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Extrajudicial Admissions: Review and Re-Evaluation

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Extrajudicial Admissions: Review and Re-Evaluation

INTRODUCTION

Extrajudicial admissions are statements made, adopted or authorized by a party-opponent beyond the parameters of formal legal proceedings. Personal admissions occur when the party-opponent actually makes the statements. Adoptive admissions take place when a party embraces the statements of another. A final category consists of vicarious admissions, which occur when another person makes statements as a representative of the litigant.

1. E. Cleary, et al., McCormick's Handbook of the Law of Evidence § 262 (2d ed. 1972) [hereinafter cited as McCormick (2d ed.)]. The extrajudicial (or evidentiary) admission must be distinguished from the judicial admission. Id., § 262. As a rule, formal judicial admissions, such as those contained in a pleading or stipulation, have the effect of withdrawing a fact from issue, unless they are shown to have been unauthorized or to have resulted from a misunderstanding or mistake. 4 J. Wigmore, Evidence in Trials at Common Law § 1058 (3d ed. 1940) [hereinafter cited as Wigmore (3d ed.)]; People v. Rutledge, 90 Ill. App. 2d 251, 232 N.E.2d 235 (1st Dist. 1967); Flodberg v. Whitcomb, 79 Ill. App. 2d 320, 224 N.E.2d 606 (1st Dist. 1967); Darling II v. Charleston Memorial Hosp., 50 Ill. App. 2d 253, 200 N.E.2d 149 (4th Dist. 1964). However, due to the advent of alternative pleading, an admission in one count will not be used as an admission in another. Defenbaugh v. Streator Canning Co., 80 Ill. App. 2d 423, 224 N.E.2d 487 (3d Dist. 1967); McCormick v. Kopmann, 23 Ill. App. 2d 189, 161 N.E.2d 720 (3d Dist. 1959). Furthermore, before a statement can be held to be a judicial admission, it must be considered in relation to the evidence and given a meaning consistent with the context in which it was found. Gauchas v. Chicago Transit Auth., 57 Ill. App. 2d 396, 206 N.E.2d 752 (1st Dist. 1965).

Similar in nature to formal judicial admissions are those admissions which are implied from the failure to call a witness, and the destruction of evidence. For an inference to arise from a failure to call a witness, the facts must point to favorable testimony from a witness available to only one party. People v. Munday, 280 Ill. 32, 117 N.E. 286 (1917); People v. Williamson, 78 Ill. App. 2d 90, 96, 223 N.E.2d 453, 456 (1st Dist. 1966). But see Note, Permissive Inference from the Nonproduction of Equally Available Witnesses, 73 Dick. L. Rev. 337, 338 (1969), which asserts that a better approach is to permit the jury to draw an inference against either party if the witness is equally available. The strength of the inference derived from destruction of evidence appears to depend on the degree of the willfulness of the act. Compare Downing v. Plate 90 Ill. 268 (1878) with Gage v. Parmelee, 87 Ill. 329 (1877). See generally Maguire and Vincent, Admissions Implied from Spoliation or Related Conduct, 45 Yale L.J. 226 (1935).

2. Wigmore (3d ed.), supra note 1, § 1048. Assume, for example, that a scaffold attached to an apartment building collapses, injuring several pedestrians below. If the pedestrians bring suit against the owner of the building, the owner's out-of-court declaration that he knew the ropes were fraying would be admissible as a personal admission. The statement would be admissible to prove notice of the dangerous situation and causation of the accident.

3. McCormick (2d ed.), supra note 1, § 269. If a tenant in note 2, supra, confronted the owner and accused him of using poor quality ropes, and the owner remained silent in the face of such an accusation, the fact of his silence and the assertion would together be admissible as an adoptive admission.

4. Id., § 267. In the example in note 2, supra, if the owner directed all inquiries concerning
Testimony by a witness regarding such statements appears to fall within the conceptual definition of hearsay. However, it is a basic and time-honored rule of evidence that a party may offer an opponent's admissions against that opponent as substantive evidence. This article examines the use of extrajudicial admissions in civil and criminal cases in Illinois. After considering the rationale and effect of allowing extrajudicial admissions as evidence, the article will discuss the various common law classifications of these admissions and will analyze Rule 801(d)(2) of the proposed Illinois Rules of Evidence, and its model, Federal Rule 801(d)(2). Finally, the article will propose changes which ought to be incorporated in either the common law or any codification which may be adopted.

**HISTORICAL RATIONALE**

Numerous rationales have been advanced to justify the admittance of extrajudicial admissions. Wigmore has suggested that a party's ability to testify about his prior statements abrogates the concern for admitting unreliable evidence. Morgan, on the other hand, discounts the importance of reliability; a party simply will not be heard to object to his own prior statements. Both theories fail to acknowledge that where a party's agent makes authorized admissions, the declarant, if not a party-opponent, may be unavai...
able to testify.12

Strahorn postulates that all admissions offered against a litigant, whether words or acts, are admissions of conduct presented for their inferential rather than assertive value.13 This inference arises from the inconsistency with the party's present claim. Strahorn's theory has merit, but appears to focus on the consequences of allowing admissions in evidence, rather than to explain why they should be admitted at all.

The most logical justification for the admissions exception is that it is a product of the adversary system.14 The theory is not predicated on any special guarantees of reliability or trustworthiness, although consideration of these factors may be implicit in a particular decision to allow an admission.15

Since hearsay has been traditionally defined as an extrajudicial statement offered in evidence to prove the truth of the matter asserted, admissions are hearsay.16 However, Rule 801(d) defines admissions as non-hearsay.17 This treatment was adopted because admissions, unlike the true hearsay exceptions, do not satisfy the traditional concerns of the hearsay rule.18 To treat them as such would render them the only exception which allows a statement into evidence which does not carry some inherent guarantee of reliability, beyond that provided by the fact that the declarant is an interested party.19 Although it may impair "theoretical coherence"20 to

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15. McCormick (2d ed.), supra note 1, § 262.
17. See note 8 supra.
20. But it destroys theoretical coherence to proclaim as nonhearsay statements which require a journey along the Testimonial Triangle simply because permissible surrogates for cross-examination are thought to exist, or because it is thought that no right to cross-examination is present in the circumstances. It would be more consistent and less bewildering to treat the categories of party admissions . . . not as excluded from the category of hearsay, but rather as reflecting particular kinds of exceptions, a treatment of the matter that seems to me more likely to keep attention riveted on the underlying reasons for such exceptions and thereby on their
treat admissions as non-hearsay, pragmatically it should make little
difference in the operation of the law.\textsuperscript{21}

**PROBATIVE VALUE**

Notwithstanding the strength of admissions, they are never con-
clusively binding on a party. Unlike the judicial counterpart, a
party may offer evidence to explain or rebut extrajudicial admis-
sions.\textsuperscript{22} However, if admissions are not met with contrary evidence,
the court may dispense with the necessity for further proof of the
facts admitted.\textsuperscript{23}

When admissions are presented, the court must instruct the jury
regarding the character of and weight to be given the evidence.\textsuperscript{24} For
example, while the admissions of a legally competent minor may be
admissible in evidence, they must be received with great caution,
and the jury must weigh them with reference to the child's age and
understanding.\textsuperscript{25} Similarly, the jury must scrutinize admissions
which are made after the controversy has arisen or during the pen-
dency of the action because these statements may be easily misin-
terpreted.\textsuperscript{26} Other factors which should be considered include a lack
of personal knowledge of the subject matter by the declarant,\textsuperscript{27}
and testimony concerning the statements given by an interested wit-
ness.\textsuperscript{28} However, in the absence of such factors, admissions that are

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24. See Burnett v. People, 204 Ill. 208, 224, 68 N.E. 505, 512 (1903). But see Mauro v.
Platt, 62 Ill. 450, 452 (1872), which holds that the court has no right to inform the jury that
a particular admission is weak evidence.
25. Chicago City Ry. Co. v. Tuohy, 196 Ill. 410, 63 N.E. 997 (1902); Hardeman v. Helene
27. Weinstein asserts that the credibility of a declarant should be examined from both a
general and a specific perspective. The general credibility is a function of the declarant's
overall attitude toward truth, as well as his ability to observe, remember and communicate
accurately. Specific credibility, while dependent on general credibility, must be analyzed by
considering the declarant's relationship to the case and the circumstances of the particular
observation and subsequent declaration. This two-pronged analysis will often be determina-
tive of the weight given an admission. Weinstein, *The Probative Force of Hearsay*, 46 Iowa
28. H. Clark, 6 Callaghan's Illinois Evidence § 18.18 (1964); People v. Estate of Moir,
207 Ill. 180, 69 N.E. 905 (1904); Kreitz v. Behrensmeier, 125 Ill. 141 (1888); Severns v.
Broffey, 155 Ill. App. 10 (3d Dist. 1910). However, the lapse of time between the dates of
declaration and testimony will not alone affect the credibility of the testimony. Ryder v.
Emrich, 104 Ill. 470 (1882).
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deliberately made and precisely identified will be considered quite probative and reliable.\(^{29}\)

**PERSONAL ADMISSIONS**

**Express**

A party-opponent's express statements are the simplest examples of admissions. Illinois courts do not condition admissibility upon a party's personal knowledge, although a lack of first-hand knowledge may affect the weight given admissions.\(^{30}\) It is presumed that a party will make adequate investigation of the facts before speaking.

