To Thine Own Self Be True: Enforcing Candor in Pleading through the Party Admissions Doctrine

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I. A Conflict Between Procedure and Evidence?

Statements of a party, as well as statements of those authorized to speak on a party’s behalf, are generally admissible as evidence against that party. Such statements, or party admissions, are not hearsay. Nor are they objectionable when they are not based on personal knowledge or take the form of an opinion. Reliability-based limits, such as these, are inapplicable because reliability is not the basis for the party admissions doctrine. Instead, the doctrine is a product of the adversarial process. It reflects our respect for free expression and our awareness of the responsibilities that accompany that freedom. In one cogent formulation:

[The party admissions doctrine] is a logical expression of the philosophy of the adversarial system and is closely connected with the
personal freedom and responsibility that are part of a life in a free society: parties bear the lion’s share of responsibility for making or breaking their own cases, and lawsuits are focused inquiries into personal rights and social responsibility. These ideas make it reasonable to say that one cannot claim that his own statement should be excluded because it was not made under oath, or subject to cross-examination, or in view of the trier of fact. In the end, it seems fair to put a party at risk that the trier will accord full evidential force to his own statement unless he comes forward with explanation or counter proof.\(^4\)

If parties are to be trusted to speak, they ought to be considered able to explain.

Statements made by counsel on behalf of a party in the context of pre-trial pleadings are paradigmatic examples of party admissions in that they are made “by a person authorized by the party to make a statement concerning the subject.”\(^5\) Lawyers engaged in civil litigation are not merely authorized to make statements on behalf of their clients, they are hired specifically to do so. Accordingly, the application of the party admissions doctrine to pleadings might appear uncontentious.\(^6\) As noted by the Eighth Circuit, however, “[t]he use of pre-trial pleadings as admissions has been a thorny issue in the law of evidence.”\(^7\)

It has been argued that to apply the party admissions doctrine to certain categories of pleading statements would be to compromise the policies of liberal pleading and amendment embodied in the Federal Rules of Civil Procedure. Specifically, it has been maintained that the admission of such statements can infringe upon the “right” afforded by Federal Rule of Civil Procedure 8(e) to plead hypothetically or in the alternative. I argue, to the contrary, that the very policies underlying a regime of liberal pleading recommend, if not demand, that most such statements be admissible. By excluding party admissions from the category of hearsay, the rules of evidence allow the adversarial system to serve the end, only partially achieved by

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5. FED. R. EVID. 801(d)(2)(C).
6. The more apparent controversial issue is the extent to which pleadings should be given binding effect as judicial admissions rather than merely evidentiary admissions. See Ediberto Roman, “Your Honor What I Meant to Say Was . . .”: A Comparative Analysis of the Judicial and Evidentiary Admissions Doctrines as Applied to Counsel Statements in Pleadings, Open Court, and Memoranda of Law, 22 PEPP. L. REV. 981, 992 (1995). My focus here is solely on the evidentiary use of pleadings.
Federal Rule of Civil Procedure 11, of insuring that the opportunity to plead hypothetically or in the alternative does not operate as an invitation to plead falsely or without basis in fact. I argue that, in this way, the application of the party admissions doctrine to pre-trial pleadings works in conjunction with, and to an extent makes possible, the liberal notice pleading and amendment provisions of the Federal Rules of Civil Procedure 8(e) and 15. Thus, I respond to those who have suggested that liberal pleading rules should serve as reasons for excluding from evidence many factual statements made in the context of pleading.

As I discuss in Part II, much of the thorniness in the case law and commentary stems from an apparent failure to think carefully about what our liberal pleading regime does and does not permit. A comprehensive view of the roles played by Rule 8, Rule 11, and the party admissions doctrine helps to dissipate the conceptual uncertainty giving rise to the exclusion of pleadings from evidence. In this light, I argue that the admissibility of pleadings should turn on the familiar distinction between law and fact. Factual allegations in pre-trial pleadings should be admitted; legal allegations and statements of legal theories should be excluded.

Before considering the merits of applying the distinction between law and fact to the context of the admissibility of pleadings, it is worth addressing the approaches courts have taken with respect to the admissibility of different kinds of pre-trial pleadings. Although they have been far from consistent, courts have generally identified four broad, and often overlapping, categories of pleadings that give rise to questions of admissibility: 1) amended or superseded pleadings; 2) pleadings from prior cases involving the same facts; 3) hypothetical or alternative pleadings; and 4) pleadings in cases involving third party joinder.

A. Amended or Superseded Pleadings

At least one commentator has suggested that pleadings which have been amended or superseded should, to the extent that they are inconsistent with remaining pleadings, be excluded from evidence to protect the liberal amendment policy articulated in Federal Rule of Civil Procedure 15.8 Even that commentator has recognized, how-

ever, that this approach is not "widely recognized." Instead, most courts hold that the mere fact that a pleading has been amended or superseded is not sufficient to give rise to any question as to its admissibility. The Second Circuit made the clearest statement on this matter more than a half century ago:

When a pleading is amended or withdrawn, the superseded portion ceases to be a conclusive judicial admission; but it still remains as a statement once seriously made by an authorized agent, and as such it is competent evidence of the facts stated, though controvertible, like any other extrajudicial admission made by a party or his agent. . . . If the agent made the admission without adequate information, that goes to its weight, not to its admissibility. 9

The Second Circuit has more recently made it clear that this analysis has not been altered by either the Federal Rules of Civil Procedure or the Federal Rules of Evidence. 10 Indeed, the law is quite clear that such pleadings constitute the admissions of a party-opponent and are admissible in the case in which they were originally filed as well as in any subsequent litigation involving that party. 11 In this context, the court observed:

A party . . . cannot advance one version of the facts in its pleadings, conclude that its interests would be better served by a different version, and amend its pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories. 12

Courts are almost universally in accord on this point. A party cannot render a pleading inadmissible merely by amending or withdrawing it. 13

