An Advocate's Guide To Personal, Adoptive And Judicial Admissions In Civil Cases In California And Federal Courts

I. INTRODUCTION

An elementary rule of evidence law is that a party may use an opponent's hearsay statement against the opponent as substantive evidence.[1] For example, assume that after the collision of an automobile and a bicycle, the driver of the auto told an investigating officer that when he was one hundred feet from the bicyclist, he saw the bicyclist veer from the shoulder onto the roadway. If the bicyclist sued the motorist, the defendant-motorist's out-of-court statement would be an express personal admission. That statement would be admissible to prove the defendant's distance from the bicyclist when the bicyclist left the shoulder and that the defendant possibly could have avoided the accident.

Another basic rule of evidence is that a party may adopt as his own the statements of another.[2] Assume that a bus driver observed the accident described above and accused the motorist of speeding. If the motorist failed to deny the bus driver's statement, the bicyclist could introduce evidence of the statement and the motorist's failure to deny it as an adoptive admission by the motorist that he was speeding.

A third type of admission occurs when a party admits a fact in a pleading, in a written stipulation, or orally during a judicial proceeding. If in his answer to the bicyclist's complaint, the motorist states that he hit the bicyclist, he has judicially admitted that fact.[3]

This article describes and analyzes the evidentiary rules governing personal, adoptive and judicial admissions in civil cases in California and federal courts.[4] The article classifies as extrajudicial the personal

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[1] E. CLEARY *et al.*, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 262 (2d ed. 1972) [hereinafter cited as MCCORMICK (2d ed.)]. Admissions may also be used to impeach a party opponent's testimony. *Id.* § 37, 74.

[2] *Id.* § 270.

[3] *See* MCCORMICK (2d ed.), *supra* note 1, § 265.

[4] Admissions in criminal cases are a separate subject because of the constitutional

and adoptive admissions illustrated in the first two hypotheticals above. The extrajudicial admissions section which begins this article first compares the rationales under which California and federal courts admit a party opponent's out-of-court statements. Second, it discusses personal admissions, focusing on the statutory criteria for admitting express personal admissions, and surveying the law of personal admissions implied by conduct. Third, it discusses adoptive admissions, suggesting a test for finding an adoptive admission. The extrajudicial admissions section concludes by discussing the applicability of testimonial qualifications to extrajudicial admissions and the use of cautionary instructions in cases of doubtful authenticity.

Judicial admissions, illustrated in the third hypothetical above, include pleadings, stipulations, requests for admissions and in court statements of counsel or the party. The latter portion of this article describes the use of judicial admissions in pending and in subsequent actions.

II. EXTRAJUDICIAL ADMISSIONS

Extrajudicial admissions may be defined as the out-of-court statements of the party opponent or the out-of-court statements of a third person which the party opponent has adopted.[5] A party opponent's out-of-court conduct, such as flight from the scene of an accident, may also be an extrajudicial admission.[6] Extrajudicial admissions are admissible either to impeach a party's testimony or as substantive evidence to prove the matter asserted.[7] The party, however, may both deny making an admission and deny the truth of the matter it asserts.[8]

A. RATIONALES FOR ADMITTING EXTRAJUDICIAL ADMISSIONS

Traditionally, courts have classified extrajudicial admissions, offered to prove the matter asserted, as hearsay but admitted them under a hearsay exception.[9] A modern court faced with the original

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issues involved. For a discussion of the constitutional issues see *Developments in the Law — Confessions*, 79 HARV. L. REV. 935 (1966); Comment, *Tacit Admissions and Miranda*, 36 TENN. L. REV. 566 (1969).

[5]Extrajudicial admissions are also termed evidential admissions. *See* MCCORMICK (2d ed.), *supra* note 1, § 262, at 630. The latter term denotes the probative force of an extajudicial admission.

[6]*Id.* § 271. *Cf.* Brooks v. E. J. Willig Truck Transportation Co., 40 Cal. App. 2d 669, 676, 255 P.2d 802, 806-07 (1953).

[7]Fibreboard Paper Products Corp. v. East Bay Union Of Machinists, 227 Cal. App. 2d 675, 706, 39 Cal. Rptr. 64, 83 (1st Dist. 1964).

[8]"Evidence of an admission is not conclusive of the facts stated in the admission or of the inferences to be drawn from them." Waters v. Spratt, 166 Cal. App. 2d 80, 83-84, 332 P.2d 754, 756 (1st Dist. 1958).

[9]*See* Hetland, *Admissions in the Uniform Rules: Are They Necessary?* 46 IOWA L. REV. 307, 309 (1961).

question of whether to receive evidence of a party's out-of-court statement might admit the evidence on any of the three following rationales.

> *Rationale 1*: The statement is hearsay but the party opponent cannot raise a hearsay objection. The primary reason for excluding hearsay is a party's inability to cross-examine an out-of-court declarant. When evidence of the party's statement is offered against the party, the party is estopped to complain of his inability to cross-examine an out-of-court declarant since the party is the declarant.[10]

> *Rationale 2*: The statement is hearsay but there is a sufficient guarantee that the jury can assess the reliability of the evidence. The purpose of the hearsay rule is to keep from the jury evidence of a statement when the accuracy of the declarant's perception cannot be tested by adversary means. When the party opponent is the declarant, the hearsay rule is unnecessary to assure that the jury will reach a verdict based on reliable evidence. If the party opponent's statement inaccurately expressed the party's perception, the party may testify to his actual perception.[11]

> *Rationale 3*: The statement is non-hearsay. Since the party cannot complain of the lack of right to cross-examine himself and can explain his statement, little reason exists to classify admissions as hearsay evidence. Moreover, receiving evidence of admissions under a hearsay exception wrongly suggests that, like evidence admitted under other hearsay exceptions, admissions are inherently reliable or receivable only when the party is unavailable. For convenience and logical consistency, evidence of admissions should be received as non-hearsay evidence.[12]

California classifies admissions as hearsay but admits them under a hearsay exception based on the first and second rationales.[13] On the

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[10] This rationale is advanced by Morgan, although Morgan does not go so far as to say the party is estopped. See Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L. J. 355, 361 (1921). For the view that estoppel is the principle underlying the admissibility of admissions, see Lev, *The Law of Vicarious Admissions — An Estoppel*, 26 U. CIN. L. REV. 17 (1957).

[11] This rationale is emphasized by Wigmore who concludes that the party's ability to explain his statement satisfies the concern of the hearsay rule to exclude unreliable evidence. 4 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1048, at 5 (Chadbourn rev. 1972) [hereinafter cited as 4 WIGMORE].

[12] This is the rationale of Federal Rule of Evidence 801(d)(2) which classifies admissions as non-hearsay. *See* FED. R. EVID. 801(d)(2), Advisory Committee Notes.

[13] The rationale underlying this exception is that the party cannot object to the lack of the right to cross-examine the declarant, since the

other hand, federal rule 801(d)(2)[14] classifies admissions as non-hearsay based on the third rationale described above.[15] The apparent intent of the drafters of rule 801 was to distinguish admissions from evidence of out-of-court statements admissible under hearsay exceptions based on probable reliability and necessity.[16] The result was a hearsay rule defining hearsay in traditional terms as an out-of-court statement offered to prove the matter asserted,[17] but excluding admissions from the category of hearsay evidence.

The difference in the basis for receiving evidence of admissions has no apparent practical consequences. In both California and federal courts the evidence is admissible to prove the matter asserted when the necessary elements of an admission are present.[18]

B. PERSONAL ADMISSIONS

The party opponent is the source of a personal admission.[19] Personal admissions may be express or implied.[20] In the introductory

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party himself made the statement. Moreover, the party can cross-examine the witness who testifies to the party's statement and can explain or deny the purported admission.

CAL. EVID. CODE § 1220, Law Rev. Comm'n Comment (West 1968). Section 1220 codifies a hearsay exception for personal admissions. Comments to Evidence Code sections were drafted by the California Law Revision Commission and approved by the Senate and Assembly Committees on Judiciary as reflecting their intent. Background Material, CAL. EVID. CODE XXXV (West 1968).

