

## **8.23. Informal and Formal Judicial Admissions**

### **(1) Informal Judicial Admissions.**

**(a) A statement made in the course of any judicial proceeding (whether in the same or another case) by a party or, in accord with paragraph (b), the party’s attorney, that is inconsistent with the position the party now assumes is admissible as an “informal judicial admission” that constitutes evidence (not conclusive evidence) of the fact(s) admitted.**

**(b) For a statement of a party’s attorney to be admitted as an informal judicial admission, the proponent must show that the attorney is the authorized agent of the client, that the client is the source of the statement, and that the client expressly or impliedly waived the attorney-client privilege.**

### **(2) Formal Judicial Admissions.**

**An act of a party done in the course of a judicial proceeding that dispenses with the production of evidence by conceding, for the purposes of the litigation, the truth of a fact alleged by the adversary is admissible as a “formal judicial admission.” A formal judicial admission is conclusive of the fact(s) admitted in the action in which the admission is made.**

#### **Note**

#### **Introduction**

The language of the rule is derived from *People v Brown* (98 NY2d 226 [2002]), although the rule applies in civil cases as well. (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 412 [2014]; *Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 99, 103 [1996].)

*Brown* summarized the differences between an “informal” and “formal” judicial admission as follows:

“An ‘informal judicial admission is a declaration made by a party in the course of any judicial proceeding (whether in the same or another case) inconsistent with the position [the party] now assumes’ (Fisch, *New York Evidence* § 803, at 475 [2d ed]). Such an admission is ‘not conclusive on the defendant in the litigation’ (*People v Rivera*, 45 NY2d [989,] 991 [1978]) but ‘is merely evidence of the fact or facts admitted’ (Prince, *Richardson on Evidence* § 8-219, at 530 [Farrell 11th ed]). By contrast, a formal judicial admission ‘takes the place of evidence’ and is ‘conclusive of the facts admitted in the action in which [it is] made’ (*id.* § 8-215, at 523 [emphasis supplied]). ‘A formal judicial admission is an act of a party done in the course of a judicial proceeding, which dispenses with the production of evidence by conceding, for the purposes of the litigation, the truth of a fact alleged by the adversary’ (*id.*)” (*Brown*, 98 NY2d at 232 n 2.)

While there is a dividing line between an “informal judicial admission” and a “formal judicial admission,” as will be seen in the following comments, it is possible that a single admission may constitute both a “formal judicial admission” in one proceeding and an “informal judicial admission” in another or, in other words, an “informal judicial admission” in one proceeding may emanate from a “formal judicial admission” in another proceeding.

### **Informal Judicial Admissions**

The foundational requirements for the introduction in evidence of an “informal judicial admission” by a party’s attorney are discernable from the facts in *Brown*. In that case, during an in-court *Sandoval* hearing, the defendant’s attorney, as *Brown*’s “authorized agent,” represented what the defendant would testify to at trial. *Brown* was present at the hearing, was the “sole source” of the attorney’s statements, and the attorney-client privilege was waived given that the attorney’s statements were “made on the record in open court.” The attorney’s statements, “which unequivocally represented to the hearing court that *Brown* was present at the scene only to buy drugs, were inconsistent with his trial testimony that he was at the scene for purely innocent purposes.” The trial court therefore properly allowed the prosecutor to use the attorney’s statements to impeach the defendant on cross-examination. (*Brown* at 232-233; *cf. People v Casas*, 84 NY2d 718, 722-723 [1995] [the attorney’s statement was inadmissible here because “the attorney’s statement was oral and made out of court, to a third party,” there was “nothing to suggest the attorney had authority to speak on behalf of his client,” and

there was “no evidentiary record support for a finding of waiver of the (attorney-client) privilege by defendant”]; *see generally* John Brunetti, New York Confessions § 10.03 [6] [Admissions by Counsel, 2014 ed.]

Notably, in *Brown*, the attorney whose statement was used for impeachment was not then representing the defendant; in the circumstance where the attorney is representing the party, the trial court may need to grant “counsel’s request to withdraw” or declare “a mistrial.” (*People v Ortiz*, 26 NY3d 430, 439 [2015].)

