

# THE ADMISSION IN EVIDENCE OF PLEADINGS UNDER THE CODES AND UNDER THE FEDERAL RULES OF CIVIL PROCEDURE

## I. INTRODUCTION

Roscoe Pound once stated that pleadings have four purposes: 1) to serve as a formal basis for the judgment; 2) to separate issues of fact from questions of law; 3) to give litigants the advantage of a plea of *res judicata* if molested again for the same cause; and 4) to notify the parties of the claims, defenses and cross-demands of their adversaries.<sup>1</sup> During the past century pleadings which contain an admission against the pleaders' interest have assumed a collateral function, namely as evidence in the same trial or in subsequent proceedings.

Formerly, pleadings were so involved and technical that they could not be said to be the statements of the parties in whose behalf they were drawn or filed.<sup>2</sup> The main purpose of a pleading at common law was to frame an issue, often in terms of one of the numerous fictional common-law counts.<sup>3</sup> Against this background, averments of a complaint or answer could be considered little more than the suggestions of counsel. However, with the advent of fact pleading, characteristic of procedure under the codes,<sup>4</sup> and the development of notice pleading under the Federal

1. 35 A.B.A. REP. 614, 638 (1910).

2. Before 1400 all pleadings were oral. STEPHEN ON PLEADING 59 (Tyler 1924). It wasn't until the early 1400's that the practice developed of entering pleadings directly on the record out of the presence of the court. 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 644 (3d ed. 1923). In the late 1400's a note or memorandum of a pleading could be left with the prothonotary or clerk who would prepare a draft of a proper entry. *Ibid.* The transition between oral and written pleadings was completed in the 17th century when written drafts of pleading entries took the place of oral pleadings. 3 *id.* at 648. Although under oral practice a pleader was expected to speak the truth, there was no clear distinction between allegation and proof. 2 *id.* at 105. However, with the change-over to written pleadings came a distinction—statements of fact in a pleading were mere allegations and without more the court had no basis for believing them to be true. Blume, *Theory of Pleading—A Survey Including the Federal Rules*, 47 MICH. L. REV. 297, 300 (1949).

3. CLARK, CODE PLEADING 29 (1928).

4. Code pleading is "any system of pleading which has been reduced to the form of a statute." HEPBURN, THE DEVELOPMENT OF CODE PLEADING 11 (1897). "Characteristically code pleading is that form of a statutory pleading which: 1. has risen out of the English common-law procedure; 2. provides for the following: a. a single judicial instrument—a single form of action—for the protection of all primary rights whether legal or equitable. b. a limited pleading characterized by plain and concise statements of the substantive facts, and none but the substantive facts, of the cause of action. c. the bringing in of new parties and the joinder of different causes of action between the necessary parties, with a view to the complete determination of the whole controversy. d. the adjustment of the relief according to the substantial rights pleaded and proven, of all the parties before the court, and of each of them, be they few or many." *Id.* at 12-13.

Rules of Civil Procedure,<sup>5</sup> fictional pleading has largely been abolished and statements contained in a pleading have assumed evidentiary value.

The present tendency of courts is to admit pleadings of the same or a prior proceeding into evidence when they contain admissions against the interest of the pleader. Naturally, the pleading offered must be relevant and material and there must be compliance with other customary rules of evidence.<sup>6</sup> It is the purpose of this Note to investigate the problems peculiar to the use of pleadings as evidence under the codes and the federal rules.

## II. PLEADINGS AS EVIDENCE IN THE CODE STATES

### A. *The Present Status of the Law*

With the exception of four states which have retained common-law pleading,<sup>7</sup> and a number of states which have eliminated the pleading of "facts,"<sup>8</sup> the majority of jurisdictions today operate under a form of code pleading similar in basic respects to the New York Field Code of 1848.<sup>9</sup> In keeping with code requirements of fact pleading, a preliminary distinction is made in these jurisdictions between admissions of fact and conclusions of law, only the former being admissible. The pleader's conclusions of law are not considered admissions of the facts necessary to support them and, accordingly, will not be received in evidence under the admissions exception to prove the truth of the facts stated.<sup>10</sup> However,

5. Congress provided that the Supreme Court shall have the power to prescribe rules for United States district courts and for the courts of the District of Columbia. 28 U.S.C. § 2071 (1952).

6. *Hines v. Bost*, 224 S.W. 698, 699 (Tex. Civ. App. 1920).

7. See ME. REV. STAT. ANN. c. 112, § 1 (1954); N.H. REV. LAWS c. 391, § 3 (1942); R.I. GEN. LAWS c. 509, § 1 (1938); TENN. CODE ANN. § 20-801 (1956).