9. See id.
12. See id.
13. Id.
14. See Andrews v. Metro N. Commuter R.R. Co., 882 F.2d 705, 707 (2d Cir. 1989) (holding it was an abuse of discretion for the district court to refuse to admit inconsistency between amended and original complaints); Sunkyong Int'l, Inc. v. Anderson Land & Livestock Co., 828 F.2d 1245, 1249 n.3 (8th Cir. 1987) ("A pleading abandoned or superseded through amendment no longer serves any function in the case, but may be introduced into evidence as the admission of a party.").
B. Pleadings from Prior Cases

If pleadings, though amended or superseded, remain admissible in the trial of the case in which they were filed, statements contained in pleadings from prior cases ought to be similarly admissible. The language of Federal Rule of Evidence 801(d)(2), at least, offers no grounds for objecting to the admission of such statements. Nor does the logic of the rule's application to pleadings. Pleadings from prior cases should remain admissible although they do not "serve any function in the case" because their status as evidentiary admissions is in no way tied to whether they have a role in the current litigation.

Within this framework, however, courts have varied substantially in their willingness to recognize the possibility of unfair prejudice arising out of the admission of pleadings from prior lawsuits. In Vincent v. Louis Marx & Co., the First Circuit reversed a district court's decision to admit pleadings from a prior lawsuit where the district court believed that it lacked discretion to exclude them. The court observed that inconsistent pleadings from prior cases are generally admissible, but held that "the initial decision [regarding the admissibility of prior pleadings] should be left to the discretion of the trial judge under Fed. R. Evid. 403." By contrast, the Sixth Circuit, in Williams v. Union Carbide Corp., appeared reluctant to see the admission of prior pleadings as potentially problematic. The court stated:

[W]e can see no unfair prejudice in the admission of the prior allegations. The hiring of an attorney and the filing of a lawsuit are generally done with considerable thought and care. Absent unauthorized conduct on the part of the attorney, there is nothing unfair about having to explain one's past lawsuits.

Some courts have taken an alternative approach. Instead of adopting a general rule in favor of admissibility, they have held that allegations contained in pleadings from prior lawsuits are admissible only when those allegations are logically inconsistent with positions taken by the pleader in the current litigation. The rationale offered

15. See Sunkyong Int'l, Inc. 828 F.2d at 1249 n.3.
16. See, e.g., Walaschek & Ass'n v. Crow, 733 F.2d 51, 54 (7th Cir. 1984).
17. 874 F.2d 36 (1st Cir. 1989).
18. Id. at 40.
19. 790 F.2d 552 (6th Cir. 1986).
20. Id. at 556.
21. See, e.g., Spinosa v. Int'l Harvester Co., 621 F.2d 1154, 1157 (1st Cir. 1980) (citing
by courts taking this position is that prior pleadings are irrelevant unless offered to impeach the pleader by showing inconsistency.\textsuperscript{22} An inconsistency requirement based on this logic serves as a proxy for Federal Rule of Evidence 403 and, thus, as a criterion for the admission of prior pleadings. As I suggest below, this approach overlooks the possibility that prior pleadings might be relevant not only for impeachment purposes, but also as substantive proof.

Although they have adopted different approaches, courts addressing the admissibility of pleadings from prior cases appear to agree at some level that the key question is one of prejudice versus probative value under Rule 403. What the cases lack, however, is a careful analysis of the nature of the prejudice litigants might face through the introduction of prior pleadings. What one finds instead are conclusory statements such as "there is nothing unfair about having to explain one's past lawsuits,"\textsuperscript{23} on the one hand, or "admission of them would potentially prejudice the jury,"\textsuperscript{24} on the other. As a result, courts not only miss potential sources of relevance, but more fundamentally fail to distinguish between unfair prejudice and legitimate impeachment or substantive use.

C. Hypothetical or Alternative Pleadings

In contrast to pleadings from prior lawsuits which are admitted by some courts only when they show inconsistency, hypothetical or alternative pleadings tend to be excluded when they are inconsistent with positions taken at trial. This is particularly true regarding pleadings which state legal theories, and, in such cases, the more glaring the inconsistency, the more likely the exclusion. The explanation for this phenomenon is that self-conscious inconsistency on the part of the pleader highlights and renders obvious the pleader's intent to make use of the permission granted by Federal Rule of Civil Procedure 8(e) to state multiple claims alternatively or hypothetically "regardless of consistency."\textsuperscript{25} When a party's statements are of a sort expressly permitted by the procedure rules and are obviously intended to give notice of what legal theories the party intends to pursue rather than to allege facts, it has been thought unfair to allow an

\textsuperscript{22} Bellevance v. Nashua Aviation & Supply Co., 104 A.2d 882 (N.H. 1954)).
\textsuperscript{23} See id.
\textsuperscript{24} Williams v. Union Carbide Corp., 790 F.2d 552, 556 (6th Cir. 1986).
\textsuperscript{25} Spinosa, 621 F.2d at 1157 n.2.
opponent to use those statements against that party.

For example, in Oki America, Inc. v. Microtech Int'l, Inc., the Ninth Circuit confronted a case involving three mutually inconsistent allegations. The plaintiff, in response to the defendant's counterclaim, had alleged: "(1) no contract existed, (2) course of dealing and usage of trade permitted it to 'cancel its performance at any time prior to 30 days before shipment date,' and (3) performance was legally impossible." The court held that these pleadings should not be considered evidence in the case:

Such inconsistent pleading is permissible under Fed. R. Civ. P. 8(e)(2). Therefore, as the Fifth Circuit has ruled, "one of two inconsistent pleas cannot be used as evidence in the trial of the other" because a contrary rule "would place a litigant at his peril in exercising the liberal pleading . . . provisions of the Federal Rules." Michael Graham, in his Handbook of Evidence, takes this line of argument a step further and applies it to factual allegations. After acknowledging that amended pleadings and pleadings from prior lawsuits ought to be admissible, Graham makes the following observation regarding alternative or hypothetical pleadings:

Fed. R. Civ. P. 8(e)(2) permits a pleader who is in doubt as to which of two or more statements of fact is true to plead them alternatively or hypothetically, regardless of consistency. When this is done, an admission in one alternative in the pleadings in the case does not nullify a denial in another as a matter of pleading. Since the purpose of alternative pleading is to enable a party to meet the uncertainties of proof, policy considerations demand that alternative pleadings not be admitted either as an admission of a party-opponent or for the purpose of impeachment.