It is essential that declarations be made voluntarily.\(^{31}\) This requirement may become the foremost consideration for the court when statements are made in the presence of police. Whether or not the declarant has been charged with an offense, particular admissions may be nothing more than a manifestation of fear or compulsion. The court must determine whether the circumstances under which the admissions were elicited afforded the litigant a fair opportunity for an objective and complete statement.\(^{32}\)

Rule 801(d)(2)(A)\(^{33}\) makes no attempt to categorize the numerous ways in which a party may make personal admissions; nor does it distinguish between civil and criminal cases.\(^{34}\) However, the rule differs substantially from Illinois law. Under the existing case law, in order for statements to be allowed against a party in his representative capacity,\(^{35}\) the party must have been acting in that office when the statements were made.\(^{36}\) The federal and proposed Illinois

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29. Marzen v. People, 173 Ill. 43, 61, 50 N.E. 249, 256 (1898); Straubher v. Mohler, 80 Ill. 21, 24 (1875); Mauro v. Platt, 62 Ill. 450, 452 (1872).
31. If voluntariness is in question, the issue must go to the jury. Reed v. Kabureck, 229 Ill. App. 36, 41 (4th Dist. 1923).
32. People v. Christocakos, 357 Ill. 599, 192 N.E. 677 (1934).
33. See note 8 supra.
34. Compare 801(d)(2)(A) with UNIFORM RULE OF EVIDENCE 63(6) (1953).
35. E.g., executor, trustee. Representative capacity must be distinguished from agency capacity. In the former, suit is brought against the representative; in the latter, suit is brought against the principal.
36. Thus, a statement made before a party is appointed administrator is not admissible when the party or a successor sues as administrator. Gooding v. United States Life Ins. Co., 46 Ill. App. 307, 308 (1st Dist. 1892); Prudential Ins. Co. v. Fredericks, 41 Ill. App. 419, 423 (1st Dist. 1891); United States Life Ins. Co. v. Kielgast, 26 Ill. App. 567, 571 (1st Dist. 1887). To the same effect is UNIFORM RULE OF EVIDENCE 63(7) (1953): Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and
codifications impose no such requirement. The fact that the statements are relevant to representative affairs is sufficient.\textsuperscript{37} This liberalizing change seems justified. Since one rationale behind personal admissions is that the declarant is a party and is available at trial to explain or rebut the statements, the existence of representative capacity should not affect admissibility.\textsuperscript{38}

**Implied**

Personal admissions may also be implied from the conduct of the actor.\textsuperscript{39} For example, when a person attempts to flee the scene of a crime or to evade an arrest, Illinois courts will allow the conduct to be admitted as a basis from which a consciousness of guilt may be inferred.\textsuperscript{40} The rationale behind permitting this evidence is that the conduct evinces a uniform meaning.\textsuperscript{41} Realistically, however, the variations from uniformity are quite frequent. The same pattern of conduct is often the result of different psychological conditions.\textsuperscript{42} Numerous psychologists have suggested that nervousness in the

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\textsuperscript{37} J. \textsc{Weinstein} and M. \textsc{Berger}, \textsc{4 Weinstein's Evidence} § 801 (1977) [hereinafter cited as \textsc{Weinstein and Berger}]. \textsc{Cf. Calif. Evid. Code} § 1220 (West 1968), which provides that the statement need only be relevant to representative affairs.

\textsuperscript{38} \textsc{Report, New Jersey Supreme Court Committee on Evidence} §§ 161-162 (1963). The committee rejected trustworthiness as a rationale for admissions.

\textsuperscript{39} "While it may be true that one entirely innocent of the charge might under like circumstances attempt to flee, escape from custody or take his life, it is not the action that would be expected of an innocent man, and such acts could in no sense be interpreted as indicating innocence." \textsc{People v. Duncan}, 261 Ill. 339, 352-53, 103 N.E. 1043, 1049 (1914).

\textsuperscript{40} This conduct will be taken into consideration in connection with all the other facts and circumstances of the case. \textsc{People v. Sustak}, 15 Ill. 2d 115, 153 N.E.2d 849 (1958). \textsc{Cf. People v. Watkins}, 309 Ill. 318, 141 N.E. 204 (1923), in which the defendant was charged with murder. Evidence concerning the defendant's participation in a bank robbery and subsequent flight, in which the murder took place, was allowed as tending to prove the murder.

\textsuperscript{41} \textsc{Hutchins and Slesinger, Some Observations on the Law of Evidence-Consciousness of Guilt}, 77 U. Pa. L. Rev. 725, 726 (1928-29).

\textsuperscript{42} [It is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted maxim of criminal law that 'the wicked flee when no man pursueth, but the righteous are as bold as a lion.' Innocent men sometimes hesitate to confront a jury — not necessarily because they fear that the jury will not protect them, but because they do not wish their names to appear in connection with criminal acts, are humiliated at being obliged to incur the popular odium of an arrest and trial, or because they do not wish to be put to the annoyance or expense of defending themselves. \textsc{Alberty v. United States}, 162 U.S. 499, 511 (1896). To the same effect is \textsc{Vick v. United States}, 216 F.2d 228, 232 (5th Cir. 1954), in which the court asserted that a person might think that his presence was a suspicious circumstance which might lead to his indictment.
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The presence of authority is a common phenomenon, often resulting from an unfounded, unconscious sense of guilt. Thus, incriminating behavior may appear without the commission of any crime. Because the motivation behind this type of conduct varies drastically, it is doubtful whether a fixed rule of law should be applied. Certainly, a distinction should be made between the situation where a party is observed actually fleeing the scene of a crime or accident, and where a party is separated in both time and space from the scene, and is merely observed avoiding police. In the former situation, the presence of the party at the scene of the crime has been established, although actual participation in the crime is yet to be determined. In the latter situation, however, the party is acting suspiciously solely due to the presence of police, which provides a poor basis for an inference of guilt with regards to a particular crime.

Consciousness of guilt may also be manifested by a defendant's suicide attempt. As with flight from arrest, the problem with allowing this inference lies in the varying emotions which can give rise to the response. Although studies have shown that persons apprehending conviction have a higher suicide rate than the population as a whole, these studies fail to consider that an innocent person may be apprehensive of conviction. Suicide has been described as an "abnormal solution to a problem of an individual personality, which that individual has been unable to solve by normal adjust-

43. Some students of human nature believe that emotion in the presence of authority is a very common phenomenon, and that it results from what they call an unconscious sense of guilt, or the need to be punished . . . . [T]he verifiable observations are of utmost significance. These observations are that 'guilty' behavior frequently appears although any guilty act may be remote, imagined or entirely unconscious.


44. "The conduct of one accused of crime, is the most fallible of all competent testimony." Smith v. State, 9 Ala. 990, 995 (1846).


46. When the defendant has been observed actually fleeing the scene of a crime, there is at least a strong inference that the defendant has some knowledge of the crime. "The inference of guilt that may be drawn from flight depends upon the knowledge of the culprit that the crime has been committed, and that he is or may be suspected." People v. Harris, 23 Ill. 2d 270, 273, 178 N.E.2d 291, 293 (1961).

47. The party may explain in court his motives for desiring to take his own life, and the attempt will be analyzed by the jury with reference to the explanation and other facts of the case. People v. Duncan, 261 Ill. 339, 352-53, 103 N.E. 1043, 1049 (1914).

48. 1 J. Wigmore, Treatise on Evidence 560 (2d ed. 1923).

ments.” Since a defendant's entire lifestyle is ordinarily dramatically upset by arrest, indictment and pre-trial incarceration, a suicide attempt may manifest family problems, loneliness, claustrophobia, and the like, just as naturally as a consciousness of guilt. Assuming this to be true, the courts and juries cannot reliably uncover the actual motives which resulted in the attempt.

