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AGENT ADMISSIONS IN FEDERAL AND GEORGIA LAW

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Research Guides

AGENT ADMISSIONS IN FEDERAL AND GEORGIA LAW

Guide Information

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This is a quick reference to some key external links included in this research guide.

- The Federal Evidence Review
  http://federalevidence.com/
  Links to the FRE, amendments, advisory committee notes, articles and blog
- ABA Section of Litigation News
  http://apps.americanbar.org/litigation/litigationnews/
  News, analysis and publications from the ABA Section of Litigation
- State Bar of Georgia
  http://www.gabar.org/
  Contact information, directories, educational resources
- Court of Appeals for the Eleventh Circuit
  http://www.ca11.uscourts.gov/
  Contains search function for Eleventh Circuit opinions (published and unpublished) back to 1995

Agent Admissions in Federal and Georgia Law

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

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

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

About this Guide

This research guide was prepared for Professor Nancy Johnson's Advanced Legal Research class in the Spring of 2011 by Casey Viggiano, a third year law student at Georgia State University's College of Law. Send an email to **njohnson@gsu.edu** for more information about this bibliography.

Disclaimer

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

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Primary Sources

Federal Rule of Evidence § 801

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

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

Advisory Committee Notes to 801

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

O.C.G.A. § 24-3-33

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

O.C.G.A. § 10-6-64

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

Unannotated Georgia code sections

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

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

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

Crossover

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

United States Court of Appeals for the Eleventh Circuirt

Some Eleventh Circuit caselaw on FRE 801(d)(2)(D):

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

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

Champ v. Calhoun Cnty. Emergency Mgmt. Agency. 226 Fed. App'x 908 (11th Cir. 2007)

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

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

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

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

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

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Secondary Sources

FEDERAL RESOURCES

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

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

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

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

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

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- McCormick on Evidence by McCormick, Charles Tilford
  Call Number: KF8935 .M29 2006
  ISBN: 0314161279
  http://gilfind.gsu.edu/vufind/Record/1518406/Description#tabnavOne of the two treatises commonly cited in the Advisory Committee Notes to the Federal Rules of Evidence, McCormick on Evidence is a comprehensive guide to evidentiary matters. While the treatise obviously was not conceived with the FRE in mind, the discussions concerning policy considerations behind agent admissions provide helpful language that would be quite useful to a brief writer who finds that the caselaw concerning his particular agent admission is not exactly on his side. Look to § 259 for representative admissions specifically, but keep in mind that some of the best historical/policy language is at the beginning of Chapter 24 Hearsay (§ 244).

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- Wigmore on Evidence by James H. Chadbourn
  Call Number: KF 8935.W54 v.4 1972
  ISBN: 0316939706The other treatise most cited in the Advisory Committee Notes to the Federal Rules of Evidence, Wigmore on Evidence also provides wonderful language in its discussions of how evidentiary rules have been born mostly out of necessity. § 1078 addresses agent admissions and contains an interesting discussion of how agency principles and hearsay principles intersect in the case of tortious liability.

Legal Encyclopedia

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

CJS *Evidence* § 580, Agents and Employees.

CJS *Evidence* § 581, Agents and Employees--Source of Declarant's Knowledge.

CJS *Evidence* § 583, Agents and Employees--Sufficiency of Evidence.

CJS *Evidence* § 586, Agents and Employees--Required Existence of Relation When Statement Made.

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

12 John Bourdeau et al, Federal Procedure, Lawyers Edition § 33:38 (Conditionally Relevant Evidence).

Evidence Current Events Websites

The Federal Evidence Review

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

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

Use of the site is free, though the comprehensive monthly newsletter is available for $25/mo.

The ABA Section of Litigation

The ABA Litigation Section of Litigation News page includes news and analysis regarding litigation issues, especially pertaining recent court decisions. ABA Section of Litigation publications are also available.

Bar Journal and Newsletter Articles

These periodical entries provide analysis of relevant cases and emerging issues in evidence.

Zachary G. Newman & Anthony Ellis, The Reliability, Admissibility, and Power of Electronic Evidence, ABA Section of Litigation Trial Evidence Committee (Jan. 25 2011).

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

Editor's Blog, Proferred Admission Insufficient Alone to Lay FRE 801(d)(2)(C) or FRE 801(d)(2)(D) Foundations, Federal Evidence Review (June 25 2009).

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

Editor's Blog, Evaluating Statements by an Authorized Party in Context Under FRE 801(d)(2)(C), (D), Federal Evidence Review (Mar. 25 2010).