Graham, however, offers no explanation for why "enabling a party to meet the uncertainties of proof" through alternative or hypothetical pleading requires the exclusion from evidence of factual allegations contained in such pleadings. What "policy considerations" demand such exclusion?

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26. 872 F.2d 312 (9th Cir. 1989).
27. Id. at 313.
28. Id. at 314 (quoting Continental Ins. Co. v. Sherman, 439 F.2d 1294, 1298-99 (5th Cir. 1971)).
30. Id.
John Mansfield suggests two such considerations. First, the potential admissibility of inconsistent factual allegations might deter parties from being specific:

A pleader, conscious that his pleadings can be used against him, may take care to keep his allegations as general as possible in order to minimize their probative value. If allegations are kept very general, they may be less useful in providing notice to the opponent of the matters in respect to which he will need to be ready with evidence. Second, Mansfield suggests that the admission of pleading statements may cause parties to forego meritorious claims:

[T]he more important point perhaps is that the admissibility of pleadings against the pleader may affect a party's readiness to plead at all on certain issues and to put before a tribunal for determination, possibly in his favor, contentions in respect to which he does have a reasonable factual basis.

D. Third Party Pleadings

In the context of multi-party litigation, the admissibility of amended, prior, or alternative pleadings is particularly controversial. Courts have frequently excluded pleadings directed towards parties other than the party seeking to make use of the statement. One such situation is that of a third party complaint stating a claim of contingent liability, where the defendant is in effect asserting "there should be no liability here, but if liability is found, it should rest on the shoulders of X." An example would be a car manufacturer who has been sued in strict liability for selling cars with allegedly defective tires. The manufacturer might well make a third party claim of contingent liability against the tire manufacturer. In doing so, a party will hypothetically allege his or her own liability. Courts have precluded opponents from introducing such allegations.

32. Id. at 711.
33. Id. at 711-12.
34. See, e.g., Continental Ins. Co. v. Sherman, 439 F.2d 1294, 1298 (5th Cir. 1971) ("[A]s a necessary exception to the general rule, there is ample authority that one of two inconsistent pleas cannot be used as evidence in the trial of the other. It would seem that this principle would also include inconsistent positions taken in pleadings in a complicated joinder situation, involving, as here, the contingent liability of third parties.").
However, the exclusion of third party pleadings has not been limited to cases involving contingent liability. For example, the Supreme Court of Kansas in *Lytle v. Stearns*, a straightforward negligence action, took a similar position. There, a defendant ambulance company had introduced allegations made by the plaintiff in pleadings against defendants no longer in the case. The court found error in the admission of those since-dismissed pleadings.

Not all courts, however, have agreed that litigants should be precluded from introducing pleadings directed towards third parties. According to the Connecticut Supreme Court, "[while] inconsistent pleading is permitted, it would be an abuse of such permission for the plaintiff to make an assertion in a complaint that he does not reasonably believe to be the truth." This rationale is employed by those courts that do admit third party pleadings and is straightforward. As I argue below, it ought to be applied more generally to pleadings of all sorts.

**II. The Complementary Roles of Procedure and Evidence**

I reject the claim that deference to the procedure rules should cast doubt on the admissibility of factual statements contained in pleadings, whether alternative, hypothetical, or otherwise. I acknowledge that there are circumstances under which the Federal Rules of Evidence properly exclude party statements as a matter of policy in order to protect or facilitate litigation. For example, settlement offers are excluded in order to encourage the resolution of dis-

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36. The potential for unfairness in *Lytle* was highlighted by the fact that the very defendant who made use of the pleadings had compelled the joinder of the third parties against whom those pleadings had been filed. See id. at 1208.
37. See Jelleff v. Braden, 233 F.2d 671, 675-77 (D.C. Cir. 1956) (holding it proper to admit complaint seeking indemnity where retailer claimed manufacturer's garment was flammable); see also Haynes v. Manning, 717 F. Supp. 730, 733 (D. Kan. 1989) (citing Friedman v. Sealy, Inc., 274 F.2d 255, 259 (10th Cir. 1959), which held that admissions in pleadings are admissible, stating that it is not "significant that the representation was made in litigation of a third party") ("In addition, evidence that plaintiffs had asserted claims against other car dealers was admissible because of the abandoned pleadings doctrine. Under this doctrine, earlier abandoned pleadings are admissible evidence as admissions by the plaintiffs.").
38. Dreier v. Upjohn Co., 492 A.2d 164 (Conn. 1985) (holding that admission of plaintiff's since withdrawn complaint against defendant Upjohn on the request of defendant doctor was not reversible error in medical malpractice action).
putes prior to trial. There, it is recognized that parties would be deterred from making honest, but potentially damaging, statements that would facilitate settlement. The question is whether factual statements made in pleadings require the same sort of protection. I argue that the difficulty posed by a liberal pleading regime is not that parties will be deterred from speaking, but that they will speak too readily. Rather than protecting liberal pleading out of concern for the litigation process, perhaps we need to protect the full and fair functioning of the litigation process from the risks inherent in liberal pleading. My argument in a nutshell is as follows.

Legal conclusions or assertions of legal theories may give rise to confusion or prejudice because parties are required to use particular terms of art with technical or legal meanings which neither parties nor fact finders may fully understand. Factual allegations are different. The Federal Rules of Civil Procedure require parties to assert in pleadings no more than is necessary to give notice of claims and defense. Specifically, litigants are not obligated to make detailed factual allegations until they have had a chance to conduct discovery. Moreover, parties are not bound by specific formal or technical requirements and are encouraged to use plain language. In short, parties are permitted to say precisely what they mean and are not required to say more. In addition, pleadings are generally thought to be, or at least ought to be, the product of substantial conscious thought, and are expressly subject to the candor requirements of Rule 11. These characteristics of the pleading regime—freedom of expression, opportunity for deliberation, and an awareness of an obligation to be truthful—make it more, not less, fair to permit, if not require, parties to be confronted with and to explain their own statements.

