

### **8.03 Admission by Party**

**(1) A statement of a party which is inconsistent with the party's position in the proceeding is admissible against that party, if the statement is one of the following:**

**(a) made by a party in an individual or representative capacity and offered against the party in that capacity, irrespective of the party's lack of personal knowledge of the facts asserted by the party.**

**(b) made by a person in a relationship of privity with the party and the statement concerns the party's and the person's joint interest.**

**(c) made by an agent or employee of the party whom the party authorized to make a statement concerning the subject. The required authorization may be expressly given by the party or implied from the scope of the agent's duties or employment.**

#### **Note**

**Subdivision (1) (a)** is derived from *Reed v McCord* (160 NY 330, 341 [1899]) which held that "admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made." *Reed* further held that the absence of personal knowledge on the part of the party making the statement does not preclude the statement's admissibility under the admission's exception. (*See Reed v McCord*, 160 NY at 341, *supra*.)

Unlike Federal Rules of Evidence rule 801 (d) (2) (A), which permits a party's statement to be admitted against the party in either the party's individual or representative capacity, present New York law authorizes the use of a statement made by the party in a representative capacity to be admitted against the party only in that capacity. (*See Commercial Trading Co. v Tucker*, 80 AD2d 779 [1st Dept 1981].)

**Subdivision (1) (b)** is derived from a series of Court of Appeals decisions which adopted this privity-based admissions exception. (See *e.g. Murdock v Waterman*, 145 NY 55 [1895] [joint obligor]; *Chadwick v Fonner*, 69 NY 404 [1877] [grantor]; *Hatch v Elkins*, 65 NY 489 [1875] [principal-surety].)

**Subdivision (1) (c)**, which sets forth New York’s so-called “speaking agent” exception, is derived from *Tyrrell v Wal-Mart Stores* (97 NY2d 650, 652 [2001] [“The Appellate Division correctly concluded that plaintiff failed to establish that the unidentified employee was authorized to make the alleged statement; thus, the statement did not constitute an admission binding on the employer”]); *Loschiavo v Port Auth. of N.Y. & N.J.* (58 NY2d 1040, 1041 [1983] [“(T)he hearsay statement of an agent is admissible against his employer under the admissions exception to the hearsay rule only if the making of the statement is an activity within the scope of his authority”]); *Spett v President Monroe Bldg. & Mfg. Corp.* (19 NY2d 203, 206 [1967] [statement of defendant’s general foreman admissible against employer since he “was apparently the person who ran (his employer’s business), in whom complete managerial responsibility for the enterprise was vested”]); and *Merchant’s Natl. Bank of Gardner, Kennebec County, Me. v Clark* (139 NY 314, 319 [1893] [“Hearsay evidence of this character is only permissible when it relates to statements by the agent, which he was authorized by his principal to make”]).

Under this exception, where the requisite authority has not been given expressly to the employee by the employer, implied authority has been found to be present, as *Spett* recognizes, where the employee has been given extensive managerial responsibility over the employer’s business. Thus, implied authority to speak has been found to exist where the employee was placed “in full charge” of the business (see *Stecher Lithographic Co. v Inman*, 175 NY 124, 127 [1903]); the employee was the “general manager” of the business (see *Vaughn Mach. Co. v Quintard*, 165 NY 649 [1903], *affg* 37 App Div 368, 372 [1st Dept 1899]); and the employee was the superintendent of the job site or facility (see *Brusca v El Al Israel Airlines*, 75 AD2d 798, 800 [2d Dept 1980]). There are cases concluding that an employer’s general manager of one of the employer’s stores did not have implied authority from that position, cases that apparently turn upon the extent of the responsibilities given to the general manager. (See *e.g. Alvarez v First Natl. Supermarkets, Inc.*, 11 AD3d 572 [2d Dept 2004]; *Scherer v Golub Corp.*, 101 AD3d 1286 [3d Dept 2012]; compare *Navedo v 250 Willis Ave. Supermarket*, 290 AD2d 246, 247 [1st Dept 2002] [implied authority present]; *Bransfield v Grand Union Co.*, 24 AD2d 586 [2d Dept 1965], *affd* 17 NY2d 474 [1965] [implied authority present].)

New York is one of three states which does not recognize an exception comparable to Federal Rules of Evidence rule 801 (d) (2) (D), which creates an exception for statements of a party's agent or employee made by the agent or employee in the scope of his or her relationship, even if the agent or employee does not have any authority to speak on behalf of the party. (*See* 4 Jones, Evidence § 27:22 [7th ed].) In *Loschiavo v Port Auth. of N.Y. & N.J.* (58 NY2d 1040, 1041-1042, *supra*), the Court of Appeals noted that New York's rule has been widely criticized but decided not to reconsider the rule due to a pending legislative modification of it.

This rule does not bar the admission of an employee's statement where it is admissible on other grounds. See, for example, the rules on declaration against interest (*Kelleher v F.M.E. Auto Leasing Corp.*, 192 AD2d 581, 583 [2d Dept 1993]); excited utterance (*Tyrell v Wal-Mart Stores*, 97 NY2d at 652 [recognizing potential but finding insufficient foundation for its admissibility]); and verbal act (*Giardino v Beranbaum*, 279 AD2d 282 [1st Dept 2001]).

For the rule on "informal judicial admissions" and "formal judicial admissions" by a party see Guide to New York Evidence rule 8.21.1.