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PERSPECTIVE

Supercharging your case with party-opponent admissions

By Diane Cafferata and Carl Spilly

Sometimes you just know that the opponent's story in your case doesn't make sense; it doesn't sound plausible. That should be a cue to consider where you might find evidence of the truth in past statements of a party or its agent.

Such "party-opponent admissions" are hearsay exceptions. They are inherently trustworthy from an evidentiary perspective because people tend to be truthful when they make statements that are not in their interests. Also, what a party says on a subject before that subject becomes controversial is typically more honest than after it has become controversial.

This means that, unlike hearsay, they can be used to assist in proving the truth of the matter asserted. This makes them a powerful tool. A prior statement that is dramatically contrary to an important position your opponent is currently taking not only has substantively probative value, but can also do serious damage to your opponent's credibility.

Federal Rule of Evidence 801(d) (2) includes as a party-opponent admission any statement offered against an opposing party that

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The California Evidence Code breaks it down a little differently, but similar principles apply. Evidence Code Section 1220 excludes from hearsay a statement "offered against the declarant in an action to which he is a party in either his individual or representative capacity." Evidence Code Section 1235 excludes from hearsay prior inconsistent statements of a trial witness so long as he has an opportunity explain it on the stand. *See also* Cal. Evid. Code Section 1221 (excluding from hearsay statements offered against a party that the party adopted with knowledge of its contents); Section 1222 (excluding from hearsay statements the party authorized another to make on his or her behalf); and Section 1223 (excluding from hearsay statements of declarants in the course of a conspiracy).

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Where to Find Relevant Party- Opponent Admissions

First, consider all the places your party-opponent makes statements.

For example:

- Other litigations or appeals, such as a probate proceeding, or a different patent case;
- PTO or TTAB proceedings — both in prosecution and in challenges;
- ITC proceedings;
- Court of Federal Claims;
- Criminal or other investigations;
- Bankruptcy examiner productions;
- International proceedings; and
- Regulatory or compliance submissions.

Then, review any publicly available information to see if there is an overlap in relevance between your case and these other proceedings.

Once you've determined which proceedings might contain useful statements, review the docket and make a list of the items that likely exist in each proceeding and which might include helpful statements. Among the materials to consider:

- Documents that were produced in other matters by your opponent;
- Documents that were produced by third parties in other matters and that are now in the possession or control of your opponent;
- Interrogatory responses, responses to requests for production, and responses to requests for admission made in other proceedings by your opponent;
- Deposition, hearing and trial transcripts reflecting testimony and exhibits from witnesses for your opponent (including those of party witnesses, third parties, and experts);
- Written declarations or affidavits given by witnesses affiliated with your opponent;
- Briefing or submissions made to judicial, regulatory or other governmental or quasi-governmental authorities by your opponent; and
- Briefing or submissions made by third parties that are in the possession of your opponent.

How to Obtain Access to the Statements

Having identified where helpful admissions may be lurking, some of these materials may be available directly from PACER or other court records. Some items may be otherwise publicly available, like SEC statements (available on EDGAR) or publicly-filed ITC submissions (available on EDIS).

For those materials that are filed under seal or are otherwise not directly accessible, demand these materials from the other party. If you cannot obtain these materials voluntarily, you will need to bring a motion that shows the issues in the other proceeding are similar to the issues in the current proceeding.

Relevance is the main hurdle. Once that relevance showing is made, the main objection may be overbreadth, which can be dealt with through meet-and-confer. Burden is difficult for the adversary to establish where the materials were already produced in another proceeding because it is easy and inexpensive to produce them again.

Protective orders can be used to slow this process down, but they should not be an insurmountable obstacle. The confidentiality designation of the materials being sought from an earlier proceeding should not prevent their production in the instant proceeding because the same party could just produce those materials directly again without implicating the protective order.

However, protective orders can make it difficult to gather the information needed to show the relevance of the materials from the earlier proceeding. In this case, you will have to scour the public record to see if the opponent described the case or the discovery materials in the earlier case. You can then compare those descriptions to the issues in your case to show the materials from that earlier case are likely to be relevant.

How to Use the Statements to Your Advantage

The main idea behind seeking these party-opponent admissions is, of course, impeachment. but there are other reasons to pursue discovery of, and related to, these prior statements.

Discovery of relevant materials from past proceedings can help you fill gaps in document productions and supply substantive evidence. If your opponent denies the existence of materials that you know it produced in another case, a well-planned motion to compel these materials can provide access to critical evidence and cast doubt on your opponent's credibility.

The existence of prior relevant statements and related materials can greatly expand the scope of discovery. Because the statements already exist and have been reviewed and produced in another forum, there is little burden associated with re-producing them in your case. This may permit more of a "fishing expedition" than might otherwise be permitted. It can also bury an opponent with a large volume of documents that will require substantial resources to review.

Prior statements can facilitate early resolution of the case, for example, where the opponent's earlier statements establish a core element of a claim or make it clear that damaging evidence exists and will eventually be produced. Those statements can create leverage when negotiating a settlement.

Compelling the production of prior statements and supporting materials from other proceedings can shortcut discovery because it obviates the need to pursue categories of materials or allows a party to avoid the costs of gathering and producing materials that were previously gathered and produced in another case.

Importantly, these potential benefits must be balanced against the costs associated with seeking this evidence. No matter how this evidence is used, seeking statements from other cases often increases the overall burden of discovery. Increasing the scope of discovery significantly may increase the quantity and burden of review without a commensurate increase in the quality of the production. Production of these materials may also lead to additional depositions or additional third party discovery. When the prior statements implicate protective orders, navigating those issues can make discovery more complex and costly. Solid research and good judgment will go a long way towards an appropriate balance of these interests. ■

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