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Richard L. Adams

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Comments

ADMISSIONS OF AGENTS

I. INTRODUCTION

A recurring problem in litigation involves the attempted introduction into evidence of a statement made by an agent of one of the parties. The controversy centers around whether the agent's statement can be used in evidence against his employer. The problem commonly arises in tort litigation, but is certainly not limited to that area. The evidential question is present regardless of whether the agent who made the statement is joined as a party to the lawsuit.

The problems associated with an agent's admission are many and varied. At least two distinctly different approaches have been taken by the courts in deciding the admissibility of the agent's statement against his principal.¹ Collateral problems also arise. For example, can the existence and scope of the agency relationship itself be proved by the agent's out-of-court declarations?² What if an agent's admission is contained in a report to his principal or in his utterances to his fellow agents?³ Is an agent's admission that is made in a sworn deposition admissible against his principal?⁴ There has been no judicial unanimity in answering these and other questions involving admissions by an agent. This comment will discuss these and other problems connected with the admissibility of an agent's admissions against his principal.

II. ADMISSIONS: OPERATION AND THEORIES OF ADMISSIBILITY

To clearly understand the rationale of "vicarious" admissions by agents, it is first necessary to comprehend the theory of admissions in general. Dean Wigmore defines an admission as a party's prior out-of-court statement offered by an opponent to prove the truth of what it says which is inconsistent with the declarant's position at trial.⁵ Such a statement falls within the classic definition of hearsay.⁶ Even though courts may differ on the exact theory used

1. See pt. III, §§ B and C of this comment.

2. See pt. V of this comment.

3. See pt. IV of this comment.

4. See pt. VI, §§ A and B of this comment.

5. See 4 J. WIGMORE, EVIDENCE § 1048 (Chad. rev. 1972). Note that the statement will never be introduced against the party *unless* it is inconsistent with his claim at trial. Thus, this portion of Professor Wigmore's definition is essentially self-enforcing.

6. See, e.g., UNIFORM RULE OF EVIDENCE 63 (195); C. McCORMICK, EVIDENCE § 246 (2d ed. 1972) [hereinafter cited as McCORMICK].

to receive an admission,⁷ it is universally accepted that a party's admissions may be introduced into evidence by his opponent.⁸ This is true even though the party spoke without personal knowledge of the truth of his assertion.⁹ When received by the court the admission is substantive evidence of the proposition stated and is not merely limited to use as impeachment evidence.¹⁰ Furthermore, no foundation testimony is required prior to receipt of an admission.¹¹

Two basic theories of admissibility have been advanced. The traditional view, espoused by Professor Morgan,¹² is that admissions are introduced as an *exception* to the hearsay rule. Most exceptions to the hearsay rule are based on the exceptional degree of reliability inherent in the declaration,¹³ plus, perhaps, a need for the statement's admission into evidence because of the declarant's death or absence.¹⁴ Admissions clearly do not fit into this pattern since the party need not have first-hand knowledge of the truth of his declaration,¹⁵ and the statement may even have been self-serving at the time it was made.¹⁶ Thus, it is not essential to the admissibility of a party's prior admissions that it must have been made under cir-

7. Numerous attempts have been made to formulate a satisfactory rationale for receiving admissions. See, e.g., Fisch, *Extra Judicial Admissions*, 4 SYRACUSE L. REV. 90 (1952); Harper, *Admissions of Party-Opponents*, 8 MERCER L. REV. 252 (1957); MORGAN, *Admissions*, 12 WASH. L. REV. 181 (1937); Morgan, *Admissions as an Exception to The Hearsay Rule*, 30 YALE L. J. 355 (1921); Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484 (1937).

8. See MCCORMICK § 262.

9. See, e.g., *Northwest Airlines v. Rowe*, 226 F.2d 365 (8th Cir. 1955); *Smedra v. Stanek*, 187 F.2d 892 (10th Cir. 1951); *Mathews v. Carpenter*, 231 Miss. 677, 97 So.2d 522 (1957); *Gaddy v. State Bd. of Registration For Healing Arts*, 397 S.W.2d 347, 354 (Spr. Mo. App. 1965); *Berkowitz v. Simone*, 96 R.I. 11, 188 A.2d 665 (1963); *Washington-Vir. R.R. v. Deahl*, 126 Va. 141, 144-45, 100 S.E. 840, 841 (1919). For additional cases on the subject, see Annot., 54 A.L.R.2d 1069 (1957).

10. *Gonzales v. Landon*, 215 F.2d 955, 957 (9th Cir. 1954), *rev'd on other grounds*, 350 U.S. 920 (1955); *Harrison v. United States*, 42 F.2d 736 (10th Cir. 1930); *Olson v. Hodges*, 236 Iowa 612, 19 N.W.2d 676 (1945); *Scherffius v. Orr*, 442 S.W.2d 120, 124-25 (Spr. Mo. App. 1969).

Note that a prior inconsistent statement of a witness is limited to use as impeachment evidence. See Koenigsdorf, *Prior Inconsistent Statements As Substantive Evidence—Missouri Retains the Orthodox Rule*, 39 Mo. L. REV. 472 (1974). Admissions are clearly not so limited.

11. See, e.g., *Cox v. Esso Shipping Co.*, 247 F.2d 629, 632 (5th Cir. 1957); *Schaible v. Uhl*, 343 S.W.2d 578 (Ky. 1961); *Mertens v. McMahon*, 334 Mo. 175, 66 S.W.2d 127 (1933); *Southern Bank of Fulton v. Nichols*, 202 Mo. 309, 100 S.W. 613 (1907); *Howe v. Messimer*, 84 Mont. 304, 275 P. 281 (1929); MCCORMICK § 262 at 630.

12. See E. MORGAN, BASIC PROBLEMS OF EVIDENCE 265 (1962).

13. MCCORMICK, § 253.

14. See Shklar, *Evidence—The Unavailability Requirement For Declarations Against Interest—Should It Be Retained?*, 39 Mo. L. REV. 461 (1974).

15. See note 9 *supra*.

16. See notes 24-28 and accompanying text *infra*.

circumstances that guarantee its trustworthiness. Professor Morgan himself admits,

The admissibility of an admission made by the party himself rests not upon any notion that the circumstances in which it was furnished furnish the trier means of evaluating it fairly, but upon the adversary theory of litigation. A party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of an oath.¹⁷

The very basis of the hearsay objection is thus said to disappear; the opportunity for cross-examination is said to be satisfied.¹⁸ It would seem, however, that this argument is not nearly so compelling when the admission is made by an agent of the party. Since the principal is not the author of the admission, his credibility has not been brought into issue.

A second theory of admissibility is premised on the assumption that the statement is simply not hearsay. Under this theory admissions are received in evidence because they are said to be a product of the adversary system. The trier of fact is entitled to hear a party's prior contradiction of his present assertion.¹⁹ Admissions are admissible under this theory because a party has taken inconsistent positions which must be explained to and weighed by the jury. It is to say that in litigation, a party should be bound by what he says, at least to the extent that the jury should be allowed to consider what he said for whatever it may be worth. Recognizing that admissions are not allowed into evidence because of any particular characteristics of trustworthiness, the new Federal Rules of Evidence adopt this nonhearsay position.²⁰ Although either rationale will support the direct admission of a party, only the second theory supports admissibility of the out-of-court statement made by the agent of a party.