ADOPTIVE ADMISSIONS

One person may adopt another's statements as his own. Whether or not a party has actually done so is a question of fact to be resolved through an analysis of the words or conduct which purportedly signify a belief in the truth of the hearsay statement. Most commonly, this type of admission occurs when a party assents to a statement already made.

Rule 801(d)(2)(B) codifies the common law concerning adoptive admissions. The rule includes both express and implicit adoption or acquiescence. Since 801(d)(2)(B) requires that the party have "manifested" his adoption, the burden of proof should be on the proponent of the evidence to show that the conduct was intended as an adoption of the statement. The question of manifestation is a preliminary issue to be decided by the judge, as the situation is one of conditional relevancy, in that the statement is not probative if it was not adopted by the party.

Express

The mere fact that a party reports that he has heard another

51. Wigmore (3d ed. 1940), supra note 1, § 1071.
53. "Where assent is clear, the justification for admitting adoptive admissions is almost as strong as the justification for admitting the party's own assertions." Lempert and Saltzburg, supra note 18, at 370. A typical example is a conversation occurring out of the presence of a particular party. If the substance of that conversation is later reported to the party, and he makes a subsequent declaration based on the conversation, the jury will consider the conversation, the relation of the declaration to it, and the surrounding circumstances in order to determine whether the party has adopted the contents of the conversation. Ponting v. More, 165 Ill. App. 536 (4th Dist. 1911). This is arguably either an express or implied adoption.
54. See note 8 supra. See also Uniform Rule of Evidence 63(8) (1953) and Calif. Evid. Code § 1221 (West 1968).
57. The problems of "conditional relevancy" and "connecting up" are considered in detail under the section dealing with the co-conspiracy exception. See notes 161 through 197 infra, and accompanying text.
person make statements is not, by itself, enough to allow a conclusion that the party has adopted those statements. However, such a report will be admitted if supported by circumstances which show that the party also intended to convey his agreement with the other person's statements. These circumstances include the party's demeanor and intonation at the time of the recitation.

A party is normally required to know the content of the statements which he expressly adopts. However, an exception may arise where a party directs inquiry to a collateral source. Thus, if a party states, "X is a reliable person; she knows what she is talking about," the party will be held to have adopted whatever statements X may subsequently make. This type of "admission" should be received with extreme caution. In the example, X has not been authorized to make any statements; nor is she necessarily the agent of the party. The party has only suggested, in a general and quite possibly off-hand manner, that he believes X speaks with a certain degree of truthfulness and may be helpful in clarifying the matter in question. There is little justification for holding that the party has "adopted" anything that X might say in the future, particularly since X may be unavailable to explain her statements at trial. Also, it is unreasonable to expect the party to evaluate X's statements where the party lacks the necessary information to assess their truthfulness.

Implied

Traditionally, adoptive admissions have also been implied from the conduct of the party. Silence under circumstances which naturally call for a denial is the most notable aspect of implied adoptive admissions. Whether adoption is manifested by the silence of one accused requires an evaluation of each case in terms of probable human behavior. The question arises as to whether either the judge

58. McCORMICK (2d ed.), supra note 1, § 269.
59. Id.
61. This type of admission, where the party has referred an inquirer to another person whose anticipated statements he approves in advance, appears to fall between an adoptive and a vicarious admission.
63. McCORMICK (2d ed.), supra note 1, § 270.
64. Allowing silence as an admission has been justified by two distinct rationales: (1) the party is assumed to have expressed his assent and thus adopted the statement as his own; or (2) the probable state of belief is to be inferred from the conduct. Id. Illinois has basically accepted the latter view. Ackerson v. People. 124 Ill. 563, 16 N.E. 847 (1888).
or the jury is ever capable of an analysis of this type. It is presumed
that the judge is capable and that he will guide the jury in its
evaluation. However, the judge is trained to solve problems of law,
not the nuances of the human subconscious. Rarely will he be able
to reliably assess the strengths of the various possible motives
which can account for a particular person’s silence. Thus, this whole
area rests on a very tenuous basis.

The grave dangers inherent in implementing a measure which
admits silence as an admission have compelled the courts to fashion
several basic restrictions on its use. Obviously, the statement must
have been heard by the party. Furthermore, it must appear that
the party understood that he was being accused. Finally, the state-
ment must not have been in the form of a blanket accusation. Thus,
if the party is accused of one particular robbery and four other
robberies, the court should exclude the evidence because the silence
could be construed as an admission of all, some or none of the

In criminal cases, the results from allowing tacit admissions have
been extremely unsatisfactory. The difficulties initially arise be-
cause the inference itself is inherently weak; silence may be moti-
vated by the advice of counsel or by the common realization that
“whatever you say may be used against you.” Also, various psy-
choanalysts have raised the argument that a person may remain
silent due to the guilt of another crime or even a general sense of
guilt.

66. Query whether this task is even consistent with the other duties entrusted to him?
67. See Miller v. United States, 320 F.2d 767 (D.C. Cir. 1963); cf. People v. Ross, 325 Ill.
417, 423, 156 N.E. 303, 305 (1927), in which it was held that dying accusations are admissible,
but only where the defendant had an opportunity to speak for himself and was in a position
where it would have been fit, suitable and proper for him to speak.
68. McCormick (2d ed.), supra note 1, § 270.
69. Where a person is in a police lineup and is tapped on the shoulder, it must affirma-
tively appear that the person knew he was being accused of the crime. People v. Aughinbaugh,
36 Ill. 2d 320, 223 N.E.2d 117 (1967).
70. People v. Frugoli, 334 Ill. 324, 166 N.E. 129 (1929).
71. Weinstein and Berger, supra note 37, § 801 (1977); See, e.g., Dill v. Widman, 413
Ill. 448, 109 N.E.2d 765 (1953).
72. E. Cleary, Handbook of Illinois Evidence § 17.13 (2d ed. 1963). It is noteworthy that
here, where the general presumption that “a person knows the law” may actually have some
validity, it is discounted.
73. “A severe sense of guilt can exist in the absence of one single overt act of hostility. A
sense of guilt means a self-reproaching attitude, a self-accusatory one, a self-attacking one
. . . . This is a universal phenomenon common to all of us.” Zilboorg, The Psychology of
the Criminal Act and Punishment, at 50 (1954). Sigmund Freud has been even more explicit:
You may be led astray . . . by a neurotic who reacts as though he were guilty even
though he is innocent — because a lurking sense of guilt already existing in him
Furthermore, when the party is accused in the presence of law enforcement officers, there is a danger that the constitutional rights of the accused will be abridged. When the defendant is forced to choose between his right not to testify and his need to explain his silence in response to an accusation, his privilege against self-incrimination may be undermined. To a limited extent, recent Supreme Court decisions relating to custodial interrogation help to resolve this dilemma. Miranda v. Arizona requires that a person accused of a crime be informed of his right to remain silent. Accordingly, in Doyle v. Ohio, it was held that the accused's silence in the face of Miranda warnings must be interpreted as nothing more than the accused's exercise of his rights. Miranda warnings implicitly guarantee that silence will carry no penalty. Therefore, once a person has been advised of his right to remain silent, the prosecution cannot constitutionally offer the defendant's silence as an admission.

A number of jurisdictions have adopted a standard whereby an accused's silence is per se inadmissible whether or not he has received a Miranda warning. In light of the probative weakness and ambiguity of silence as an admission, it should make little difference whether a warning has been given. However, exclusion of the evidence is conditioned on arrest, and many courts require that the judge determine the technical moment of arrest. This requirement risks nullifying the effectiveness of the per se standard, since the police can simply make accusations before the moment of the arrest. To assure efficacy, several jurisdictions have extended per se

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assimilates the accusation made against him on this particular occasion . . . .
People of this kind are often to be met, and it is indeed a question whether your technique will succeed in distinguishing such self-accused persons from those who are really guilty.