[14] ". . . A statement is not hearsay if . . . [t]he statement is offered against a party and is (A) his own statement . . . or (B) a statement of which he has manifested his adoption or belief in its truth . . . ."

FED. R. EVID. 801(d)(2). The Federal Rules of Evidence are set out at 28 U.S.C. FED. R. EVID. 101 *et seq.* (1975) [hereinafter cited as FED. R. EVID.].

[15] "Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule."

FED. R. EVID. 801(d)(2), Advisory Comm. Notes.

[16] The Advisory Committee Note to rule 801(d)(2) cites Strahorn as authority for classifying admissions as non-hearsay. Strahorn's non-hearsay theory of admissions is premised on the difference between the "genuine" hearsay exceptions and the exception for admissions. Strahorn, *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 484, 574-575 (1937).

[17] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." FED. R. EVID. 801(c).

[18] Despite the non-hearsay classification, admissions may be offered as substantive evidence in federal court. "We note that the new Federal Rules of Evidence . . . classify admissions . . . as statements which are not hearsay . . . . They are admissible to establish the truth of what is said." United States v. Rosenstein 474 F.2d 705, 711 n.2 (2d Cir. 1973); and see 4 J. WEINSTEIN AND M. BERGER, WEINSTEIN'S EVIDENCE § 801(d)(2) [01] (1975) [hereinafter cited as WEINSTEIN].

[19] Adoptive admissions are discussed in the text accompanying notes 41-61 *infra*.

[20] 4 WIGMORE, *supra* note 11, § 1052.

hypothetical, the motorist's statement that he struck the bicyclist would be an express personal admission. The motorist's words express the proposition which the admission is offered to prove: that the motorist collided with the bicyclist. If the motorist fled after the accident, evidence of his conduct could be offered as an implied personal admission that he believed himself responsible.[21] A party opponent's statements may also imply an admission. If the motorist first admitted and later disclaimed causing the accident, evidence of his inconsistent statements can be offered to show that the motorist was conscious of responsibility.[22]

1. EXPRESS PERSONAL ADMISSIONS

California Evidence Code section 1220 provides that

> [e]vidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity regardless of whether the statement was made in his individual or representative capacity.[23]

Two elements are implicitly required by section 1220 for an out-of-court statement to be admitted under the admissions exception to the hearsay rule. First, the statement must be the declaration of the party opponent.[24] Second, the statement must be introduced against the party opponent. In *Betty v. Knapp*,[25] the plaintiff, a creditor of the defendant, sued to set aside the defendant's contract for the sale of real property to a third person on grounds that no consideration had been received by defendant and that the contract was made to defraud plaintiff. The defendant attempted to show she had received consideration by introducing evidence of her statements to the buyer. The appellate court affirmed the trial court's exclusion of the evidence since it was not being offered against the party opponent.[26]

Under section 1220 a statement offered against a party being sued

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[21] *Cf.* Brooks v. E.J. Willig Truck Transportation Co., 40 Cal. 2d 669, 676, 255 P.2d 802, 806-07 (1953).

[22] *See* People v. Player, 161 Cal. App. 2d 360, 327 P.2d 83 (1st Dist. 1958).

[23] CAL. EVID. CODE § 1220 (West 1968). Federal Rule of Evidence 801(d)(2) provides "[a] statement is not hearsay if ... (2) [t]he statement is offered against the party and is (A) his own statement, in either his individual or a representative capacity ...." The elements of admissibility in federal court are the same as in California: the statement must be the party's own, and it must be offered against him.

[24] Out-of-court statements of someone other than a party opponent may be admissible against the party opponent under several California Evidence Code sections, *e.g.*, section 1222 (authorized admissions). Authorized admissions are discussed in Comment, *Negligence At Work: Employee Admissions In California And Federal Courts*, this volume.

[25] 5 Cal. App. 2d 512, 43 P.2d 325 (3d Dist. 1935).

[26] *Id.* at 517, 43 P.2d at 326.

in his representative capacity[27] is admissible whether or not the party made the statement in his representative capacity. For example, in a negligence action against a taxi driver and his employer, the driver's statement that he was driving the cab which collided with the plaintiff was admissible against the driver but not against his employer.[28] The fact that the driver made the statement in his individual capacity a month after the accident did not affect its admissibility against the driver.

Unlike declarations against interest,[29] admissions need not have been against interest when made in order to be admissible.[30] Judges sometimes use the misleading phrase "admissions against interest" to describe the admissions of a party opponent. Such usage confuses the different foundational requirements for evidence offered under the two exceptions.[31]

2. *IMPLIED PERSONAL ADMISSIONS*

Implied admissions frequently result from non-assertive conduct.[32] Evidence of a party opponent's flight from the scene of an accident, for example, may be offered to prove the party opponent believed he caused the accident.[33] In California and federal courts evidence of non-assertive conduct, such as flight, is not hearsay, and is admissible without being labelled an admission.[34] It may be useful, how-

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[27] Representative capacity denotes agency. "An agent is one who represents another . . . . Such representation is called agency." CAL. CIV. CODE § 2295 (West 1970).

[28] Tieman v. Red Top Cab Co., 117 Cal. App. 40, 45, 3 P.2d 381, 383 (1st Dist. 1931). *See also* B, WITKIN, CALIFORNIA EVIDENCE § 497 at 469 (2d ed. 1966). Federal Rule of Evidence 801(d)(2) is in accord. *See* 4 WEINSTEIN, *supra* note 18, § 801(d)(2)(A) [01].

[29] The hearsay exception for declarations against interest is the subject of Comment, *Declarations Against Interest In California And Federal Courts*, this volume.

[30] MCCORMICK (2d ed.), *supra* note 1, § 262, at 630.

[31] The only prerequisite to offering evidence of a personal admission is a preliminary showing of authenticity. "Under Section 403(a)(4) an admission is admissible upon the introduction of evidence sufficient to sustain a finding that the party made the statement." CAL. EVID. CODE § 403, Law Rev. Comm'n Comment at 37 (West 1968). Federal Rule of Evidence 104 is the analogous federal rule. Unavailability is not a foundational requirement, nor is a showing of the time or place the admission was made. Owens v. Atchison, Topeka And Santa Fe Railway Co., 393 F.2d 77, 79 (5th Cir. 1968); Borror v. Dept. Of Investment, 15 Cal. App. 3d 531, 547, 92 Cal. Rptr. 525, 534 (1st Dist. 1971).

[32] Examples of non-assertive conduct implying admissions include: willful suppression of evidence as an admission of guilt, see CAL. EVID. CODE § 413 (West 1968); and the failure to produce available evidence, as an admission that, if produced, it would be adverse to the party, see CAL. EVID. CODE § 412 (West 1968).

[33] Brooks v. E.J. Willig Truck Transportation Co., 40 Cal. 2d 669, 679, 255 P.2d 802, 806-07 (1953).

[34] ". . . [E]vidence of a person's conduct out of court is not inadmissible under the hearsay rule expressed in Section 1200 unless that conduct is clearly asser-

ever, to characterize non-assertive conduct as an admission to increase its impact on the jury. By labeling the conduct an admission during closing argument, counsel emphasizes that the party opponent believed himself culpable when the events occurred.

A party opponent's statements may sometimes be offered as an implied admission. For example, a party opponent's inconsistent statements may imply an admission that the party is conscious of guilt.[35] Likewise, an employer's safety rules may constitute an implied admission concerning the standard of due care to be applied in a negligence case.[36]

California and federal statutes, for extrinsic policy reasons, exclude evidence of certain conduct. To encourage parties to make repairs after an accident, the law excludes evidence of repairs to show negligence.[37] To encourage settlement of claims, evidence of offers to compromise and evidence of statements made during compromise negotiations are inadmissible to prove liability.[38] In addition, evidence of insurance may not be admitted to show negligence.[39] Evidence of an offer to plead guilty to a criminal charge is also inadmissible in both civil and criminal cases.[40]

C. ADOPTIVE ADMISSIONS

Adoptive admissions result when a party fails to deny the assertions of a third person in circumstances where a denial would be natural were the assertions untrue.[41] For example, if a party remains silent in the face of accusations of negligent conduct, an adoptive admission may result. An adoptive admission may also result where

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tive in character." CAL. EVID. CODE § 1200, Law Rev. Comm'n Comment (West 1968). Federal Rule of Evidence 801(c) defines hearsay as "a statement . . . offered in evidence to prove the truth of the matter asserted." Rule 801(a) defines "statement" as "an oral or written assertion" or nonverbal conduct intended as an assertion. For a thorough discussion of assertive and nonassertive conduct see, Comment, *Hearsay: The Threshold Question*, this volume.

