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NARRATIVE IMPLICATIONS OF EVIDENTIARY RULES

Bruce Ching*

INTRODUCTION

"Sociolinguists have provided a functional definition of narrative: it matches the temporal sequence of experience and, by providing a main point, it serves personal interests of those in the social context where the narrative originates."¹

Advocates have become increasingly aware of the importance of narrative in persuasion. Researchers recognize that jurors use narratives to bring pieces of evidence into coherent relationship throughout the course of a trial.² One observer has explained that "[t]rial advocacy is essentially a form of story-battle. In the courtroom, each attorney will tell the jury a different story, call witnesses to support that story, and make arguments for what a just verdict looks like according to the plot of the advocate's told story."³ Moreover, during deliberation, individual jurors similarly use "story battles in their attempts to persuade one another."⁴ In using such story battles for persuasion, "[w]hen confronted by an oppositional story, some jurors made the tactical move of offering a counter-story, crossing metaphorical swords with other members of the

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³ See, e.g., John H. Blume et al., Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense, 44 AM. CRIM. L. REV. 1069, 1088 (2007). More generally, the narrative practice of relating things in story structure seems to be fundamental to the way that everyone processes information throughout his or her life. JAMES BOYD WHITE, HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 169 (1985).

⁴ SUNWOLF, PRACTICAL JURY DYNAMICS 272 (2004).

⁵ Id.
jury through the use of story. Proponents of the “story model” or “narrative theory” acknowledge that when the plaintiff and the defendant offer competing stories, the party whose version of the events most closely matches the jury’s collective understanding is the one that will win. Thus, in evaluating members of a jury pool, a trial lawyer looks to match the potential jurors’ backgrounds with the narratives that the lawyer will present:

[M]uch labor is expended by litigators in presenting narratives that will resonate and cohere with the past experiences of the jurors. (It is, in large part, for this reason that determining through the voir dire process the composition of the jury, with its particular set of past experiences, is so crucial.)

But during the trial, the evidence must be presented in a way that is admissible before the jurors can begin to piece together a story. The narrative approach to advocacy can be extended to recognize that the evidentiary rules, which determine what facts can be presented to the jury, also embody a view of narrative coherence and narrative integrity. Some of the prohibitions—such as those generally dealing with hearsay, leading questions on direct examination, and “speaking objections”—shield witnesses’ testimony from being contaminated by extrinsic narratives. On the other hand, other rules—such as allowing leading questions during cross-examination—appropriately permit the use of extrinsic narratives for purposes such as impeaching the witness’s credibility.

Part I of this Article examines the general background of using narratives in persuasion. Part II explores a narrative perspective for the evidentiary rules and practices governing leading questions and “speaking objections,” using the Federal Rules of Evidence and Federal Rules of Civil Procedure as an illustrative framework for the discussion. Part III critiques the standard justifications for differences in the rules governing the treatment of parties and their agents, party witnesses on direct examination, and admissions made by those for the prior alternative, tested for

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In contrast, the experiences, inviting of the story’s character quality that rhetoric

[They are] not properly this sort are not a stock of information.

Another common a story such a powerful experience to the audience.

5. Id. at 285.
6. Blume et al., supra note 2, at 1089.
8. See FED. R. EVID. 801(c) (providing a broad definition of hearsay); FED. R. EVID. 611(c) (prohibiting leading questions on direct examination); FED. R. CIV. P. 30(c)(2) (forbidding speaking objections in depositions).
9. See FED. R. EVID. 611(c) (allowing leading questions on cross-examination).
governing the treatment as nonhearsay of prior statements made by parties and their agents on one hand, and prior statements made by non-party witnesses on the other hand. Part IV takes a narrative perspective on hearsay and party "admissions," and recommends that vicarious admissions made by a party’s agent be treated under the same criteria as those for the prior statements of a non-party witness, or in the alternative, tested for admissibility as a hearsay exception.

I. NARRATIVE EFFECTS IN PERSUASION

Although syllogistic forms of argument can work well when the audience is receptive, a skeptical audience is more likely to be persuaded by a presentation in narrative form.10 Commentators have observed that "[v]ivid, personally observed events have a more forceful effect on the mind and on social attitudes than tightly constructed logical arguments or carefully organized instructional lectures."11 Syllogistic reasoning often fails to convince a skeptical audience because the direct attempt at persuasion "often comes across as an attack. It can feel like nagging or manipulation."12

In contrast, effective narratives persuade by creating vicarious experiences,13 inviting the audience to step into the shoes of one or more of the story’s characters. Narrative persuasion thus incorporates a quality that rhetorician James Boyd White noted about literary texts:

[They are] not propositional, but experiential and performative . . . . Texts of this sort are not coercive of their reader, but invitational: they offer an experience, not a message, and an experience that will not merely add to one’s stock of information but change one’s way of seeing and being and talking.14

Another commentator similarly observed that "[p]art of what makes a story such a powerful tool of persuasion is that it helps convey the experience to the audience through ‘narrative transportation’ and lets the

10. See, e.g., KERRY PATTERSON ET AL., INFLUENCER: THE POWER TO CHANGE ANYTHING 50–51, 57, 72 (2008). The authors narrowly use the term “verbal persuasion” to refer to syllogistic forms of argument, which they contrast with “narrative” forms of persuasion. Id. at 50–51.
12. PATTERSON ET AL., supra note 10, at 50.
13. Id. at 57, 72.
audience construct and experience the meaning of the story for itself.\textsuperscript{15} And, one psychiatry professor explained that on a physiological level, the narrative form is particularly amenable to carrying emotional impact:

We know from the research on memory that metaphors and narratives are more memorable and persuasive than abstract, impersonal data alone. Metaphors and narratives appear to pass through the amygdala prior to storage, a part of the brain that applies emotional salience to information. Scientific data that remains abstract in nature and unrelated to personal experience or affect seems to go into another category altogether. Our practical experience tells us that data does not persuade policy makers nearly as effectively as do human-interest stories.\textsuperscript{16}

In addition to making the evidence memorable, narrative construction also offers an organizing framework for the evidence on a larger scale: “Stories provide useful structures: plot, characters, time frames, motives, settings.”\textsuperscript{17} Commenting on the role of counsel in shaping the legal argument based on the available evidence, Judge Smyser explained that “[t]he best arguments come in the form of stories, with the trial evidence transformed into a coherent and persuasive narrative that offers a plausible explanation of the evidence in the light most favorable to the client.”\textsuperscript{18} Similarly, Noelle Nelson, a jury consultant, advised that trial lawyers should organize the presentation of their information around a “case theme” that defines the trial, and that, “[w]hoever controls the definition of the case is inevitably the one with the power.”\textsuperscript{19} To further explicate case themes, she summarized their use in a couple of high profile cases in California: “The case theme in the Menendez brothers’ defense, for example, was ‘the abuse excuse’:

\begin{quote}
15. Brian J. Foley, Applied Legal Storytelling, Politics, and Factual Realism, 14 LEGAL WRITING: J. LEGAL WRITING INST. 17, 47 (2008) (citation omitted). Foley, however, warns that by entrusting the audience to perform such a construction, the storyteller must necessarily give up some control, and perhaps risk “story indeterminacy” which may lead to misinterpretation of the narrative. Id.
16. Kyle D. Pruett, Social Science Research and Social Policy: Bridging the Gap, 45 FAM. CT. REV. 52, 56 (2007). But see Adam M. Gershovitz, An Informational Approach to the Mass Imprisonment Problem, 40 ARIZ. ST. L.J. 47, 71 (2008) (noting, in the context of attempts to reduce incarceration through influencing prosecutors’ charging decisions, that “[a]lthough scholars debate the persuasive influence of statistics, some studies have found them to be more persuasive than narrative evidence”).
17. SUNWOLF, supra note 3, at 271.
19. NOELLE C. NELSON, WINNING: USING LAWYERS’ COURTROOM TECHNIQUES TO GET YOUR WAY IN EVERYDAY SITUATIONS 227, 229 (1997).
\end{quote}

The brothers should have been saved. Simpson defense was the framework of all such themes are into and reviewing the evidence.