76. Id. at 467-73.
77. 426 U.S. 610 (1976).
78. Id. at 617-18.
80. See United States v. Lo Biondo, 135 F.2d 130 (2d Cir. 1943); People v. Pignataro, 263 N.Y. 229, 188 N.E. 720 (1934); Cardell v. State, 156 Texas Crim. 457, 243 S.W.2d 702 (1951). This rule has been applied to a person free on bail and a person in custody on another charge. See State v. Bates, 140 Conn. 326, 330, 99 A.2d 133, 135 (1953); State v. Goodwin, 127 S.C. 107, 112, 120 S.E. 496, 499 (1923).
81. "[T]he determination of when a technical arrest occurred is a factor seemingly without relation to the likelihood of a response, which depends rather on the possible reliance on
exclusion to include "constructive custody" cases, situations in which the accused is about to be arrested.\textsuperscript{82}

Illinois has not adopted the \textit{per se} standard.\textsuperscript{83} In the absence of a \textit{Miranda} warning, an Illinois court analyzes several factors in determining the admissibility of an accused's silence. The courts consider whether: the declaration was made in the presence of the accused under circumstances in which he was not in a position to deny them; his silence was of a character which does not justify the inference that he should have spoken;\textsuperscript{84} or he was restrained in any way from speaking by fear, doubt of his rights, instruction by his attorney or a reasonable belief that his security would be best promoted by silence.\textsuperscript{85} If the silence is admitted, the accusation itself is received, not as proof of the fact stated, but to give meaning to the defendant's silence.\textsuperscript{86}

Although the courts emphasize that this type of admission must be received with extreme caution,\textsuperscript{87} the present Illinois scheme lacks the residual safeguards afforded by the \textit{per se} standard.\textsuperscript{88} First, it

\begin{itemize}
  \item a policy of silence or fear of the authorities." Note, Tacit Admissions, supra note 74 at 210, 257.
  \item See \textit{State v. Kissinger}, 343 Mo. 781, 123 S.W.2d 81 (1938); \textit{People v. Allen}, 300 N.Y. 222, 90 N.E.2d 48 (1949).
  \item See \textit{People v. Garreau}, 27 Ill. 2d 388, 189 N.E.2d 287 (1963). Arest is merely one factor to be considered in determining whether the accused was called upon to make a denial, and whether he had an opportunity to do so. \textit{People v. Lee}, 23 Ill. 2d 80, 177 N.E.2d 199 (1961); \textit{People v. Niemoth}, 409 Ill. 111, 98 N.E.2d 733 (1951); \textit{Ackerson v. People}, 124 Ill. 563, 16 N.E. 847 (1888).
  \item Cf. \textit{People v. Hodson}, 406 Ill. 328, 94 N.E.2d 166 (1950), in which the defendant had forcibly resisted the questioning.
  \item \textit{People v. Hanley}, 317 Ill. 39, 147 N.E. 400 (1925) (the defendant stated that he would thereafter remain silent and did so).
  \item Thus, the declaration must have been such as would naturally call for a reply. \textit{Bell v. McDonald}, 308 Ill. 329, 339, 139 N.E. 613, 617 (1923).
  \item In various instances, allowing defendant's silence into evidence has produced questionable inferences. See, e.g., \textit{People v. Andrae}, 305 Ill. 530, 137 N.E. 496 (1922), in which the defendant expressly refused to answer questions, but the admission was nonetheless allowed; \textit{People v. Niemoth}, 409 Ill. 111, 98 N.E.2d 733 (1951), in which two defendants were accused by a man near death. The inference of guilt is seriously weakened because more than one person was being accused and because the defendants may not have had a full opportunity to reply.
  \item Because of these residual defects and because of the reluctance to adopt a \textit{per se} exclusionary standard, courts might consider implementing a measure whereby the defendant's silence would be held inadmissible if the defendant indicated that he was motivated by factors other than a consciousness of guilt and this motivation was "minimally corroborated" by extrinsic evidence. Such corroboration might entail a showing (out of the presence of the jury) that the defendant had previously been arrested or that he had knowledge of the criminal justice system, and thus knew of his rights against self-incrimination.
\end{itemize}
puts the court into the position of psychoanalyzing the motives of the defendant. This examination may be impossible for the court, as the true reason for the defendant's silence may lie deep within his subconscious. Second, due to the implausibility of ascertaining the defendant's motives, the jury is apt to focus on the accusation itself. Finally, the common police practice of reading the confession of an alleged co-conspirator to all those accused forces defendants who do not object to risk having their silence construed as acquiescence in the truth of the statement. The admission then becomes tantamount to a confession, without the stringent safeguards of a confession.

Closely related to tacit adoptions are those admissions implied from equivocal answers, which are ambiguous responses that might allow an inference of either guilt or innocence. In some respects, this type of answer may be more reliable than silence because the fact of a response indicates that the accusation was heard. Nonetheless, an equivocal reply may manifest the party's ignorance of the facts of the accusation or his intention not to be drawn into an argument. Thus, the jury should not be permitted to infer an adoption unless the response tends to admit the accusation.

Vicarious Admissions

A vicarious admission may be defined as an assertion made by some person whose words or acts are treated through the operation of substantive law as those of the ligitant. The admissibility of a

89. See Miller v. United States, 320 F.2d 767 (D.C. Cir. 1963).
90. The problem is exacerbated because the prosecutor may comment upon the defendant's silence during his closing argument to the jury. People v. Jackson, 103 Ill. App. 2d 209, 223, 243 N.E.2d 551, 558 (1st Dist. 1968).
92. Although Ill. Rev. Stat. ch. 38, § 103-2(b) (1977) does not designate different rules for admissions and confessions, courts are more apt to view with suspicion an oral statement if it is labelled a confession rather than an admission. Courts are also more apt to find reversible errors in confessions. McCormick (2d ed.), supra note 1, § 144. "The use of an accused's silence to his alleged accomplice's incriminating confession as a tacit admission has provided the police with an easy method of evading the rule that a confession is admissible only against the speaker." Note, Tacit Admissions, supra note 74, at 210, 238
93. See Note, Tacit Admissions, supra note 74, at 226-29.
96. People v. Sarney, 351 Ill. 428, 184 N.E. 612 (1933); People v. Morgan, 44 Ill. App. 3d 459, 358 N.E.2d 280 (5th Dist. 1976); see People v. Evenow, 355 Ill. 451, 189 N.E. 368 (1934).
vicarious admission then depends upon the relationship between the declarant and the party against whom the declaration is offered. The general rationale of the admissions exception is not fully applicable to vicarious admissions because the party is held responsible for statements which he did not make and may be unable to explain.

**Authorized Admissions**

Rule 801(d)(2)(C) restates the general proposition that a statement made by an authorized declarant is regarded as an admission by the party-principal. Ordinarily, evidence falling within this category will be analyzed, for purposes of admissibility, under the laws of agency, rather than the traditional concepts of evidence such as credibility. Hence, the court is required to determine the source and extent of the declarant’s authority.

It has been argued that the agent who is only authorized to make statements to his principal does not make statements for him.

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100. See note 8 supra. It should be noted that Rule 801(d)(2)(C), unlike 804(b), does not require that the declarant be unavailable to testify. Since the two rules may both be applicable in a given situation, the distinction is important.
102. The Restatement (Second) of Agency § 286 (1958) provides: In an action between the principal and a third person, statements of an agent to a third person are admissible in evidence against the principal to prove the truth of the facts asserted in them as though made by the principal, if the agent was authorized to make the statement or was authorized to make, on the principal’s behalf, any statements concerning the subject matter. Although the principles governing the agency admission do not exclude admissions made under a duty imposed by law, such admissions may nonetheless be excluded where the statute imposing the duty expressly makes the declaration confidential or where such privilege is necessarily implied to protect public policy objectives. Farmer v. Paccar, 562 F.2d 518, 526 (8th Cir. 1977).
103. Partners may make declarations admissible against both the partnership and other partners, as they are general agents for the partnership and each other. The Uniform Partnership Act § 11 (1965); Ill. Rev. Stat. ch. 106½, § 11 (1977). Generally speaking, a continuing power is recognized in each partner to settle the affairs of the partnership. McCormick (2d ed.), supra note 1, § 267. Therefore, a partner may be regarded as having the authority to speak for ex-partners in the process of collecting debts and settling claims. However, all disputes concerning authorization must ultimately be settled by an examination of the nature and scope of the duties given the declarant in the Articles of Partnership. Weinstein, Basic Problems (5th ed.), supra note 12, at 250.
104. E. Morgan, Basic Problems of Evidence 273 (1962). Uniform Rule of Evidence 63(8) (a) is unclear on this point, limiting admissibility to a statement of one “authorized by
However, the federal and proposed Illinois codifications, as well as present Illinois case law, suggest that the authority to communicate to outsiders is not an essential requirement of an authorized admission. As a result, a company's books, records and reports are admissible in evidence against it, even though they are typically prepared for use only by insiders.