Missouri decisions have long referred to admissions as "admissions against interest."²¹ Such phraseology is unfortunate because it

17. Morgan, *supra* note 12 at 266.

18. See 4 WIGMORE, *supra* note 5, at § 1048.

19. See McCORMICK, § 262 at 629; Morgan, *supra* note 12 at 265. Harvey, *Evidence Code Section 1224-Are An Employee's Admissions Admissible Against His Employer?*, 8 SANTA CLARA LAW. 59, 62 (1967); Hetland, *Admissions in the Uniform Rules: Are They Necessary?*, 46 IOWA L. REV. 307, 308 (1961); Lev, *The Law of Vicarious Admissions- An Estoppel*, 26 U. CINN. L. REV. 17, 29-30 (1957); Strahorn, *supra* note 7. See also Cox v. Esso Shipping Co., 247 F.2d 629, 632 (5th Cir. 1957).

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

21. See, e.g., State *ex rel.* Highway Comm'n v. Baker, 505 S.W.2d 433 (Mo. 1974); Cline v. Carthage Crushed Limestone Co., 504 S.W.2d 102 (Mo. 1973).

invites confusion between admissions and declarations against interest, a totally separate and distinct exception to the hearsay rule.²² To be admissible a declaration against interest must have been contrary to the declarant's interest at the time the statement was made.²³ Although the vast majority of admissions are indeed against the party's interest when they are made, no such requirement is applied to admissions.²⁴ To illustrate this point, Professor McCormick hypothesizes a party who purchased a tract of land or a note which has since become the subject of a lawsuit. Prior to his purchase the party stated that the deed or note was a forgery. Although not against the party's interest when made, the statement is receivable in evidence as an admission.²⁵ Perhaps one of the clearest judicial expressions on the subject is found in *State v. Anderson*:²⁶

But the admissibility of a party's own previous statements or declarations in respect to the subject in controversy, as evidence against him, does not in any manner depend upon the question whether they were for or against his interest at the time they were made, or afterwards.

Hence, the misnomer of "admissions against interest" is an invitation to confuse admissions with declarations against interest and "to engraft upon admissions a requirement without basis in reason or authority."²⁷

It is important to distinguish between *evidential* admissions, which are the subject of this comment, and judicial admissions. Evidential admissions are words or conduct of a party or his representative offered in evidence against that party. Judicial admissions are not evidence at all. Rather, they take the form of stipulations between the parties, formal admissions in the pleadings, or affirma-

22. See generally McCormick §§ 276-80; Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 HARV. L. REV. 1 (1944); Morgan, *Declarations Against Interest*, 5 VAND. L. REV. 451 (1952).

23. See *McComb v. Vaughn*, 358 Mo. 951, 218 S.W.2d 548 (1949); *Straughan v. Asher*, 372 S.W.2d 489, 494-95 (St. L. Mo. App. 1963); *Neely v. Kansas City Pub. Serv. Co.*, 241 Mo. App. 1244, 252 S.W.2d 88 (K.C. Ct. App. 1952).

24. See, e.g., *Kaiser v. United States*, 60 F.2d 410 (8th Cir. 1932); *Barber v. Seaboard Coast Line R.R.*, 372 F. Supp. 1232, 1238 (S.D. Ga. 1973), *aff'd mem.*, 488 F.2d 1056 (5th Cir. 1974); *Wade v. Lane*, 189 F. Supp. 661 (D.D.C. 1960); *Conway v. Hudspeth*, 229 Ark. 735, 738-39, 318 S.W.2d 137, 140 (1958); *East Kentucky Rural Elec. Coop. v. Phelps*, 275 S.W.2d 592 (Ky. 1955); *Commonwealth Dep't of Highways v. Ward*, 461 S.W.2d 380 (Ky. App. 1970); *Drumheller v. Nasburg*, 3 Wash. App. 519, 523, 475 P.2d 908, 911 (1970); *Lev*, *supra* note 19, at 29.

25. McCormick, § 262 at 630.

26. 10 Ore. 448, 454 (1882).

27. McCormick, § 262 at 631.

tive responses to requests for admissions. Judicial admissions eliminate any controversy concerning the fact admitted.²⁸ Hence, there is no need for any proof at the trial of a fact which has been the subject of a judicial admission.²⁹ An evidential admission, on the other hand, is not conclusive, and the party who made the admission may always explain the prior statement and introduce contrary testimony.³⁰

III. ADMISSIONS OF AGENTS: RULES GOVERNING ADMISSIBILITY

A. Introduction

When a party to a lawsuit has expressly authorized another person to speak on his behalf, it is a firmly accepted extension of the admission rule that the agent's declarations be admitted against the party.³¹ For example in *Porter v. Equitable Life Assurance Society*,³² the plaintiff brought suit on a group disability policy. In response to a letter from plaintiff's attorney prior to commencement of the suit, the insurance company instructed plaintiff that all matters pertaining to her claim would be handled directly through the office of her employer. As a result, statements made by her employer's office manager, who supervised the group insurance policy, were held to be properly received against the insurer.³³

In *Nuttall v. Holman*,³⁴ plaintiff sued for specific performance of a contract for the sale of land, alleging that defendant had sold the land to others in violation of their agreement. At the trial, the secretary of the bank officer making arrangements for the loan testified that plaintiff had come to her office, told her that he was unable to raise his share of the money, and gave her instructions to transmit the information to the bank officer and the defendant. In ruling the

28. *Id.* at 630.

29. *Polk v. Missouri-K.-T. Ry.*, 341 Mo. 1213, 111 S.W.2d 138 (1937).

30. *See, e.g.*, *Cooper v. Brown*, 126F.2d 874 (3d Cir. 1942); *Aide v. Taylor*, 214 Minn. 212, 7 N.W.2d 757 (1943); 4 WIGMORE, *supra* note 5, § 1048 at 5.

31. 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 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.

Similarly, FED. R. EVID. 801, ADVISORY COMM. NOTE (d)(2)(C) states:

No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party.

32. 71 S.W.2d 766 (K.C. Mo. App. 1934).

33. *Id.* at 777.

34. 110 Utah 375, 173 P.2d 1015 (1946).

secretary's testimony properly admitted, the Utah court said that plaintiff, in effect, had made the secretary his agent for conveying the particular information which he contended was hearsay.³⁵

Hence, where express authority to speak may be found, statements made by the agent will be admitted against his principal. While such a rule is easily stated, "express authority to make admissions will rarely be found in the contract of employment"³⁶ since "few principals employ agents for the purpose of making damaging statements."³⁷ Because a rule which admits only expressly authorized statements would likely result in almost total exclusion of agent's statements, courts will sometimes find that an agent's declaration was impliedly authorized.³⁸

A common example of implied authority is in the area of telephone conversations. Statements made by a person answering a telephone call made to a place of business in ordinary course of business are admissible, although there is no personal identification of the person answering the call. Courts imply authority in the person answering to transact such business for the company.³⁹

In the vast majority of cases an agent has authority to perform certain functions for the principal; but is without authority to speak on the principal's behalf. Where express authority is not present, jurisdictions employ different approaches in finding implied authority or some similar basis for admitting the agent's declarations. The remainder of this section will be devoted to a discussion of the various approaches taken.