[35] *See* People v. Player, 161 Cal. App. 2d 360, 327 P.2d 83 (1st Dist. 1958)(defendant first denied, then admitted, having sexual relations with prosecutrix).

[36] Dillenbeck v. City Of Los Angeles, 69 Cal. 2d 472, 478, 446 P.2d 129, 132, 72 Cal. Rptr. 321, 324 (1968) (safety rules in police department training bulletin).

[37] CAL. EVID. CODE § 1151 (West 1968); FED. R. EVID. 407. The admissibility of evidence of subsequent remedial conduct is the subject of Comment. *Evidence of Subsequent Repairs: Yesterday, Today, and Tomorrow*, this volume.

[38] CAL. EVID. CODE § 1152 (West 1968). Section 1152 was intended to overrule practice of admitting evidence of statements made during compromise negotiations. *Id.*, Law Rev. Comm'n Comment to § 1152. One recent case has apparently followed the pre-Evidence Code rule and admitted statements made during negotiations on grounds that the statements were independent of the offer of compromise. *See* Moving Pictures etc. v. Glasgow Theaters, 6 Cal. App. 3d 395, 86 Cal. Rptr. 33 (1st Dist. 1970). Federal Rule of Evidence 408 is the analogous federal rule.

[39] CAL. EVID. CODE § 1155 (West 1968); FED. R. EVID. 411.

[40] CAL. EVID. CODE § 1153 (West 1968); FED. R. EVID. 410.

[41] *See* MCCORMICK (2d ed.), *supra* note 1, § 270.

the party responds equivocally or evasively to the damaging assertion.[42] A party may also expressly adopt another's statement. For example, in the introductory auto-bicycle hypothetical, if the motorist repeated the bicyclist's accusation that the motorist was speeding without denying or challenging it, an express adoption might result.

1. ADMISSIBILITY

California Evidence Code section 1221 governs the admissibility of an adoptive admission.

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.[43]

The statutory requirements for admissibility are: (1) that the statement be offered against the party opponent, (2) that the party opponent have knowledge of the statement, and (3) that the party opponent's words or other conduct show his express adoption of the declarant's statement or imply his adoption of it by showing his belief in its truth.

The first requirement, that the statement be offered against the party opponent, precludes a party from offering another's statement in which the party acquiesced.[44] In reviewing the admissibility of an adoptive admission, appelate courts, in the better reasoned decisions, apply a two-pronged test to determine whether the knowledge and adoption requirements are met. The courts first analyze the declarant's statement to determine whether it called for denial.[45] Second, the courts inquire whether under the circumstances the particular party's failure to deny could have signified acquiescence.[46]

a. Determining Whether a Statement Calls for Denial

Courts apply an objective test to ascertain whether a statement calls for denial.[47] The courts ask whether the declarant's statement is one which a reasonable person would deny. A clear example of a statement calling for denial is an accusation of negligence. Courts hold that such statements call for denial on the theory that the party's interest in preserving his reputation will cause him to deny

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[42] *Id.*, § 270, at 652.

[43] CAL. EVID. CODE § 1221 (West 1968). Federal Rule of Evidence 801(d)(2)(B) provides that "[a] statement is not hearsay if . . . the statement is . . . (B) a statement of which [the party] has manifested his adoption or belief in its truth . . . ." Section 1221 and rule 801(d)(2)(B) do not state what constitutes a manifestation of adoption. This discussion applies equally to rule 801(d)(2)(B).

[44] This requirement was discussed in the text accompanying note 25 *supra*.

[45] *See, e.g.*, Estate of Neilson, 57 Cal. 2d 733, 747, 371 P.2d 745, 753, 22 Cal. Rptr. 1, 9 (1962).

[46] *Id.*

[47] *See* Estate of Neilson, 57 Cal. 2d 733, 371 P.2d 745, 22 Cal. Rptr. 1 (1962).

the accusation if it is untrue.[48] At the opposite extreme from accusations are statements which are not against the party's interest. Courts generally hold that these statements do not call for denial. For example, in a trip and fall case the plaintiff was asked whether she saw a crack in the sidewalk.[49] The court held that this question did not call for denial because it involved no assertion adverse to the party. The court suggested that if the plaintiff had been asked when she saw the crack, rather than if she saw it, the implication of negligence would have called for denial.[50]

The party opponent's fiduciary obligations may require him to deny untrue statements whether or not they are against his interest. For example, in one case[51] a woman about to die had requested the defendant, who was to be her executor, to obtain for her signature an authorization card so that defendant could withdraw money from her bank account to pay her hospital bills. Instead, defendant presented the woman with a joint tenancy agreement naming himself as the joint tenant. A third person told the woman, in defendant's presence, that the instrument was the authorization card she had requested. Defendant failed to deny the declarant's statement. The court held that, under the circumstances, the defendant had a duty to deny the statement.[52]

b. Determining Whether the Party Opponent's Failure to Deny Signifies Acquiescence

Whereas courts apply an objective test to ascertain whether the declarant's statement calls for a denial, the second prong of the test involves a subjective question: assuming the assertion calls for denial, under all the circumstances of the case could the party opponent's failure to deny have signified acquiescence?[53] The courts have considered five criteria in answering the question: (1) the party must have heard and understood the statement, (2) the party must have been physically able to respond, (3) the social circumstances must not have made a denial unwarranted, (4) the failure to deny must have been voluntary, and (5) the party's failure to deny must not have been the exercise of a privilege.

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[48] Baldarachi v. Leach, 44 Cal. App. 603, 607, 186 P. 1060, 1062 (2d Dist. 1919).
[49] Gilbert v. City Of Los Angeles, 249 Cal. App. 2d 1006, 58 Cal. Rptr. 56 (2d Dist. 1967).
[50] *Id.* at 1009, 58 Cal. Rptr. at 59.
[51] *In re* Fritz' Estate, 130 Cal. App. 725, 20 P.2d 361 (1st Dist. 1933).
[52] *Id.* at 728, 20 P.2d at 362.
[53] The California courts have generally applied a subjective test without stating the necessity of doing so. In Baldarachi v. Leach, 44 Cal. App. 603, 609, 186 P. 1060, 1063 (2d Dist. 1919), the court stated,

> [t]he jurors had the party before them, and opportunity to form an estimate of his disposition . . . and it was within their province to determine what, if any, significance attatched to his silence.

Even where the third person's statement unquestionably calls for denial, the party's silence cannot result in an adoption if the party did not hear or understand the statement. In *Henderson v. Northam*,[54] plaintiff was injured when a race car allegedly owned by defendant sideswiped his buggy. The plaintiff attempted to prove defendant owned the car and sponsored it in the race by introducing evidence that she had been announced as its owner at the start of the race. The California Supreme Court held that evidence inadmissible because the plaintiff failed to show defendant was present in the grandstand to hear the announcement.[55]

When the party opponent is physically unable to deny the declarant's assertion, no adoptive admission should result.[56] In one Maine case,[57] involving a head-on collision on a three lane highway, the issue was whether the defendant's car had crashed into the rear end of a second vehicle sending it across the center lane into the plaintiffs' car. To prove that his car did not collide with the second vehicle, the defendant offered in evidence a third person's statement, made in the presence of the plaintiffs, to the effect that the second vehicle collided with the plaintiffs' car after crossing into the center lane to pass. The trial court admitted that statement and evidence of the plaintiffs' silence as an adoptive admission. The Supreme Judicial Court reversed on the ground that the plaintiffs' silence could not have implied acquiescence since the plaintiffs were seriously injured in the accident.