The freedom allowed for by the liberal pleading rules not only makes it fair to permit parties to be confronted with factual statements in their own pleadings, but also almost demands such confrontation. As commentators have recognized since before the enactment of the Federal Rules Civil Procedure, the major potential difficulty with unconstrained pleading is that parties might use that leeway to interpose baseless allegations, file pleadings intended to harass adversaries, or cause delay. While this difficulty is addressed in part by Rule 11, Rule 11 has yet to prove a sufficient protection

39. See Fed. R. Evid. 408; see also Fed. R. Evid. 409 (excluding offers to pay medical expenses).
against pleading abuses, despite periodic amendments. Accordingly, we must rely on the adversarial process with respect to pleading just as we do with respect to our system of justice generally. The parties themselves are our best line of defense against the abuse of liberal pleading rules. The way they offer that defense is through the well established principle currently embodied in Federal Rule of Evidence 801(d)(2) which states that a party's own statements may be used as evidence against it. Make what factual allegations you choose, says our pleading system, but keep in mind that you may be asked to explain them, says the party admissions doctrine.

Granted, the distinction between law and fact, however familiar, is notoriously difficult to draw with precision. Many statements contained in pleadings will inhabit that substantial grey area between the categories. Factual allegations and legal conclusions will be intermingled. When this is the case, and factual statements cannot be severed from statements of legal theories or legal conclusions, courts need not engage in formalistic hair splitting. Instead, the question of admissibility should turn on the underlying concerns which render the law/fact distinction an appropriate criterion. Does the statement have a technical legal significance which the fact-finder, or the party, might not be able to appreciate fully? If so, it might be unfairly prejudicial to require a party to explain that statement at trial. In answering this question, however, courts should be careful to distinguish unfair prejudice of the sort that Federal Rule of Evidence 403 is designed to prevent, from the fair and appropriate discomfort experienced by litigants forced to explain their own ill-considered or questionably-motivated assertions.

A. Rule 8

Federal Rule of Civil Procedure 8(a) provides that pleadings need not contain detailed factual assertions, but need only contain: 1) an appropriate jurisdictional allegation; 2) "a short and plain statement of the claim showing that the pleader is entitled to relief;" and 3) "a demand for judgment for the relief the pleader seeks."40 Rule 8(e)(2), the specific provision which provides the basis for hypothetical and alternative pleading, is relatively concise and worth quoting in full:

A party may set forth two or more statements of a claim or defense

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40. FED. R. CIV. P. 8(a).
alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.41

At bottom, the purpose and effect of Rule 8 is to reduce the significance of pleading—to shift the focus of litigation from artful pleading to a full and fair determination of the merits. The rule accomplishes this end in at least two related ways. First, it relieves parties of the obligation to assert any more than is necessary to give notice to the opposing party and to provide a framework and starting point for the litigation. Second, it allows parties to state claims and defenses, and make factual assertions, in plain and straightforward language. Parties are neither limited to narrowly specified causes of action nor bound by technical requirements of form and structure. These provisions free parties from the need to elect specific legal theories or make detailed factual allegations before they have had a chance to acquire the information necessary to do so accurately and thoughtfully.42

Initially, what this procedural framework means is that parties who make detailed factual allegations in pleadings do so largely as a matter of choice. Granted, few litigants, and few plaintiffs in particular, take advantage of the invitation contained in Rule 8 to file a “short and plain statement.” Extensive, fact-filled complaints are common. For the purpose of advocacy, plaintiffs choose this approach in an effort to frame the case before the court in the fullest and most favorable light.43 Once a party has chosen, for strategic reasons, to say more than necessary, it hardly seems unfair to require that party to explain those statements at trial.44

41. FED. R. CIV. P. 8(e)(2).
42. These ends are also served by liberal discovery provisions and by the provisions of Federal Rule of Civil Procedure 15, which allow parties to amend pleadings as information becomes available.
43. Parties may also include extensive factual allegations for less legitimate ends. For example, parties may engage in what is sometimes known pejoratively as “shotgun pleading,” whereby one makes as many allegations as possible in the hope that something will hit home.
44. By contrast, where parties are required to make specific allegations before they
For our purposes, however, the essential novelty of the liberal pleading regime inaugurated by the Federal Rules is the availability of alternative or hypothetical pleading, not only as to alternative legal theories, but also as to alternative or inconsistent factual allegations. The intersection of alternative and hypothetical pleading with the party admissions doctrine is perhaps best illustrated by the Eighth Circuit case of *Garman v. Griffin.* There, an eleven-year-old Missouri boy had been run over and killed by a school bus, and his parents, as plaintiffs, sued the driver, alleging that he had failed to keep a proper lookout. On the eve of the statutory limitations period, the plaintiffs also sought to take advantage of Missouri's recently recognized doctrine of strict liability. They brought a claim in strict liability against Superior Bus Sales, Inc., alleging that the bus "was so constructed and its mirrors so positioned that a full and complete view of the area within the path of the bus was not discernable by a person positioned in the driver's seat." Prior to trial, however, the plaintiffs learned that they had sued the wrong bus company. Superior Bus Sales, Inc. had neither manufactured nor sold the bus in question. The plaintiffs then dismissed that claim and proceeded against the bus driver.

At trial, the defendant driver was permitted to introduce the above-quoted portions of the plaintiffs' since-dismissed complaint. The Eighth Circuit found reversible error. The court acknowledged that factual statements contained in pleadings are often admissible, but drew distinctions based on whose conduct those statements concern:

have had an opportunity to conduct discovery, as is the case with claims of fraud under Federal Rule of Civil Procedure 9(b), the possibility of unfairness or prejudice through the subsequent introduction of those allegations increases. This risk is particularly salient in areas such as securities fraud litigation and antitrust conspiracy litigation where common law pleading requirements have extended and broadened the requirements of Rule 9(b) and have, thus, introduced a counter-current to the notice-pleading regime of the Rules generally. See generally Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure,* 86 COLUM. L. REV. 433 (1986).

