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Lawyer Insights

Outside Counsel Statements and the Party Exception to Hearsay

By Syed Ahmad, Patrick McDermott and Latosha Ellis
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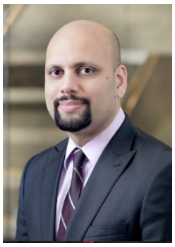

Under Federal Rule of Evidence (FRE or Rule) 801(d)(2), an opposing party's out-of-court statements may be admissible. Such party admissions are often consequential to prove an element of a claim or defense or to call into question a witness's credibility.

One issue that can arise, however, is whether statements by a party's outside counsel fall within this rule. There is a patchwork of court rulings on this issue. Due to the unique nature of the attorney-client privilege, courts have generally urged caution when the challenged statement is made by a party's attorney. Nonetheless, in some jurisdictions, attorney statements have been admitted under FRE 801(d)(2).

This article summarizes noteworthy decisions where courts have examined the admissibility of outside counsel's statements under Rule 801(d)(2)

The Party-Opponent Statement Exception to Hearsay

Hearsay under Rule 801, in simplest terms, is an out-of-court statement offered to prove the truth of the matter asserted. However, an opposing party's statements are not hearsay under certain circumstances. Specifically, under FRE 801(d)(2), a statement is not hearsay when offered against an opposing party and the statement.

(A)was made by the party in an individual or representative capacity; (B) is one the party manifested that it adopted or believed to be true; (C) was made by a person whom the party authorized to make a statement on the subject; (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

Court Decisions: Admissible Attorney Statements

Party admissions can be crucial to a case, and a number of courts have determined that statements made by a party's attorney are, or may be, admissible evidence as a party-opponent admission under Rule 801(d)(2).

For example, in *Hanson v. Waller*, the court found that although an attorney does not have authority to make an out-of-court admission for a client in all instances, an attorney does have authority to make admissions directly related to the management of litigation. 888 F.2d 806, 814 (11th Cir. 1989).

Accordingly, the court held that factual statements in a letter from the plaintiff's attorney to the defendant's attorney were related to the management of the plaintiff's lawsuit and, therefore, under Rule 801(d)(2)(C), were properly admitted as an admission by a party opponent. *Id*.

Another court found that because the adversarial process in civil cases "insures trustworthiness," as a general rule, statements made by an attorney concerning any matter within the scope of his employment are admissible under Rule 801(d)(2)(D). *United States v. D.K.G. Appaloosas, Inc.*, 630 F. Supp. 1540, 1564 (E.D. Tex. 1986), *aff'd*, 829 F.2d 535 (5th Cir. 1986) (finding that statements made by government attorneys concerning the ownership of seized property were admissible).

Similarly, the court in *Williams v. Union Carbide Corp.* held that, generally, statements made by an attorney concerning a matter within the scope of his employment may be admissible against the party who retained the attorney. 790 F.2d 552 (6th Cir. 1986) (finding that the trial court erred in prohibiting the defendant from using the allegations made in the plaintiff's complaint in another lawsuit where the plaintiff's attorney was fully authorized to act and speak for the plaintiff).

And the court in *Harris v. Steelweld Equipment Co., Inc.* held that statements made by the plaintiff's previous workers' compensation attorney in a letter to a witness two years before an action was filed regarding the plaintiff's employability was an admission by a party opponent clearly admissible pursuant to Rule 801(d)(2)(D). 869 F.2d 396, 403-04 (8th Cir. 1989) (finding that if the district court had sustained appellants' objection to the admissibility of statements in a letter from appellants' workers' compensation attorney, it would have been "a clear abuse of discretion requiring reversal").

In addition, the U.S. Court of Appeals for the Second Circuit has identified several guideposts that it uses to determine the admissibility of these kinds of statements. IN *United States v. McKeon*, the court held that statements made by a party's prior counsel are admissible as statements by the party opponent as long as the statements are nontestimonial in nature and are "clear and unambiguous" statements of fact. 738 F.2d 26, 30 (2d Cir. 1984). Most relevant, the court in *McKeon* identified certain criteria that must be satisfied before permitting the evidentiary use of statements by counsel:

- First, the court must be satisfied that the prior statement is an assertion of fact that is inconsistent with the assertion at a later trial. The inconsistency between the statements must be "clear and of a quality which obviates any need for the trier of fact to explore other events at the prior trial." *Id*. at 33

- Second, the court must determine that the statements of counsel are the equivalent of testimonial statements by the party; there must be something beyond the attorney-client relationship to show participation by the party.