The social circumstances in which an accusatory statement is made may also preclude the finding of an adoptive admission. In *Baldarachi v. Leach*,[58] defendant's car allegedly struck plaintiff, a pedestrian. A bystander who witnessed the accident told the defendant, "[y]ou had ought to be strung up by the heels for running into a woman in that fashion."[59] The defendant made no reply. The trial court admitted evidence of defendant's silence and the jury returned a verdict for the pedestrian. The appellate court in affirming the trial court said that some courts refused to admit accusations such as the one in the instant case on the ground that the social circumstances made a response unwarranted. In this case, however, the court was unwilling to say that, as a matter of law, the social circumstances made a re-

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[54] 176 Cal. 493, 168 P. 1044 (1917).
[55] *Id.* at 497, 168 P. at 1046.
[56] The doctrine of adoptive admissions "does not apply if the party is in such physical or mental condition that a reply could not reasonably be expected from him." Southers v. Savage, 191 Cal. App. 2d 100, 104, 12 Cal. Rptr. 470, 472 (1st Dist. 1961) (proper to admit evidence of adoptive admission where evidence concerning the plaintiff's physical condition in conflict).
[57] Gerulis v. Viens, 130 Me. 378, 156 A. 378 (1931).
[58] 44 Cal. App. 603, 186 P. 1060 (2d Dist. 1919).
[59] *Id.* at 605, 186 P. at 1061.

sponse unwarranted.[60]

The statement or conduct manifesting an adoption must be voluntary. This principle is illustrated in cases where an insurance policy requires the beneficiary to file proofs of loss containing a third person's verification of the cause of death. In *Bebbington v. California Western Insurance Co.*,[61] the California Supreme Court held that the party opponent does not adopt a third person's statement of the cause of death if the policy requires the submission of such a statement.[62] Since required by the insurer, submission of the declarant's statement does not imply acquiescence.

An adoption results only when the party's silence amounts to acquiesence in the declarant's assertion.[63] If the party's silence stems from the exercise of a privilege, his silence does not imply acquiescence.[64] For example, in a case[65] in which a trolley struck a pedestrian, a police officer asked the motorman a question implying that the motorman had been negligent. The motorman failed to deny the officer's assertion. If the motorman's failure to deny had been based on an assertion of his privilege against self-incrimination, no adoptive admission should have resulted.[66]

In summary, the court, to admit evidence of an adoptive admission, must decide that the evidence is sufficient to support a jury finding of an adoption. Courts should require that the evidence satisfy both the objective and subjective prongs of the two-pronged test before admitting the evidence. Also, courts should instruct the jurors that they must find both prongs of the test satisfied before they can consider the evidence as an adoptive admission.

D. APPLICABILITY OF MENTAL COMPETENCY, PERSONAL KNOWLEDGE AND OPINION RULES TO EXTRAJUDICIAL ADMISSIONS

A witness' testimony is admissible only if he is mentally competent to testify and his testimony is based on personal knowledge.[67] This

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[60] *Id.* at 610, 186 P. at 1063.

[61] 30 Cal. 2d 157, 180 P.2d 673 (1947).

[62] *Id.* at 161, 180 P.2d at 675.

[63] ". . . [T]he inference of assent may safely be made only when no other explanation is equally consistent with silence . . . ." 4 WIGMORE, *supra* note 11, § 1071, at 102.

[64] CALIFORNIA EVIDENCE CODE section 913 (West 1968) states that no inference can be drawn from the exercise of a privilege and, thus, precludes the finding of an adoptive admission on alternative grounds.

[65] Keller v. Key Systems Transit Lines, 129 Cal. App. 2d 596, 277 P.2d 869 (1st Dist. 1954).

[66] The defendant made this claim at trial. The court denied the privilege claim on appeal. 129 Cal. App. 2d at 597-98, 277 P.2d at 871-72.

[67] *See* MCCORMICK (2d ed.), *supra* note 1, § § 61-71; and see CAL. EVID. CODE § 701 (West 1968) (mental competency requirement) and CAL. EVID. CODE § 702 (West 1968) (personal knowledge requirement).

section discusses whether these rules, and also the opinion rule, apply to out-of-court admissions. Prior to adoption of the Evidence Code, California courts imposed the requirement of first hand knowledge on the party opponent.[68] In addition California courts excluded evidence of the party opponent's out-of-court opinion statements.[69] This section focuses on the impact of the Evidence Code on these decisions.[70]

1. COMPETENCY

No California cases and surprisingly few cases from other jurisdictions have dealt with the issue of whether an extrajudicial statement of a mental incompetent can be received as an admission.[71] Some older cases considering the issue held that if a party lacked competency because he was injured, asleep, under sedation or too young to testify, his statements were inadmissible as admissions.[72] More recent decisions have held such statements admissible. These cases hold that the issue of competency goes to the weight of the admission and not to its admissibility.[73]

In its pre-Evidence Code hearsay study, the California Law Revision Commission recommended that minimum competency standards be applied to admissions:

> [i]f the admitter, when making his out-of-court statement, is too

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[68] Both Kerr v. Milatovitch, 209 Cal. 765, 290 P.289 (2930) and People v. Rose, 221 Cal. App. 2d 524, 34 Cal. Rptr. 543 (3d Dist. 1963) assume the applicability of the personal knowledge rule, finding its conditions satisfied under the facts.

[69] "The distilled essence of the California rule is that the declaration must be one of fact and not a conclusion of law, opinion, legal contention or argument." Fibreboard Paper Products Corp. v. East Bay Union of Machinists, 227 Cal. App. 2d 675, 709, 39 Cal. Rptr. 64, 85 (1st Dist. 1964) (italics in original) (error to exclude appeal document in administrative proceeding offered as admission in subsequent civil action).

[70] The question of the applicability of competency and personal knowledge rules to a party's out-of-court statements relates to both personal and adoptive admissions. As discussed in the adoptive admissions section, the party must be mentally competent for an adoptive admission to result. Assuming that a party should not be charged with adopting another's statement of which he was unaware or did not understand, competency and knowledge rules validly apply to the party's adoption of another's statement. The question of whether competency and knowledge requirements apply to the declarant's statement (as opposed to the party's adoption of it) has apparently never been raised. Seemingly, the Evidence Code rule, discussed in this section, that competency and knowledge requirements do not apply to a party's out-of-court statements should mean that these requirements do not apply to the declarant's statement adopted by the party.

[71] See cases collected in 4 WIGMORE, *supra* note 11, § 1053, at 19 n. 4.

[72] *See, e.g.*, Butler v. Greenwood, 180 Va. 456, 23 S.E.2d 217 (1942). (Defendant's statement while suffering from a brain concussion could not be considered as substantive evidence).

[73] *See, e.g.*, Currier v. Grossman's Of New Hampshire, Inc., 107 N.H. 159, 219 A.2d 273 (1966) (statement of sedated party admissible as admission).

> young or so insane that he could not have been heard in court at that time, then his out-of-court statement should be excluded.[74]

The Law Revision Commission's recommendation that minimum competency standards be applied to extrajudicial admissions was rejected by the drafters of the Evidence Code. The Comment to section 1220 provides that the statement constituting the admission "need not be one which would be admissible if made at the hearing."[75] This is in accord with the current weight of scholarly authority on the question,[76] and is also consistent with the trend of the more recent cases.[77]

The Evidence Code rule is sound. The ability of the party to explain to the jury that he was drunk or temporarily insane when he made the statement is a sufficient guarantee that the jury will take those factors into account. While the mental competency requirement, as applied to witnesses, may keep unreliable testimony from the jury,[78] the rule serves no valid purpose when the party can alert the jury to any inaccuracy in his statement.[79]

2. PERSONAL KNOWLEDGE AND OPINION RULES

The majority rule in both state and federal courts is that the personal knowledge and opinion rules do not apply to a party opponent's out-of-court statements.[80] Prior to the enactment of the Evidence Code, California courts followed the minority rule that the knowledge and opinion rules apply to admissions.[81] The Comment to section 1220 suggests that this is no longer the law in California. The Comment states that the extrajudicial statement of a party is receivable as an admission whether or not the statement would be admissible if made at a hearing.[82] Read in the context of other legislative history,[83] the Comment to section 1220 shows the intent of the legis-

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[74] CAL. LAW REV. COMM'N. REPORTS, RECOMMENDATIONS, AND STUDIES 1964) [App. - Tentative Recommendations and a Study Relating to the Uniform Rules of Evidence. Art. VIII. Hearsay Evidence 588 (1962)].