8. See ARIZ. REV. STAT. ANN. vol. 16, p. 11 (1956); COLO. R. CIV. P. 8a (1941); N.M. STAT. ANN. § 21-1-1 (1953); N.J. R. CIV. P. 4:8-1 (1953); UTAH R. CIV. P. 8 (1953).

9. In 1948 the Field Code was adopted in New York in an attempt to reform the difficulties inherent in the common-law system of procedure. See N.Y. Sess. Laws 1848, c. 380, § 1. The following statutes are similar to the New York statute in that they require the pleading of "facts": ALA. CODE ANN. tit. 7, § 212 (1940); ARK. STAT. ANN. § 27-1113 (1947); CAL. CIV. PROC. CODE ANN. § 426 (West 1954); CONN. GEN. STAT. § 7813 (1949); DEL. CODE ANN. tit. 10, § 3901 (1953); FLA. STAT. ANN. 51-02 (1956); GA. CODE ANN. § 81-101 (1935); IDAHO CODE ANN. § 5-605 (1948); ILL. ANN. STAT. c. 110, § 33 (Smith-Hurd 1956); IND. ANN. STAT. § 2-1004 (Burns 1933); IOWA R. CIV. P. 70 (1951); KAN. GEN. STAT. ANN. § 60-704 (1949); KY. CRIM. CODE PRAC. ANN. § 90 (Carroll 1948); LA. REV. STAT. ANN. § 13.3601 (1951); MD. ANN. CODE art. 75, § 2 (1951); MASS. ANN. LAWS c. 231, § 7 (1956); MICH. STAT. ANN. § 27.812 (1938); MINN. STAT. ANN. § 544.02 (1947); MISS. CODE ANN. § 1464 (1942); MO. ANN. STAT. § 509.050 (1952); MONT. REV. CODES ANN. § 93-3202 (1947); NEB. REV. STAT. § 25-804 (1943); NEV. COMP. LAWS § 8594 (1929); N.Y. CIV. PROC. ACT § 241; N.C. GEN. STAT. § 1-122 (1953); N.D. REV. CODE § 28-0702 (1943); OHIO REV. CODE ANN. § 2309.04 (Page 1954); OKLA. STAT. ANN. tit. 12, § 264 (1937); ORE. REV. STAT. § 16.210 (1953); PA. STAT. ANN. tit. 12, rule 1019 (1951); S.C. CODE § 10-632 (1952); S.D. CODE § 33.0903 (1939); TEX. R. CIV. PROC. 47 (1955); VT. REV. STAT. § 1613 (1947); VA. CODE ANN. § 8-102 (1950); WASH. REV. CODE § 432.040 (1951); W. VA. CODE ANN. § 5609 (1955); WIS. STAT. § 263.03 (1953); WYO. COMP. STAT. ANN. § 3-1301 (1945).

10. *E.g.*, *Srednick v. Sylak*, 343 Pa. 486, 492, 23 A.2d 333, 337 (1941). Conclusions of law may, however, be admitted in evidence under the opinion exception to the hearsay rule. *McCORMICK*, EVIDENCE § 241 (1954).

there is nothing to prevent the introduction of such evidence for the purpose of impeaching the credibility of the declarant. It is not a prerequisite of admissibility in code jurisdictions that the pleading offered in evidence was filed in the same jurisdiction. Pleadings filed in a federal court, for example, have been permitted in evidence in subsequent state proceedings.<sup>11</sup> In determining the evidentiary value of a pleading filed in another jurisdiction, the court of the jurisdiction in which it is offered must look to the procedural rules governing pleadings in that other jurisdiction at the time the pleading was drawn.

The general test for admissibility of pleadings under the codes seems to be whether, under the circumstances, the party against whom the admissions are offered can fairly be supposed to have had personal knowledge of the content of the pleadings.<sup>12</sup> There is, however, some conflict as to what factors must be present to establish such knowledge. Some jurisdictions admit pleadings into evidence only when they have been signed by the litigant or when there is other positive evidence indicating knowledge on his part.<sup>13</sup> This places the burden of presenting evidence of the pleader's knowledge upon the party offering the admission. Other states, where the pleading is signed only by the party's attorney, recognize a rebuttable presumption of knowledge.<sup>14</sup> If the pleading offered was filed in a prior proceeding in which the parties joined issue on the fact admitted in the pleading, some jurisdictions hold this to be sufficient indication of knowledge.<sup>15</sup>

In no jurisdiction are admissions in pleadings conclusive. The party against whom the pleading is offered may in each case explain to the jury the circumstances under which the admission was made;<sup>16</sup> evidence may

11. *E.g.*, *Allen v. Hazen*, 26 Mich. 142, 144 (1872).

