed in obtaining or opposing the admission of agent and employee statements is determined at the time of deposition. Understanding the foundation that is required allows trial lawyers to capture or undermine the foundation requirement to bar such statements in advance of dispositive motions and trial. It goes without saying that broadly interrogating a deponent in detail about his training, duties, and responsibilities will expand the scope of employment, providing a greater opportunity to capture admissible statements. The only foundation elements required to build an adequate basis for the admission of such statements are the following:

1. The declarant was an agent of the party opponent.
2. The declarant made the statement while he or she was an agent.
3. The statement related to the agent's employment duties.
4. The statement is inconsistent with the position that the party opponent is taking at trial; the statement is logically relevant to an issue the proponent has a right to prove at trial.

Edward J. Imwinkelreid, *Evidentiary Foundations* § 10.03[4][a] (Matthew Bender 8th ed. 2012).

Establishing Agency

At trial, it is advantageous to have the court decide outside the presence of the jury, pursuant to Federal Rules of Evidence 104(a) and 801(d)(2)(D), whether the agent's statement concerned a matter within the scope of the agency. The proponent of the evidence must demonstrate the scope of employment by a preponderance of the evidence. For a determination of 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). The mere contents of the declarant's statement alone do not establish an agency or employment relationship; some additional proof is required, but not much. For instance, was the declarant wearing a uniform of the employer or standing behind a retail counter when the statement was made? Just "some" semblance of agency or employment relationship should suffice for admission.

When a trial court finds that the statement was made within the scope of the agency, it is imperative that opposing counsel be prepared to argue zealously the weight and credibility of the evidence and attempt to admit evidence to discredit the reliability of the statement, including factual arguments that may suggest there was no agency relationship at the time the statement was made.

On the record, counsel should encourage the court 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].

Federal Rule of Evidence 403 provides a viable escape hatch for opponents challenging the admissibility of agents' statements. 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. After statements are classified as nonhearsay under Rule 801(d)(2)(D), the question remains whether there are other objections. 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.*

An unwitting blabbermouth can win a plaintiff's case.

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.

Of course, an opponent may impeach an agent declarant pursuant to Rule 806, which is the same impeachment available for trial witnesses. There is one caveat: The usual foundation requirement for prior inconsistent statements under the Federal Rules of Evidence are suspended, and "the court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it." Fed. R. Evid. 806. It is incumbent on opponents attacking the statement to attempt to call the declarant and ask artfully crafted leading questions to impeach the credibility of the declarant and the statement that was introduced against the party.

It is true that an unwitting blabbermouth can win a plaintiff's case. By the same measure, failing to capture the required foundation and effectively argue the admission of such statements can lose your case. The ability to implement Federal Rule of Evidence 801(d)(2)(D) should be a formidable weapon in every trial lawyer's arsenal. ■