[75] CAL. EVID. CODE § 1220, Law Rev. Comm'n Comment (West 1968).

[76] McCormick and Wigmore believe that testimonial qualifications should affect only the weight of admissions. MCCORMICK (2d ed.), *supra* note 1, § 263, at 631; 4 WIGMORE, *supra* note 11, § 1053, at 18-19.

[77] *See* MCCORMICK (2d ed.), *supra* note 1, § 263, at 631.

[78] *Cf.* MCCORMICK (2d ed), *supra* note 1, § 263, at 631.

[79] If the party was so insane that his statement is of low probative value, the party may move to exclude the statement under CALIFORNIA EVIDENCE CODE section 352 (West 1968). See note 86 *infra*.

[80] MCCORMICK (2d ed.), *supra* note 1, § 263, at 632.

[81] See notes 68 and 69 *supra*.

[82] CAL. EVID. CODE § 1220, Law Rev. Comm'n Comment (West 1968).

[83] > . . . [T]he party cannot successfully object either on the ground that his statement was in terms of a conclusion or opinion or on the ground that he had no direct knowledge of that whereof he spoke. . . . The foregoing doctrines are well established generally and in

lature to make both the knowledge and opinion rules inapplicable to admissions.

The Evidence Code position that admissions are not subject to the knowledge and opinion rules is in accord with Federal Rule of Evidence 801(d)(2) and the views of Wigmore and McCormick.[84] Wigmore argues against applying the personal knowledge rule to admissions on the theory that a party's out-of-court statements have testimonial value since a party usually has "taken pains to ascertain dependable facts in his own affairs."[85] Another reason to receive the evidence is that the party's ability to explain his statement should be adequate assurance that the jury will not reach a verdict based on inaccurate evidence.[86] Regarding the opinion rule, McCormick argues that it should not apply to a party's out-of-court statements, since the result would be the exclusion of relevant evidence.[87] Applied in the courtroom, the opinion rule allows counsel to reframe his question to elicit a concrete answer. The rule can be applied to out-of-court statements only by excluding the evidence.[88]

E. ADMISSIONS OF DOUBTFUL AUTHENTICITY: CAUTIONARY INSTRUCTIONS

A party "on all proper occasions" is entitled to a jury instruction that evidence of the party's oral, out-of-court admission should be viewed with caution.[89] The courts broadly interpret the phrase "on

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California.

6 CAL. LAW REV. COMM'N, REPORTS, RECOMMENDATIONS AND STUDIES (1964). [App.-Tentative Recommendations and a Study Relating to the Uniform Rules of Evidence. Art. VIII. Hearsay Evidence. 484 (1962)]. The Commission was mistaken in its statement of the pre-Evidence Code rule in California. See notes 68 and 69 supra. In Breidert v. Southern Pacific Co., 272 Cal. App. 2d 398, 77 Cal. Rptr. 262 (2d Dist. 1969), the appellate court followed the pre-Evidence Code position and excluded an admission on grounds that it violated the opinion rule. *Id.* at 412, 77 Cal. Rptr. at 270-71. *See also* Dillenbeck v. City Of Los Angeles, 69 Cal. 2d 472, 446 P.2d 129, 72 Cal. Rptr. 321 (1968), where the supreme court in dictum assumes the applicability of the opinion rule to admissions. *Id* at 478 n.2, 446 P.2d at 133 n.2, 72 Cal. Rptr. at 325 n.2.

[84] FED. R. E VID. 801(d)(2), Advisory Comm. Notes; 4 WIGMORE, *supra* note 11, § 1053, at 16 MCCORMICK (2d ed.), *supra* note 1, § 263, at 632.

[85] 4 WIGMORE *supra* note 11, § 1053, at 18.

[86] The party may move to exclude evidence of his statement if it lacks substantial probative value.

> "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

CAL. EVID. CODE § 352 (West 1968) Federal Rule of Evidence 403 is the analogous federal rule.

[87] MCCORMICK (2d ed.), *supra* note 1, § 264, at 632.

[88] *Id.*

[89] Former CODE OF CIV. P. § 2061 (1872, repealed Stats. 1965, c.299, p.1366,, § 127). Section 2061 was repealed by the statute enacting the Evidence Code.

all proper occasions" and give the instruction whenever requested in a civil or criminal case.[90] In a case in which the evidence is closely balanced, the trial court's failure to give a requested cautionary instruction may be prejudicial error.[91]

In summary, extrajudicial admissions are statements made by the party opponent, or statements adopted by the party opponent, which are offered against him at trial. Also, a party's conduct may imply an admission. Extrajudicial admissions are admissible under California and federal rules of evidence whether or not they are based on personal knowledge or are in opinion form. The party may request an instruction that the jury view evidence of the party's statement with caution. Judicial admissions, the other broad category of admissions, is the subject of the following sections.

III. JUDICIAL ADMISSIONS

Judicial admissions include admissions made by a party's attorney in pleadings or stipulations. Less formal statements made in court by counsel or the party may also be judicial admissions.[92] Unlike out-of-court admissions which may be rebutted by contrary evidence, judicial admissions, in the action in which they are made, are conclusive of all matters admitted.[93]

Evidence of a pleading, stipulation or other judicial admission may be introduced in a subsequent action between the parties or between one of the parties to the original action and a stranger.[94] Evidence of an in-court admission introduced in a subsequent action has the evidentiary effect of an extrajudicial rather than a judicial admission; it is evidence of the facts asserted and is not conclusive.[95]

The Comment to repealed section 2061 makes clear that the cautionary instruction is still to be given. CAL. CODE CIV. P. § 2061, Law Rev. Comm'n Comment (West Supp. 1975). The instruction is set out in Cal. Jury Instructions Civil 2.25 (West, 5th ed. 1969). An analogous instruction may be requested in federal courts. *See* Naples v. United States, 344 F.2d 508, 512 (D.C. Cir. 1964). The instruction is designed to aid the jury in determining whether an admission was in fact made. People v. Bemis, 33 Cal. 2d 395, 400, 202 P.2d 82, 85 (1949).
395, 400, 202 P.2d 82, 85 (1949).

[90] See, e.g., People v. Southack, 39 Cal. 2d 578, 584, 248 P.2d 12, 16 (1952) ("The statement may be construed to be an admission, and it was proper to instruct the jury to view with caution testimony of oral admissions . . ."). The trial court's failure to give the instruction *sua sponte* may be error. Pemberton v. Ince Brothers Construction Co., 208 Cal. App. 2d 167, 25 Cal. Rptr. 38 (1st Dist. 1962).

[91] Crawford v. Alioto, 105 Cal. App. 2d 45, 233 P.2d 148 (1st Dist. 1951).

[92] See text accompanying note 140-148 *infra*.

[93] 4 WIGMORE, *supra* note 11, § 1064, at 67.

[94] MCCORMICK (2d ed.), *supra* note 1, § 265, at 635.