In deliberation, significance of the evidence indicated that the result were a narrative, like to make a story about happened.\textsuperscript{22} Incomplete pieces of evidence is not during the course of events.

The evidence complete convey pieces of evidence are pieces of events that are the same critical enough information about sometimes not present evidence (for example, isolation; the meaning of related statements.)

Thus, narrative construction process by which events:

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20. Id. at 227. 21. For a discussion of four criminal trials in the consent of the “amorys”, public broadcast, and school.
22. Id. at 271. SunWolf, supra note 3, at 271.
23. Hastie & Pennington, Legal proceedings:
One fundamental time, about ourselves.
The story is the claiming meaning for language and we keep for at some level we the stories of our life.
\end{quote}
The brothers should be excused from murdering their parents because they had been severely abused. A primary case theme of the O.J. Simpson defense was ‘the cops messed up and planted evidence.’ In the framework of a trial, the main opportunities for advocates to use such themes are in previewing the evidence during opening statement and reviewing the evidence during closing argument.

In deliberation, jurors also use narrative structures to determine the significance of the evidence. For example, a recording of deliberations indicated that the recently-elected foreperson of a jury self-consciously invoked a narrative framework by saying to the other jurors, “I’d kind of like to make a story. Then have everybody believe the same story that happened.” In constructing such stories, jurors bring together different pieces of evidence into a coherent relationship that is often not apparent during the course of presentation in the trial:

The evidence comes in a scrambled sequence, and witnesses and exhibits convey pieces of a historical puzzle in a jumbled temporal sequence. The evidence is piecemeal and riddled with gaps in its depiction of the historical events that are the focus of reconstruction; event descriptions are incomplete, some critical events were not observed by the available witnesses, and information about personal reactions and motivations is always uncertain and sometimes not presented (often because of rules of evidence). Finally, some evidence (for example, individual witnesses’ statements) cannot be assessed in isolation; the meaning of one statement may depend on the meanings of many related statements.

Thus, narrative construction helps jurors to make sense out of the chaotic process by which evidence is presented during the course of a trial.

20. Id. at 227.
22. Id. at 271. Sunwolf’s research of actual jury deliberations was based on videotapes of four criminal trials in Maricopa County, Arizona. Id. at 395 n.405. In all four trials, the consent of the “attorneys, judges, defendants, and jurors[] was obtained for videotaping, public broadcast, and scholarly analysis.” Id. at 396 n.405.
24. Id. Moreover, narrative construction is common in everyday life, not just in legal proceedings:

One fundamental characteristic of human life is that we all tell stories, all the time, about ourselves and others, both in the law and out of it. . . .

The story is the most basic way we have of organizing our experience and claiming meaning for it. We start telling the stories of our lives as soon as we have language and we keep it up until we die. We make narratives literally all the time, for at some level we are constantly engaged in the process of telling and retelling the stories of our lives, trying to make sense of what is past and to allow for the
But, unfortunately, jurors sometimes digress into considering alternate narratives based on facts that never occurred; thus, jury deliberations might improperly ponder fictional narratives that are not closely tied to the evidence that was presented, such as by considering what would have happened if one or more characters had acted differently. Such alternate narratives may be fundamentally unavoidable because of the way that information is produced at trial:

Story-making by jurors, outside the real evidence presented at trial, may be inevitable, particularly because story-making is highly functional for a jury. These stories have powerful explanatory, pedagogical, persuasive, social-relational, group-cohesiveness building, argumentative-attacking, and therapeutic powers. Trials are full of gaps, which frustrates jurors, yet the decisions are highly consequential in the lives of other people, and jurors realize other jurors have reached verdicts later proven to be wrong. As a result, story-making as verdict consequences are anticipated helps them explain what was not explained at trial.

Moreover, in choosing between verdicts, jurors tend to anticipate “decisional regret” by considering “imagined verdict consequences,” such as whether a criminal defendant who is released after a verdict for acquittal might later kill a juror’s own child. When faced with such a story, jurors often choose between accepting the story and creating alternate stories; thus, a juror’s use of a “counterfactual” narrative can provoke other jurors to resort to other counterfactual narratives, as if by contagion.

II. NARRATIVE IMPLICATIONS OF LEADING QUESTIONS AND SPEAKING OBJECTIONS

Some evidentiary rules and practices can be explained by their narrative effects. Restrictions on the use of leading questions and “speaking objections” seem to be concerned with narrative integrity—keeping a witness’s testimony from being “contaminated” by lawyers’ statements.

force of what might happen next. We perpetually process new material, checking it against old claims, revising our story where necessary, repressing parts of it when that is the only alternative.

WHITE, supra note 2, at 169.
25. SUNWOLF, supra note 3, at 257–68.
26. Id. at 259.
27. Id. at 258–61.
28. Id. at 261, 264.
A. Leading Questions

When a lawyer questions a witness, the distinction between leading and nonleading questions is based on whether the predominant voice is that of the witness or of the lawyer who is questioning the witness. As Peter Murray’s *Basic Trial Advocacy* explains:

[A] leading question has been defined as a ‘question which suggests the answer.’ Another way of looking at it is that in a leading question the lawyer *supplies* the information to be conveyed, while in a nonleading question the lawyer *describes* the kind of information expected, but the actual information is provided by the witness.  

For example, “You were scared, weren’t you?” is a leading form of questioning, while “How did you feel?” is phrased in a nonleading form.  

In federal trial courts, the use of leading questions is governed by Federal Rule of Evidence 611(c):

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’ testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Section 611(c) is further explained by section 611(b), which sets the scope of cross-examination to include casting doubt on the witness’ credibility:

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

One explanation for restricting the use of leading questions on direct examination is that the policy is “based on considerations of fairness and accuracy. If the witness is able to give the details directly, without being transmitted through the lawyer, it is more likely that the

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31. FED. R. EVID. 611(c).
32. FED. R. EVID. 611(b) (emphasis added).
information will be accurate and authoritative. Moreover, one article indicated that testimony tends to have “more errors when subjects were forced to answer leading questions than when they were free to narrate.”

Another article similarly noted not only that “open-ended questions which allow the observer to report in a narrative form will yield more accurate reports,” but also observed that the results of such open-ended questions “will be less complete than reports obtained through the use of leading questions.”

But there is no reason to be less concerned about accuracy and authoritative recall on cross-examination than on direct examination, and no reason to be less concerned about completeness on direct examination than on cross-examination. Instead, the rules requiring the different formats seem to reinforce the different narrative purposes of direct and cross-examinations. The difference in format reflects the difference in who is telling the story—the witness on direct examination, or the attorney who is questioning the witness on cross-examination.

Direct examination is the time for a witness to present his or her own narrative about what happened. Thus, Mauet’s Trial Techniques explains:

The examination should involve the jurors in the witness’ story. . . . Consequently, direct examinations should let the witness be the center of attention. The lawyer should conduct the examination so that he does not detract from his witness. After all, a witness will be believed and remembered because of the manner and content of his testimony, not because the questions asked were so brilliant.