Statements of a defendant’s attorney at the defendant’s arraignment may constitute an “informal judicial admission” (*see People v Gary*, 44 AD3d 416, 416 [1st Dept 2007]) and may be introduced in evidence “by way of the testimony of a court reporter.” (*People v Castillo*, 94 AD3d 678, 679 [1st Dept 2012]; *People v Killiebrew*, 280 AD2d 684, 685 [2d Dept 2001] [“The attorney who represented the defendant at arraignment informed the court that the defendant ‘tells me that the complaining witness . . . came towards him in a very threatening manner and he thought he was going to be attacked.’ The trial court (properly) ruled that the defendant could be impeached with this statement if he testified and raised a defense which was inconsistent with justification”]; *but see People v L.D.*, 60 Misc 3d 729 [Sup Ct, Bronx County 2018].)

Statements of a defendant’s attorney at a bail hearing may constitute an “informal judicial admission.” (*People v Johnson*, 46 AD3d 276, 278 [1st Dept 2007]; *People v Mahone*, 206 AD2d 263, 264 [1st Dept 1994].)

A plea of guilty or admission of guilt may be a “formal judicial admission” in the action where entered and is admissible as an “informal judicial admission” in a separate action. (*See Ando v Woodberry*, 8 NY2d 165, 166 [1960] [a plea of guilty to a traffic offense is admissible in a civil negligence action as evidence of the defendant’s carelessness, but the defendant may submit evidence on the reason for entering the plea that may affect the weight to accord the plea]; *People v Walden*, 236 AD2d 779, 779 [4th Dept 1997] [in a prosecution for sexual abuse and endangering the welfare of a child, the defendant’s admission of guilt in a parallel Family Court proceeding was properly received into evidence against the defendant].)

Similarly, an “admission in a pleading in one action is admissible against the pleader in another suit” as an “informal judicial admission,” provided “that it can be shown that the facts were alleged with the pleader’s knowledge or under his direction.” (*Jack C. Hirsch, Inc. v Town of N. Hempstead*, 177 AD2d 683, 684 [2d Dept 1991]; *compare* CPLR 3123 [b] [“Any admission made, or deemed to be made, by a party pursuant to a request (for an admission) made under this rule is for the purpose of the pending action only and does not constitute an admission by

him for any other purpose nor may it be used against him in any other proceeding”].)

A formal judicial admission in a pleading in a civil proceeding may become an “informal judicial admission” when the pleading is amended. See the section below on Formal Judicial Admissions in a civil proceeding.

An “informal judicial admission” of a party to a judicial proceeding by the party’s attorney may be used to impeach that party’s testimony given as a defense witness in another case. (*People v Davis*, 103 AD3d 810, 812 [2d Dept 2013] [the People properly impeached “the testimony of a defense witness with a statement made by that witness’s former counsel in his presence at a plea proceeding (see *People v Brown*, 98 NY2d 226 [2002])”].)

Statements of a defendant’s attorney in an affidavit may constitute an informal judicial admission. (See *Matter of Union Indem. Ins. Co. of N.Y.*, 89 NY2d 94, 99, 103 [1996] [statements made by a party’s outside counsel in a sworn affidavit in a related action, incorporating supporting documentation and evidence, constituted informal judicial admissions].) That informal judicial admission may be used to impeach a defendant during cross-examination; in the discretion of the court, the affidavit itself may be received in evidence solely for impeachment purposes. (*People v Rivera*, 58 AD2d 147, 148 [1st Dept 1977], *aff’d* 45 NY2d 989 [1978] [the trial court did not commit error when it “permitted cross-examination based on this affidavit and received the affidavit in evidence, limiting however, both the exhibit and the related cross-examination to use for impeachment of credibility only”].)

### **Formal Judicial Admissions**

A party may admit the truth of fact(s) in issue in an action that would thereby be conclusive of the fact(s) admitted in that action. The bedrock principle behind a “formal judicial admission” is: “ ‘A controversy put out of the case by the parties is not to be put into it by us.’ ” (*People v Robinson*, 284 NY 75, 81 [1940].)

### **Criminal proceeding**

Examples of a “formal judicial admission” in a criminal proceeding are:

- The defense concession in a murder trial that the deceased had been “brutally killed,” “strangled by someone,” in part justified the court in denying the defendant’s request to charge the jury on the need for corroboration of a confession by some proof that the

crime charged has been committed by someone. (*People v Louis*, 1 NY2d 137, 141 [1956].)