45. 666 F.2d 1156 (8th Cir. 1981).
46. See id. at 1157.
47. See id. at 1158.
48. Id. at 1157.
49. See id. at 1158.
50. See id.
51. See id. at 1157.
52. See id.
53. See id. at 1160.
When factual allegations in the pleading relate to the conduct of the same defendant who is offering the evidence, the evidence is generally admitted, even though the particular pleading has been abandoned or dismissed. Where a party has made a statement in a pleading about his own conduct which is at variance with his position in the matter being litigated, the evidence is generally admitted.\textsuperscript{54}

The court held, however, that pleadings which relate solely to the conduct of parties no longer in the case should not be admissible.\textsuperscript{55} According to the court:

The use of pleading admissions in situations akin to the case under submission seems to us to be contrary to the spirit of the Federal Rules. Furthermore, it simply does not seem quite fair to these plaintiffs. A pleader in the Federal Courts should not have to forgo a potential claim rather than run the risk of having such a claim used as an admission.\textsuperscript{56}

In his vigorous dissent, Judge Arnold argued not only that the court's holding was inconsistent with prior precedent, but also that the case was wrongly decided on its own terms.\textsuperscript{57} According to Judge Arnold, an allegation that the mirrors precluded the driver from seeing the child "most certainly concerns the driver's conduct."\textsuperscript{58} The dissent further maintained that admitting factual statements of this sort did not infringe on the right to plead in the alternative, and that the question of undue prejudice should be left to the discretion of the trial court under Federal Rule of Evidence 403.\textsuperscript{59}

\textit{Garman} thus provides a context in which to evaluate the law/fact distinction. Did the admission of that pleading by the trial court represent an unfair imposition on the plaintiffs' right to plead hypothetically or in the alternative under Federal Rule of Civil Procedure 8(e)? This is the heart of the matter, and it turns on an interpretation of the "rights" bestowed by Rule 8(e). What, precisely, are the liberal pleading provisions in the Federal Rules designed to permit?

It is perhaps most important to be explicit about what the rules do \textit{not} permit. Specifically, Rule 8(e), and the regime of liberal pleading ushered in by the Federal Rules generally, do not allow par-

\begin{itemize}
\item\textsuperscript{54} \textit{Id.} at 1158 (citations omitted).
\item\textsuperscript{55} \textit{See id.}
\item\textsuperscript{56} \textit{Id.} at 1160.
\item\textsuperscript{57} \textit{See id.}
\item\textsuperscript{58} \textit{Id.} at 1162 (Arnold, J., dissenting).
\item\textsuperscript{59} \textit{See id.}
\end{itemize}
ties to make factual allegations which they do not reasonably believe to be true. Any doubt on this point is eliminated by the explicit reference in Rule 8(e) to Rule 11.⁶⁰ Rule 11 does not permit a party to make an allegation which he or she merely has no reason to believe is false on the chance that discovery will provide some support. While a denial may be based on "a lack of information or belief,"⁶¹ an affirmative allegation requires more. A party must at least have reason to believe that factual allegations "are likely to have evidentiary support."⁶² One might attempt a pinched and formalistic reading of the phrase "evidentiary support" and argue that the obligations of Rule 11(b)(3) are met by a party's reasonable belief that, by the time of trial, he or she is likely to be able to find someone willing to perjure himself in support of the allegation in question. The only reasonable interpretation, however, is that a party, before making an allegation, must have some reason to believe that it might actually be true.

This interpretation is borne out when one contrasts our modern pleading regime with the common law and code pleading systems it replaced and when one considers the concerns which motivated and accompanied the drafting and passage of the Federal Rules of Civil Procedure. Under the common law and code pleading systems in existence prior to the adoption of the Federal Rules, provisions varied, and courts were less than completely consistent, but certain pleading requirements were emblematic. First, pleaders were subject

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⁶⁰ The relevant portions of Rule 11, in its current formulation, provide:
(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
(1) it is not being presented for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation;
(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or if specifically so identified, are reasonably based on a lack of information or belief.

⁶¹ FED. R. CIV. P. 11(b)(4).

⁶² FED. R. CIV. P. 11(b)(3).
to numerous and varied formal requirements. Although the highly restrictive pleading forms of an earlier era had been liberalized to a substantial extent by the turn of the century, a claim could still be subject to dismissal if it did not fit squarely within a recognized cause of action. Second, alternative or hypothetical pleading was generally not permitted.\(^{63}\) Claims and defenses were required to be affirmatively stated and mutually consistent.\(^{64}\) The aim was to provide certainty in pleadings so that parties would know precisely what claims they were confronting.\(^{65}\) Some courts held that a "party may plead in the alternative, but that if he does so, he will be made to adopt and stand by the weakest of the alternatives."\(^{66}\)

Courts in the early part of the century began to recognize that this system often forced a premature choice of legal theories. In 1928, Charles Clark, who was to play a substantial role in drafting the Federal Rules of Civil Procedure enacted a decade later, noted a tendency on the part of courts to enforce the consistency requirement less strictly.\(^{67}\) He went on to question the value of the requirement itself:

> It is doubtful if the rule [requiring consistency of legal theories as well as factual allegations] achieves any practically desirable result. At most it is only an attempt to compel the pleader to be truthful, which is better achieved, so far as it can be done, by a summary motion to strike the pleading as false.\(^{68}\)

In place of the consistency rule used in most jurisdictions at the time, Clark advocated allowing parties to state as many claims or defenses as they could, so long as those claims or defenses were truthful. Regarding defendants, for example, Clark argued that "[t]he defendant should be entitled to rely upon as many different defenses as he honestly has."\(^{69}\) The single limitation Clark proposed was "that we ought to enforce [a requirement] against [the pleader] . . . that he be as truthful as his knowledge of the circumstances will permit."\(^{70}\)

\(^{64}\) See Charles E. Clark, Handbook of Code Pleading (1928).
\(^{65}\) See Wright & Miller, supra note 63, at § 1282.
\(^{66}\) Gregory Hankin, Alternative and Hypothetical Pleadings, 33 Yale L.J. 365, 374 (1924).
\(^{67}\) See Clark, supra note 64, at 432.
\(^{68}\) Id.
\(^{69}\) Id. at 434.
\(^{70}\) Id.
This approach, including its emphasis on allowing freedom in pleading while enforcing a requirement of candor, carried over into Clark's work on the Federal Rules.