Therefore, when the lawyer calls the witness to the stand and questions him or her on direct examination, the lawyer must generally use nonleading questions to allow the witness’s own version of events to develop. This role for the lawyer’s questions is consistent with the above-noted requirement of Federal Rule of Evidence 611(c), generally prohibiting the use of leading questions on direct examination.

33. MURRAY, supra note 29, at 127.
36. MAUET, supra note 30, at 73.
37. Id.
38. Compare MAUET, supra note 30, at 73, with FED. R. EVID. 611(c).
On the other hand, in cross-examining the witness, a lawyer can introduce alternative narratives that often discredit the witness's previous direct-examination testimony. One article noted that "[t]he rules of evidence assume that leading questions are among the most effective means for exposing flaws in perception, recollection, narration, and sincerity." The cumulative effect of a lawyer's use of leading questions on cross-examination was summarized well in an article by Kwai Hang Ng:

Specifically, the witness's statements are interpreted as a reply to the leading questions put forward by the opposing counsel.... Through the deployment of leading questions—through the sliding from one leading question into another, the lumping of one layer of implied meaning upon another, an opposing lawyer can weave together a contrapuntal narrative between the "statements" offered by the witness—without stating that other story him- or herself.

Cross-examination can therefore be viewed as a type of ventriloquism, in which the witness is co-opted into confirming the cross-examining attorney's narrative—which may differ significantly from the witness's own previous narrative that was given during direct examination. In fact, an article by Joseph Harbaugh and Barbara Britzke has noted the metaphorical ventriloquism that can occur in cross-examination:

With a series of narrow, focused, fact-laden leading questions, the skilled cross examiner communicates the information he or she wants to get across to the trier of fact while the witness plays the role of a puppet in the hands of an experienced ventriloquist. For example, "Isn't it true that Jones is planning to get into the executive counseling business in the next six months?" The witness is relegated to a string of monosyllables indicating agreement or

40. Id. at 81.
41. Kwai Hang Ng, "If I Lie, I Tell You, May Heaven and Earth Destroy Me," Language and Legal Consciousness in Hong Kong Bilingual Common Law, 43 LAW & SOC'Y REV. 369, 382–83 (2009). The above-quoted passage discusses cross-examination in English-language trials in Hong Kong. See id. at 377. Ng later mentions, however, that in Cantonese-language trials in Hong Kong, the division between attorney and witness roles in cross-examination tends to be less distinct, with witnesses becoming more active and assertive than in the English-language trials. See id. at 383, 395.
disagreement with the information identified by the lawyer. The form of the question permits this phenomenon.43

The cross-examining lawyer thus uses a series of leading questions to construct one or more alternative versions of events to call into question the reliability of the witness’s previous testimony, or to introduce narratives that affirmatively support the other side of the case.44

Both of the narrative roles of cross-examination—impeaching the witness, and affirmatively presenting a story that supports the other side of the dispute—were displayed in yet another high-profile case in California, the first trial of the police officers who repeatedly struck the motorist Rodney King.45 The California highway patrol officer who had initially pursued King, and who subsequently witnessed the beating administered by Los Angeles police department officers, was a witness for the prosecution.46 Commentators mentioned that the attorney for one of the defendants used cross-examination to cast doubt on the highway patrol officer’s direct examination descriptions of King’s behavior as non-aggressive, and her details regarding the defendant’s use of a police baton to strike King, as well as to cast doubt on the witness’s motivation for her direct examination testimony.47 But they also observed that in addition to impeaching the witness, the defense attorney “was able to use his interactions with [the] adverse witness as an effective story-telling tool that powerfully advanced his own well-plotted defense narrative.”48

The construction of [defense attorney] Stone’s questions—which may have had a more potent impact on the jury than [prosecution witness] Singer’s answers because the questions were generally of the leading sort that prompted Singer to answer simply “yes” or “no” or to utter a short, verbless phrase—embodied the core images of the justification narrative: King as aggressor and dominating actor; the police officers as passive figures who acted only to the extent that King forced them to respond.49

Thus, the defense lawyer used the cross-examination format—frequent use of leading questions, phrased in a way that limited the

43. Id.
44. See id.; see also Mendez, supra note 39, at 80.
46. Id. at 35–36, 109.
47. Id. at 128.
48. Id.
49. Alper et al., supra note 45, at 131.
scope of the witness’s responses—to portray King, rather than the police officers, as responsible for the incident.\textsuperscript{50}

B. Speaking Objections

Modern practice in depositions and trials generally bans the use of “speaking objections,” which insert legal argument at inappropriate times during a trial, or improperly coach a witness during questioning in the course of a trial or deposition.\textsuperscript{51} Such speaking objections are narratives voiced by lawyers, but disguised in the form of objections raised during the other side’s questioning of a witness.

When a judge rules on the admissibility of evidence, the lawyer who objects to the ruling must explain the basis for objection to the admission or exclusion of the evidence.\textsuperscript{52} Thus, for trials in federal court, Federal Rule of Evidence 103 provides in relevant part:

(a) Effect of Erroneous Ruling.—Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection.—In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof.—In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.\textsuperscript{53}

Stating the grounds for objection to pretrial testimony is also required, as Federal Rule of Civil Procedure 30(c)(2), governing objections in depositions, provides in relevant part that, “[a]n objection must be stated concisely in a nonargumentative and nonsuggestive manner.”\textsuperscript{54}

Nevertheless, some attorneys improperly use objections to insert their own narratives into the evidentiary process when the opposing lawyer is questioning a witness, or to convey an argument to the jury before the time that such argument is appropriate.\textsuperscript{55} Paul Grimm's
Taking and Defending Depositions thus notes that “[a] speaking objection is one in which an attorney objects to a question during deposition or trial in order to instruct, coach, or otherwise transmit information to the witness or the fact finder. They are inappropriate at trial and are also inappropriate during a deposition.” 56 Judge McVey identifies “speaking objections” as “nothing more than an interruption of opposing counsel with a speech rather than a simple, succinct objection stating a rule or point of evidence pursuant to Rule 103 of the Utah and Federal Rules of Evidence.” 57

The first type of improper speaking objection “is a speech or a ‘mini’ closing argument that is made in the guise of an objection.” 58 As explained by a Florida appellate court:

[S]o-called speaking objections are improper, as they constitute nothing less than unauthorized communications with the jury. Such objections characteristically consist of impermissible editorials or comments, strategically made by unscrupulous lawyers to influence the jury. They are distinguishable from legitimate objections which simply state legal grounds that arguably preclude the introduction of the evidence at issue. 59

Rather than presenting such a narrative, the objecting attorney “simply should state the grounds, such as lack of foundation, relevance, or hearsay. If an explanation is necessary, counsel should provide it in the fewest words possible.” 60 If a more extensive discussion of the objection is needed, then the discussion should occur at sidebar, outside of the hearing of the jury. 61 The prohibition against this form of speaking objection is therefore meant to keep the objecting attorney’s narrative from being intermingled with the presentation of the evidence, so that the jury will not confuse the attorney’s characterization of events with actual evidence such as a witness’s testimony.