- The trial court did not err “in failing to instruct the jury that, if they found that the value of the [stolen] property was less than \$100, they should find the defendant guilty of a misdemeanor” because the defendant testified and admitted in his testimony that the value exceeded \$100, “thus taking the issue of value out of the case.” (*People v Brady*, 16 NY2d 186, 189-190 [1965].)
- In a bribery prosecution, the defendant’s “guilty connection with the crime did not extend to actual payment of the money, only to bringing about the payment[;] the issue of whether or not [the bribe giver] actually gave the money to [the bribe receiver] was taken out of the case by defense counsel’s numerous concessions on this point.” The concessions “relieved the prosecution of any obligation of presenting further evidence on the question on the trial even though the jury was charged that it must find that a bribe took place in order to bring in guilty verdicts on the counts in the indictment on which [the defendant] was convicted.” (*People v Morhouse*, 21 NY2d 66, 75 [1967].)

### **Civil proceeding**

In a civil proceeding: “Facts admitted in a party’s pleadings constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are made” (*GMS Batching, Inc. v TADCO Constr. Corp.*, 120 AD3d 549, 551 [2d Dept 2014]; see *Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 412 [2014] [quoting *GMS Batching* in holding that as a “general matter, statements in the corporations’ pleadings that they owed (appellant) the settlement money constitute formal judicial admissions . . . (and these) assertions are ‘conclusive upon the party making (them)’ ” (citations omitted)]; *Cook v Barr*, 44 NY 156, 158 [1870] [“admissions contained in the pleadings” are admissible when shown “by the signature of the party, or otherwise, that the facts were inserted with his knowledge, or under his direction, and with his sanction”]; *Roxborough Apts. Corp. v Kalish*, 29 Misc 3d 41, 42-43 [App Term, 1st Dept 2010] [“Statements made in a pleading verified by a person with personal knowledge of the content of the statements are formal judicial admissions, which dispense with the production of evidence and concede, for the purposes of the litigation in which the pleading was prepared, the truth of the statements”]; see also CPLR 2104 [“An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered”]).

A statement in a pleading made on personal knowledge “constitutes a formal judicial admission,” and “even though [the pleading is] subject to a subsequent, valid amendment, [the statement] remains evidence of the facts admitted”—i.e., the statement then constitutes an “informal judicial admission.” (*Bogoni v Friedlander*, 197 AD2d 281, 291-292 [1st Dept 1994]; *Stauber v Brookhaven Natl. Lab.*, 256 AD2d 570, 570-571 [2d Dept 1998] [“If a complaint is amended with leave of the court, any formal judicial admission deleted by the amendment is relegated to the status of an informal judicial admission which, although not conclusive, constitutes evidence of the proposition alleged”]; *Resseguie v Adams*, 55 AD2d 698, 699 [3d Dept 1976], *affd on mem below sub nom. Locator-Map v Adams*, 42 NY2d 1022 [1977] [“Even if a valid amendment of defendants’ pleadings were made, the admissions are still evidence of the facts admitted”].)

A party cannot be charged with a “formal judicial admission” based on inconsistent pleadings which are authorized by law (*Scolite Intl. Corp. v Vincent J. Smith, Inc.*, 68 AD2d 417, 421 [3d Dept 1979]).

Statements made in a pleading “on information and belief” do not constitute a “formal judicial admission.” (*Empire Purveyors, Inc. v Weinberg*, 66 AD3d 508, 509 [2009]; *Scolite Intl. Corp. v Vincent J. Smith, Inc.* at 421; *but see Ficus Invs., Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 11 [2009].)

A “concession arguendo contained in a brief on a motion for summary judgment is not a formal judicial admission.” (*1014 Fifth Ave. Realty Corp. v Manhattan Realty Co.*, 67 NY2d 718, 720 [1986].)

By statute, certain conduct generally directed to a settlement of an action “shall not be made known to the jury.” (CPLR 3219 [Tender (of an amount deemed by party to be sufficient to satisfy the claim asserted against the party)]; 3220 [Offer to liquidate damages conditionally]; 3221 [Offer to compromise].)