[95] *Id.*

A. JUDICIAL ADMISSIONS AND THE HEARSAY RULE

Unlike a party's out-of-court statements, judicial admissions are not evidence used to prove a fact; rather they limit the issues to be litigated in a case.[96] Since judicial admissions are a procedural device rather than evidence, they are not hearsay in the action for which they are made.[97] In subsequent actions, however, evidence of a pleading, stipulation, or oral admission at trial offered to prove a fact in the later action is hearsay.[98] Such evidence is admissible in the subsequent action under California Evidence Code section 1222 which codifies a hearsay exception for statements authorized by the party.[99] In federal court judicial admissions are admissible in subsequent actions under Federal Rule of Evidence 801(d)(2)(C) which defines authorized admissions as non-hearsay.[100]

The party opponent may make a judicial admission while testifying.[101] Evidence of a party's testimony is admissible in subsequent actions in California under Evidence Code section 1220 whether or not the testimony resulted in a judicial admission in the original action.[102] In federal court, evidence of a party's in-court testimony is admissible in subsequent actions under Federal Rule of Evidence 801(d)(2)(A), which classifies a party's statements as non-hearsay.[103]

Evidence of a party's testimony may also be admissible against the party in a subsequent action under Evidence Code section 1291 which is the California hearsay exception for former testimony, or Federal Rule of Evidence 801(d)(1), the analogous federal rule. The former testimony exception requires that the witness, here the party, be unavailable. Therefore, in the usual case the hearsay exception for admissions is the practical means of offering evidence of a party's former testimony.[104]

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[96] 4 WIGMORE, *supra* note 11, § 1064, at 67.

[97] *See* 4 WIGMORE, *supra* note 11, § 1064, at 67.

[98] California Evidence Code section 1200 defines hearsay evidence as ". . . Evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated."

[99] Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) the statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement . . . .

CAL. EVID. CODE § 1222 (West 1968).

[100] ". . . A statement is not hearsay if . . . [t]he statement is offered against the party and is . . . (c) a statement by a person authorized by him to make a statement concerning the subject . . . ." FED. R. EVID. 801(d)(2)(C).

[101] See text accompanying notes 145-148 *infra*.

[102] For the text of California Evidence Code section 1220 see text accompanying note 23 *supra*. Evidence of a witness' former testimony is hearsay if offered to prove the matter asserted. *See* People v. Perkins, 7 Cal. App. 3d 593, 86 Cal. Rptr. 585 (1st Dist. 1970).

[103] For the text of Federal Rule of Evidence 801(d)(A) see note 23, *supra*.

[104] *See* MCCORMICK (2d ed.), *supra* note 1, § 254.

B. ADMISSIONS IN THE PLEADINGS

The plaintiff may judicially admit a fact in his complaint. Any material allegation of the complaint, will bind the plaintiff at trial.[105] The defendant may judicially admit a fact by expressly conceding it in his answer or by failing to deny, and hence adopting, an allegation of the complaint.[106]

In California, courts will admit evidence of a pleading in one action as an authorized admission in a subsequent action. The courts conclusively presume that an attorney had actual or implied authority to draw the pleading for the party.[107] Under the California rule, evidence of the pleading would probably be admissible even if the party had explicitly denied his attorney authority to file the pleading or to aver or concede a fact.[108] That the attorney lacked authorization would go only to the weight of the admission.[109]

In the majority of federal courts, if a pleading is neither verified nor signed by the party, evidence of the pleading is inadmissible against the party in a subsequent action unless the proponent of the admission shows that party could be the only source of the facts pleaded.[110] The federal rule is illustrated in an action against a bank

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[105] 3 B. WITKIN, CALIFORNIA PROCEDURE, PLEADING, § 340, at 2008 (2d ed. 1971). Malone v. Roy, 118 Cal. 512, 50 P. 542 (1897) (allegation of rental value).

[106] Gabrado v. Collins, 136 Cal. App. 2d 323, 288 P.2d 620 (2d Dist. 1955) (express averment in the answer). "Every material allegation of the complaint, not controverted by the answer, shall, for the purposes of the action, be taken as true." CAL. CODE CIV. P. § 431. 20(a) (West Supp. 1973).

[107] When a pleading is verified by counsel and the client allows it to remain as a pleading in the case so that it contains a solemn admission of record, it should be presumed that the allegations contained therein were inserted by his authority . . . . No longer is there any reason for considering the allegations of the pleading as the mere suggestion of counsel . . . .

Dolinar v. Pedone, 63 Cal. App. 2d 169, 176, 146 P.2d 237, 241 (3d Dist. 1944).

[108] Under the rule herein enunciated it is always competent for the party . . . to show that the statements were . . . not authorized by him . . . . [S]uch explanation . . . only affects the weight, not the admissibility of such pleading in evidence.

Id. at 177, 146 P.2d at 241, The California rule is in accord with the apparent trend in recent cases. *See* MCCORMICK (2d ed.), *supra* note 1, § 265, at 636.

[109] Evidence of an unauthorized pleading would not be admissible under EVIDENCE CODE section 1222, the Comment to which provides that the authority of the declarant is to be determined under the substantive law of agency. Evidence of an unauthorized pleading would be admissible under a judicially created hearsay exception. The Comment to EVIDENCE CODE section 1200 provides that exceptions to the hearsay rule may be found in the decisional law. CAL. EVID. CODE § 1200, Law Rev. Comm'n Comment (West 1968).

[110] State Farm Mutual Auto Insurance Co. v. Porter, 186 F.2d 834, 841 n.10 (9th Cir. 1950). *See also* Fuller v. King, 204 F.2d 586, 590 (6th Cir. 1953). Verification consists of swearing to the truth of the allegations of a pleading. See 3 B. WITKIN, CALIFORNIA PROCEDURE, PLEADING, § 347 *et seq.* (2d ed. 1971). If the party opponent verifies the truth of the pleading drawn by his attorney, evidence of the pleading should be admissible against the party opponent as an adoptive admission.

for negligence, in which the bank offered in evidence the plaintiff's unsigned, unverified answer to a complaint in a prior action.[111] The plaintiff's attorney in the prior action had not consulted with the plaintiff, who was in another state at the time, before filing the answer. The federal appellate court held that evidence of the plaintiff's answer in the prior action was properly excluded since the pleading in the prior case was not shown to contain statements of fact originating with the party.[112]

Under the California rule, evidence of the pleadings in this case would have been admissible on grounds of presumed authority despite the fact that the statements in the pleading did not originate with the party. Although the California rule allows the party to explain that the pleading was unauthorized,[113] it is inconsistent with the rationales for receiving admissions to admit against the party evidence of a statement which he neither made, adopted nor authorized.[114] California courts should consider adopting the federal rule.

In certain cases the use of pleadings as evidence in a subsequent action may be prohibited on extrinsic policy grounds. Evidence Code section 1153 prohibits admission of evidence of withdrawn guilty pleas "in any action or in any proceeding of any nature."[115] The rationale of section 1153 is that admitting the plea into evidence in a subsequent action could discourage plea bargaining and similar pretrial negotiations.[116] A similar rationale is applied to exclude evidence of pleas of *nolo contendere* in subsequent actions.[117]

1. USE OF ADMISSIONS IN PLEADINGS TO PRECLUDE ADVERSE EVIDENCE

Ordinarily plaintiff's attorney would consider an opponent's judicial admission advantageous to plaintiff's case. An issue of fact has been concluded in plaintiff's favor. Moreover, since an admission narrows the issues to be litigated, the efficiency of counsel as well as of the judicial system is promoted. In certain circumstances, however, the opponent may make admissions which are to his client's advantage. For example, in negligence actions plaintiff's case may be so strong that a finding of liability is assured. By conceding fault,

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[111] Fidelity & Deposit Co. Of Maryland v. Redfield, 7 F.2d 800 (9th Cir. 1925).
[112] *Id.* at 803.
[113] See note 108 *supra.*
[114] See text accompanying notes 9-18 *supra.*
[115] Federal Rule of Evidence 410 is the analogous federal rule.
[116] People v. Quinn, 61 Cal.2d 551, 393 P.2d 705, 39 Cal. Rptr. 393 (1964).
[117] CAL. PEN. CODE ANN. § 1016 (West 1966). A plea of *nolo contendere* represents an agreement between the defendant and the court that the court may consider the defendant guilty for purposes of the pending action. Caminetti v. Imperial Mutual Life Insurance Co., 59 Cal. App. 2d 476, 492, 139 P.2d 681, 689-90 (2d Dist. 1943).

defendant will foreclose a showing of those circumstances surrounding the negligent act, which could influence a liberal damage award.