The second type of improper speaking objection functions at a more

56.  Id.
57.  Samuel D. McVey, Speaking Objections, Utah B.J., Mar./Apr. 2005, at 30, 30. Judge McVey also states a third reason that lawyers tend to use speaking objections: “to make at least some objection when an attorney is at a loss over what to say about bothersome evidence or argument.” Id. This third type of speaking objection might not be as problematic as the others, as it is justified by the need to present a timely objection. See, e.g., Fed. R. Evid. 103(a)(1) (indicating that raising an objection must be done in a timely manner).
60.  Johnson, supra note 58, at 91.
61.  Murray, supra note 29, at 46; Michaels, 773 So.2d at 1231.

62.  McVey, supra note 57.
64.  McDonough v. C.
65.  City of N.Y. v. C.
66.  Id.
68.  Grimm, supra note 29.
fundamental level, attempting to shape the evidence itself by coaching the witness while interrupting the other side’s questioning.\textsuperscript{62} For example, in one case, the court noted that during defense counsel’s questioning of the plaintiff in a deposition, plaintiff’s counsel “consistently interrupted [defense counsel] and the witness, interposing ‘objections’ which were thinly veiled instructions to the witness, who would then incorporate [plaintiff’s counsel’s] language into her answer.”\textsuperscript{63} Another court similarly disapproved of improper speaking objections in a deposition in which plaintiff’s counsel stated that defense counsel’s question was “too broad to be answered” and also referred to a previous deposition, and the plaintiff “subsequently adopts his lawyer’s coaching and complains of the broadness of the question and answers referencing the... deposition.”\textsuperscript{64} Yet another court noted, in an unpublished opinion, that defense counsel was coaching the witness to answer that he did not remember enough to answer some of the questions that plaintiff’s counsel asked during deposition: “Review of the entire transcript also shows that defense counsel often made objections which had the appearance of coaching the witness by continually reminding the witness by stating ‘if you know’ or ‘if you remember.’”\textsuperscript{65} In addition to coaching the witness, defense counsel sometimes placed himself even more directly into the deposition responses when he “offered his testimony in the witness’s stead.”\textsuperscript{66} These sorts of speaking objections during depositions obviously violate Federal Rule of Civil Procedure 30(c)(2), which requires that “[a]n objection must be stated concisely in a nonargumentative and nonsuggestive manner.”\textsuperscript{67} Nevertheless, they tend to appear frequently in depositions because—unlike at trials—the judge is not immediately present to compel adherence to the evidentiary rules.\textsuperscript{68}

\textsuperscript{62} McVey, supra note 57, at 30.
\textsuperscript{63} Van Pilsen v. Iowa State Univ. of Sci. and Tech., 152 F.R.D. 179, 180 (S.D. Iowa 1993).
\textsuperscript{66} Id.
\textsuperscript{67} FED. R. CIV. P. 30(c)(2) (emphasis added).
\textsuperscript{68} GRIMM, supra note 51, § 13.3, at 167.

Part III of this Article examines the conventional justifications for treating party admissions as nonhearsay, and rebuts those same justifications by using conventional reasoning to expose their flaws in logic. Then, Part IV examines how narrative considerations can justify treating most forms of party admissions as nonhearsay, but also examines how such considerations emphasize the deficiency in treating an agent's vicarious admission as nonhearsay.

When an in-court witness attempts to present a statement that was previously made by an out-of-court declarant, the witness's recounting of the declarant's statement is likely to raise the problem of hearsay. Federal Rule of Evidence 802 provides that—subject to various exceptions detailed throughout the remainder of Article Eight and other exceptions that might be enacted by the Supreme Court or Congress—hearsay is generally not admissible.\(^69\) Federal Rule of Evidence 801(c) broadly defines hearsay as "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."\(^70\)

The conventional explanation for treating most forms of hearsay as inadmissible is based on concerns about allowing the fact finder to assess the reliability of the testimony. *McCormick on Evidence* notes that, in contrast to statements of hearsay declarants, a threshold for the assessment of in-court testimony is established by requiring the witness to testify under oath, to be present at the hearing, and to be subject to cross-examination.\(^71\) These requirements are enacted to "encourage witnesses to put forth their best efforts" as well as "to expose inaccuracies" in the witness's perception, memory, narration (the witness's verbal description that comprises his or her testimony), and sincerity.\(^72\) The availability of cross-examination has been regarded as especially important, touted as "the greatest legal engine ever invented for the discovery of truth."\(^73\)

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70. *Fed. R. Evid.* 801(c).
72. *Id.*
The concern about the risk of unreliable hearsay testimony can also be gleaned from the advisory committee notes dealing with a broad range of exceptions in Federal Rule of Evidence 803, explaining that "under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available." As an example of a situation in which hearsay contains such circumstantial guarantees of trustworthiness, Federal Rule of Evidence 803(4) provides that "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment" are "not excluded by the hearsay rule." The advisory committee notes justify treating these statements as presumptively admissible in spite of their hearsay nature, "in view of the patient's strong motivation to be truthful. . . . The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment." In addition, the Federal Rules of Evidence contain a broad "Residual Exception" in Federal Rule of Evidence 807, which provides that a hearsay statement that is not covered under a specific exception, but that has "equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule." In order for the statement to fit within the Federal Rule of Evidence 807 exception, the court must determine that:

(A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The Federal Rule that classifies some previous statements that were made by nonparty witnesses as nonhearsay is generally compatible with the three requirements for in-court testimony noted by McCormick.

Under Federal Rule of Evidence 801(d)(1), a witness’s prior statements are not hearsay if the following conditions are met:

1. Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant’s testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person.

Because the declarant testifies under oath at the hearing and is subject to cross-examination, the fact finder has some basis to assess the reliability of the statement that the witness is purported to have made earlier.

But, in contrast to the restrictive circumstances under which prior statements of witnesses may be classified as nonhearsay, the Federal Rules more broadly classify previous statements that were made by a party to the litigation as nonhearsay (and thus presumptively admissible) when they are offered by the opposing party. Federal Rule of Evidence 801(d)(2) categorizes a party’s prior statement as nonhearsay under the following circumstances:

2. Admission by party-opponent. The statement is offered against a party and is (A) the party’s own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the existence of a conspiracy.

In addressing committee notes excluded from the admissibility of evidence, the view is that because the same sort of care is required to make a statement as was previously made without showing the matter of the statement to be required to make a statement as was previously made without showing the matter of the statement to be true, the court provides that a witness about which he is to testify.

Judges have found admissions as nonhearsay, theory, that a party’s statements. But unconvincing because conditions for applying the party-opponent’s prior state fails because—at least—has been waived by the court. The rationale justifies the court asserting that unlikely not even have been
sufficient to establish the declarant’s authority under subdivision (C), the
agency or employment relationship and scope thereof under subdivision (D),
or the existence of the conspiracy and the participation therein of the declarant
and the party against whom the statement is offered under subdivision (E). 83

In addressing Federal Rule of Evidence 801(d)(2), the advisory
committee notes state that “[a]dmissions 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.” 84 The conventional
view is that because party admissions are not hearsay, they do not need
the same sort of circumstantial guarantees for trustworthiness that are
required to make hearsay statements admissible. 85 Thus, a statement that
was previously made by a party can be admitted into evidence even
without showing that the party had first-hand knowledge of the subject
matter of the statement. 86 This absence of requiring such knowledge
stands in contrast to Federal Rule of Evidence 602, which generally
provides that a witness must have personal knowledge of the matter
about which he is to testify. 87