12. 1 GREENLEAF, EVIDENCE § 186 (16th ed. 1899). The cases, with few exceptions, *e.g.*, *Lamar v. Pearre*, 90 Ga. 379, 380-81, 17 S.E. 92, 94-95 (1892), neglect to speak of the admission into evidence of pleadings on a theory of representative or vicarious admissions; see McCORMICK, EVIDENCE 520 (1954); UNIFORM RULES OF EVIDENCE rule 63(9). It would appear that in the context of the law of Agency, the statements made by an attorney are made within the scope of his authority and should therefore be binding upon his client. However, this Note will attempt to analyse the evidentiary considerations which are necessary when pleadings are offered in evidence rather than discussing the problem from the standpoint of the law of Agency.

13. *Birmingham Elec. Co. v. Wood*, 222 Ala. 103, 105, 130 So. 786, 787 (1930); *Missouri Pac. R.R. v. Zolliecoffer*, 209 Ark. 559, 563-64, 191 S.W.2d 587, 589 (1946); *Griffin Grocery Co. v. Thaxton*, 178 Ark. 736, 740-41, 11 S.W.2d 473, 474 (1928); *Jackson v. Schine Lexington Corp.*, 305 Ky. 823, 825, 205 S.W.2d 1013, 1014-15 (1947); *Clarke v. Taylor*, 269 Mass. 335, 336, 168 N.E. 806, 807 (1929); *Cady v. Doxtator*, 193 Mich. 170, 159 N.W. 151 (1916).

14. *E.g.*, *Greer v. Davis*, 177 Ark. 55, 58, 5 S.W.2d 742, 743 (1928); *Mitchell v. Mitchell*, 136 Me. 406, 419-20, 11 A.2d 898, 905 (1940); *Peck v. New England Tel. & Tel. Co.*, 225 Mass. 464, 466, 114 N.E. 675 (1917); *Carpenter v. Tri-state Tel. & Tel. Co.*, 169 Minn. 287, 288-89, 211 N.W. 463, 464 (1926); *Leistikow v. Zuelsdorf*, 18 N.D. 511, 515-16, 122 N.W. 340, 342 (1909); *Quealy Land & Livestock Co. v. George*, 45 Wyo. 254, 262, 18 P.2d 253, 255-56 (1933).

15. *E.g.*, *Cady v. Doxtator*, 193 Mich. 170, 159 N.W. 151 (1916); *Reno v. Bull*, 226 N.Y. 546, 554-55, 124 N.E. 144, 146 (1919); *Pipan v. Aetna Ins. Co.*, 60 N.D. 657, 663-64, 235 N.W. 719, 721 (1931).

16. *E.g.*, *Hope v. First Nat. Bank*, 198 La. 878, 891, 5 So. 2d 138, 142 (1941); *Stinchcomb v. Mortgage Co.*, 171 Md. 317, 324, 188 Atl. 790, 792 (1936); *Cherry v. Mitosky*, 353 Pa. 401, 406, 45 A.2d 23, 26 (1946).

be introduced to show, for example, that a pleading was signed at a time when the pleader was mistaken as to the true facts.<sup>17</sup> Since the greater number of jurisdictions require pleadings containing admissions to be offered in evidence before being made use of as tending to prove the facts admitted,<sup>18</sup> the pleader may offer his explanation of the admission before it reaches the jury. It is important at this point to distinguish between the above use of pleadings, with their ordinary use in the same cause as judicial admissions. In the latter sense they are not evidence but rather a waiver of all controversy and therefore a limitation of the issues.<sup>19</sup>

There is little or no controversy concerning the persons, in addition to the pleader, against whom an admission in a pleading may be used. Admissions of fact in the answer of one defendant generally may not be used against his co-defendant, since the latter was not the individual who made the admission.<sup>20</sup> However, this rule does not apply where the parties have a joint interest, either as partners or otherwise, in the transaction in question.<sup>21</sup>

There is disagreement among the states as to what constitutes sufficient evidence of the party's knowledge of the contents of a pleading in the area of abandoned or withdrawn pleadings. A majority do not distinguish between a pleading that has been abandoned or withdrawn prior to the time when it is offered in evidence, and a pleading that has been permitted to stand.<sup>22</sup> In these jurisdictions, if the pleading would have been admissible in its original state under the standards imposed upon pleadings generally, then it is admissible although its basic role as a pleading has ceased.<sup>23</sup> The rationale behind this position appears to be that an admission made at any time has evidentiary value;<sup>24</sup> the fact that it was retracted is a question of weight to be left to the trier of fact.<sup>25</sup> There are, however, states, which hold that once a pleading is abandoned or withdrawn, its function for any purpose is terminated.<sup>26</sup> This position

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17. See *Dixon v. Davidson*, 202 Wis. 19, 22, 231 N.W. 276, 278 (1930).