Given the explicit reference in Rule 8(e) to Rule 11, and given the history and context of the development of the Federal Rules, the right to plead hypothetically or in the alternative cannot be interpreted as a privilege to make false or baseless claims. On the other hand, one possible reading of Rule 11 may suggest an internal inconsistency in the procedural rules. If we read the Rule 11 requirement that allegations must be "likely to have evidentiary support" as meaning that the allegations must be "probably true," we have a problem. That is, Rule 11 would seem to preclude what Rule 8(e) expressly permits. After all, how can one reasonably believe in the truth of two logically inconsistent factual assertions? Rule 11, in its current formulation, provides a resolution. While a party cannot reasonably believe that two inconsistent statements are both actually true, a party can reasonably believe that either of two inconsistent allegations might be true. One can be honestly uncertain. The distinction may seem fine, but it is vital and is highlighted by Rule 11 itself. Rule 11(b)(3) makes clear that if a party is asserting the latter—that he or she has reason to believe that an allegation might be true but presently lacks sufficient information to be sure—the allegation must be "specifically so identified."

In essence, this is what it means to plead alternatively or hypothetically but not falsely or without basis in fact. Rule 8(e) tells plaintiffs that a lack of certainty regarding specific details should not preclude them from bringing the claims which will afford them the discovery opportunities necessary to uncover the facts. The same rule tells defendants that a lack of certainty regarding details should not prevent them from asserting defenses necessary to protect their rights while they pursue discovery of their own. Rule 11 then clarifies. Parties must at least have some basis for believing the claims and defenses they assert, and, equally important, they must not pretend to have more certainty with respect to their claims than they actually possess. Together, the rules permit parties to be honestly uncertain, but not dishonestly certain.

71. See FED. R. CIV. P. 8(e)(2).
72. FED. R. CIV. P. 11(b)(3).
B. Legal Theories

This understanding of the pleading rules suggests that pleadings, which must always have some basis in fact or honest uncertainty, should be excluded from evidence where circumstances suggest that the party against whom the pleadings are offered will be unfairly prejudiced, as opposed to fairly and legitimately called upon to explain his or her own statements. Unfair prejudice of this sort is most likely to exist where an opponent seeks to make use of an allegation containing technical, legal terminology with a precise meaning or legal significance that might not be appreciated by the fact-finder. A paradigmatic example is the third party contingent liability claim in which a party hypothetically asserts his or her own liability. Since that party never intended to assert that he or she is actually liable, he or she can neither be fairly impeached for a willingness to make baseless claims nor fairly construed as offering substantive support for the facts at issue. The only use for such an allegation is a prejudicial use—an attempt by the opponent to take advantage of the fact-finder's potential inability to appreciate the special, limited legal significance of contingent allegations.

A similar situation arises when alternative or inconsistent legal theories are phrased in ways which make them look like inconsistent factual assertions. For example, a contract plaintiff might allege in separate counts that: 1) the parties had a contract which the defendant has breached; and 2) because of fraud in the inducement, no valid contract existed. Legal allegations of this sort are best understood as announcements of an intention on the part of the pleader to pursue a particular form of claim or defense. Thus, the allegation "because of fraud in the inducement, no valid contract existed," should be read as "one of the legal theories under which the facts of this case entitle this party to recover is that which the law of contracts knows as fraud in the inducement." As one commentator has observed, "pleadings of this nature are directed primarily to giving notice and lack the essential character of an admission."73

The fact/law distinction in this context is thus neither formal nor technical, but rather substantive and functional. Factual assertions and legal allegations play distinct roles in the adversarial process. A party is permitted to make inconsistent factual allegations so that he or she can gain access to the discovery necessary to learn what the

73. STRONG, supra note 8, at § 257.
facts really are. As a result, by the time of the trial, the party can fairly be asked to report what has been learned. The fact-finder deserves to know why one allegation rather than another should be believed. Inconsistent legal allegations, however, serve a different end. They assert not that the state of the world is "X" or "Y," but that a given state of the world should be understood as fitting within the legal definition "X" or "Y." Not only might juries find it difficult to appreciate this distinction, but parties themselves will be hard pressed to explain it. As observed by the Supreme Court of Kansas, "clients are rarely in a position to explain the legal theories and strategies chosen by their attorney." 74

Moreover, the fact-finder is not asked to decide what legal theories might appropriately be applied to a given set of facts. Therefore, when a jury is presented with a legal allegation which sounds like a factual assertion—e.g., "there was no contract"—they can only be expected to put it to work in the task they have been given, determining the facts. They can make use of a legal assertion only by misunderstanding it as an assertion about the state of the world. The conclusions they draw from this misunderstanding, whether regarding the credibility of the party or the facts of the case, are thus improper and potentially prejudicial. In this sense, the exclusion of legal allegations under Federal Rule of Evidence 403 is necessary not to protect the freedom of expression provided for by liberal pleading rules, but rather because that freedom is not, and can never be, complete. While factual assertions can be stated in plain language, legal conclusions are by nature formal or technical. Parties are forced to use particular terms of art, despite the potential for confusion or prejudice, so that the court can perform its role of fitting facts into the formal framework of the law. 75

C. Factual Allegations

A party who has conformed with Rule 11, as incorporated into


75. Recognizing the significance of the roles played by the court and the fact finder suggests an alternative method of excluding legal conclusions contained in pleadings. Courts could apply the general bar against testimony stating legal conclusions to party admissions. Given, however, that most of the limitations placed on witness testimony are not applicable to party admissions, Federal Rule of Evidence 403 provides a more satisfactory and doctrinally consistent foundation upon which to ground the law/fact distinction in this context.
Rule 8(e), will almost never face undue prejudice when confronted at trial with the factual allegations contained in his or her own pleadings. Put differently, the potential introduction of factual allegations contained in pleadings will almost never burden the legitimate exercise of alternative or hypothetical pleading under Rule 8(e). The parties with most reason to fear being confronted with their own pleadings are those who have misused the liberal pleading rules by introducing baseless claims or by pretending to have a level of certainty they did not possess.