Judges have further tried to explain the categorization of party
admissions as nonhearsay by invoking “a kind of estoppel or waiver
theory, that a party should be entitled to rely on his opponent’s
statements.” 88 But justifications based on estoppel or waiver are
unconvincing because the evidentiary rules do not require meeting the
conditions for applying estoppel or waiver before admitting a party-
opponent’s prior statement into evidence. 89 The analogy to waiver also
fails because—at least in a civil case—there is no identifiable right that
has been waived by the party that made the statement. 90 Another
rationale justifies the nonhearsay classification of party statements by
asserting that unlike the typical hearsay situation—where a party might
not even have been present at the time the declarant made the out-of-

83. FED. R. EVID. 801(d)(2).
84. FED. R. EVID. 801(d) advisory committee’s note.
85. MCCORMICK ON EVIDENCE, supra note 71, at § 254, at 180.
86. FED. R. EVID. 801(d) advisory committee’s note.
87. FED. R. EVID. 602.
88. See, e.g., Jewell v. CSX Transp., Inc., 135 F.3d 361, 365 (6th Cir. 1998) (quoting
United States v. DiDomenico, 78 F.3d 294, 303 (7th Cir. 1996)).
89. See Roger Park, The Rationale of Personal Admissions, 21 IND. L. REV. 509,
511 (1988).
90. But in a criminal case, there may be a waiver of the Fifth Amendment right against
self-incrimination if, during custodial interrogation, the suspect speaks after Miranda warnings
have been given. See infra notes 109–13 and accompanying text.
court statement, and would not have an opportunity to cross-examine the declarant—the party cannot object to the absence of an opportunity to cross-examine himself about his own statement.\footnote{McCormick on Evidence, supra note 71, § 254, at 179.} Although that rationale may be satisfactory when applied to statements made by the party himself, “notions that a party cannot object to not being able to cross-examine himself or that he should be punished for inconsistency have little or no application to a party who objects to the admission of the statement of an agent.”\footnote{Park, supra note 89, at 520 n.44.} In addition, in criminal cases, it is unclear whether the declaration of an agent might also trigger concerns arising from the Sixth Amendment right for a criminal defendant “to be confronted with the witnesses against him.”\footnote{U.S. Const. amend. VI. The uncertainty arises from the Supreme Court’s decision in Crawford v. Washington, 541 U.S. 36 (2004). In Crawford, the Court held that prior testimonial statements were not admissible against a criminal defendant unless the declarant is unavailable and the defendant previously had the opportunity to cross-examine the declarant. Id. at 68. Some sources have nevertheless stated that agents’ vicarious admissions are likely to remain admissible. See, e.g., 5 Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence § 802.05(3)(d) (2d ed. 2011), cited in Kastin Graham, Comment, Accomplice Confessions and the Confrontation Clause: Crawford v. Washington Confronts Past Issues with a New Rule, 32 PEPP. L. REV. 315, 367 n.352 (2005).}

A. The Failure of Analogy to Estoppel

Both promissory estoppel and equitable estoppel require a showing of reliance on a party’s statement. As explained in one New York state law treatise, “equitable estoppel involves a misrepresentation of an existing fact, while promissory estoppel concerns a statement of intention regarding future conduct.”\footnote{57 N.Y.Jurisprudence 2d § 49, at 76 (2000).} The Colorado Supreme Court has explained the distinction between promissory estoppel and equitable estoppel in the following terms:

Promissory estoppel is an offensive theory of recovery, or cause of action, providing a remedy for those who rely to their detriment, under certain circumstances, on promises, despite the absence of any mutual agreement by the parties on all the essential terms of a contract. Recovery on a theory of promissory estoppel is incompatible with the existence of an enforceable contract. By contrast, the doctrine of equitable estoppel is not a cause of action at all, but rather a defensive doctrine, which may be invoked “to bar a party
from raising a defense or objection it otherwise would have, or from instituting an action which it is entitled to institute.\footnote{95}

In summary, promissory estoppel can serve as a quasi-contractual cause of action to enforce a promise of future conduct, whereas equitable estoppel can bar denial of reliance-inducing statements of existing fact. The Ohio Supreme Court has observed the policy underlying the doctrine of promissory estoppel, that, “[a] promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.”\footnote{96} Thus, promissory estoppel is “a quasi-contractual or equitable doctrine designed to prevent the harm resulting from the reasonable and detrimental reliance of [a promisee] upon the false representations of his [promisor].”\footnote{97}

Statements on which promissory estoppel are based are not hearsay because the statements about future actions directly affect the legal rights between the parties to the statement. The advisory committee notes specifically indicate that the definition of hearsay in Federal Rule of Evidence 801(c) “exclude[s] from hearsay the entire category of ‘verbal acts’ and ‘verbal parts of an act,’ in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.”\footnote{98} Another example of such verbal acts would be a statement that constitutes slander.\footnote{99} When a defamation plaintiff places a slanderous statement into evidence, he does not assert the truth of the statement, but rather offers the statement to establish that the defendant’s making of the statement was a legally significant action.\footnote{100}

But, unlike the doctrine of promissory estoppel and its underlying policy, Rule 801(d)(2) does not require any showing of reliance upon a party’s previous statement to make the statement admissible.\footnote{101} In contrast with the “verbal acts” exclusion from the definition of hearsay

\footnote{95. Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, LLC, 176 P.3d 737, 741 (Colo. 2007) (citations omitted) (quoting Jablon v. United States, 657 F.2d 1064, 1068 (9th Cir. 1981)).
98. FED. R. EVID. 801(c) advisory committee’s note.
99. Schindler v. Seller, 474 F.3d 1008, 1010 (7th Cir. 2007).
100. See id.
101. See FED. R. EVID. 801(d)(2).}
in the advisory committee notes to Federal Rule of Evidence 801(c), a party-opponent’s previous statement does not need to have affected the legal rights of the parties in order to be admissible.102

Analogizing the evidentiary treatment of party admissions to equitable estoppel similarly fails because placing a party-opponent’s statement into evidence under Federal Rule of Evidence 801(d)(2) does not require a showing of reliance on that statement. Williston explains the policy underlying the doctrine of equitable estoppel as a recognition that:

[A] representation of past or existing fact made to a party who relies upon it reasonably may not thereafter be denied by the party making the representation if permitting the denial would result in injury or damage to the party who so relies. The party making the representation is denied, by virtue of equitable estoppel, the right to plead or prove the existence of facts contrary to the prior representations.103

Thus, equitable estoppel does not apply unless a party has detrimentally relied on a statement that was made by the other party regarding past or present fact. Because Federal Rule of Evidence 801(d)(2) does not require a showing of such reliance to render admissible the party’s prior, out-of-court statement, ideas of estoppel do not provide solid justification for the admissibility of party admissions.

B. The Failure of Analogy to Waiver

Waiver consists of a party’s intentional relinquishment of a known, enforceable right. In distinguishing between waiver and estoppel, the New York Court of Appeals explained that, “[w]hile estoppel requires detriment to the party claiming to have been misled, waiver requires no more than the voluntary and intentional abandonment of a known right which, but for the waiver, would have been enforceable.”104 Further explanation has been provided by the North Carolina Court of Appeals:

Waiver is always based upon an express or implied agreement. There must always be an intention to relinquish a right, advantage or benefit. The intention to waive may be expressed or implied from acts or conduct that

102. See id.

106. Id.
107. Id.
108. Id. at 723.
naturally leads the other party to believe that the right has been intentionally
given up.\textsuperscript{105}

The North Carolina case considered whether there was a waiver of a
contractual clause providing that "time is of the essence" for a sale of
real property.\textsuperscript{106} The defendant vendor argued that the failure to close
the sale of the property by the contractually agreed-upon date canceled
the defendant's obligation to convey the property to the plaintiff
buyer.\textsuperscript{107} The court, however, held that the vendor's statements and
actions "manifest[ed] an intent that closing should occur at some
unspecified later date," and that the vendor had therefore given an
implied waiver of the "time is of the essence" clause because it had not
insisted on closing the sale by the date specified in the contract.\textsuperscript{108}

On the other hand, applying a rationale of waiver to party
admissions fails because in a civil case, there usually does not seem to
be any enforceable right that has been waived by a party's prior
statement. Especially before litigation has arisen, individuals probably
do not consider how their statements might later be produced against
them in court. The attempt to use waiver to justify introducing a party's
previous statement in court appears to say that in making the previous
out-of-court statement, the party showed an intent to abandon the right to
keep the same statement out of later court proceedings, but that appears
to be nonsense, at least in most situations.