18. *E.g.*, *Louisville & N.R.R. v. Hull*, 113 Ky. 561, 573, 68 S.W. 433, 435 (1902); *Greenville v. Steamship Co.*, 104 N.C. 91, 93, 10 S.E. 147, 148 (1888). *Contra*, *Bowes v. Cannon*, 50 Colo. 262, 268, 116 Pac. 336, 338-39 (1911); *Koser v. Hornback*, 75 Idaho 24, 33, 265 P.2d 988, 993 (1954).

19. See 4 WIGMORE, EVIDENCE § 1064 (3d ed. 1940).

20. *E.g.*, *Chambliss v. Smith*, 30 Ala. 366, 368 (1857); *Eckman v. Eckman*, 55 Pa. 269, 276 (1867).

21. *McCORMICK*, EVIDENCE 520 (1954).

22. *E.g.*, *Stout v. McNary*, 75 Idaho 99, 103, 267 P.2d 625, 628 (1954); *Lawrence v. Tschirgi*, 244 Iowa 386, 390, 57 N.W.2d 46, 48 (1953); *Carlson v. Fredsall*, 228 Minn. 461, 472-73, 37 N.W.2d 744, 749-50 (1949); *Johnson v. Griepenstroh*, 150 Neb. 126, 130, 33 N.W.2d 549, 552 (1948); *Taliaferro v. Reiridon*, 197 Okla. 55, 168 P.2d 292 (1946).

23. See text at note 13 and note 15 *supra*.

24. See *Norris v. Rawlings*, 138 Ga. 711, 76 S.E. 60 (1912), where an amendment was disallowed as a pleading but was permitted in evidence as an admission.

25. *E.g.*, *Bartlow v. C.B. & O. R.R.*, 243 Ill. 332, 337, 90 N.E. 721, 723 (1909); *Carlson v. Fredsall*, 228 Minn. 461, 472-73, 37 N.W.2d 744, 749-50 (1949); *Johnson v. Sheridan Lumber Co.*, 51 Ore. 35, 44, 93 Pac. 470, 473 (1908).

26. *E.g.*, *Little Rock & Ft. S. Ry. v. Clark*, 58 Ark. 490, 493, 25 S.W. 504, 505 (1894); *Wiley v. Northern Pac. Ry.*, 60 Wash. 597, 111 Pac. 801 (1910).

assumes that the act of revocation is an indication that the pleader found himself to be mistaken about the statements of fact which the original pleading contained, and that, therefore, the evidentiary value of the admission is low compared with the potential prejudice involved.<sup>27</sup>

### B. *Considerations Affecting the Admissibility of Pleadings*

The majority of cases rely on the adversary theory of litigation as reason for admitting pleadings into evidence.<sup>28</sup> If an individual has at any time made a statement which his opponent can now utilize to the detriment of the declarant, the courts admit the statement in evidence and put the task of explanation upon the declarant.

If, however, the basic reason for introducing evidence in a judicial proceeding is to enable the trier of fact to determine what the "facts" are, the adversary theory provides an inadequate foundation for accepting pleadings in evidence. Rather, consideration should be given to the reliability of pleadings as evidence, particularly in view of the impact statements in pleadings may have upon a jury when commented on by skillful counsel.

Pleadings are a species of hearsay evidence.<sup>29</sup> Traditionally, their entry into evidence has been treated by the authorities as an application of the admissions exception to the hearsay rule.<sup>30</sup> Hearsay exceptions generally are founded upon the existence of special circumstances which assure the probable reliability of the types of evidence involved. Reliability is primarily the product of two factors: (1) veracity, and (2) objective accuracy. There are situations in which the veracity element is strong enough to warrant the admission of evidence even though there is no proof that the witness was accurate in his observations. Dying declarations,<sup>31</sup> declarations against interest<sup>32</sup> and admissions<sup>33</sup> are within this category. A statement made in the face of death is admitted because of the belief that a declarant under such circumstances would not be prone to lie. Whether or not that person was in a position to adequately perceive what took place does not affect the admissibility of the statement made. Similar reasoning calls for the admission of a statement which at the time it was made was against the interest of the declarant. It is more likely than not that a person making a remark which is against his interest is revealing the facts as he truthfully believes they exist and is more likely to be accurate.

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27. *Ibid.*

28. See LADD, EVIDENCE 437 (2d ed. 1955).

29. The hearsay rule challenges statements "not made on the stand" and "not made at a time and place where it could be subjected to certain essential tests or investigations calculated to demonstrate its real value by exposing latent sources of error." 5 WIGMORE, EVIDENCE 3 (3d ed. 1940).