Rule 801(d)(2)(C), in accordance with traditional agency law, permits authorized admissions where the litigant has no personal knowledge of the content of the declarations and does nothing to manifest his agreement with the statements. This doctrine is justifiable because a contrary requirement would allow principals to seek refuge behind the agency relationship in inappropriate circumstances. The rule does depart from common law evidence concepts by not requiring personal knowledge of the facts underlying the statements on the part of the declarant. The effect of this liberalization is to penalize the party-opponent for confidential communication legitimately required by his business. If an agent reports an unsubstantiated story to his employer for the sole purpose of informing him that rumors are being spread, the report may be misinterpreted by the court and jury as a statement and acceptance of the substance of the rumors. If so, the rule of admissibility in the particular case has inadvertently become grounded on the inferences drawn from the rumor. This chance of misinterpretation may have the effect of requiring an impractical formality in communications between the principal and agent.

Authority is often "express," which simply means the principal has verbally directed the agent to speak on his behalf. Rule

the party to make a statement or statements for him concerning the subject of the statement." [emphasis added].

105. FED. R. EVID. 801, Advisory Comm. Notes. But cf. LEMPERT AND SALTZBERG, supra note 18, at 372, which asserts that so long as one justifies admissions on the basis of responsibility and other characteristics of the adversary system, a distinction based on the authorized recipients is proper. "When a party has taken precautions so that third parties will not learn what his agents have said, why should he be responsible for statements which leak out against his orders?" Id.

106. See Delbridge v. Lake, Hyde Park and Chicago Bldg. and Loan Ass'n, 98 Ill. App. 96 (1st Dist. 1901), in which the court allowed the books kept by the secretary of the association to be accepted as evidence tending to show the payment of money to the association; Plattdeutsche Grot Gilde von de Vereenigten Staaten von Nord Amerika v. Ross, 117 Ill. App. 247 (1st Dist. 1904). Contra, Falknor, Vicarious Admissions and the Uniform Rules, 14 VAND. L. REV. 855, 861 (1961).

107. LEMPERT AND SALTZBERG, supra note 18, at 371.

108. Id.

109. See Kuhlen v. Chicago Athletic Ass'n, 185 Ill. App. 579 (1st Dist. 1914).

110. To the same effect is UNIFORM RULE OF EVIDENCE 63(8)(a).

111. WEINSTEIN AND BERGER, supra note 37, § 801(d)(2)(C).
801(d)(2)(C) codifies the common law with regard to this type of authorization. A statement may also be received as an admission by virtue of implied or apparent authority. Traditionally, Illinois courts have required that a litigant establish several elements before either of these latter types of admissions will be allowed. First, it must be affirmatively shown that the declarant was an agent or apparent agent. Evidence of the agent's statements is not admissible against the principal for purposes of establishing, enlarging or renewing the agency. When agency status is disputed, its existence must ordinarily be established by evidence of the conduct of the principal, from which authority may be implied, or by his representations to third parties, from which apparent authority may arise. These situations must be analyzed with reference to the context of the interaction between the principal and agent or third parties and other circumstances germane to the issue of agency. However, a prima facie proof of agency may be established where the evidence shows one person acting for another, under circumstances which imply knowledge of the acts on the part of the alleged principal.

112. The statements, representations and admissions of the agent, made in reference to the act which he is authorized to perform and, while engaged in its performance, are binding upon the principal in the same manner and to the same extent as the agent's act or contract under like circumstances, and for the same reason. While keeping within the scope of his authority and engaged in its execution, he is the principal, and his statements, representations and admissions in reference to his act are as much the principal's as the act itself. Such statements, representations and admissions are, therefore, admissible in evidence against the principal in the same manner as if made by the principal himself.


113. See Kapelski v. Alton and S. R.R., 36 Ill. App. 3d 37, 343 N.E.2d 207 (5th Dist. 1976); Note, Admissibility of Statements by an Agent as Evidence Against His Principal, 43 HARV. L. REV. 936, 937 (1929-30).

114. The litigant must establish a foundation for the scope and extent of the agency before eliciting testimony concerning the alleged admission. See Grubb v. Milan, 249 Ill. 456, 94 N.E. 927 (1911); Washburn v. Terminal R.R. Ass'n., 114 Ill. App. 2d 95, 252 N.E.2d 389 (5th Dist. 1969).


116. The evidence must be objected to or will be admitted and given its natural probative effect. Rincon v. License Appeal Comm'n, 62 Ill. App. 3d 600, 607, 378 N.E.2d 1281, 1287 (1st Dist. 1978).


The second requirement amounts to an examination as to whether the subject of the statements is within the scope of the agent's authority. When express authority is the basis for the admission, the court need only consider the bounds of the authority as delineated by the principal to the agent. However, when the basis for the admission is implied authority, the court must consider any express authorization in conjunction with several additional factors: the declarant's position in the hierarchy of an organization; the declarant's duties; and the time at which the declaration is made. Apparent authority is analyzed with a view toward these same factors coupled with the additional requirement of subjective foreseeability of statements made by the agent.

The third requisite element is that admissions by an agent or employee are competent only if they can be considered part of the generally recognized scope of authority. This determination requires an analysis of the declarations against an objective standard, to ascertain whether they fall within the scope of duties and activities inherent in the particular agency relationship. Therefore, statements which are a mere narrative of a completed transaction or a past occurrence are not binding on the principal. The declarations must be made concurrently with and in furtherance of the duties of the agent.

119. Rockford, Rock Island and St. Louis R.R. v. Wilcox, 66 Ill. 417 (1872); Doan v. Duncan, 17 Ill. 272 (1855).
120. Rincon v. License Appeal Comm'n, 62 Ill. 2d 600, 607, 378 N.E.2d 1281, 1287 (1st Dist. 1978).

The principal is, as to third persons not having any notice of a limitation, bound by the ostensible authority of the agent, and cannot avail himself of secret limitations upon the authority and repudiate the agency where innocent persons have in good faith acted upon the ostensible authority conferred by the principal.

Rule 801(d)(2)(D)\textsuperscript{127} eliminates this third requirement.\textsuperscript{128} The common law effectively limits admissions by agents to those in which the declarant has specific authority to make the statement,\textsuperscript{129} thereby excluding most statements from evidence. Both the federal and proposed Illinois codifications, reflecting a growing trend,\textsuperscript{130} require only that these statements relate to a matter within the scope of the agency or employment.\textsuperscript{131} The drafters have taken the view that requiring the statements to have been made during the existence of the agency relationship is alone sufficient to guarantee reliability.\textsuperscript{132} They have recognized that the agency admission can be a very probative, valid and effective type of evidence, as well as a means of frustrating unjustifiable efforts of principals to immunize themselves from liability.\textsuperscript{133}

Nonetheless, this approach has not been free from criticism. The typical argument is that an organization ought to have the right to hire a skilled worker who is at the same time a careless and unreliable talker, without being subject to having the employee’s casual utterances used against it.\textsuperscript{134} While this argument has a certain appeal, it is misdirected. Authorization is not actually determinative of reliability\textsuperscript{135} and, if given a viable choice, few companies...

\textsuperscript{127} See note 8 supra.


\textsuperscript{131} S. SALTZBERG AND K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL § 801 (2d ed. 1977).

\textsuperscript{132} See REPORT, NEW JERSEY SUPREME COURT COMMITTEE ON EVIDENCE 165-67 (1963). But see REPORT, 6 CAL. LAW REVISION COMMISSION, at 491-96 (1964) (the commission rejected this type of rule because of a concern for reliability).


\textsuperscript{134} Falknor, Vicarious Admissions and the Uniform Rules, 14 VAND. L. REV. 855, 856 (1960-61).

[By ignoring the question of authority to speak, and finding trustworthiness in the mere circumstance that the declarant is speaking of authorized conduct, we come pretty close, . . . to accepting a principle, which if generally applied, would all but annihilate the hearsay rule. If an agent is 'likely to be telling the truth' about a past authorized act, cannot it be said with equal correctness that any declarant, one in no relationship with the party, is 'likely to be telling the truth' about his past act, if it was an act he had a right to perform and was important to him in his own affairs?]

\textit{Id.} at 857.

would authorize any employee to make damaging statements. It appears as though there is little area for compromise. Thus, the necessity for and high probative value of this type of evidence dictate this change.  

