

8.04. Admission by Party¹

(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.

(2) A statement offered against an opposing party shall not be excluded from evidence as hearsay if made by [a] a person whom the opposing party authorized to make a statement on the subject or [b] by the opposing party's agent or employee on a matter within the scope of that relationship and during the existence of that relationship.

The required authorization may be expressly given by the party or implied from the scope of the agent's or employee's duties or employment. The statement cannot be used as proof of the agency or employment relationship, or the claimed authority to make the statement, or the scope of the agency or employment relationship, unless it is admissible under another exception.

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.)

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 (2) contains three sentences. The first sentence restates verbatim CPLR 4549 (enacted by L 2021, ch 833), except for the insertion of paragraph letters, and sets forth two closely related hearsay exceptions for statements made by an agent or employee offered against the principal or agent. When the agent's or employee's statement is admitted under either of the exceptions, the statement is treated as a party's admission (*see Michael J. Hutter, New CPLR 4549: Admissibility of Agent/Employee Statements Against the Principal/Agent*, NYLJ, Feb. 16, 2022 at 3, col 1).

Paragraph (a) of the first sentence codifies New York's well established common law "speaking agent" exception, permitting the admission of a statement of a party's agent or employee against the principal or employer when the party has authorized the statement to be made; paragraph (b) creates a new exception permitting the admission of a statement of a party's agent or employee against the party principal or employer when the statement concerns a matter within the scope of the agency or employment irrespective of whether the statement was authorized or not. Before the enactment of CPLR 4549, New York's common law did not recognize a hearsay exception for an agent's or employee's statement concerning the relationship when the agent or employee had no speaking authority.

The operative element of the "speaking agent" exception is that the agent or employee has been given authority to make the statement in issue (*see e.g. 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 . . . if the making of the statement is an activity within the scope of his authority"]; *Merchants' 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”)). Proof that the person was authorized or otherwise directed to act in the matter to which his statement relates is insufficient (Barker & Alexander, Evidence in New York State and Federal Courts § 8:21 [2d ed]).

The other exception set forth in paragraph (b) creates an exception for statements of a party’s agent or employee made by the agent or employee in the scope of such relationship. The exception has two operative elements: (1) the statement relates to or concerns a matter within the scope of the agency or employment relationship; and (2) the statement was made during the existence of that relationship. As to the first element, the relational phrase—“within the scope of that relationship”—is identical to that phrase in Federal Rules of Evidence rule 801 (d) (2) (D). Commentators have noted that relationship phrase “is broad in its scope” (Mueller & Kirkpatrick, Federal Evidence § 8:55 [4th ed]). Consistent with that observation, the federal courts have given the phrase a liberal construction, requiring only that the statement have some connection to the agent’s or employee’s specific job duties (*id.*). With respect to the second element, the temporal requirement—“during the existence of that relationship”—is likewise derived from Federal Rules of Evidence rule 801 (d) (2) (D). Federal courts uniformly hold the statement must be made while the agent or employee was employed, not before the person was hired, or after the person quit or was fired.

The subdivision’s second sentence, reciting present law, provides that authority may be expressly given by the agent’s or employee’s principal or employer or implied from the scope of the agent’s or employee’s duties or employment (*see e.g. Spett v President Monroe Bldg. & Mfg. Corp.*, 19 NY2d 203, 206 [1967] [although defendant’s general foreman was not given any authority to speak on behalf of his employer, his statement was 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”]). As *Spett* recognizes, where the employee has been given extensive managerial responsibility over the employer’s business, speaking authority may be implied. Thus, implied authority to speak has been found to exist where the employee was placed “in full charge” of the business (*Stecher Lithographic Co. v Inman*, 175 NY 124, 127 [1903]); the employee was the “general manager” of the business (*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 on the extent of the responsibilities given to the general manager. (*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].)

The subdivision's third sentence addresses foundational requirements, specifying that the agent's or employee's statement cannot be used as proof of the agency or employment relationship, or the claimed authority to make the statement, or the scope of the agency or employment relationship unless it is admissible under another exception. Proof of those foundation elements must be made by independently admissible evidence, i.e., evidence other than the statement being offered into evidence. This requirement is derived from present law governing the "speaking agent" exception (Martin, Capra & Rossi, NY Evidence Handbook § 8.3.2 [2d ed]). No principled reason suggests that it should not also apply to the newly created exception. Of note, Federal Rules of Evidence rule 801 (d) (2) provides that the agent's or employee's statement may be considered along with other evidence to establish the agency relationship.

An agent's or employee's lack of personal knowledge of the facts underlying an otherwise admissible statement does not under existing New York law preclude the statement's admissibility (Martin, Capra & Rossi, *supra* at 715; *see also Reed*, 160 NY at 341).

This rule does not bar the admission of an employee's statement that 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 (*Tyrrell*, 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 8.23.

¹ In June 2022, this rule and Note were amended for the purpose of incorporating CPLR 4549, enacted in 2021. Subdivision (1) (c) was deleted, and subdivision (2) was added to incorporate portions of former subdivision (1) (c) and CPLR 4549.