30. *E.g.*, McCORMICK, EVIDENCE § 242 (1954).

31. UNIFORM RULES OF EVIDENCE rule 63(5).

32. *Id.* rule 63(10).

33. *Id.* rule 63(7).

Although a statement made in a pleading may in a later context turn out to have been an "admission," it must be considered to have been a self-serving declaration at the time when it was drawn. Plaintiffs and defendants<sup>34</sup> will each draft pleadings designed to prevent summary disposition of their respective cases by a demurrer or its equivalent. Accordingly, the veracity basis for reliability presumed to be present in the case of admissions and declarations against interest may not be present in the same measure in the case of pleadings.

Moreover, it is often the case that the pleader has not had a primary sensory perception of many of the facts which he alleges. His pleading may be largely dependent upon statements made to him by others (who may or may not become witnesses in the action). Therefore, it is often not possible to rely on the objective accuracy of the pleadings.

### 1. Pleadings Signed by the Party

Pleadings signed by a party under oath or accompanied by an affidavit offer the strongest evidence of veracity and therefore of reliability.<sup>35</sup> The oath or affirmation is some indication that the party had knowledge of the contents of the pleading and that the statements contained in the pleading were made with some degree of solemnity. Since the factor of veracity is present, the pleading should be accepted in evidence unless the pleader against whom it is offered can carry the burden of challenging its reliability to the satisfaction of the court in one of two ways: either by offering evidence that he in fact had no knowledge of the contents of the pleadings or evidence that at the time the pleadings were drawn he was laboring under a mistake of fact. If the pleader attempts the first course, that of showing no knowledge of the contents of the pleadings, the demands of the adversary theory and the sanctity of pleadings may indicate that appropriate disciplinary action should be taken against either the party or his attorney, depending upon the source of the fault.<sup>36</sup> But the pleading should nevertheless not be admitted if the court is satisfied that the party actually had no knowledge of its contents.

### 2. Pleadings Signed Only by the Attorney

The veracity of a pleading is not as strongly established when it is signed by the attorney alone. The attorney's signature is neither an

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34. According to Professor Morgan statements may be admitted under the hearsay rule even though they were not against the interest of the declarant at the time they were made; see Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 YALE L.J. 355 (1921). It is submitted, however, that a distinction should be drawn between ordinary statements made at a time when no litigation is contemplated and those made in a pleading when the preliminary steps involved in litigation have been taken.

35. There are some jurisdictions which compel the party litigant to sign an affidavit verifying the contents of the pleading. See PHILA. C.P. Ct. (Civ.) RULES 1023, 1024.

36. Perhaps a more frequent use of contempt proceedings against those who deliberately insert false information into the contents of the pleading will be an effective sanction against such practices. Although this weapon is at the disposal of the courts it is very seldom invoked.

indication that the client, against whom the statements will be offered, has read and therefore has knowledge of the contents of the pleading, nor that the client regarded the making of the statements in the pleading as a solemn act. Moreover, in drawing a pleading, an attorney may depend to some extent on his memory of statements made to him by the client or witnesses at an earlier date. Errors or distortions may thus creep in. It might be argued that the attorney's signature is some indication of veracity on the attorney's part and that the client, having entrusted his case to the attorney, ought to be responsible for what the attorney says.<sup>37</sup> Such an argument, however, is not founded upon considerations of reliability but upon the theory of vicarious admissions.

The reliability of pleadings signed only by the attorney may further be called in question by the code jurisdiction rule that evidence not in conformance with the pleadings may not be introduced at the trial.<sup>38</sup> Faced with such a rule, an attorney may attempt to protect his client in the impending trial and incidentally his own interest in winning the case, by pleading as much as possible without primary regard for the veracity of the statements made. This threat to the veracity of statements in pleadings is also present in situations where the client signs the pleading, since the attorney may be expected to impress upon the client the need to lay a foundation for the introduction of evidence. However, some safeguard is found because the client, if required to sign the pleading under oath, may cause statements known by him to be untrue to be stricken.

In light of these considerations it is believed that a pleading signed only by an attorney cannot be admitted in evidence as reliable on the basis of the veracity element alone. Before such a pleading should be admitted, it should therefore be incumbent upon the party offering it to carry the burden of satisfying the court that reliability can be founded upon the pleader's objective accuracy. To do this he would have to demonstrate successfully that the pleader had knowledge of the contents of the pleading and had a primary sensory perception of the facts alleged.