The result of applying either 801(d)(2)(C) or (D) is rather easily discerned. However, it is more difficult to perceive the relationship between the two rules. On the one hand, Rule 801(d)(2)(D) can be seen merely as a restatement and clarification of 801(d)(2)(C). The former, then, only emphasizes that the authority to act implies the authority to speak. Rule 801(d)(2)(C) becomes the workhorse for any determination of admissibility and the analysis boils down to a search for express, implied or apparent authority. On the other hand, Rule 801(d)(2)(D) can be seen as an extension of 801(d)(2)(C), which would allow admissions based on the doctrine of "inherent agency power." This theory goes beyond conventional concepts of authorization, to include statements and acts which are part of the generally recognized scope of agency between principals and agents in the particular fact situation. Pragantically, whichever view is taken, the result will remain the same in terms of admissibility. The only real difference lies in whether one is willing to accept the theory that inherent authority is part of both implied and apparent authority. By not addressing the problem, the drafters have left this discussion open. However, by their structuring of Rules 801(d)(2)(C) and (D), the problem remains largely academic.

Admissions Based on Privity

A related basis for admissibility of vicarious statements is the notion of privity, or identity of interest, between the declarant and the party against whom the declarations are offered. Illinois courts have traditionally recognized privity as a basis for extrajudicial admissions. Thus, the declarations of a joint tenant or joint owner are admitted, but not those of a tenant in common or a co-legatee. The concept has also been applied to the statements of a

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136. See Martin v. Savage Truck Line, 121 F. Supp. 417, 419 (D.D.C. 1954). It appears somewhat incongruous to assert that the owner of a taxi may make a person his agent for the purpose of operating the taxi over public highways but not for the purpose of truthfully relating the facts of an accident to a police officer shortly after its occurrence. In most situations this erects an "untenable fiction" not contemplated by the parties at the time the agency was created. Grayson v. Williams, 256 F.2d 61, 66 (10th Cir. 1958).


139. MCCORMICK (2d ed.), supra note 1, § 268.

140. Cf. Belfield v. Coop, 8 Ill. 2d 293, 134 N.E.2d 249 (1956) (the court held that because
predecessor in title to land and personality.\textsuperscript{141}

Rule 801(d)(2), following the Model Code and Uniform Rules of Evidence,\textsuperscript{142} makes no provision for privity-based admissions.\textsuperscript{143} One rationale for this omission is that the admissibility of admissions is regarded as a product of the adversary system, rather than as a result of circumstantial guarantees of reliability. Thus, identity of interest must be rejected as grounds for admissions, since privity goes far beyond reasonable standards of party responsibility.\textsuperscript{144}

Where these statements have particular probative value, they will nonetheless admissible under the declaration against interest exception.\textsuperscript{145} Furthermore, despite the rejection of privity under Rule 801(d)(2), it is impossible for personal admissions allowed in certain situations against one joint holder not to affect the interests of another joint holder.\textsuperscript{146}

\textbf{ADMISSIONS BY CO-CONSPIRATORS}

The admissibility of statements by a co-conspirator\textsuperscript{147} has been predicated on the theory that the concepts of vicarious responsibility, which make a conspirator criminally liable for a co-conspirator’s acts, also confer an evidential responsibility for statements furthering the conspiracy.\textsuperscript{148} Admissibility is then justified on an agency rationale; persons that participate in crime together become “ad hoc agents”\textsuperscript{149} or “partners in crime.”\textsuperscript{150} However, an agency theory alone does not warrant the waiver of the hearsay rule.\textsuperscript{151} The declarations are not likely to be particularly reliable,\textsuperscript{152} because co-
Extrajudicial Admissions

Conspirators often harbor ulterior motives for making these statements. Furthermore, the opportunity to explain these declarations may be curtailed because defendants in criminal cases often have legitimate reasons for not wishing to testify.\textsuperscript{153}

Rule 801(d)(2)(E)\textsuperscript{154} codifies the traditional co-conspirator exception. It requires: (1) that the fact of conspiracy be independently established; (2) that the statements have been made in furtherance of the objects of the conspiracy; (3) that the declarations have been made during the pendency of the conspiracy. The question arises regarding why the drafters of the rule chose to retain the "in furtherance" requirement when they discarded it under Rule 801(d)(2)(D). The answer lies not in the fact that agency provides a convincing theoretical rationale but because this requirement has been adjudged a practical scheme for protecting defendants from unreliable hearsay statements.\textsuperscript{155} The rule reflects a compromise between the need for the testimony,\textsuperscript{156} and the desire to protect defendants from deliberately fabricated and inadvertently misrepresented evidence.\textsuperscript{157}

By definition,\textsuperscript{158} subsection (d)(2)(E) is only applicable when the statements of a co-conspirator are offered for the truth of the matter asserted therein.\textsuperscript{159} These statements may also be offered merely to show the existence of communication between the declarant and the defendant. Introduction for this purpose is made sufficiently reliable by the defendant's opportunity to cross-examine the witness.\textsuperscript{160}

Foundation

Both the federal and proposed Illinois codifications, as well as the common law, condition admissibility upon proof of the existence of

\textsuperscript{153} Mich. L. Rev. 1159, 1165 (1954).
\textsuperscript{154} Id.
\textsuperscript{155} See note 8 supra.
\textsuperscript{156} Weinstein and Berger, supra note 37, § 801(d)(2)(E) (1977).
\textsuperscript{157} Indeed, the true basis for the rule is not a belief in the reliability of the statements, but the doctrine of necessity . . . . This socially desirable policy has been deemed to be of such importance that the legal system has willingly sacrificed some protection of the individual defendants." Kessler, The Treatment of Preliminary Issues of Fact in Conspiracy Litigations: Putting the Conspiracy Back Into the Coconspirator Rule, 5 Hofstra L. Rev. 77, 81 (1976).
\textsuperscript{158} Weinstein and Berger, supra note 27, § 801(d)(2)(E).
\textsuperscript{159} Fed. and Proposed Ill. R. Evid. 801.
\textsuperscript{160} Davenport, The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1398 (1972). If the statements are not offered to prove the truth of the matter asserted therein, no hearsay problem exists.
a conspiracy and the defendant's participation therein. This found-
dation must be established solely by evidence independent of the statements of the co-conspirator. The procedural requirements are quite liberal, as the indictment need not allege a conspiracy. The existence of a conspiracy may be established by direct evidence or by inference from conduct, statements, documents, and circumstances which disclose a common design. However, mere presence or association is insufficient to establish a defendant's participation in a conspiracy. When the prosecution seeks to establish the conspiracy by circumstantial evidence, the different pieces of evidence must be analyzed collectively, not in isolation.

Often the independent and hearsay evidence are intertwined. It would create an untenable burden to require the prosecution to proffer the independent evidence before introducing the admissions. Thus, the acts or declarations of an alleged co-conspirator may be admitted in evidence before independent proof of the conspiracy is offered. The prosecution then undertakes to furnish the requisite independent proof at a subsequent stage of the trial.

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161. Several federal courts have held that once a conspiracy is shown to exist, only slight evidence is required to connect a defendant with the conspiracy. See United States v. Testa, 548 F.2d 847, 852 (9th Cir. 1977). It is not required that the defendant have been present when the declaration was made. People v. Barnett, 347 Ill. 127, 133, 179 N.E. 450, 453 (1931). Often the conspiracy will involve numerous participants, some of whom have little knowledge and control of what the others are saying. The co-conspiracy rule works most to the disadvantage of these peripheral conspirators because the guilt of the central participants can usually be shown by their own acts and statements. Yet the peripheral conspirators are often not in a position to explain the statements of the central conspirators. Comment, The Hearsay Exception for Co-Conspirator's Declarations, 25 U. CHI. L. REV. 530, 539 (1957-58).


163. People v. Davis, 46 Ill. 2d 554, 559, 264 N.E.2d 140, 142 (1970); People v. Niemoth, 409 Ill. 111, 118, 98 N.E.2d 733, 737 (1951). In United States v. Stanchich, 550 F.2d 1294, 1299 (2d Cir. 1977), the court found itself in the inevitable yet seemingly anomalous position of taking consideration of a conspiracy count away from the jury for want of evidence, while finding that the prosecution had proved the existence of a conspiracy by a preponderance of the evidence. Thus, the co-conspirator's statements could be used against the defendant on substantive counts. In reality, the holding was not incongruous. A judge may consistently find that, although the evidence tends to prove a point, it is not so compelling that it leaves no room for a reasonable doubt. S. SALTZBERG AND K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL § 801(d)(2)(E) (2d ed. 1977).