One way to test this claim is to ask whether one can envision a set of circumstances under which a party would be dissuaded from making a legitimate and necessary hypothetical or alternative factual allegation out of fear of being confronted with that allegation at trial. I should be explicit about the scope of my claim. By "legitimate," I mean in conformity with Rule 11(b). By "necessary," I mean needed in order to state a claim or defense while pursuing the discovery that the party requires in order to proceed with certainty. If a party can state a claim or assert a defense and gain access to discovery without making a specific, yet unsupported factual allegation, there is little reason to compromise a longstanding principle of evidence law in an effort to protect that party's right to make that specific allegation prematurely.

In this context, I do not share John Mansfield's concern over the possibility that the potential introduction of pleadings might deter parties from being as specific as possible. The very purpose of a liberal notice-pleading regime is to defer specificity until after discovery when parties have had an opportunity to gather information. We forego some certainty in the opening phases of litigation in favor of rationality and fairness in the process as a whole. The absence of an obligation to be prematurely specific also means that Mansfield's more serious concern—that parties may forego legitimate claims—is misplaced. We need not fear that the admissibility of factual allegations contained in pleadings will deter parties from pursuing meritorious claims because parties need make so few such allegations in order to preserve those claims.

In Garman v. Griffin, recall that the defense counsel introduced plaintiffs' withdrawn allegation that the mirrors on the bus were "so positioned that a full and complete view of the area within the path of

76. See Mansfield, supra note 31, at 711.
77. See id. at 711-12.
the bus was not discernable by a person positioned in the driver's seat." Note that plaintiffs arguably need not have been this specific to state a claim and obtain discovery. Note also that, if this complaint were filed today under the post-1993 version of Rule 11, assuming that plaintiffs had not inspected the bus or conducted any significant investigation prior to filing the complaint, some form of qualifier along the lines of "subject to further investigation" would arguably be required. Even given that they failed to qualify their allegations, however, no undue prejudice needed accompany the introduction of that pleading by the defendant bus driver at trial.

Consider defense counsel's goals in introducing the pleading. The aim was either to gain substantive support for the defense's theory that poorly positioned mirrors caused the accident, or to impeach the plaintiffs by showing that they are willing to say anything in an effort to recover damages. Plaintiff's counsel, however, should have been able to insure that neither end was met. Consider the following hypothetical re-direct examination:

PLAINTIFF'S COUNSEL (ON RE-DIRECT): Ms. Garman, defense counsel read a statement to the effect that defective mirrors were the cause of this accident, do you recall that?

MS. GARMAN: Yes I do.

PLAINTIFF'S COUNSEL: Did you at any time have reason to believe that might be the case—that defective mirrors were the real cause of the accident?

MS. GARMAN: I did. That's what the driver told the police. He told the police that he couldn't get a full view. [Or whatever reason there was for believing that the bus might actually be defective.]

PLAINTIFF'S COUNSEL: Do you now believe that was true—that the defective position of the mirrors caused the accident?

MS. GARMAN: No, I do not. It turns out there was nothing wrong with the mirrors. That's why I'm suing the driver and not the bus company.

Plaintiffs would hardly have been prejudiced by this exchange. More to the point, it is hard to imagine that the possibility of this sort of exchange would dissuade them from making their initial allegation against the bus company, assuming they had some reason to believe

78. 666 F.2d 1156, 1157 (8th Cir. 1981).
79. See FED. R. CIV. P. 11. Rule 11(b)(3) requires that factual allegations likely to have evidentiary support only after further investigation must be "specifically so identified." FED. R. CIV. P. 11(b)(3).
that the bus might actually have been defective.

The parties who will be disconcerted by the introduction of the factual statements in their own pleadings are those who have difficulty answering the two key questions put to Ms. Garman in this hypothetical re-direct. If a party did not have a reason to believe that the assertion in question might actually be true, then that party will appear before the fact-finder as one who is willing to make baseless allegations. Given that Rule 8(e) does not permit parties to violate Rule 11 in this fashion, this use of Federal Rule of Evidence 801(d)(2) does not constitute unfair prejudice but legitimate impeachment. Alternatively, if the party did have some basis for believing that the assertion might be true, it is relevant as substantive proof of what it asserts.

The plaintiffs in Garman, while no doubt damaged by the introduction of the statement, were not unfairly prejudiced. Although the opinion does not give a complete sense of the courtroom dynamic, one of two things must have been true. Either the plaintiffs' allegation conformed with Rule 11 or it did not. If the plaintiffs had no legitimate basis for believing that the mirrors on the bus were positioned as they claimed, then they were caught in a violation of Rule 11 and were legitimately impeached for their willingness to file a baseless claim. If, on the other hand, the plaintiffs did have some reason for believing that the bus provided the driver with an inadequate view, then the defendant was well within his rights to introduce that statement for whatever it was worth as substantive evidence of the fact.

The court makes much of the fact that the plaintiffs filed their claim against the bus company at the eleventh hour in an effort to beat the limitations period. This suggests a potentially troubling consequence of admitting all factual statements. What of plaintiffs who, like those in Garman, appear to have been forced to make allegations before they have any opportunity at all to conduct an investigation? Might not such parties be unfairly burdened by the introduction of such statements? Might they not be unfairly inhibited, by the anticipation of such introduction, from exercising their rights under Rule 8(e) to file claims necessary to preserve their rights?