### 3. Other Factors Affecting Reliability

In addition to the basic distinction between pleadings signed only by an attorney and those signed by the party, other factors which have a bearing upon reliability should be considered. Pleadings which have been withdrawn or later amended, for example, should be distinguished from those permitted to stand. The fact that a pleading is withdrawn or amended may be some indication that the party was dissatisfied with its contents, which in turn casts doubt on the veracity of the statements made. The party attempting to introduce the pleading in evidence ought therefore to be required to persuade the court that the pleading was withdrawn or amended for reasons other than a change in belief on the part of the pleader, for

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37. See *Lamar v. Pearre*, 90 Ga. 377, 380-81, 17 S.E. 92, 94-95 (1892).

38. ODGERS, *PRINCIPLES OF PLEADING AND PRACTICE* 230 (13th ed. 1946).

example, for tactical purposes. This burden should rest upon the pleader's opponent even in cases where the pleading was signed by the client rather than his attorney. Note should also be taken of possible differences between pleadings drawn for a prior proceeding and those which are a part of the proceeding in which they are offered. As was previously discussed, evidence must conform with the pleadings in most code jurisdictions<sup>39</sup> and, accordingly, there is a temptation on the part of attorneys to include statements in pleadings without regard to their truthfulness. The fact that a statement made may become an "admission" in the context of later litigation is probably not a deterrent to this practice. However, it is reasonable to assume that the attorney will use care not to include statements which will be damaging to his client in the context of the present litigation. Those that are included may be analogized to other admissions and declarations against interest, the veracity factor of which is high. It is therefore believed that a pleading drawn for the proceeding in which it is offered in evidence should be admitted unless the pleader can convincingly demonstrate his lack of knowledge of the contents of the pleading or that he was laboring under a mistake of fact.

A final distinction may be drawn between pleadings utilized in proceedings the outcome of which was favorable to the pleader on the merits and those utilized in proceedings the outcome of which was unfavorable. When the ultimate outcome of litigation is favorable to the pleader on the merits, it is fair to assume that fact issues raised by the pleadings have been resolved in his favor. This in turn gives rise to an inference that statements made in the pleading are reliable, which should be reflected in a more liberal attitude on the part of the court with regards to their admission. The pleader, however, ought to be able to challenge admission on the ground that the issue to which the statements offered is relevant was not litigated in the prior proceeding and was not essential to the judgment.

#### 4. Summary

Admission of pleadings in evidence on a theory of reliability must be differentiated from admission on an adversary theory. Reliability is the product of veracity and objective accuracy. In the case of pleadings in which the veracity factor is high, the pleading should be admitted unless the pleader against whom it is offered can challenge its veracity, either on the grounds of lack of knowledge of the contents of the pleading or mistake of fact. If the veracity factor is low, the pleading should not be admitted unless the party offering it can overcome the apparent lack of veracity by demonstrating that the litigant had knowledge of the statements which the pleading contained. Illustrations of situations in which the veracity factor is high include pleadings signed by the party or accompanied by his affidavit and pleadings offered in the same proceeding for which they were drawn. In the case of pleadings signed only by an attorney or

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39. *Ibid.*

pleadings which are amended or withdrawn, the veracity factor is lower. Similarly, where the pleadings are offered in a subsequent proceeding, except perhaps, where the pleader was successful in the prior proceeding on the merits, the veracity factor is low.

### III. PLEADINGS AS EVIDENCE UNDER THE FEDERAL RULES

The Federal Rules of Civil Procedure were intended to supplant earlier rules of procedure which were deemed to hinder the enforcement of substantive justice.<sup>40</sup> The purpose of pleading was changed from that of stating all the facts which constitute a cause of action or defense to one of notice, stating a claim upon which relief can be granted.<sup>41</sup> In general, pleadings now need only sketch the broad outlines of transactions in question. There is no penalty attached to pleading conclusions of law or evidentiary facts.<sup>42</sup>

The practice in federal courts prior to the adoption of the federal rules was to admit in evidence pleadings which were signed by the party litigant.<sup>43</sup> Pleadings signed only by the litigant's attorney were inadmissible.<sup>44</sup> The fact that a pleading was amended<sup>45</sup> or withdrawn<sup>46</sup> did not affect its admissibility as evidence if it was signed by the pleader. Just as in state courts, admissions made in the pleading of one defendant were inadmissible in a subsequent suit against his co-defendant.<sup>47</sup>

In cases decided since the effective date of the rules, no effort has been made to decide whether the policy of the rules necessitates a change in the existing law regarding the admission of pleadings in evidence.<sup>48</sup> Instead, federal courts have split widely over the problem. Some admit only those pleadings signed by the party to be charged with the admission.<sup>49</sup> Others admit pleadings signed by an attorney alone.<sup>50</sup> The conflict extends into the area of superseded pleadings as well.<sup>51</sup>

40. Clark, *Fundamental Changes Effected by the New Federal Rules*, 15 TENN. L. REV. 551 (1939).

41. FED. R. CIV. P. 8 (a).

42. Stayton, *The Scope and Function of Pleading Under the New Federal and Texas Rules: A Comparison*, 20 TEXAS L. REV. 16, 23-24 (1941).