165. United States v. Hassell, 547 F.2d 1048, 1052 (8th Cir. 1977).

166. United States v. Calaway, 524 F.2d 609, 612 (9th Cir. 1975).

167. WEINSTEIN AND BERGER, supra note 37, § 801(d)(2)(E).

168. This is subject to the discretion of the trial judge. People v. Nall, 242 Ill. 284, 293, 89 N.E. 1012, 1016 (1909).

169. [I]t will be considered immaterial whether the conspiracy was established before or after the introduction of such acts and declarations. The prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible
Nonetheless, the court must exercise care to ensure the this process is not subverted into a means of using the hearsay evidence in the foundation. To minimize the risk of prejudice, the judge, if requested, must issue an admonition to the jury before allowing the hearsay declarations to be admitted without the requisite foundation. If the necessary quantum of evidence is not subsequently provided, an Illinois court is faced with two alternatives. It must decide whether to merely strike the hearsay evidence and instruct accordingly, or to declare a mistrial if the hearsay accounted for a substantial portion of the evidence.

Federal cases have indicated that the trial judge may not actually have this choice. In Bruton v. United States, a defendant was implicated by the inadmissible confession of a co-conspirator in a joint trial. Since the co-conspirator had invoked his fifth amendment right not to testify, the defendant was unable to cross-examine him. In light of these events, the United States Supreme Court held that instruction to disregard the hearsay did not prevent the abridgment of the defendant’s sixth amendment right to confront the witness. Subsequent cases have applied the Bruton holding to the co-conspirator admissions exception, even when there is no joint trial. The effect of this holding is that a mistrial may be compelled in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy.

Spies v. People, 122 Ill. 1, 238, 12 N.E. 865, 980 (1887).
170. See United States v. Peterson, 549 F.2d 654 (9th Cir. 1977).
171. The general rule is that a limiting instruction need only be given upon request. Failure to request the instructions precludes appeal on the question. United States v. Smith, 564 F.2d 244, 248 (8th Cir. 1977).
173. See, e.g., Buttitta v. Lawrence, 346 Ill. 164, 178 N.E. 390 (1931).
174. "[A] ruling does not always remove the ill effects of a pernicious argument." Worthy v. Birk, 224 Ill. App. 574, 579 (4th Dist. 1922). In many instances, the chances of a mistrial would be lessened if the prosecutor was required to make an "offer of proof" as to the independent evidence before allowing the admission in evidence. The court would then know what evidence would be forthcoming to "connect up" the admission, and might be able to make a ruling before its introduction. See United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978).
176. [T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored . . . . It was against such threats to a fair trial that the Confrontation Clause was directed.
391 U.S. at 135-36 (footnotes omitted).
177. See United States v. DeCicco, 435 F.2d 478 (2d Cir. 1970); Goodwin v. Page, 418 F.2d 867 (10th Cir. 1969); United States v. Lyon, 397 F.2d 505 (7th Cir. 1968), cert. denied, 393 U.S. 846 (1968).
if the prosecution does not establish a *prima facie* foundation. The fundamental point of the *Bruton* opinion is that selective consideration of the evidence is beyond the jury's capability.

It has been asserted that the admissibility of a co-conspirator's statements should be determined by the jury, in order to alert the jury to the potential unreliability of the hearsay evidence and to preserve the jury's function as the trier of fact. However, the better view is that these preliminary questions, which do not concern the probative force of the hearsay evidence, should be decided by the judge. Exclusionary rules have been developed to protect defendants from verdicts furthered by intellectual confusion and undue prejudice. These rules are better implemented by withholding objectionable evidence from the jury than by submitting the evidence to the jury with instructions regarding its conditional nature. Determination of these questions entails intricate legal reasoning for which the jury is poorly equipped. Furthermore, if prior to receiving the hearsay declarations, the jury had to be satisfied that the declarant and defendant were engaged in a conspiracy, the value of these declarations as evidence would be diminished. The statements would be used only to confirm what the jury had already decided. Federal and proposed Illinois Rule 104 recognize this problem and mandate that these preliminary admissibility questions be resolved by the judge.

The degree of protection afforded a defendant depends in large part upon the standard by which the prosecution must establish the preliminary facts. Illinois courts have steadfastly required the prosecution to offer proof which *prima facie* establishes the fact of

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182. Carbo v. United States, 314 F.2d 718, 736 (9th Cir. 1963).
183. FED. AND PROPOSED ILL. R. EVID. 104(a) and (b) provide:

(a) Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

conspiracy.185 This standard purportedly requires “clear and convincing” proof before the admissions will be allowed.186 Nevertheless, the prima facie standard has been criticized for not adequately protecting the defendant from conviction based on improperly screened hearsay.187 The rule inherently requires the judge to draw all reasonable inferences in favor of the state.188 Thus, a witness whom the judge regards as untrustworthy must be treated as reliable for purposes of the test.189 The result is often that the admissions will be allowed on the basis of unreliable evidence. The jury will then receive both the independent and hearsay evidence and may rely almost exclusively on the co-conspirator’s declarations.190

Several federal courts have determined that a higher quantum of evidence should be required. Accordingly, the prosecution must establish the foundation by a preponderance of the evidence.191 While the prima facie rule only requires evidence from which a reasonable person could find the existence of a conspiracy, the preponderance standard requires proof which would lead one to conclude that the existence of the conspiracy is more probable than its non-existence.192 Moreover, the preponderance test, unlike the prima facie standard, commands the judge to actively evaluate the evidence. The judge is no longer restricted to passive consideration of the evidence in the light most favorable to the state.193 Although Rule 801(d)(2)(E) does not specify a required quantum of evidence, Rule 104(a) which designates the judge as the sole arbiter of preliminary issues, should induce the courts to employ the preponderance standard. A lower standard of proof would dilute the guarantee of reliability that the requirements are intended to provide.194

188. Id.
192. United States v. Trotter, 529 F.2d 806, 811 (3d Cir. 1976); McCormick (2d ed.), supra note 1, § 267.
Recognizing that extrajudicial declarations may be extremely influential in the final disposition of a trial, it has been suggested that these statements should not be admitted unless the conspiracy can be proved beyond a reasonable doubt. Weinstein would establish a reasonable doubt standard which utilizes both hearsay and non-hearsay evidence. Although this theory appears to afford the defendant a high degree of protection, it would result in a "bootstrap" approach to the problem. The trial judge would be able to determine the existence of a conspiracy from the hearsay evidence alone. Moreover, if the court required the prosecution to prove the foundation beyond a reasonable doubt, the preliminary hearing would be transformed into a second trial. In view of these infirmities, it appears that the preponderance test is the more rational alternative.

In Furtherance

The requirement that a co-conspirator's statements be "in furtherance" of the conspiracy was originally based on an agency rationale. It stems from the historical requirement that an agent's declarations be within the scope of his authorization. Although the agency rationale has since been discredited as the sole justification for admitting the declarations of co-conspirators, the "in furtherance" requirement has been retained. This was done not to structure a consistent hearsay rule, but to curtail expansion of the use of the co-conspirator exception which has threatened to weaken the probative value of admissible hearsay. A number of courts have construed the "in furtherance" require-

195. J. Weinstein and M. Berger, 1 Weinstein's Evidence § 104(05) (1977). Accord, Begman, The Coconspirators' Exception: Defining the Standard of the Independent Evidence Test Under the New Federal Rules of Evidence, 5 Hofstra L. Rev. 99, 110 (1976): In conspiracy prosecutions where a major concern is the inability of the defendant to cross-examine a coconspirator regarding an out-of-court statement which comes before the jury, it seems reasonable to require that before a judge makes the determination that the statement is or is not to be admitted, the judge should be given the widest possible latitude in deciding whether there is enough for a reasonable juror to be convinced beyond a reasonable doubt that the defendant was a part of the conspiracy at issue. The proffered hearsay itself should be considered in making that determination.