B. *Admission of Statements Concerning a Matter Within the Scope of Employment*

When the agent makes a statement out subject matter which is within the scope of his employment, a growing number of jurisdictions admit the statement into evidence as an admission of his principal. This view, which does not require "speaking authority" on the part of the agent,⁴⁰ must be distinguished from the contrary position which requires that the agent be authorized to actually speak for the principal. All that is necessary, under this newer ap-

35. 173 P.2d at 1018.

36. *Grayson v. Williams*, 256 F.2d 61, 66 (10th Cir. 1958).

37. FED. R. EVID. 801, ADVISORY COMM. NOTE (d)(2)(D).

38. See, e.g., *Cafone v. Spiniello Constr. Co.*, 42 N.J. Super. 590, 127 A.2d 441 (App. Div. 1956).

39. See, e.g., *Mattan v. Hoover Co.*, 350 Mo. 506, 166 S.W.2d 557 (1942); *Shelton v. Wolf Cheese Co.*, 338 Mo. 1129, 93 S.W.2d 947 (1936); *Barrickman v. National Utilities Co.*, 191 S.W.2d 265 (St. L. Mo. App. 1945).

40. See part III, § C of this comment.

proach is that the admission by the agent concern a matter within the scope of his agency or employment.

The application of the rule can best be illustrated by recent cases which have chosen to adopt it. In *Myrick v. Lloyd*,⁴¹ the defendant's son was operating a vehicle while working for his father's business. In the course of the journey the vehicle struck plaintiff's child. While driving the child to the hospital, the driver told the child's parents that the accident was his fault and that their child was not to blame. In adopting what it called the "more practical and liberal rule,"⁴² the Florida Supreme Court held that the driver's statement was admissible against his employer because it concerned a matter within the scope of the driver's agency. That is, the driver was employed to operate the vehicle and his statement concerned the manner in which it was operated.

One of the best known cases supporting this view is *KLM v. Tuller*.⁴³ The case involved a crash of a KLM airliner; the plane's radio operator failed to send a distress signal to the control tower. Several hours later the radio operator told the Inspector of Accidents:

We were tuned at . . . the tower frequency, and I honestly must say that I did not think when it happened, to take the microphone and tell people there was something wrong with the plane. I could tell you that would never happen. *You first think of your skin, and then of the microphone.*⁴⁴

In sustaining the district court's ruling that the statement was admissible against KLM, the court of appeals reasoned that the statement concerned a matter within the scope of the radio operator's employment, since his compliance with undisputed safety regulations was in question.⁴⁵

In *Nobero Co. v. Ferro Trucking Co.*,⁴⁶ a landlord sued his tenant for damage to the leased premises which resulted from a fire allegedly caused by defendant's negligence. A fire department officer testified that one of defendant's employees told him that he and another employee had been cleaning away paint with gasoline when the gas ignited. Since the statement related to matters within the

41. 158 Fla. 47, 27 So.2d 615 (1946).

42. *Id.* at 49, 27 So.2d at 616.

43. 292 F.2d 775 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 921 (1961).

44. 292 F.2d at 783 (emphasis added).

45. *Id.* at 783.

46. 107 N.J. Super. 394, 258 A.2d 713 (App. Div. 1969).

duties of the agent, the court deemed it property admitted.⁴⁷

The newly enacted Federal Rules of Evidence adopt the position that admissions of agents should be allowed in evidence against the principal when they concern "a matter within the scope of his agency or employment made during the existence of the relationship."⁴⁸ In recommending this position, the advisory committee noted:

The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusion of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment.⁴⁹

This test of admissibility was also adopted by both the Model Code of Evidence⁵⁰ and the Uniform Rules of Evidence.⁵¹

Criticism of this rule of admissibility is generally premised on the supposed lack of trustworthiness inherent in the agent's prior out-of-court declaration.⁵² It is submitted that such criticism is largely unfounded. Since the statement concerns an act within the authority of the agent, it can rarely be claimed that he is unfamiliar with what occurred. In light of the apparent unity of interest between principal and agent in seeing that the authorized act is performed, exclusion of the agent's statement would seem illogical. Admittedly, exclusion under the hearsay rule may seem theoretically sound if we look only to the physical absence of the principal at the time the statement was made, yet the broad scope of the

47. Many other cases support the view discussed in this section. See, e.g., *Ryerson v. Crane*, 417 F.2d 1263 (3d Cir. 1969); *Grayson v. Williams*, 256 F.2d 61 (10th Cir. 1958); *Martin v. Savage Truck Line*, 121 F. Supp. 417 (D.D.C. 1954); *Thorton v. Budge*, 74 Idaho 103, 257 P.2d 238 (1953); *Litman v. Pepper*, 214 Minn. 127, 7 N.W.2d 334 (1943); *Whitaker v. Keough*, 144 Neb. 790, 14 N.W.2d 596 (1944); *Branch v. Dempsey*, 266 N.C. 733, 145 S.E.2d 395 (1965) (Sharp, J., dissenting); *Marshall v. Thomason*, 241 S.C. 84, 127 S.E.2d 177 (1962) (Lewis, J., dissenting).

48. FED. R. EVID. 801 (d)(2)(D).

49. FED. R. EVID. 801, ADVISORY COMM. NOTE (d)(2)(D). See also *Grayson v. Williams*, 256 F.2d 61 (10th Cir. 1958).

50. MODEL CODE OF EVIDENCE rule 508(a) (1942).

51. UNIFORM RULE OF EVIDENCE 63 (9)(a).

52. See, e.g., *Falknor, Vicarious Admissions And The Uniform Rules*, 14 VAND. L. REV. 855 (1961); Note, *Admissibility of An Agent's Declaration Against His Employer Under Evidence Code Section 1224*, 19 HAST. L.J. 1395 (1968).

agency relationship itself lends support to admitting the statement. Since the law deems the principal constructively present for the agent's authorized acts, the same theory should be applied to the agent's statements concerning those acts.⁵³

Both the new Federal Rules of Evidence and the Uniform Rules of Evidence propose an additional safeguard: An agent's statement is not admissible unless made "during the existence of the relationship."⁵⁴ The statement must be made while the agent is still an employee of the principal. If it is made after the relationship has been severed, the statement is not admissible into evidence against the principal. Obviously, the purpose of such a provision is to guard against vengeful and vindictive assertions of an ex-employee. Such a rule adds to the statement's reliability and should be required by courts adopting this standard of admissibility.

It is important to recognize that this rule will not result in the universal admissibility of agents' statements. An employee's declaration about matters not falling within his own scope of authority should not be admissible against his employer. The Idaho court recognized this principal in *Mann v. Safeway Stores, Inc.*,⁵⁵ where plaintiff testified that after his fall in defendant's store he overheard one of the grocery checkers say that the floor had too much wax on it.⁵⁶ In holding that the testimony was improperly admitted, the court reasoned that a grocery checker's authority did not extend "in any manner to the condition of the floor."⁵⁷

C. *The Missouri Approach: Requirement That Agent Have "Speaking Authority"*

In order to get an agent's statement admitted into evidence against his principal, present Missouri law requires that the court be satisfied that the agent was either expressly or impliedly authorized by his principal to speak on the subject. The Missouri approach is diametrically opposite the position of the new federal rule; Missouri's "authority" requirement looks the authority to make the *declaration* itself, whereas the federal rule requires only that the subject matter of the declaration be something within the agent's authority.