43. *E.g.*, *White v. Mechanics' Securities Corp.*, 269 U.S. 283, 301-02 (1925); *Pope v. Allis*, 115 U.S. 363, 370-71 (1885); *Williams v. Williams*, 61 F.2d 257, 262 (7th Cir. 1932), *cert. denied*, 288 U.S. 612 (1933).

44. *E.g.*, *Delaware County v. Diebold Safe Co.*, 133 U.S. 473, 487 (1890); *Combs v. Hodge*, 62 U.S. (21 How.) 397, 404 (1859); *Oregon & C.R. Co. v. Grubisich*, 206 Fed. 577, 580-81 (9th Cir. 1913).

45. *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter*, 32 F.2d 195, 198 (2d Cir. 1929).

46. See *Lyster v. Stickney*, 12 Fed. 609, 610 (D. Colo. 1882).

47. *Hyman v. Wheeler*, 29 Fed. 347, 356-57 (D. Colo. 1886).

48. *Giannone v. United States Steel Corp.*, 238 F.2d 544, 547-48 (3d Cir. 1956).

49. *E.g.*, *Rogers v. Edward L. Burton & Co.*, 137 F.2d 284 (10th Cir. 1943); *Hardy v. Commissioner*, 125 F.2d 863, 865 (9th Cir. 1942). This despite the fact that the federal rules do not require the pleadings to be signed by the party; see FED. R. CIV. P. 11.

50. *E.g.*, *Christensen v. Trotter*, 171 F.2d 66, 68 (9th Cir. 1948); *Jones v. Piper Aircraft Corp.*, 18 F.R.D. 181, 182 (M.D. Pa. 1955).

51. See *State Farm Mut. Auto Ins. Co. v. Porter*, 186 F.2d 834, 841 (9th Cir. 1950), where the court held a pleading signed only by the attorney admissible. *Contra*, *Louisville & N.R. Co. v. Tucker*, 211 F.2d 325, 334 (6th Cir. 1954).

A. *Considerations Affecting the Admissibility of Pleadings Under the Federal Rules*

Factors affecting reliability discussed in conjunction with the use of pleadings as evidence in code jurisdictions are also applicable to federal practice. However, certain of the federal rules introduce new considerations which must be analyzed.

Rule 8(a) requires that a party state a claim upon which relief can be granted.<sup>52</sup> Examples annexed to the rules make clear that considerably less detail is required than in code jurisdictions.<sup>53</sup> Emphasis is on the giving of notice, supplementary discovery procedures being available for exploration of fact.<sup>54</sup> Rule 15 complements rule 8(a) by establishing a liberal amendment procedure.<sup>55</sup> Rules 8(a) and 15 together relieve the attorney from the compulsion of pleading with a view to laying a detailed foundation for the later introduction of evidence. He can be more selective in the statements included in the pleading and need phrase them only in general terms, thereby minimizing the possibility of use of pleadings as evidence against his client. The result should be greater veracity and enhanced reliability of the statements made.

This general conclusion must be tempered in light of rules 8(e)(2) and 11. Rule 8(e)(2) authorizes a party to "state as many separate claims or defenses as he has regardless of consistency. . . ." <sup>56</sup> Its purpose is to enable the party who is unsure of the facts of his case to invoke the judicial process nevertheless. Liberal admission of pleadings in evidence might discourage resort to this device on the one hand, and inconsistency in the pleadings is at least prima facie evidence of unreliability on the other. If rule 8(e)(2) is to be effectuated, statements in a pleading which is inconsistent should be immunized until the pleader eliminates the inconsistency by amendment.<sup>57</sup> That portion of the pleading which remains should then be subjected to the tests of admissibility previously suggested.

Rule 11 encourages parties to plead not only what they know to be true but also any fact which they believe "there is good ground to support." <sup>58</sup> An individual is permitted to state facts which he believes he can to some extent support without believing that those facts are true. The rule reflects the policy of limiting the pleadings to notice and emphasizing dis-

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52. FED. R. CIV. P. 8 (a).

53. *Id.* appendix of forms.

54. *Id.* 26-37. Under rule 36, an opponent may compel the pleader to admit relevant material, but an admission obtained in this manner may be used for the pending action only and not in any other proceeding. *Id.* 36 (b).