Initially, I acknowledge that prejudice might arise through the introduction of a statement which a party was truly forced to make, in the sense that the statement was involuntary, or never intended as an

79. See Garman, 666 F.2d at 1158.
For example, were an attorney to act in bad faith and make a statement against his or her own client's wishes, it could be prejudicial to require the client to explain that statement at trial. Plaintiffs in the position of those in Garman, however, are not "forced" to make factual allegations. Granted, if the Garman plaintiffs had not made the allegation prior to the expiration of the limitations period, they would have lost the ability to do so. This is as it should be. The purpose of limitations statutes is to provide repose to potential defendants by putting potential plaintiffs in this very position. What a limitations statute says to potential plaintiffs, in conjunction with Rule 11, is the following: If, by the end of the allotted time period, you do not have a reasonable basis for believing that a given potential defendant might actually be liable, you cannot sue that potential defendant. In short, Rule 11 does not permit a party to toll a limitations statute by filing a baseless claim or making baseless factual allegations.

To the extent that the allegations at issue in Garman did have some basis in fact and, thus, did not violate Rule 11, the defendant may have been seeking not to impeach the plaintiffs but rather to use their statements to bolster his own defense. The plaintiffs in Garman may well have been unable to counter this substantive use of their own statement because they had no good reason for retracting it. They had a reason for withdrawing the pleading—the dismissal of the claim—but evidently had no explanation for why their former statement should be disregarded. They withdrew the claim not because they had acquired additional information suggesting the allegations concerning the mirror were incorrect, but because they had sued the wrong defendant. They retracted the allegation not because it proved wrong, but because it proved unnecessary and inconvenient.

Also, the possibility that an opponent could make legitimate substantive use of a party's statement in this way is apparently dismissed or overlooked by those courts which hold that factual statements contained in prior or withdrawn pleadings should be admitted only when they are inconsistent with positions taken by the pleader at trial. By focusing solely on the impeachment value of inconsistent factual pleadings, these courts appear to reject the possibility that

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81. As noted, one of the reasons legal allegations are potentially prejudicial is that parties are forced to use specific words and phrases despite the potential for confusion or prejudice.

82. See, e.g., Spinosa v. Int'l Harvester Co., 621 F.2d 1154 (1st Cir. 1980).
such pleadings might be relevant simply as proof of what they assert. Underlying this approach may be a sense that it is somehow unfair or prejudicial to allow a party's own allegations to be used against him or her in this fashion. This paternalism, however, runs counter to the autonomy and free expression concerns which form the basis for the party admissions doctrine.

**Conclusion**

One might draw an analogy between the freedom of pleading provided by the procedure rules and the freedom of speech protected by the First Amendment. We do not consider it an infringement on the First Amendment when an individual is confronted with or forced to explain his or her statements. Nor do we worry that freedom of the press might be inhibited by journalists' knowledge that some of what they say may ultimately provide support for positions other than their own. To the contrary, it is in these ways that freedom of the press produces its finest benefits to society. Without making any attempt to rehearse the case for free speech, we can recognize the extent to which the benefits of free expression flow from vigorous debate between citizens, each of whom is likely to have valuable but partial information and insights. We rely on adversaries to make use of, and put into context, information provided by those with whom they debate. We hope that participants in public discourse will not abuse the right of free expression, but we recognize the likely inefficacy of rule-based attempts to control speech. Short of defamation, Rule 11 has no counterpart in the court of public opinion. Thus, it is not only fair, but it is vital, that citizens be permitted and encouraged to keep one another honest.

What is true of the broader marketplace of ideas applies as well to a regime of civil justice that has chosen to apply the market principle to the resolution of disputes. If the adversarial process is to function as a method of fact-finding, parties must be free to speak. But with that freedom comes the potential for abuse. While Rule 11 might be more palatable than would be an attempt to codify and enforce speech regulations outside the sphere of litigation, we cannot

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83. It is worth noting that impeachment, as a non-hearsay use of statements, would be permissible even absent Federal Rule of Evidence 801(d)(2) so long as the party testifies at trial. A hearsay exclusion is necessary only where parties seek to offer out of court statements as proof of what they assert. Rule 801(d)(2), if it is to apply, must be seen as allowing substantive use.
rely on courts with limited resources to enforce the obligations of candor and legitimate motives codified in that rule. Rule 11 lays down the law, but the parties themselves must be trusted to enforce it.

One potentially troubling aspect of allowing the introduction of pleadings in aid of this enforcement is that many clients may have no idea why their pleadings contain, or did contain prior to amendment, certain factual allegations. The admission of pleadings seems to punish clients for the sins of their lawyers. At one level, this is a more general, and largely unavoidable, consequence of any system in which people act through agents. Where people speak, act, and hope to benefit through agents, they can hardly be permitted to disclaim at will their agents' words and actions. More fundamentally, however, it may be the case that not all lawyers are created equal and that some people can afford more expert representation. In this light, it might be desirable to reduce the extent to which outcomes are determined by differences in lawyering skills. This is precisely the purpose of the pleading rules.

Recall that Rule 8, in particular, is intended to make civil litigation less of a technical chess match and more of a forum for the fair and open resolution of disputes. It does so by relegating pleading to the function of notice-giving and issue-framing. Deserving litigants should not be defeated by superior tacticians before they have had a chance to investigate and build a case. Outcomes should be determined by an open adversarial process, rather than by a contest of artful pleading. We gain little, however, if the gamesmanship of technical pleading is merely replaced by a new game—a game of harassment, delay, or shotgun pleading. Our liberal pleading regime, combined with the party admissions doctrine, represents a decision to allow the adversarial process to deal with this problem. We forego the dubious protections of technical pleading requirements in favor

There is certainly no merit to the claim that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in this action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

Id. (citations omitted).
of the heartier discipline of the marketplace. Parties are trusted not only to ferret out baseless claims, but also to deter and sanction abuses by holding their adversaries accountable for what they have said and done. It would be ironic if Rule 8, by providing a rationale for excluding party admissions set forth in pleadings and for limiting the ability of litigants to keep each other honest as a result, were to serve as a shield for the gamesmanship it aims to prevent.