Early Missouri decisions were prone to test admissibility of an

53. See Comment, *Vicarious Admissions and Utterances*, 47 MARQ. L. REV. 84, 88-89 (1963).

54. FED. R. EVID. 801 (d)(2)(D), UNIFORM RULE OF EVIDENCE 63 (9).

55. 95 Idaho 732, 518 P.2d 1194 (1974).

56. *Id.* at ____, 518 P.2d at 1201.

57. *Id.*

agent's statement under the *res gestae* exception to the hearsay rule. *Res gestae*, unfortunately, means different things to different people. The term was actually used to refer to several different exceptions to the hearsay rule.⁵⁸ Usually, however, *res gestae* as used in the older Missouri cases can be equated with the excited utterance exception to the hearsay rule. In *Sconce v. Jones*⁵⁹ the court said that to be admissible under *res gestae*, the statement must not be a "mere reflective narration of past events"⁶⁰ and the "true test is neither the time nor the place of a statement but whether it is a spontaneous statement produced by the event itself."⁶¹

The leading early Missouri case setting forth this position is *Shelton v. Wolf Cheese Co.*⁶² In *Shelton*, an employee of the defendant corporation had allegedly been involved in a motor vehicle accident during the course of his employment. Plaintiff sought to introduce evidence of a telephone conversation with the defendant's manager in which the manager admitted that the employee worked for the cheese company and that "he was out calling on some customers" at the time of the accident. At trial the manager denied ever having such a conversation. In holding the alleged phone conversation inadmissible, the court, in classic language, stated:

. . . declarations or admissions of an agent with respect to an act or transaction, made after the occurrence of the act or the completion of the transaction, are not provable against the principal. This rule is the basis for the exclusion of evidence of declarations of an agent that he had previously bound his principal by a contract, as well as for the exclusion of evidence of the admissions of a servant, whose alleged negligence caused injury to another, made long after the accident. Such statements are merely hearsay and like those of any other person, and cannot affect his principal. A rule that would allow an agent, after a transaction is closed, to admit away the rights of his principal, would be too dangerous to be tolerated.⁶³

Unless an agent's declaration fell within the ambit of *Shelton*, Missouri courts refused to admit it against the principal. Missouri cases did not recognize a theory of admissibility separate from *res*

58. See *Showalter v. Western Pac. R.R.*, 16 Cal.2d 460, 465, 106 P.2d 895, 898 (1940); *Cox v. State*, 64 Ga. 374, 410 (1897); *Harvey*, *supra*, note 19, at 68; Comment, *Res Gestae: A Synonym For Confusion*, 20 BAYLOR L. REV. 229 (1968). See also McCORMICK 1 § 244, at 517 (1954), where *res gestae* is referred to as a "rather clumsy theory."

59. 343 Mo. 362, 121 S.W.2d 777 (1938).

60. *Id.* at 370, 121 S.W.2d at 781.

61. *Id.* at 371, 121 S.W.2d at 782.

62. 338 Mo. 1129, 93 S.W.2d 947 (1936).

63. *Id.* at 1138, 93 S.W.2d at 952.

gestae. It is probable that *res gestae* was relied upon by the courts because the statement in question was usually made at or near the event and thus was either considered a part of the event itself and therefore non-hearsay, or was an excited utterance. Actually, these constitute totally separate and distinct rationales for admissibility, as the Missouri courts now recognize.⁶⁴ Today, an agent's admission will not be refused by a court simply because it does not fit within the rather abstract concept of *res gestae*.⁶⁵ Hence, counsel should always evaluate the admissibility of an agent's declaration from an "admissions of agent's" standpoint as well as the statement's potential evidential value as an excited utterance.⁶⁶ In *Roush v. Alkire Truck Lines*,⁶⁷ the court properly differentiated between the separate theories of "admission by an agent" and the spontaneous declaration exception to the hearsay rule. In so doing, however, the court opted for a very strict standard in testing the admissibility of an agent's admission. *Roush* involved a conversation at the scene of the accident between plaintiff's wife and defendant's truck driver. The trial court allowed plaintiff's wife to relate portions of the conversation in which defendant's employee made certain damaging admissions. The supreme court reversed, stating:

There is nothing in this case to show the authority of the truck driver to make the statements attributed to him, and the fact that he was admittedly driving the truck as the defendant's agent, together with the other circumstances revealed by the evidence, do not indicate that the scope of authority of the driver could include by any reasonable interpretation the making of admissions of negligence binding on his employer.⁶⁸

In *State ex rel. State Highway Commission v. Baker*,⁶⁹ plaintiff sought to condemn defendant's property. At trial, defendant was allowed to testify that plaintiff's resident engineer had previously told her that the land in question was worth \$24,000. In reversing, the court ruled that the trial court "patently erred in overruling the

64. For a correct analysis of the two separate theories of admissibility see *Roush v. Alkire Truck Lines*, 299 S.W.2d 518 (Mo. 1957): Some recent cases evidently still do not draw the distinction. See *Alabama Power Co. v. Sellers*, 283 Ala. 137, 214 So.2d 833 (1968); *Crawford v. County of Sacramento*, 239 Cal. App.2d 791, 49 Cal. Rptr. 115 (1966); *Gorman v. McCleaf*, 369 Mich. 237, 119 N.W.2d 636 (1963).

65. *Roush v. Alkire Truck Lines*, 299 S.W.2d 518, 521 (Mo. 1957).

66. Of course, all other exceptions to the hearsay rule should also be considered.

67. 299 S.W.2d 518 (Mo. 1957).

68. *Id.* at 521.

69. 505 S.W.2d 433 (Mo. 1974).

timely objections of the Commission's counsel,"⁷⁰ since defendant had not shown that the Commission's resident engineer had authority to speak for the Highway Commission.

It should be made clear that not even the present Missouri position always results in the exclusion of the agent's statement against the principal. Several cases have admitted an agent's statement against his employer when the requirement of "speaking authority" was held to have been satisfied. In *Cline v. Carthage Crushed Limestone Co.*,⁷¹ plaintiff sued for injuries sustained in a job-related accident. At trial defendant contended plaintiff was not entitled to maintain a common law action for damages since the injury was covered by workmen's compensation. Three or four weeks after the accident, Potter, defendant's "chief executive officer," came to plaintiff's home to talk with him concerning the accident. Over objection, plaintiff's wife was allowed to testify that Potter said, "I consider this a liability case and the insurance company considers it a compensation case."⁷² The supreme court affirmed, ruling that in visiting plaintiff to discuss the accident, Potter's statement was "attributable to the corporation he was representing."⁷³ Similarly in *Kaufman v. Baden Ice Cream Mfrs.*⁷⁴ the president of the defendant corporation went to plaintiff's home to discuss a traffic accident involving plaintiff and one of defendant's drivers. The president admitted to plaintiff that the employee was on his way to make a delivery when the accident occurred. The court held the evidence properly admitted, since, in discussing the case with plaintiff and his family, the president "was acting within the scope of his duties as president of the company."⁷⁵

As would be expected, "speaking authority" is more readily implied by courts when the declarant is a high-level official of the company; the statement of a president is more likely to be admitted than that of a truck driver. In *Garvis v. K Mart Discount Store*,⁷⁶ however, plaintiff was allowed to testify concerning what she had

70. *Id.* at 437. For additional authority supporting the Missouri position, see, e.g., *Rekart v. Safeway Stores, Inc.*, 81 N.M. 491, 468 P.2d 892 (N.M. App. 1970); *Big Mack Trucking Co., Inc. v. Dickerson*, 497 S.W.2d 283 (Tex. 1973); *Falknor*, *supra* note 51.