55. "A party may amend his pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend his pleading by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." FED. R. CIV. P. 15(a).

56. FED. R. CIV. P. 8 (e) (2).

57. *E.g.*, *Houston East & West Texas Ry. v. DeWalt*, 96 Texas 121, 134, 70 S.W. 531, 537-38 (1902). *But see* *Johnson v. Butte & Superior Copper Co.*, 41 Mont. 158, 166, 108 Pac. 1057, 1059 (1910). See discussion in 1 ELLIOTT, EVIDENCE § 236 (1904).

58. FED. R. CIV. P. 11.

covery and other pre-trial procedures. If pleaders accept the invitation of rule 11, the veracity factor and therefore the reliability of all federal pleadings is diminished.

### *B. Conclusion With Respect to the Federal Rules*

The veracity and hence the reliability of pleadings under the federal rules, as compared to those under the codes, is increased by the application of rules 8(a) and 15. The liberal amendment procedure eliminates the hazard that unreliable statements will be made in an attempt to lay a foundation for the later introduction of evidence. However, the application by pleaders of rule 11 completely offsets any increased reliability gained through rules 8(a) and 15. A signature on a pleading by a party or an attorney is merely an affirmation that "to the best of his knowledge there is good ground to support" the statements made.<sup>59</sup> This attempt by the framers of the federal rules to prevent sham pleadings nevertheless leaves the door open for the inclusion of statements, the truthfulness of which the pleader is uncertain. This factor coupled with the self-serving nature of a pleading when it is drawn, dictates the need to prevent the introduction in evidence of pleadings submitted under the federal rules. The above conclusion should be modified to the extent that portions of pleadings which are amended to conform to the proof in accordance with rule 15(b) should be admitted. Statements of facts ascertained through the introduction of evidence in a prior proceeding should be admitted since they are facts gathered in court under the protection of cross-examination.

## IV. OTHER CONSIDERATIONS WITH RESPECT TO THE CODES AND THE FEDERAL RULES

It is extremely difficult to lay down a set of general rules which should govern the area of pleadings as evidentiary admissions. The circumstances surrounding every case differ: the types of parties differ; the types of facts included in the admission are different; the impact upon the jury of some admissions may outweigh their probative value; the attempt may be to introduce the pleading in evidence in the same case or in a subsequent proceeding; or in a different jurisdiction; or the pleading in question may be one that has previously been withdrawn; or amended; or abandoned.

Although it is desirable to admit as much relevant evidence as possible it is important to prevent the introduction of evidence when the degree of reliability is small and the impact upon a jury may be out of proportion to the probative value of the evidence. The introduction of a pleading in evidence probably creates a greater impression in the minds of the jury than does the introduction of ordinary oral testimony. An opposing attorney skilfully reading each word before the jury and impressing upon them the sanctity to be accorded these legal documents, can cause an impact which the pleader would never overcome. It is for this reason that it is

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59. *Ibid.*

imperative that knowledge of the pleader, and therefore the reliability factor of veracity, be established before such evidence is admitted.

The above discussion of the reliability factor of veracity is premised upon the knowledge of the pleader. It is therefore important that a certain degree of flexibility be given to the rules formulated when determining whether the litigant had knowledge of the contents of the pleading. It should be the function of the court to determine when the above rules should be invoked to ascertain knowledge or when rules should be completely set aside and absolute discretion should be used.

It has been suggested that the signature of the litigant is an indication that he was aware of the contents of the pleading. The signature of a bank president on a legal document should, however, be considered in a different light from the signature of an immigrant who has difficulty understanding the English language. The court should attempt to determine whether the litigant had an understanding of the factual content of the pleading before admitting it in evidence. The same considerations should be applied when only the attorney's signature appears on the pleading.

In many instances it will be apparent to the court that the information contained in the pleading could only have been gotten from the litigant. If a jurisdiction lists several grounds for divorce, among which is drunkenness, and the pleading alleges that the husband was a confirmed alcoholic, it is a good indication that such information was gotten from the wife of the alcoholic. However, if drunkenness is the only ground for divorce in the particular jurisdiction, there may be some doubt as to the truthfulness of the contents of the pleading.

There is also a need for flexibility in the area of placing the burden of proof. Although the rules submitted in this regard appear desirable, the court should have discretion in placing the burden of showing knowledge in cases where one party has a decided advantage in gaining access to the information in question. Considerations such as whether the jurisdiction has a pre-trial discovery procedure making it easy for both parties to obtain access to needed information, or whether the passage of time since the filing of the pleading makes it extremely difficult for one party to determine the facts in question should influence the court's decision.

*M. D. G.*