Fuentes v. Tucker,[118] a wrongful death action, illustrates the principle. In *Fuentes*, the California Supreme Court held it error, after the plaintiff had conceded liability, to admit evidence of defendant's intoxication and the fact that the deceased children were thrown eighty feet when defendant's car hit them. The rule applied in *Fuentes* is limited in two respects. First, the evidence may be admitted if relevant to any other issue in the case. Second, the rule applies only if judicial admissions are both unequivocal and coextensive in scope with the facts they purport to concede. The party opponent may not rob his adversary of the "legitimate force and effect of his material evidence" by an ambiguous admission.[119] If the party opponent plainly concedes an entire issue as in *Fuentes*, he may legitimately preclude his adversary from introducing evidence relevant only to the admitted matter by simply invoking the pleading containing the admission.

2. INCONSISTENT PLEADINGS AS ADMISSIONS

Unverified inconsistent pleadings are an exception to the general rule that statements in the pleadings are judicial admissions in the pending action.[120] By pleading inconsistent causes of action or defenses, the party intends no admission. He pleads inconsistently because of uncertainty of the facts and to alert his adversary to the theories on which he will proceed at trial.[121] If, however, the party verifies pleadings which contain contradictory facts he judicially admits the fact which bears most strongly against him.[122] For example, in an unlawful detainer action the defendant filed a verified answer which both admitted and denied the existence of a lease. The appellate court held that the answer constituted an inconsistent defense which would not ordinarily result in a judicial admission. Since defendant verified the answer and since the answer pleaded contradictory facts, the court held that his answer conceded the

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[118] 31 Cal. 2d 1, 187 P.2d 752 (1947).
[119] *Id.* at 7, 187 P.2d at 756.
[120] L. Mini Estate Co. v. Walsh, 4 Cal. 2d 249, 48 P.2d 666 (1935); Jones v. Tierney-Sinclair, 71 Cal. App. 2d 366, 373, 162 P.2d 669, 673 (4th Dist. 1945).
[121] *See* Beatty v. Pacific States Savings And Loan Co., 4 Cal. App. 2d 692, 696, 41 P.2d 378, 380 (2d Dist. 1935).
[122] ". . . [T]he rule does not permit the pleader to blow both hot and cold in the same complaint on the subject of fact of which he purports to speak with knowledge under oath." *Id.* at 697, 41 P.2d at 381. *Cf.* Manti v. Gunari, 5 Cal. App. 3d 422, 449-50 85 Cal. Rptr. 366, 370-71 (1st Dist. 1970) (contradictory facts in unverified complaint). For the fact which bears most strongly against the pleader to be deemed a judicial admission, the existence of that fact must be supported by proof or admissions in his opponent's pleadings. Beatty v. Pacific States Savings And Loan Co., 4 Cal. App. 2d, 692, 697, 41 P.2d 378, 381 (2d Dist. 1935).

existence of the lease.[123] The rule that verified inconsistent pleadings may result in a judicial admission of the facts most adverse to the pleader probably serves to prevent abuse of the privilege of pleading inconsistently by parties who are sufficiently aware of the facts to attest to their truth by verifying.

In certain actions, like the unlawful detainer action described above, verification is statutorily required.[124] When verification is required, a party pleading inconsistently should not be deemed to admit the facts most adverse to him. Such an application of the rule penalizes the party who is uncertain of the ultimate facts.[125]

Whereas inconsistent pleadings do not generally result in admissions in the pending action, evidence of an inconsistent pleading is admissible in a subsequent action as an evidential admission.[126] Although evidence of the pleading is admissible in the subsequent action, the party may explain that the inconsistent pleading resulted from uncertainty of the facts.

3. *SUPERSEDED PLEADINGS AS ADMISSIONS*

Material allegations or concessions of fact in the pleadings are judicial admissions in the pending action unless the trial court allows the pleading to be withdrawn because of mistake or inadequate knowledge of the facts. Once the pleading is withdrawn any judicial admissions contained in the pleading are also withdrawn.[127] The majority of courts, however, will admit the withdrawn pleading, as evidence of the facts pleaded, in the action in which the pleading was filed.[128] In *Meyer v. State Board of Equalization*,[129] the California Supreme Court took the extreme minority position that evidence of the withdrawn pleading is inadmissible in the pending action to prove the facts asserted in the pleading.[130]

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[123] Walker v. Dorn, 240 Cal. App. 2d 118, 49 Cal. Rptr. 362 (5th Dist. 1966).

[124] California Code of Civil Procedure section 1166 (West 1967), for example, requires verification of the complaint in an unlawful detainer action. When the complaint is verified, California Code of Civil Procedure section 466 requires verification of the answer

[125] 3 B. WITKIN, CALIFORNIA PROCEDURE, PLEADING, § 300, at 1972-73 (2d ed. 1972).

[126] To hold that a party may plead inconsistent defenses in different proceedings without incurring procedural sanctions would stultify the rule which permits the use of pleadings in prior proceedings as evidentiary admissions in subsequent proceedings.

Fibreboard Paper Products Corp. v. East Bay Union Of Machinists, 227 Cal. App. 2d 675, 712, 39 Cal. Rptr. 64, 87 (1st Dist. 1964). The term "evidential admission" is defined in Note 5 *supra*.

[127] *See* Jackson v. Pacific Gas & Electric Co., 95 Cal. App. 2d 204, 212 P.2d 591 (3d Dist. 1949).

[128] MCCORMICK (2d ed.), *supra* note 1, § 265, at 634.

[129] 42 Cal. 2d 376, 267 P.2d 257 (1954).

[130] Evidence of a superseded pleading is admissible in a subsequent action in California and federal courts. Coward v. Clanton, 79 Cal. 23, 21 P. 359 (1889);

In *Meyer*, the supreme court stated that to admit the superseded pleading in the pending action would defeat the policy favoring liberality in permitting amendments to pleadings.[131] The idea that the jury would give too much weight to the contents of the superseded pleading may also underlie the rule in *Meyer*.

The majority of state and federal courts admit the superseded pleading as substantive evidence.[132] The rationale of the majority position was summarized by the Tenth Circuit Court of Appeals.

> When a pleading is amended or withdrawn, the superseded portion ceases to be a conclusive judicial admission; but it still remains as a statement once seriously made by an authorized agent, and as such it is competent evidence of the facts stated . . . .[133]

Since the attorney carefully prepares his pleading after soliciting from his client all information about the facts in the case, the pleading has inherent probative value. Moreover, the ability of the party opponent to explain why it was necessary to amend his pleading should protect the party against prejudice. Since the *Meyer* rule restricts the admission of relevant and probative evidence, California should consider adopting the majority position that superseded pleadings are admissible as substantive evidence in the pending action.[134]

C. JUDICIAL ADMISSIONS OTHER THAN THOSE IN THE PLEADINGS

1. ADMISSIONS OBTAINED BY REQUEST DURING DISCOVERY AND STIPULATIONS

California Code of Civil Procedure section 2033(a) and Federal Rule of Civil Procedure 36 provide that a party may serve his opponent with a request for the admission of the truth of any relevant matters of fact set forth in the request. Requests for admission are a discovery device aimed at removing a triable fact from controversy. An admission secured by request is conclusive of the facts admitted.[135] By statute, an admission secured by request is not admissible as a conclusive or evidential admission in a subsequent action.[136]

Thompson v. Municipal Bond Co., 23 Cal. App. 2d 402, 73 P.2d 274 (4th Dist. 1937), State Farm Mutual Auto Insurance Co. v. Porter, 186 F.2d 834 (9th Cir. 1950).

[131] 42 Cal. 2d at 384-85, 267 P.2d at 262-63.

[132] MCCORMICK (2d ed.), *supra* note 1, § 265, at 634.

[133] Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc. 32 F.2d 195, 198 (2d Cir. 1929) quoted in Raulie v. United States, 400 F.2d 487, 526 (10th Cir. 1968).