- Third, the trial court must "determine by a preponderance of the evidence that the inference the prosecution [or another party] seeks to draw from the inconsistency is a fair one and that an innocent explanation… does not exist." *Id*. at 33. If opposing inferences are of equal weight or the preponderance of evidence favors the innocent explanation, the prior statement should be excluded.

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Court Decisions: Inadmissible Attorney Statements

Unlike in the cases above, other courts have been unwilling to admit statements from counsel as an opposing party's statement. These courts recognize that the mere fact that an attorney represents a client does not render the attorney an agent of the client. Instead, the question is whether the attorney has the authority to act as the client's agent and whether the attorney's statements were made in the course of exercising that authority. Focusing on that inquiry has led a number of courts to deny admission of counsel's statements under Rule 801(d)(2).

In *Litton Systems Inc. v. American Telephone & Telegraph Co.*, the court found that notes that the plaintiff's attorney took about interviews with various corporate employees during an internal investigation into possible employee misconduct were not within the scope of the attorney's agency or employment as contemplated by Rule 801(d)(2)(D). 700 F.2d 785 (2d Cir. 1983). The court reasoned that counsel's summary of what certain employees said about other employees in the course of his investigation did not bring the events within the "scope of his agency or employment" under the rule. *Id*. at 816-17. The court held that the trial court did not err in refusing to admit the notes because the defendant could have examined the attorney or the employees that the attorney interviewed. *Id*. The court further held that the hearsay within the attorney's notes was likely inadmissible even with testimony from the attorney or the employees and that the defendant failed to lay a proper foundation for its admissibility under any rule of evidence.

Likewise, in *United States v. Jung*, the court held that "[t]he unique nature of the attorney-client relationship… demands that a trial court exercise caution in admitting statements that are the product of this relationship," and urged counsel to "only offer this sort of evidence in rare cases and when absolutely necessary, in order to avoid impairing the attorney/client relationship." 473 F.3d 837, 841 (7th Cir. 2007). In *Jung*, the district court admitted statements attributed to the defendant's counsel under Rule 801(d)(2)(D). The appeals court held that counsel's statements did not fit with the defense's theory of the case but instead contradicted the defense's argument, and that clients would be chilled from sharing information with attorneys if attorney statements regarding a client's liability were admissible. *Id*. at 842. Accordingly, the appeals court determined that the district court had abused its discretion in admitting the out-of-court statements attributed to the defendant's attorney.

Litigants: Necessary Preparation

Outside counsel's statements are not per se admissible or inadmissible as party-opponent admissions under Rule 801(d)(2). Given the various contexts in which the proffered evidence arises – i.e., oral arguments, out-of-court oral statements, correspondence, and pleadings – such evidence is subject to a wide variety of balancing tests and factors. Litigators should understand the case law on these issues to take advantage of opportunities to admit counsel's statements where appropriate or to defend against improper attempts to use attorneys' words against their clients.

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Syed Ahmad *is a partner in the firm's Insurance Coverage group in the firm's Washington D.C. office. Syed represents clients in connection with insurance coverage, reinsurance matters and other business litigation. He can be reached at +1 (202) 955-1656 or sahmad@HuntonAK.com.*

Patrick M. McDermott *is a counsel in the firm's Insurance Coverage group in the firm's Richmond office. Patrick counsels clients on all aspects of insurance and reinsurance coverage. He assists clients in obtaining appropriate coverage and represents clients in resolving disputes over coverage, including in litigation and arbitration. He can be reached at +1 (804) 788-8707 or pmcdermott@HuntonAK.com.*

Latosha M. Ellis *is an associate in the firm's insurance coverage group in the firm's Washington D.C. office. From advising clients at policy renewal and through the claims process to representing clients in litigation or alternative dispute resolution of coverage disputes, Latosha delivers comprehensive end-to-end counsel. She can be reached at +1 (202) 955-1978 or lellis@HuntonAK.com.*