71. 504 S.W.2d 102 (Mo. 1973).

72. *Id.* at 114.

73. *Id.*

74. 7 S.W.2d 298 (St. L. Mo. App. 1928). The "accident investigation" cases have been distinguished as being in a separate category, and thus not altering the general Missouri rule. See *Rosser v. Standard Milling Co.*, 312 S.W.2d 106 (Mo. 1958).

75. 7 S.W.2d at 300.

76. 461 S.W.2d 317 (K.C. Mo. App. 1970). *Garvis* was an action for false imprisonment brought by a customer.

been told by the store's security guard when he stopped her. The appellate court affirmed because it was thought that, in speaking to the plaintiff incident to stopping her, the security guard had acted within the scope of his authority. *Garvis* demonstrates that an admission of a low-level agent will not be automatically excluded.

It is noteworthy that one recent Missouri decision has spoken favorably of the federal approach. The supreme court in *German v. Kansas City*,⁷⁷ quotes the federal advisory committee's comment to the effect that the traditional approach frequently results in the "loss of valuable and helpful evidence."⁷⁸ It is to be hoped that this favorable language in *German* may be the first step in altering Missouri's present position.

Like many other jurisdictions, Missouri recognizes that an agent's statement which indicates knowledge of a condition or control over property, when such issues are disputed, is properly admitted. This is only logical, since corporations, for example, can only acquire knowledge through their agents.⁷⁹ The exception can best be illustrated by the cases recognizing it. In *Bowyer v. Te-Co. Inc.*,⁸⁰ plaintiff slipped on loose steps at the rear of defendant's building. The next day plaintiff returned to defendant's offices and spoke with defendant's vice-president, who told plaintiff that he had known for some time that the stone slab was loose but that the corporation had put off fixing it. Since at the trial the defendant contended that the steps were not on it's property and therefore not under the dominion of the corporation, the vice president's statement was held to be admissible to show both knowledge and control. *Brown v. Kroger Co.*⁸¹ was a suit to recover for injuries sustained when a paper soda carton collapsed and plaintiff was cut by flying glass. Over defendant's objection, plaintiff introduced the deposition of the store manager in which the manager said that he knew that the bottoms of soda cartons became weak and unfit for use after they had been wet. In affirming, the court observed:

Such knowledge could have been acquired by Kroger only through its proper employee or other agent and evidence tending to show that knowledge in the form of deposition statements by its employee whose assigned duties encompassed the necessity that he

77. 512 S.W.2d 135 (Mo. en banc 1974).

78. *Id.* at 146.

79. See 2 W. FLETCHER, CYCLOPEDIA OF CORPORATIONS § 745 at 1043 (1954 ed.).

80. 310 S.W.2d 892 (Mo. 1958).

81. 344 S.W.2d 80 (Mo. 1961).

acquire knowledge on that subject in order to fulfill his duties as store manager was admissible on the question of Kroger's knowledge⁸²

Brown is an example of misapplication of the "knowledge" exception. The knowledge of the declarant is only relevant if the inference can be drawn that the knowledge existed at time of the event itself. As Professor McCormick states:

Of course, this theory is only available where the inference sought to be drawn is the declarant's knowledge at the very time of the declaration. Thus if a declarant, a week after the accident stated that he knew of the bad brakes before the accident, and this is offered to show his previous knowledge, it is hearsay and can come in only under some exception to the hearsay rule, such as for admissions of parties and their agents.⁸³

A deposition taken many months after the event is improperly admitted to show declarant's knowledge at the time of the event in question. Thus, knowledge is not properly proved by use of a deposition.⁸⁴

In a suit involving multiple parties on one side of the lawsuit, evidence is not rendered totally inadmissible simply because it is competent against only one of the co-parties. When the agent himself is joined as a co-defendant in the suit, for example, the agent's admission will always come into evidence against him. It is then the responsibility of the employer's counsel to request that the trial judge give a proper limiting instruction; the judge is under no obligation to do so on his own motion.⁸⁵ Even if the jury is instructed that they cannot consider the agent's admission as evidence against the principal, the plaintiff's case has assumed a higher degree of credibility. Once a jury has heard the agent's own admission, a limiting instruction may be of questionable practical value. Even

82. *Id.* at 82. See also *State ex rel. S.S. Kresge Co. v. Shain*, 340 Mo. 145, 101 S.W.2d 14 (1936); *Henry v. First Nat'l Bank* 232 Mo. App. 1071, 115 S.W.2d 121 (K.C. Ct. App. 1938); Annot., 141 A.L.R. 704 (1942).

83. MCCORMICK, § 249 at 592. See also *Couch v. Hutcherson*, 243 Ala. 47, 8 So.2d 580 (1942); *Kutcher v. Minneapolis, St. P. & S.S.M. Ry.*, 54 N.D. 897, 212 N.W. 51 (1927); Annot., 141 A.L.R. 704 (1942).

84. For another case involving the misapplication of showing knowledge by use of a deposition, see *German v. Kansas City*, 512 S.W.2d 135 (Mo. en banc 1974).

85. See *Elms v. Kansas City Pub. Serv. Co.*, 335 S.W.2d 26 (Mo. 1960); *Grimm v. Gargis*, 303 S.W.2d 43 (Mo. 1957). *Chawkey v. Wabash Ry.*, 317 Mo. 782, 297 S.W. 20 (En banc 1927); *Pyles v. Bus Lines*, 427 S.W.2d 790 (St. L. Mo. App. 1968); *State ex rel. Nelson v. Hammett*, 240 Mo. App. 307, 203 S.W.2d 115 (K.C. Ct. App. 1947); *Lanham v. Vesper-Buick Co.*, 21 S.W.2d 890 (St. L. Mo. App. 1929). See also Annot., 27 A.L.R.3d 966 (1969).

though the agent himself is judgment proof for all practical purposes, a wise plaintiff's counsel may wish to join him as a party to the lawsuit.

IV. INTRA-COMPANY REPORTS AND DECLARATIONS

Tort cases frequently involve accident reports filed by an agent to his principal. The issue arises whether a statement made by an agent to his principal qualifies as an admission against his principal. A similar problem is presented by an agent's statement to one of his fellow agents. The courts are about evenly divided on these questions.⁸⁶

One line of authority holds such statements inadmissible. The Restatement (Second) of Agency would not admit such statements because they are "statements which the principal does not intend to be given to the world or to be considered as his statements."⁸⁷ In *State ex rel. Kroger Company v. Craig*,⁸⁸ Kroger was served with an interrogatory calling for any written reports and memoranda made by any employee or any person on behalf of defendant. Citing *Shelton v. Wolf Cheese Co.*,⁸⁹ the court ruled that, since the reports would be incompetent as "admissions against interest" of defendant Kroger, they need not be turned over in response to plaintiff's interrogatory. Illustrating this position as applied to communications between agents is the case of *Arizona State Highway Department v. Bechtold*,⁹⁰ where plaintiff sought to admit a letter written two months after the accident by one state traffic engineer to another. In the letter the author stated that plaintiff's accident was "caused presumably by malfunctioning traffic signals."⁹¹ In holding that the letter was erroneously admitted, the Arizona court adopted what it referred to as the "better rule"⁹² of the Restatement.