[134] The rule in *Meyer* is criticized in City Of Pleasant Hill v. First Baptist Church, 1 Cal. App. 3d 384, 82 Cal. Rptr. 1 (1st Dist. 1969).

[135] Crembrook v. Superior Court, 56 Cal. 2d 423, 429, 364 P.2d 303, 15 Cal. Rptr. 127 (1961).

[136] CAL. CODE CIV. P. § 2033(d) (West Supp. 1975). Federal Rule of Civil

Statements of a party in depositions and answers to interrogatories, however, may be offered against the party as substantive evidence in the pending and in subsequent actions.[137]

When the attorneys for adverse parties stipulate to an agreement relating to a matter of fact at issue in a judicial proceeding, the resulting stipulation is treated as a judicial admission. Unless the trial court in its discretion allows the stipulation to be withdrawn, it is conclusive on the parties.[138] As long as there is no doubt that an agreement was in fact reached, the stipulation is admissible as evidence in subsequent litigation.[139]

2. COUNSEL'S STATEMENTS AS ADMISSIONS

Oral statements of counsel during trial which are intended as admissions will bind the party as judicial admissions. The intent requirement is a judicial recognition that an attorney's oral statement may be the result of stress, carelessness or confusion and that a client's interests should not hang on his attorney's slip of the tongue. Hence, the California courts hold that statements of counsel not intended as admissions do not bind the party in the pending action and, by implication, are inadmissible against him in subsequent actions.[140] The federal courts take the same position.[141]

A California case, *Scafidi v. Western Loan and Building Co.*,[142] illustrates when a statement by counsel will constitute a judicial admission. The plaintiff sued for fraud to recover money advanced to the defendant. Defendant raised the statute of limitations by demurrer. Plaintiff amended his complaint to allege that he demanded an accounting and that defendant promised to pay prior to the running of the statute of limitations. During trial, plaintiff's counsel stated that his client had not asked for an accounting until after the statute of limitations had run. Defendant's counsel then repeated the statement, and plaintiff's counsel replied, "[t]hat is correct." The trial court held that the statement by plaintiff's counsel was a binding admission and dismissed the case. The appellate court affirmed.

Procedure 36(b) is in accord.

[137] *See* CAL. CODE CIV. P. § § 2016, 2030 (West Supp. 1975); Singer v. Superior Court, 54 Cal. 2d 318, 353 P.2d 305, 5 Cal. Rptr. 697 (1960) (answers to interrogatories not conclusive admissions).

[138] Lenox Clothes Shops v. Commissioner of Internal Revenue, 139 F.2d 56, 60 (6th Cir. 1943); Palmer v. City of Long Beach, 33 Cal. 2d 134, 141, 199 P.2d 952, 956 (1948).

[139] *See* Harris v. Spinali Auto Sales Inc., 240 Cal. App. 2d 447, 454, 49 Cal. Rptr. 610, 614-15 (4th Dist. 1966).

[140] Coats v. General Motors Corp., 3 Cal. App. 2d 340, 350, 39 P.2d 838, 842-43 (1st Dist. 1934).

[141] Berner v. British Commonwealth Pacific Airlines Ltd., 346 F.2d 532, 542 (2d Cir. 1965).

[142] 72 Cal. App. 2d 550, 561, 165 P.2d 260, 267 (1st Dist. 1946).

Counsel's motive for making the admission in *Scafidi* is unclear. The concession, however, was more than a slip of the tongue. He had an opportunity to retract his statement and failed to do so.

In *Scafidi*, the appellate court, looking at the record, concluded that counsel intended to make a judicial admission. In *Coats v. General Motors Corp.*,[143] the court reached the opposite conclusion. In *Coats*, the plaintiff alleged that defendants wrongfully denied him a salary bonus. Plaintiff's counsel cross-examined plaintiff's superior in the attempt to show that the defendant corporation acted in bad faith. Counsel asked the witness if the decision to deny plaintiff's salary bonus was arbitrary. The witness stated that the word "arbitrary" did not describe his action in denying the bonus. Counsel stated, "[t]here is no desire to impute that to you Mr. Sloan." On appeal from a verdict for plaintiff, defendant argued that plaintiff's counsel's statement was a judicial admission that the defendant acted in good faith. The court said,

> "[m]ere incidental or ambiguous statements by counsel will not bind or be admissible against the client where there is no such formality in the making of the statements as to indicate an intention that they should be taken as admissions."[144]

Counsel's statement in *Coats* was not intended to admit facts, but to placate an angry witness.

3. STATEMENTS OF THE PARTY AS ADMISSIONS

While testifying, a party may admit a fact adverse or fatal to his case. Depending on the jurisdiction, the party may be bound conclusively by his statement or his statement may result only in an evidential admission.[145] California takes the position that the party's statement may be a judicial admission, but only if it is an advertent statement.[146]

In *McNeil v. Young*,[147] a tort action, the defendant truck driver testified that on seeing plaintiff's vehicle he realized there was danger of a collision. This testimony contradicted his contention that he had no last clear chance to avoid the accident. Plaintiff argued that defendant's statement that he realized a hazardous situation existed was a judicial admission. The trial court did not agree. The appellate court, upholding the trial court, said that it was for the trial judge to decide whether a party's adverse statements are judicial admissions or merely inconsistent statements and the product of stress. If the trial judge determines the statement was advertent and not a mere

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[143] 3 Cal. App. 2d 340, 39 P.2d 838 (1st Dist. 1934).
[144] *Id.* at 350, 39 P.2d at 842-43.
[145] *See* MCCORMICK (2d ed.), *supra* note 1, § 266, at 637.
[146] Weingetz v. Cheverton, 102 Cal. App. 2d 67, 79, 226 P.2d 742, 750 (1st Dist. 1951).
[147] 201 Cal. App. 2d 488, 20 Cal. Rptr. 34 (2d Dist. 1962).

inconsistency due to stress, he may decide the statement is a judicial admission. The California position permits flexibility by allowing the trial judge or jury to determine whether a party's statement should bind him.[148]

In summary, admissions of a party or party's counsel, whether made in the pleadings, in a stipulation, or orally at trial bind the party in the pending action and are admissible against the party as substantive evidence in subsequent actions. Exceptions to the rule are: (1) inconsistent pleadings do not generally result in judicial admissions in the pending action but may if the pleading is verified; (2) superseded pleadings may not be used as judicial admissions or as substantive evidence in the pending action; (3) a party's oral statements at trial are not judicial admissions unless advertent.

IV. CONCLUSION

This article has described and examined the California and federal rules relating to the use of extrajudicial and judicial admissions. Several of the rules currently applied are of questionable validity.

California courts have applied the personal knowledge and opinion rules to exclude evidence of a party's out-of-court statement. An attorney may argue that Evidence Code section 1220 has overruled the prior practice. The legislative history of section 1220 shows that the legislature intended that admissions not be subject to the knowledge and opinion rules.

In dealing with adoptive admissions, an attorney may suggest that the court should decide whether to admit evidence of an adoption based on a two-pronged test. First, the court should determine whether the declarant's statement calls for denial. If it does, the court should then determine whether under all the circumstances the party opponent's response signifies acquiescence.

California courts presently admit evidence of a pleading against the party as an authorized admission, even if the party can show that his attorney exceeded his authority in admitting a fact in the pleading. An attorney can stress that the California rule is unfair to the party who did not authorize the attorney to file the pleading or to admit certain facts. He may suggest that the better rule is the federal practice of only admitting evidence of an unverified pleading when information of the facts pleaded could have solely come from the party.

California courts presently prohibit the use of superseded pleadings as substantive evidence in the pending action. The California rule

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[148] The federal rule is that a party's in court statement is not a judicial admission unless it concerns a matter about which the party could not have been mistaken. Guenther v. Armstrong Rubber Co., 406 F.2d 1315, 1318 (3d Cir. 1969) (plaintiff's testimony in conflict with evidence favorable to his case).

represents an extreme minority position. An attorney may argue that it should be abandoned because it results in the exclusion of relevant, probative evidence which a jury could consider without undue prejudice to the party opponent.

A. Richard Tolles