The nonsensical nature of generally applying the waiver theory to
all party admissions becomes more apparent when it is contrasted with a
specific category of admissions to which the waiver rationale is directly
applicable—statements that are made by a criminal suspect, after
Miranda warnings are given. In Miranda v. Arizona, the Supreme Court
addressed the importance of the Fifth Amendment privilege against
compelled self-incrimination, in the context of custodial interrogation by
the police.\textsuperscript{109} The Court explained that:

\begin{quote}
The warning of the right to remain silent must be accompanied by the
explanation that anything said can and will be used against the individual in
court. This warning is needed in order to make him aware not only of the
privilege, but also of the consequences of foregoing it. It is only through an

(quoting Fairview Developers, Inc. v. Miller, 652 S.E.2d 365, 368 (N.C. Ct. App. 2007)).
\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 723.
awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest. 110

Moreover, to safeguard the right against compelled self-incrimination, the Court also declared “that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today.” 111 Further, the Court required that the suspect must also be advised that, “if he is indigent a lawyer will be appointed to represent him.” 112 After receiving these warnings, the suspect may waive his rights to silence and to an attorney, but “[p]resuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.” 113 Requiring the use of the Miranda warnings thus aims to ensure that a criminal defendant’s previous statements that were made during police interrogation were knowingly and voluntarily made in waiver of the Fifth Amendment right against self-incrimination.

By contrast, the general use of party admissions does not require identifying any particular right that the party has abandoned. 114 Nor does it require a showing that the party understood that such a right was being waived. 115 For these reasons, the analogy to waiver fails to justify the rule of classifying party admissions as nonhearsay.

C. Vicarious Admissions by Agents

Federal Rule of Evidence 801(d)(2)(D) defines “a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship” as nonhearsay. 116 Most states take the same approach as Federal Rule of Evidence 801(d)(2)(D), treating vicarious admissions by agents as

110. Id. at 469.
111. Id. at 471.
112. Id. at 473.
114. See Fed. R. Evid. 801(d)(2).
115. See id.
nonhearsay.\textsuperscript{117} Some other states take a slightly different approach, treating vicarious admissions by agents as exceptions to the hearsay rule.\textsuperscript{118} Two states provide for the admissibility of vicarious admissions without specifying whether it is classified as nonhearsay or as a hearsay exception.\textsuperscript{119} All of these approaches are substantially the same, resulting in the agents' declarations being presumptively admissible.\textsuperscript{120}

Commenting on the rationale for allowing the declaration of an agent to be admitted against the principal, the Supreme Court observed that "it was thought that a party could not complain of the deprivation of the right to cross-examine himself (or another authorized to speak for him) or to advocate his own, or his agent's, untrustworthiness."\textsuperscript{121} The treatment of an agent’s statement as nonhearsay (or admissible hearsay) "embodies the presumption that a certain class of utterances, despite being out-of-court statements admitted to prove the truth of the matter asserted, may properly be treated as evidence regardless of the reliability problems inherent to hearsay."\textsuperscript{122}

\textsuperscript{117} ALA. R. EVID. 801(d)(2)(D); ALASKA R. EVID. 801(d)(2)(D); ARIZ. R. EVID. 801(d)(2)(D); ARK. R. EVID. 801(d)(2)(iv); COLO. R. EVID. 801(d)(2)(D); DEL. R. EVID. 801(d)(2)(D); IDAHO R. EVID. 801(d)(2)(D); IND. R. EVID. 801(d)(2)(D); IOWA R. EVID. 5.801(d)(2)(D); LA. CODE EVID. ANN. art. 801(D)(3)(a) (2010); ME. R. EVID. 801(d)(2)(D); MASS. R. EVID. 801(d)(2)(D); MICH. R. EVID. 801(d)(2)(D); MINN. R. EVID. 801(d)(2)(D); MISS. R. EVID. 801(d)(2)(D); MONT. R. EVID. 801(d)(2)(D); NEB. REV. STAT. ANN. § 27-801(4)(b)(iv) (West 2010); NEV. REV. STAT. ANN. § 51.035(3)(d) (West 2010); N.H. R. EVID. 801(d)(2)(D); N.M. R. EVID. 11-801(d)(2)(D); N.D. R. EVID. 801(d)(2)(iv); OHIO R. EVID. 801(D)(2)(D); OKLA. STAT. ANN. tit. 12, § 2801(B)(2)(d) (West 2010); OR. REV. STAT. ANN. § 40.450(4)(b)(D) (West 2010); R.I. R. EVID. 801(d)(2)(D); S.C. R. EVID. 801(d)(2)(D); S.D. CODED LAWS § 19-16-3(4) (2010); TEX. R. EVID. 801(e)(2)(D); UTAH R. EVID. 801(d)(2)(D); VT. R. EVID. 801(d)(2)(D); WASH. R. EVID. 801(d)(2)(iv); W.V. R. EVID. 801(d)(2)(D); WIS. STAT. ANN. § 908.01(4)(b)(4) (West 2010); WVU. R. EVID. 801(d)(2)(D).


\textsuperscript{119} GA. CODE ANN. § 24-3-33 (West 2010); KAN. STAT. ANN. § 60-460(i) (West 2010).

\textsuperscript{120} See supra notes 117–19. Several states, however, take the opposite approach, treating agents' vicarious admissions as inadmissible hearsay. See infra notes 125–29 and accompanying text.

\textsuperscript{121} Bourjaily v. United States, 483 U.S. 171, 190 (1987). In making this statement, the Supreme Court noted that the classification of coconspirators' statements as admissible (under Federal Rule of Evidence 801(d)(2)(E)) is based on the same rationale for treating statements of an agent as admissible (under Federal Rule of Evidence 801(d)(2)(D)). Id. at 190 n.3.\textsuperscript{122}

\textsuperscript{122} Ben Trachtenberg, Coconspirators, "Coventies," and the Exception Swallowing the Hearsay Rule, 61 HASTINGS L.J. 581, 584 (2010). In making this statement, Trachtenberg pointed out that the classification of coconspirators' statements as admissible under Federal
But this rationale breaks down when the relationship between principal and agent is rather distant and impersonal, such as in a large organization. Employees are agents of their employer when they act within the scope of their employment. The employer’s decision-makers, however, may not know anything that a particular individual employee said at the time the employee made the statement. Therefore, contrary to the reasoning given in the Bourjaily case, a principal might not even have known about the agent’s statement at the time it was made, and so would not have been able to question the declarant at that time. The agent might have left his or her employment after making the out-of-court declaration; in this circumstance, the principal might not be able to locate the now-former agent to appear at the trial or hearing, and thus might be unable to explain or refute the opposing party’s use of the declaration if the principal does not independently know about the facts asserted in the purported declaration.