On the other hand, such reports and declarations are frequently held admissible. The advisory committee of the Federal Rules of

86. See McCORMICK, § 267 at 642.

87. RESTATEMENT (SECOND) OF AGENCY § 287, comment (a) at 9 (1958). See also Lev, *supra* note 19 at 43.

88. 329 S.W.2d 804 (Spr. Mo. App. 1959).

89. 338 Mo. 1129, 93 S.W.2d 947 (1936); see notes 62-63 and accompanying text *supra*. See also *Smith v. Wabash Ry.*, 416 S.W.2d 85 (Mo. en banc 1967) (holding a report inadmissible because it was "work product.") For other cases holding such reports inadmissible, see *Dilley v. Chesapeake & O. Ry.*, 327 F.2d 249 (6th Cir. 1964); *Standard Oil Co. v. Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied* 356 U.S. 975 (1958); *Nuttall v. Reading Co.*, 235 F.2d 546 (3d Cir. 1956).

90. 105 Ariz. 125, 460 P.2d 179 (1969).

91. *Id.* at 130, 460 P.2d at 184.

92. *Id.*

Evidence recommended that such statements be admitted since "communication to an outsider has not generally been thought to be an essential characteristic of an admission."⁹³ This position is illustrated in *Compagnie De Navigation v. Mondial United Corp.*⁹⁴ A surveyor made a report to his principal regarding the amount of damage to cargo. In holding the surveyor's report admissible as an admission of the principal, the court aptly pointed out that:

The surveyor was hired to inspect and report his conclusions and recommendations. In reporting he was doing exactly what he was employed to do. Since part of his acts were to be reported words, his statement was within his authority.⁹⁵

The logic employed by the fifth circuit here is difficult to dispute. Frequently reports are required of agents by their principal. When this is the case, the report is plainly made within the scope of the agent's authority. This type of statement is likely to be true, for it is difficult to imagine an agent who would falsely relate facts to his principal which would subject the principal to liability. The report would only be offered against the principal when it admits some fact disadvantageous to the principal. There would seem to be "little basis"⁹⁶ for shaping our rules of admissibility to exclude such reports.⁹⁷

Another method of using an agent's intercompany report against the principal arises when the principal has "adopted" the contents of the agent's statement. This was the case in *Pekelis v. Transcontinental & Western Air, Inc.*⁹⁸ In *Pekelis*, the defendant established an accident board to investigate and report on air disasters involving its own plans. Following one such crash, the accident board reported that the cause of the crash was altimeter error due to lack of testing. The report was approved by the defendant and later submitted to the Civil Aeronautics Board and the International Aircraft Accident Board. Plaintiff's attempts to introduce the report at trial were unsuccessful. On appeal, the second circuit reversed, since the defendant by its actions in submitting the report had given the report the status of an "adoptive admission."⁹⁹

93. FED. R. EVID. 801, ADVISORY COMM. NOTE (d)(2)(D).

94. 316 F.2d 163 (5th Cir. 1963).

95. *Id.* at 171, n.10.

96. McCORMICK, § 267 at 643.

97. For other cases supporting this view, see *United States v. Lykes Bros. S.S. Co.*, 432 F.2d 1076 (5th Cir. 1970); *Brown and Root, Inc., v. American Home Assurance Co.*, 353 F.2d 113 (5th Cir. 1965); *Chicago, St. P., M. & O. Ry. v. Kulp*, 102 F.2d 352 (8th Cir. 1939); *Dotson v. Pennsylvania R.R. Co.*, 142 F. Supp. 509 (W.D. Pa. 1956).

98. 187 F.2d 122 (2d Cir. 1951).

99. (*Id.* at 128. See also *United States v. United Shoe Machinery Corp.*, 89 F. Supp.

V. AGENT'S STATEMENTS AS TO FACT AND SCOPE OF AGENCY

It is universally recognized that the *fact* of the agency relationship must be established before an admission made by an agent may be admitted against the principal, regardless of the test of admissibility thereafter chosen.¹⁰⁰ For the purpose of establishing the relationship, the agent's own hearsay statements asserting the existence of the relationship are inadmissible.¹⁰¹ Nothing, however, prevents the alleged agent from testifying at trial concerning the fact of agency, since at trials testimony is not offered as an admission.¹⁰²

Where the fact of agency has been established by competent evidence, the courts are not in agreement as to whether hearsay statements of the agent are admissible to show the scope and extent of the agent's authority, as distinguished from the fact of agency. Missouri cases have consistently followed the general rule that neither the existence nor the scope of the agency relationship may be proved by the agent's own hearsay remarks. For example, in *Alt v. Groscluse*,¹⁰³ a trespass case, the existence of an agency was conceded. The only controversy centered around whether the agent's authority extended to making unconditional sales. The court held the extent of that authority could not be shown by the agent's own hearsay declarations.¹⁰⁴

The mere establishment of the fact of agency carries with it a certain scope of power incident to the agent's position.¹⁰⁵ Where the party seeks to establish that the agent had additional powers which are not inherent in the normal agency relationship, a minority of courts hold that the scope of agency can be proved by the agent's hearsay remarks.¹⁰⁶ The cases that attempt to apply this rule defy

349, 352 (D. Mass. 1950); *Oxley v. Linnton Plywood Assn.*, 205 Ore. 78, 284 P.2d 766 (1955).

100. See 4 J. WIGMORE, *supra* note 5, § 1078 at 176.

101. See, e.g., *Brownell v. Tide Water Associated Oil Co.*, 121 F.2d 239, 244 (1st Cir. 1941); *Rosser v. Standard Milling Co.*, 312 S.W.2d 106 (Mo. 1958); *State ex rel. Massman v. Bland*, 355 Mo. 17, 194 S.W.2d 42 (1946); 4 J. WIGMORE, *supra* note 5, § 1078, at 176; *McCORMICK*, § 267 at 642.

Note, however, that the agent's statement may be admitted under another exception to the hearsay rule. See, e.g., *Mattan v. Hoover Co.*, 350 Mo. 506, 166 S.W.2d 557 (1942) (state of mind exception); *McCORMICK*, § 267 at 642 n.2.

102. See, e.g., *Smith v. Fine*, 351 Mo. 1179, 175 S.W.2d 761 (1943); *Barr v. Howe*, 166 S.W.2d 244, 246 (St. L. Mo. App. 1942).

103. 61 Mo. App. 409 (St. L. Ct. App. 1895).

104. For other Missouri cases holding that the scope of the relationship may not be proved by the agent's hearsay declarations, see *Rosser v. Standard Milling Co.*, 312 S.W.2d 106 (Mo. 1958); *State ex rel. Massman v. Bland*, 355 Mo. 17, 194 S.W.2d 42 (1946).

105. See *Harper, Admissibility of Declarations of Corporate Agents*, 76 U. PA. L. REV. 1 (1927).

106. See, e.g., *Jolly v. Chatahoochee Fertilizer Co.*, 28 Ga. App. 194, 110 S.E. 639 (1922); *Mitchell v. Sherman E. McEwen Associates*, 360 Ill. 278, 196 N.E.2d 186 (1935).

reconciliation; suffice it to say that the more remote the specific powers in issue are from those generally inferred, the less likely a court will be to allow the alleged power to be shown by the agent's hearsay.¹⁰⁷

VI. ADMISSIONS CONTAINED IN DEPOSITIONS—MISSOURI SUPREME COURT RULE 57.07(a)

A. *Missouri Case Law*

The question frequently arises whether an agent's admission which is contained in a deposition may be admitted against his principal.¹⁰⁸ Missouri courts have generally answered this question in the negative. There have been numerous Missouri decisions on the subject, several of which are especially interesting and significant.