199. Weinstein and Berger, supra note 37, § 801(d)(2).
Extrajudicial Admissions

mention so broadly that any conduct related to the conspiracy is found to be in furtherance of its objectives.\textsuperscript{200} Recognizing this tendency, the drafters of the Uniform Rules of Evidence eliminated the "in furtherance" requirement.\textsuperscript{201} Pursuant to Uniform Rule 63(9)(b), any statements made during the existence of a conspiracy which related to the objectives of the conspiracy would be admitted in evidence. The "in furtherance" requirement also came under attack from Senator McClellan. He proposed the incorporation into Federal Rule 801(d)(2)(E) of a more relaxed standard, based directly on reliability.\textsuperscript{202}

In the wake of these proposals for change, the efficacy of the "in furtherance" requirement is called into question. Illinois courts have adhered to the requirement and have given it a fairly strict construction. Mere narrative declarations regarding what has been done or will be done are not admitted, except against the defendant making them or in whose presence they are made.\textsuperscript{203} However, it is arguable that the results would be no less acceptable if the requirement was replaced by one that demands a showing of circumstances from which the trustworthiness of the declarations might be inferred, and requires that the declarations relate to the character or execution of the conspiracy. Granted, the "in furtherance" requirement renders narrative statements inadmissible, thus eliminating evidence of highly questionable reliability and probative value. Nonetheless, a test based on reliability would also discard this testimony unless the facts demonstrated the declarations to be particularly dependable.\textsuperscript{204} The problem with the "in furtherance" requirement is that it sweeps too broadly; courts are forced to strike evidence that may be highly reliable and highly probative.\textsuperscript{205}

\textsuperscript{200} Note, Developments in the Law — Criminal Conspiracy, 72 Harv. L. Rev. 920, 985 (1959). For example, the Seventh Circuit has asserted that the requirement refers only to the content of the declaration, not to the circumstances under which it was made. International Indem. Co. v. Lehman, 28 F.2d 1, 4 (7th Cir. 1928).

\textsuperscript{201} See Uniform Rule of Evidence 63(9)(b) (1953).

\textsuperscript{202} Hearings on the Proposed Rules of Evidence — Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Subcomm. on the Judiciary, 93d Cong., 1st Sess., House Hearings Supp. at 56, 58-59 (1973), reported in Am. Jur. 2d, Federal Rules of Evidence, Appendix 4 at 314-17 (1975). Senator McClellan proposed a two-pronged requirement (1) that there be facts or circumstances from which the trustworthiness of the declaration may be inferred; (2) that the declaration relate to the character or the execution of the conspiracy. If adopted, this amendment would have enlarged the scope of 801(d)(2)(E). Senator McClellan proposed a two-pronged requirement (1) that there be facts or circumstances from which the trustworthiness of the declaration may be inferred; (2) that the declaration relate to the character or the execution of the conspiracy. If adopted, this amendment would have enlarged the scope of 801(d)(2)(E).


\textsuperscript{204} See note 202 supra. The first requirement in Senator McClellan’s test seems geared for this purpose.

\textsuperscript{205} For example, in United States v. Birnbaum, 337 F.2d 490 (2d Cir. 1964), one conspir-
"in furtherance" requirement is easily applied in a uniform manner, this alone does not justify the exclusion of all other tests. Instead, the "in furtherance" aspect should be merely one of the factors considered by the court in assessing whether the statements are sufficiently reliable to be admitted into evidence.

The opinion in *Dutton v. Evans*\(^{206}\) may have bearing on this situation. In *Dutton*, the court had to determine whether consideration of statements held *admissible* under the traditional co-conspirator exception could violate the Confrontation Clause when the declarant did not testify. A plurality of the court affirmed the defendant's conviction, focusing on three factors: the "crucial" nature of the statements; the "devastating" nature of the statements; and the reliability of the statements.\(^{207}\) The first two factors appear to affect a balance between the necessity for the evidence and its prejudicial effect. The reliability factor may tip the balance either way.

This balancing provides no more than an approach for a case-by-case analysis. Barring extreme circumstances, this evaluation will uphold the validity of evidence admitted under the traditional co-conspiracy exception.\(^{208}\) However, *Dutton* does point toward several specific criteria which the trial judge should appraise in weighing the reliability of an extra-judicial declaration. These include: (1) whether the declarant has a personal knowledge of the facts of the declarations; (2) whether there is a possibility that the testimony was based on faulty recollection; (3) whether the circumstances provide a reason to believe that the declarant misrepresented the facts of the declarations.\(^{209}\) The adequacy of the "in furtherance" requirement as a substitute for a direct assessment of reliability, based on these criteria, is subject to serious doubt.

**Pendency**

The statements of a co-conspirator are inadmissible unless rendered during the pendency of the conspiracy.\(^{210}\) Although this rule was recorded as stating that the defendant had kept the money used in a bribery scheme. The court ruled that the statement was no more than an account of the defendant's post-conspiracy activities and thus not clearly in furtherance of the conspiracy. However, because the declarant was striving to regain a part of the balance of money owed him, it appears as though the statement was highly reliable. Certainly, it was highly probative.

208. *Id.*
209. 400 U.S. at 89.
is universally recognized, its application in particular fact situations has not been uniform. For example, the Fourth Circuit has held that once a conspiracy has been established, it is presumed to continue until its termination is affirmatively shown. The mere lapse of time between the last overt act and the declarations is not alone sufficient to prove that the conspiracy ceased before the declarations were made. In contrast, the Seventh Circuit has held that the statements of a co-conspirator are inadmissible if made after the occurrence of the last overt act proven by the prosecution. The codifications offer meager assistance; both Federal and proposed Illinois Rule 801(d)(2)(E) merely require the declarations to have been made “during the course” of the conspiracy. This only restates the traditional rule and provides no guidance for its application.

Illinois courts appear settled in holding that a conspiracy normally terminates, in respect to the declarant, upon the declarant’s arrest. Once again, the problem lies in determining the technical moment of arrest. It is plausible to assume that the conspiracy ended at the point where the declarant became aware of the presence of law enforcement authorities.

The pendency requirement pertains only to the declarant, not to the party against whom the statements are offered. Thus, although a co-conspirator placed under arrest may not make admissions against other conspirators, an unarrested co-conspirator, still working in furtherance of the common design, can bind one under arrest.

CONCLUSION

It is evident that extrajudicial admissions have assumed a fundamental role in the adversary system. This hearsay exception is justified and governed by the concept and scope of party responsibility. Hence, the drafters of both the Federal and proposed Illinois Rules have done little more than codify the existing case law, incorporating significant changes only in the areas of representative and agency admissions.

212. United States v. Harris, 542 F.2d 1283, 1301 (7th Cir. 1976). Query whether the Seventh Circuit’s strict application here is due to its liberal interpretation of “in furtherance?” See note 200 supra.
214. The jury may not consider the flight of co-conspirators as an admission of guilt against another, because flight effectively terminates the conspiracy. People v. Blumenberg, 271 Ill. 180, 187, 110 N.E. 788, 791 (1915).
215. See United States v. Testa, 548 F.2d 847, 852 (9th Cir. 1977).
Nevertheless, the impact of any codification process is not solely a function of the express changes it would mandate. Instead, the process should be recognized as providing the courts with an opportunity to re-examine their previous decisions with a view toward insuring that extrajudicial admissions are restricted to applications which their reliability and probativeness will support.

Courts must realize the tremendous dangers inherent in allowing admissions to be implied from conduct. Passively submitting this evidence to the jury for its consideration does not adequately protect defendants, even when the admissions are accompanied by cautionary instructions. The jury is simply not capable of arriving at a decision which reflects a systematic evaluation of the various psychological impulses which may result in a given type of conduct. The ambiguity of the conduct, when coupled with the confessional nature of an inferred admission, suggest that a defendant's conduct should not be allowed as an admission of guilt if he can establish a reasonable explanation for his reaction, consistent with innocence. In the particular realm of tacit admissions, the likelihood that an accused will be prompted to remain silent by the right against self-incrimination, mandates that Illinois adopt a rule requiring exclusion of all alleged tacit admissions which occur in the presence of law enforcement authorities.

The problem of admitting the declarations of co-conspirators must also be reconsidered by the courts. In order to insure that defendants are protected by a meticulous screening of the evidence, the prosecution should be required to prove, by a preponderance of independent evidence, the existence of the conspiracy and the defendant's participation therein. In the event that substantial hearsay evidence has been admitted and the prosecution has failed to meet its burden of proving the foundation, the defendant should invariably be entitled to a mistrial. Limiting instructions are not adequate to erase the prejudicial effect of this hearsay. Furthermore, the courts should analyze the trustworthiness of the declarations by a test based directly on the reliability of the declarant, considering such factors as the declarant's personal knowledge and interest in the subject matter of the declaration. The "in furtherance" requirement is not sufficiently indicative of reliability to warrant its inclusion in the general rule.

Finally, it must be more fully recognized that all of the numerous standards of admissibility must ultimately be governed by the principle of relevancy. With this in mind, it becomes apparent that in certain situations the probative value of admissions are slight when
compared to the undue prejudice and confusion which results from their inclusion in evidence. Courts must be more willing to take the initiative and strike the evidence when this is the case.

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