The difficulties presented by an agent’s vicarious admissions are also reflected by a few states that refuse to recognize an agent’s admissions unless the principal authorized the agent to make a statement about the matter. These states’ approach to the admissibility of agents’ statements is equivalent to the treatment of Federal Rule of Evidence 801(d)(2)(C) (“a statement by a person authorized by the party to make a statement concerning the subject”), but not the broader treatment of Federal Rule of Evidence 801(d)(2)(D) (“a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship”). For example, in a slip-and-fall case involving an employee’s declaration that others had previously fallen at the same location where the plaintiff fell, the New York Court of Appeals upheld the exclusion of the declaration, explaining that the hearsay statement of an agent is admissible against his employer under the admissions exception to the hearsay rule only if the making of the statement is an activity within the scope of his authority. Similarly, in a personal injury case involving an automatic door, the New York Appellate Division upheld the trial court’s striking of a store manager’s statement that the plaintiff pulled the handle on a handcart, reasoning that the manager’s statement of fact was not admissible against the plaintiff under the admissions exception.

Rule of Evidence 801(d)(2)(E) is based on the same rationale for treating statements of an agent as admissible under Federal Rule of Evidence 801(d)(2)(D). See, e.g., Restatement (Third) of Agency § 2.04 (2006) (discussing respondent superior liability in tort that employers may incur for the actions of their employees).

123. See, e.g., Bourjaily, 483 U.S. at 190.
124. Bourjaily, 483 U.S. at 190.
130. CONN. CODE ENG. § 52-567c.
132. See Barr v. S.W. Conn. agent’s statements may be
of a store manager’s declaration that “the door is still not working.”  

The appellate court explained that a “statement by an agent who has no authority to speak for the principal does not fall within the ‘speaking agent’ exception to the rule against hearsay even where the agent was authorized to act in the matter to which [the] declaration relates.”  New York’s approach to the matter thus treats “vicarious admissions” as hearsay statements that do not fall within an exception for party admissions.

Similarly, although section 8-3(1) of Connecticut’s Code of Evidence establishes that statements by a party-opponent are not excluded by the hearsay rule, that section does not include statements of an agent unless—as provided in subsection 8-3(1)(C)—the agent was “authorized by the party to make a statement concerning the subject.”  Connecticut courts have therefore noted that, “[t]he mere existence of an employment relationship without more does not render statements of an employee admissible against an employer.  Before evidence can be admitted to show what an agent said, it must be established that the agent was authorized by the principal to make an admission.”

California evidentiary practice also requires that an agent be authorized to speak for the principal in order for the agent’s declaration to be admissible against the principal: “No person can be bound by the declarations of another who is not his or her agent and not expressly or by implication authorized to make them.”  Virginia courts similarly appear to require that in order for an agent’s hearsay declaration to be admissible against the principal, the agent must have been authorized to make statements for the principal.

129. Id. (alteration in original) (quoting Simpson v. N.Y. City Transit Auth., 724 N.Y.S.2d 196, 196 (App. Div. 2001)).
130. CONN. CODE EVID. § 8-3(1), § 8-3(1)(C).
132. 31 CAL. JURISPRUDENCE 3D EVIDENCE § 268 (citing Flickinger v. Wrenn Inv. Co., 155 P. 627 (Cal. 1916)); see also CAL. EVID. CODE § 1220 (admission by party himself); CAL. EVID. CODE § 1222 (vicarious admission by agent whom the party authorized to make a statement), cited in L.A. Cnty. Flood Control Dist. v. Mindlin, 165 Cal. Rptr. 233, 242 (Ct. App. 1980).
133. See Barr v. S.W. Rodgers Co., Inc., 537 S.E.2d 620, 624 (Va. Ct. App. 2000) (“[A]n agent’s statements may be admitted against his or her principal if the agent made the
Moreover, additional complications arise when the agency relationship has subsequently been terminated. As one commentator, Paul Rice, has noted, “because the theory of the common law admissions exception (now excluded from the definition of hearsay) is that we each speak at our own risk, and must account for our own prior statements, vicarious admissions of former employees stretch that theory to its breaking point.”

Rice concluded that “[p]erhaps such statements should only be admissible as vicarious admissions if the proponent calls the former employee as a witness or demonstrates that the former employee is either unavailable or is available to the party against whom it is offered.”

This approach—requiring the party that offers the declaration to either produce the declarant at the hearing or to show that the declarant is unavailable—apparently urges that vicarious “admissions” be treated as witnesses’ prior statements under Federal Rule of Evidence 801(d)(1), or urges taking a step toward applying the doctrine of hearsay exceptions for unavailable declarants under Federal Rule of Evidence 804.

### IV. HEARSAY, PRIOR STATEMENTS, AND PARTY ADMISSIONS: A NARRATIVE VIEW

As explained in Part II of this Article, a narrative function of cross-examination is to test a witness’s statements by comparing them to extrinsic narratives that the cross-examining lawyer may raise. Such comparison provides context for understanding the facts that the witness reports. But testimony about a previous statement complicates the situation because it presents embedded narratives: one narrative (such

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statements while acting within the scope of employment and the agent had authority to make such statements on behalf of the principal.”).


135. Id.

136. Federal Rule of Evidence 804(a) defines when a declarant is unavailable to testify as a witness. FED. R. EVID. 804(a). Federal Rule of Evidence 804(b) establishes that when a declarant is unavailable to testify, then that person’s previous statement may be treated as an exception to the hearsay rule if the statement was given in testimony at a previous hearing, or if the declarant made the statement under belief of imminent death, or if the statement was against the declarant’s interest at the time it was made, or if the statement was one of personal or family history (such as marriage, divorce, or adoption), or if the statement is offered against a party whose wrongdoing has intentionally made the declarant unavailable to testify. FED. R. EVID. 804(b).

137. For a description of embedded narratives in literary texts, see MIKE BAL, NARRATOLOGY: INTRODUCTION TO THE THEORY OF NARRATIVE 52-60 (Christine Van

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as a hearth in the court with a warm subject to which she is at great context in the narrative.

The prior vicarious party admitted statements does not require admissions: the difficult undertaking “unreliable” compared with the narrator’s veracity, ignorance, or

In dealing toward present reforming FED. vicarious statements 801(d)(2)(D) statements of 801(d)(1). For hearing and the context for the motivation in circumstances that has a bearing.

By contrast
as a hearsay declaration) is presented within another narrative (the in-court witness’s testimony). If the previous statement’s declarant is not subject to cross-examination, then the fact finders at the trial or hearing are at greater risk of being unable (or at least less able) to establish the context in which the previous statement was made—thus compromising the narrative coherence and integrity for that story-thread of evidence.

The risk is amplified in the current practice of dealing with vicarious party “admissions” under rules like Federal Rule of Evidence 801(d)(2)(D). As noted in Part III of this Article, unlike the treatment of statements that are categorized as hearsay, Federal Rule of Evidence 801 does not require circumstantial guarantees of trustworthiness for party admissions. The absence of such a threshold requirement complicates the difficulty of evaluating vicarious admissions, as the trier of fact is less likely to be able to determine whether the in-court witness is undertaking the role that literary criticism designates as that of an “unreliable narrator.” One law review article has noted that, compared with a broader understanding of events, an unreliable narrator’s version “is compromised due to psychological instability, bias, ignorance, or intentional deception of the audience.”