In *Meyer v. Dubinsky Realty Co.*,¹⁰⁹ plaintiff attempted to introduce portions of the deposition of the president of the defendant corporation as admissions against the corporation. In holding these statements inadmissible, the court stated:

Of course such statements, even though they were made by Dubinsky, the president of the company, did not constitute admissions against defendant's interests, since Dubinsky had not given his deposition in evidence in the course of the performance of any official function for the defendant.¹¹⁰

*Capra v. Phillips Investment Company*¹¹¹ was an action by a restaurant owner for fire damage allegedly caused by the negligence of two defendant corporations. The deposition of one Phillips, chairman of the board of both defendants, revealed that certain combustible materials were stored by the corporations in the basement of the damaged building. At trial plaintiff attempted to introduce portions of the deposition as admissions against the defendant corporations. The court rejected the contention and held the statements inadmissible against the corporations, reasoning that Mr. Phillips' duties as chairman of the board did not include the giving of depositions.

The Missouri Supreme Court recently faced the issue again in *Tile-Craft Products Co., Inc. v. Colonial Properties, Inc.*,¹¹² an ac-

107. See Annot., 3 A.L.R.2d 598, 602 (1949).

108. See part III, § C *supra*.

109. 133 S.W.2d 1106 (St. L. Mo. App. 1939).

110. *Id.* at 1110.

111. 302 S.W.2d 924 (Mo. en banc 1957).

112. 498 S.W.2d 547 (Mo. 1973).

tion for breach of contract for payment due plaintiff for building supplies delivered to defendant. Plaintiff took the deposition of the defendant's president, who was the sole shareholder of defendant corporation. The trial court refused to allow into evidence portions of the deposition as admissions of the corporation. The supreme court affirmed, despite plaintiff's quite logical argument that the president "is, in fact, the corporation."¹¹³

Thus, current Missouri case law on the subject of the use of an agent's admission which is contained in a deposition can be accurately summarized by saying that it will never be admissible.¹¹⁴ Missouri courts have consistently taken the position that no agent ever acts within his scope of authority when he is giving a deposition.¹¹⁵ As the cases just discussed clearly indicate, Missouri courts hold this rule to be applicable regardless of the deponent's position in the organization and regardless of the authority he may possess in company affairs.¹¹⁶

B. *Missouri Supreme Court Rule 57.07(a)*

Effective January, 1975, Missouri adopted a series of new discovery rules patterned largely after the federal rules of discovery. Rule 57.07(a), which deals with the admissibility of depositions given by certain agents, provides:

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had proper notice thereof, in accordance with any of the following provisions: . . .

(2) The deposition of a party or of anyone who at the time of taking the deposition was an *officer, director, or managing agent*, or a person designated under Rule 57.03 (b) (4) or 57.04 (a) to testify on behalf of a public or private corporation, partnership

113. *Id.* at 548. .

114. Of course, testimony in a deposition which shows knowledge or control, when such are at issue, will be admissible, *German v. Kansas City*, 512 S.W.2d 135, 145-46 (Mo. En Banc 1974).

115. For other Missouri cases representing this approach, see *Pettus v. Casey*, 358 S.W.2d 41 (Mo. 1962); *Davis v. Sedalia Yellow Cab Co.*, 280 S.W.2d 869 (K.C. Mo. App. 1955); *Kolb v. Howard Corp.*, 219 S.W.2d 856 (St. L. Mo. App. 1949).

116. The refusal to admit admissions contained in the depositions of high-ranking corporate officials has been criticized as illogical. See *Loyal's Auto Exch. v. Munch*, 153 Neb. 628, 45 N.W.2d 913 (1951).

or association or governmental agency which is a party, may be used by an adverse party for any purpose.¹¹⁷

The new rule makes an important change in current Missouri law; it alters the rule concerning the use which can be made of the agent's statements in a deposition at trial. Under present Missouri case law, an agent's admission which is contained in a deposition, regardless of his position or authority, cannot be admitted against the principal. In effect, Missouri courts carved out a specific activity, that of giving a deposition, which was absolutely outside the scope of any agent's authority and scope of duty. Under new rule 57.07(a), however, an admission made in a deposition by one of the high-ranking agents specified in the rule would be admitted in evidence against the employer without regard to the question of the agent's authority.¹¹⁸

The adoption of 57.07 (a) (2) presents a significant problem. The controversy centers around Article 5, section 5, of the Missouri Constitution:

The Supreme Court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no

117. Mo. R. Civ. P. 57.07 (1975)(emphasis added).

118. The new Missouri rule raises an interesting question as to who is a "managing agent." Missouri's new rule is a copy of FED. R. Civ. P. 32(a) (1971). The question of the scope of the "managing agent" phrase has been faced many times by the federal courts. These federal decisions take on great importance to Missouri courts in light of the decision in *State v. Anderson*, 515 S.W.2d 534, (Mo. En Banc 1974), where the court said that the adoption of legislation from another jurisdiction necessarily gives great weight to the interpretation that the other jurisdiction's courts have given the language.

A suggested criteria for determining whether a person qualifies as a "managing agent" under the new rule would include the following factors: (1) whether the deponent is invested by his principal with general powers to exercise his judgment and discretion in dealing with his principal's matters with respect to the subject matter of the litigation; (2) whether the deponent is a person who could be depended upon to carry out his principal's direction to give testimony at the demand of a party engaged in litigation with the principal; (3) what the deponent's functions, powers, and duties (as well as his rank and title) are with reference to the subject matter of the lawsuit; (4) whether any person or persons in higher authority than the deponent sought to be examined are in charge of the particular matter or possessed of the information as to which the deposition is sought; (5) whether there is any danger that the proposed deponent's interests at the time of the deposition are adverse or hostile to the party whose managing agent he is alleged to be. See, e.g., *United States v. The Dorothy McAllister*, 24 F.R.D. 316 (S.D. N.Y. 1959); *Krauss v. Erie Ry. Co.*, 16 F.R.D. 126 (S.D.N.Y. 1954).

For a good analysis of the cases decided by the federal courts on the subject, see generally Annot., 98 A.L.R.2d 622 (1964).

rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose.¹¹⁹

Thus, the Missouri Constitution clearly forbids a change by supreme court rule in the substantive evidence law. It would appear that a change in the rules concerning the use of depositions is in fact a change in the law of evidence. The court will undoubtedly be called upon to decide whether rule 57.07 (a) (2) runs afoul of the constitutional prohibition on such alteration by the supreme court. The court could well hold that the new rule represents just such an alteration, since an admission made in the deposition of an agent of the requisite level would be admitted against the principal under the new rule, whereas previous case law would have required the exclusion of the same statement.

On the other hand, the validity of the rule be defended on the ground that the use of a deposition does not really involve the use of hearsay testimony. It is taken under oath with all parties represented and with opportunity for cross-examination. One might argue that it is merely an alternate form of in-court testimony and since the court can, by rule, provide procedural rules for the use of various types of in-court testimony, it can adopt rules as to the use of depositions. Certainly the direction of the rule toward broadening the use of the agent's statement against the principal is a commendable development. Criticism of the rule must focus on the method of accomplishment and not on the result.