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

GEORGIA RESOURCES

- Courtroom Handbook on Georgia Evidence by Paul S. Milich

Call Number: KFG540 .M542 c.3
ISBN: 0314905855
http://gilfind.gsu.edu/vufind/Record/50353This is the go-to book for Georgia lawyers who find themselves faced with an evidentiary issue in the courtroom. The explanations are wonderfully straightforward and brief (for more in depth explanations and citations, use the Georgia Rules on Evidence featured below). The best part of this book is that at the end of each explanation of Georgia law on an evidentiary point, the corresponding FRE text is listed, then there is a comparison with Georgia law. The "Agency Admissions" section is relevant for our purposes, and provides more than enough primary authority to being researching. However, the explanation of the differences between federal and Georgia law in this section is too short for an in depth understanding. If you want primary sources, use the Handbook. If you want to read a secondary source about this for greater understanding, go to the aforementioned Georgia Rules on Evidence.

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- Georgia Rules of Evidence by Paul S. Milich
  Call Number: KFG540 .M54 c.4
  ISBN: 0314049703
  http://gilfind.gsu.edu/vufind/Record/2148889/Holdings#tabnavThis is the big brother version of Prof. Milich's Courtroom handbook. The explanations and citations are more comprehensive.

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- Georgia Procedure by Don F. Vaccaro
  Call Number: KFG 530. G47 1995 v.4
  http://gilfind.gsu.edu/vufind/Record/49231/Details#tabnavVolume 4 §§ 8:28-8:40 cover admissions in the civil context generally, while §§ 8:36-8:37 specifically cover admissions by agents or other representatives and proving agency. Beyond providing statutory and case cites, Georgia Procedure has the added benefit of providing relevant West Digest key numbers. Also, research references are conveniently listed at the beginning of the Hearsay, Admissions section (directly preceding § 8:28). Categories included are: West's Key Number Digest, primary authority, A.L.R. library, legal encyclopedias, treatises and practice aids, trial strategy, and forms.

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- Georgia Jurisprudence by Edward K. Esping
  Call Number: Ref. KFG80 .G45 1995
  http://gilfind.gsu.edu/vufind/Record/790492Georgia Jurisprudence is the companion set to Georgia Procedure, and provides summaries of Georgia law on selected substantive topics. Like in Georgia Procedure, the references to other useful sources is perhaps its most useful function beyond providing a statement of the law. Volume 17 (Employment and Labor) § 14:36, Declarations, Statements, and Conduct of Agent is the most relevant section for the purposes of this research guide.

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- Agnor's Georgia Evidence by Jennifer Lewis Roberts
  Call Number: KFG540 .A94 2008
  http://gilfind.gsu.edu/vufind/Record/1944597This update of Professor Agnor's reference work contains plenty of primary source cites for points of Georgia law as well as a comparison between Georgia Law and the Federal Rules of Evidence. Sections 19:2 (Admissions--Agents'), 19:3 (Admissions--Attorneys'), and 11:11 (Admissions by Agents or Representatives) are most relevant for the purposes of this research guide.

Journal Articles

The articles below, though dealing with specific issues in agent admissions, also provide excellent general background material on agent admissions in general.

John E. Sullivan, Note, Bourjaily v. United States: *A New Rule for Admitting Coconspirator Hearsay Statements Under Federal Rule of Evidence 801(d)(2)(E)*, 1988 Wis. L. Rev. 577 (1988).

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

Mary Jo Reilly, Casenote, *Admissibility of Defense Counsel's Out-of-Court Statements Under Federal Rules of Evidence 801(d)(2)(C) and 801(d)(2)(D)*—United States v. Valencia, 61 Temp. L. Rev. 1541 (1988).

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

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

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

Anne Bowen Poulin, *Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?* 87 Minn. L. Rev 401 (2002-03).

> A very interesting journal article about how the rule governing party admissions has been applied less liberally to statements made by the government or prosecution. The article provides background on party admissions before the Federal Rules of Evidence, the Rules themselves, and how they have been applied to government statements as compared with application to other declarants.
> *Please note that this links to HeinOnline. Users accessing the link through the GSU server will be able to see the full article, but those*

accessing it from off campus must login in to see the full text.

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Special Interest Groups, Specific Circumstances

Special Interest Groups

ABA Section of Litigation

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

State Bar of Georgia

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

Specific Circumstances

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

Interpreters:

Beth Bates Holliday, Annotation, *Interpreter or Translator as Party's Agent for Purposes of "Admission by Party–Opponent" Exception to Hearsay Rule (Federal Rules of Evidence, rules 801(d)(2)(c), 801(d)(2)(d))*, 121 A.L.R. Fed. 611 (1994).

Attorneys:

Beth Bates Holliday, Annotation, *Admissibility as "Not Hearsay" of Statement by Party's Attorney under Federal Rules of Evidence 801(d)(2)(c) or 801(d)(2)(d)*, 117 A.L.R. Fed. 599 (1994).

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