In dealing with vicarious party admissions, a step may be taken toward preserving the narrative function for cross-examination by reforming Federal Rule of Evidence 801 and similar state rules, so that vicarious statements by an agent under current Federal Rule of Evidence 801(d)(2)(D) will be subject to the same requirements as prior statements of nonparty witnesses under current Federal Rule of Evidence 801(d)(1). By requiring that “[t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement,” context for the statement can be developed—such as the declarant’s motivation in making the statement, the declarant’s memory of other circumstances that are associated with the statement, or anything else that has a bearing on the declaration’s credibility.

By contrast, under present practice, a witness to whom a declaration

Boheemans trans., 3d ed. 2009). As an example, Bal explains that “the story cycle of the Arabian Nights stories” presents a situation of multiple narratives embedded within a larger, overarching narrative: “The primary narrative presents the story of Scheherazade, threatened with death by her husband, the king. Only if she succeeds in fascinating him with her stories will she survive the night, night after night. Every night she tells a story; in that story new stories are embedded . . .?” Id. at 53.

140. FED. R. EVID. 801(d)(1).
has been made might not know about the facts bearing on many of these factors that affect the credibility of the declaration. Consequently, the witness could testify as to the declaration under Federal Rule of Evidence 801(d)(2)(D), but probably could not testify as to many of the associated matters due to the personal knowledge requirement of Federal Rule of Evidence 602, which provides that “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”\textsuperscript{141} At worst, even an honest witness who faithfully testifies as to what he heard the declarant say might not recognize when the declarant was speaking ironically—resulting in a complete mismatch between the witness’s report and the declarant’s meaning.\textsuperscript{142}

Equally as important, because of Federal Rule of Evidence 602, the party against whom an agent’s vicarious admission is offered under Federal Rule of Evidence 801(d)(2)(D) will also be barred from disputing that the declarant made the statement, when the employer has no personal knowledge about whether the employee said such a thing or not. This situation is likely to occur when an employer has hundreds, thousands, or tens of thousands of employees. In contrast, other subsections of Federal Rule of Evidence 802(d)(2) are not so problematic. At least in a civil trial, the party reputed to have made the declaration would be available to testify, and thus declarations that are purported to be the party’s own statement (Federal Rule of Evidence 802(d)(2)(A)) or adoptive admission (Federal Rule of Evidence 802(d)(2)(B)) could be explained or disputed by the party’s own testimony.\textsuperscript{143} The party against whom a declaration purportedly made by an agent authorized to make a statement on the subject (Federal Rule

\textsuperscript{141} FED. R. EVID. 602. Thus, “[a]ny question that asks the witness to speculate or guess is improper,” although “greater latitude is given during the examination of expert witnesses.” MAUET, supra note 30, at 443.

\textsuperscript{142} Verbal irony “is a figure of speech in which the intended meaning is other than that which is expressed. It can take the form of mock seriousness, or showering attention on minutiae while ignoring what is important.” Richard Delgado & Jean Stefancic, Scorn, 35 Wm. & MARY L. REV. 1061, 1071 (1994) (footnote omitted). A federal judge has written a humorously ironic commentary on the rules governing admissions by an agent: James M. Rosenbaum, In Defense of Rule 808, Federal Rules of Evidence, 12 GREEN BAG 165 (2009), available at http://www.greenbag.org/v12n2/v12n2_rosenbaum.pdf. The rule that is praised in Judge Rosenbaum’s commentary, Federal Rule of Evidence 808, does not exist.

\textsuperscript{143} In a criminal trial, however, there could be a concern about whether the way that the declaration was obtained violated the defendant’s right against being compelled to incriminate himself. See U.S. CONST. amend. V; see also Miranda v. Arizona, 384 U.S. 436 (1966). This concern would be especially acute if—as an exercise of the Fifth Amendment right—the defendant declined to testify at the trial.

\textsuperscript{144} For a list of exceptions to the rule, see FED. R. EVID. 804(b).
of Evidence 802(d)(2)(C)) is offered could also confirm or deny having authorized the agent to speak for the principal, and presumably would be in a position to correct any misstatement that the agent might have made. The party who is named in a coconspirator admission (Federal Rule of Evidence 801(d)(2)(E)) similarly may confirm or deny the existence or the scope of the alleged role in a conspiracy.

Testing an agent’s vicarious admission as nonhearsay under Federal Rule of Evidence 801(d)(1) rather than Federal Rule of Evidence 801(d)(2) thus preserves the ability to compare the agent’s out-of-court declaration with extrinsic alternative narratives, as in any situation of cross-examination.

Moreover, even if Federal Rule of Evidence 801(d)(1) did not apply—such as in a situation where the declarant is unavailable to testify at the trial or hearing—the agent’s declaration would not necessarily be inadmissible. Instead, the agent’s declaration could be recognized as admissible hearsay if it met the conditions for any of the existing hearsay exceptions, including the broad residual exception in Federal Rule of Evidence 807. Of course, in suggesting that a vicarious admission should be tested for admissibility as a hearsay exception, I argue against the rules of several states that automatically provide hearsay exception status for an agent’s declaration to be admitted against the principal.144

Further, an employer who deliberately dismissed an agent in an effort to make the agent unavailable to testify would face having the agent’s declaration be admitted under the “[f]orfeiture by wrongdoing” exception of Federal Rule of Evidence 804(b)(6).145

In addition, the declarant’s statement would not be hearsay if it were offered for a purpose other than to prove the truth of the matter asserted in the statement. As noted in Part III, the declaration would not be hearsay if it constituted a “verbal act”—a statement that in itself affects the legal relationship between the parties—under the advisory committee notes to Federal Rule of Evidence 801(c). Also, if a declarant subsequently testified in the hearing, then the previous declaration would not be hearsay if offered for the purpose of impeaching the testimony of the declarant-turned-witness, rather than as substantive evidence of the truth of the matter asserted by the declaration.146 Thus, a wide range of

144. For a list of such states, see supra note 118.
145. Federal Rule of Evidence 804(b)(6) provides for admissibility of a hearsay declaration “offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” Fed. R. Evid. 804(b)(6).
146. MCCORMICK ON EVIDENCE, supra note 71, at 137.
alternative justifications for presenting the out-of-court declaration would still be available for legitimate uses of an agent’s declaration that is offered against the principal, because they do not encounter the problems noted at the beginning of this Part.

CONCLUSION

Narrative considerations work well in explaining the operation of some of the rules of evidence. Prohibiting or allowing leading questions is based largely on whose story is being told, that of the witness (on direct examination) or that of the attorney questioning the witness (on cross-examination). The prohibition on “speaking objections” is sometimes based on the need to restrict legal argument to the beginning and end of the courtroom phase of a trial, and at other times based on the need to avoid having an attorney coach a witness during questioning by the opposing attorney (and thus improperly shaping the evidence that is incorporated into the fact finder’s narrative construction of the testimony).

Although conventional justifications for treating party admissions as nonhearsay are unconvincing, narrative considerations show that most of the concerns can be at least partially remedied by the party’s own testimony. But concerns for narrative coherence and narrative integrity also cast doubt on the legitimacy of classifying as nonhearsay (or admissible hearsay) every declaration vicariously made by an agent, subsequently offered as substantive evidence against the principal. Implementing restrictions on the admissibility of such vicarious “admissions”—treating them like statements made by a nonparty witness, or testing them for conformity with existing hearsay exceptions—would preserve the ability to develop the context of the declaration through cross-examination (for nonparty witnesses) or through the demonstration of circumstantial guarantees of trustworthiness (for hearsay exceptions).