This rule must be considered in conjunction with rule 57.03(b)(4),¹²⁰ which also became effective in January, 1975. This rule, taken verbatim from the Federal Rules of Civil Procedure,¹²¹ requires a corporation, partnership or other association to name one or more of its officers, directors, managing agents, or some other person as its agent for the purpose of giving its deposition.¹²² If a

119. Mo. CONST., art. V, § 5 (1945) (emphasis added).

120. A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, director, or managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(4) does not preclude taking a deposition by any other procedure authorized in these rules.

121. FED. R. CIV. P. 30 (b)(6).

122. See note 120 *supra*.

party wishing to depose a corporation describes the matters it wishes to examine in its notice of deposition when the corporation is a party, or in the subpoena if it is not a party, the burden is then on the deponent to name as its agent for the purpose of giving the deposition a person who has knowledge of the facts in question.¹²³ The principal is itself subject to sanctions for failure to designate an agent or for the agent's failure to comply with a court order.¹²⁴

Normally an employee of a corporate party will be considered a nonparty witness; he must be subpoenaed, simple notice being insufficient to require him to submit to a deposition. His deposition is not attributable to his employer. If a corporation designates one of its employees as its agent under this rule, however, his status is the same as an officer, director or managing agent. His deposition "may be used by an adverse party as if it were the deposition of the corporation itself."¹²⁵ Because a corporation is required to select as its agent a person who will be able to testify on the areas described in the notice or subpoena, it would appear that under certain circumstances, a corporation must name a low-level employee as its agent. For example, in a suit evolving from a collision between a car and a corporation's truck, the truck driver might be the only person connected with the company competent to represent the corporation at the deposition; the corporation would be required to designate the truck driver as its agent under 57.03(b)(4). This rule represents a significant change in Missouri discovery, and, when coupled with rule 57.07(a)(2),¹²⁶ may also present constitutional problems.¹²⁷

The portion of the rule stating that the deposition is admissible "for any purpose" presents a further potential problem in multi-party lawsuits. For example, consider a suit where plaintiff is suing two legally unrelated corporations and plaintiff seeks to introduce the deposition of an officer of one defendant against the second defendant. Carried to its logical extreme, the "for any purpose" clause would support the introduction of the deposition testimony into evidence against both defendants. Such a holding would be unfortunate since it would predicate admissibility, not on any legal relationship between the defendants, but rather on the mere similarity of the parties as co-defendants. Likewise, one defendant should not be allowed to use the deposition of the other defendant's

123. See C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2103 (1970).

124. *Id.* See also FED. R. CIV. P. 37, and MO. R. CIV. P. 61.

125. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2103 (1970).

126. See pt. VI, § A this comment.

127. See note 19 and accompanying text *supra*.

officer against such other defendant.¹²⁸ Under the terms of the rule, such deposition statements may be used against "adverse" parties only, and, absent a cross-claim, co-defendants are not adverse.

It can be argued that the constitutional argument is obviated by the portion of rule 57.07(a) which states that the deposition is admissible "so far as admissible under the rules of evidence applied as though the witness were then present and testifying." Practically, however, a party who has admitted a deposition of an opposing party's officer or managing agent will hardly be able to argue for upholding the rule on the ground that it refers back to the existing case law rules of evidence for its admissibility. In effect, the party would be arguing that the rule is constitutional since it contains a provision limiting admissibility to situations where the deposition would be admissible under prior cases. Since prior Missouri law would exclude any admissions contained in the deposition, the party would, in effect, be arguing against himself. It makes little sense to argue for admissibility under the new rule while at the time arguing in support of its constitutionality on the basis of prior cases rendering the agent's deposition inadmissible.

A better interpretation of the clause is that it is not meant to limit the admissions of agents. Rule 57.07(a)(2) expressly sets out those agents whose level of authority is sufficient to render their depositions admissible against the principal. Additionally, the requirement that the deponent be an officer, director, or managing agent "at the time of taking the deposition" adds another substantial safeguard for truthfulness since, in effect, it is required that the agent has not been dismissed by the principal.¹²⁹ The rule is obviously written with the intent of admitting such a deposition "for any purpose," just as it states. A preferred interpretation of the "so far as admissible under the rules of evidence" clause is that it gives the trial judge power to exclude portions of the deposition which violate some additional rule of evidence, for example, those portions that are irrelevant¹³⁰ or privileged.

Two other problems which may arise under the rule should also be discussed. First of all, what effect should the "for any purpose"

128. *But see* Riley v. Layton, 329 F.2d 53 (10th Cir. 1964), where, in a medical malpractice suit, one co-defendant was allowed to use the deposition of another co-defendant against him, even though no cross-claim was involved. It is submitted that such a result is incorrect.

129. *See* note 54 and accompanying text *supra*.

130. *See, e.g.*, Fenstermacher v. Philadelphia Nat'l Bank, 493 F.2d 333 (3d Cir. 1974); Zimmermann v. Safeway Stores, Inc., 410 F.2d 1041 (D.C. Cir. 1969); Pursche v. Atlas Scraper and Eng. Co., 300 F.2d 467 (9th Cir. 1961), *cert. denied* 371 U.S. 911 (1962); Merchants Motor Freight, Inc. v. Downing, 227 F.2d 247 (8th Cir. 1955).

clause have on the evidential value of the deposition testimony— That is, should the deposition be substantive evidence of the facts contained therein or limited to use as impeachment evidence? The federal courts have uniformly held that the deposition may be used as substantive evidence.¹³¹ In fact, this is the most likely meaning of the “for any purpose” language. It is unlikely that the phrase was intended to broaden the limited use approach traditionally followed in multi-party litigation.

The second problem concerns the admissibility of the deposition when the deponent is in court and testifying. The federal courts have frequently considered this problem and have consistently held that the fact that the agent has also testified is irrelevant. The deposition is nonetheless substantively admissible.¹³² This result is appropriate since the rule is basically a restatement of the admissions exception to the hearsay rule with respect to depositions and the availability of the declarant has never been a factor in the admissibility of an admission.

VII. CONCLUSION

Missouri, like some other jurisdictions, follows a policy of near wholesale exclusion of an agent’s admissions. The result is frequently the loss of reliable and extremely probative evidence. Realizing this, the trend of the cases and authorities is in the direction of more liberal admissibility. This comment advocates such an approach because it is the better reasoned rule of evidence.¹³³ Its acceptance by Missouri courts would be expedient.

Missouri’s new deposition rule is a commendable step in the right direction. The problem lies not with the theory of the rule, but with the method by which the change was made. Rule 57.07 clearly alters the position of the Missouri decisions on the admissibility of agent’s admissions contained in depositions. As such, the new rule raises serious constitutional problems.

RICHARD L. ADAMS

131. See, e.g., *Pingatore v. Montgomery Ward & Co.*, 419 F.2d 1138 (6th Cir. 1969); *Lassiter v. United States Lines, Inc.*, 370 F. Supp. 427 (E.D. Va. 1973).

132. See, e.g., *Fey v. Walston & Co., Inc.*, 493 F.2d 1036 (7th Cir. 1974); *Community Counseling Serv., Inc. v. Reilley*, 317 F.2d 239 (4th Cir. 1963); 4A J. MOORE, FEDERAL PRACTICE, § 32.04 (2d ed. 1972).

133. McCormick, *Hearsay*, 10 RUTGERS L. REV. 620, 625 (1956).