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Rival Claims to "Truth"

by
ELEANOR SWIFT*

Professor Sherman J. Clark asserts in his article *To Thine Own Self Be True: Enforcing Candor in Pleading Through the Party Admissions Doctrine*[1] that factual statements made in a party's prior pleadings—whether amended or superseded, from prior cases involving the same facts, hypothetical or alternative, or involving third party joinder—should be admissible in on-going litigation against that party, subject only to the general requirements of Federal Rules of Evidence 401, 402, and 403. And why not? As we know, such prior pleadings are hearsay when offered to prove the truth of the factual statements made. But, Federal Rule of Evidence 801(d)(2) exempts from the ban on hearsay a party's own statements that are offered against that party. And this exemption includes, as Professor Clark points out, statements made by a party's attorney, who is an authorized agent.[2] So it seems unremarkable that prior pleadings should be admissible against the pleading party, if relevant and not excluded under Federal Rule of Evidence 403. And most courts agree, according to Professor Clark.[3]

Yet, respected commentators assert the opposite—that factual statements made by a party in prior pleadings should *not* be admissible against that party at trial.[4] These commentators claim that the specter of admissibility deters parties from pleading all of their

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1. Sherman J. Clark, *To Thine Own Self Be True: Enforcing Candor in Pleading Through the Party Admissions Doctrine,* 49 HASTINGS L.J. 565 (1998).

2. *See id.* at 566.

3. As described by Professor Clark, some courts acknowledge that a trial judge has discretion to exclude a party's prior pleadings under Rule 403. Clark, *supra* note 1, at 569-70. Judicial concern about the unfair prejudice that justifies exclusion is not, however, well-defined. Professor Clark supports the application of Rule 403 to the admission question. *See id.* at 583. He proposes exclusion when the allegations are statements of legal theories rather than statements of fact. *See id.* at 567. He argues that "unfair prejudice" exists when an allegation contains "technical, legal terminology with a precise meaning or legal significance might not be appreciated by the fact-finder." *Id.* at 582. This risk would be better analyzed under Rule 403 as "misleading the jury," as I discuss *infra* Part VI.

4. *See* MCCORMICK ON EVIDENCE ACTIVITY OF PARTY § 257 (John W. Strong ed., 4th ed. 1992); MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801.26 (3d ed. 1991); John H. Mansfield, *Evidential Use of Litigation*, 43 SYRACUSE L. REV. 695, 701-02, 707-16 (1992).

possibly meritorious claims—including hypothetical and alternative claims, as permitted under the liberal pleading regime of Federal Rule of Civil Procedure 8(e).[5] The purposes of litigation would be better served, they believe, by a bright line rule of exclusion that protects parties from use at trial of any damaging assertions of fact made previously by them in formal pleadings.

This comment focuses on the dispute between Professor Clark and those who advocate a wholesale bar against the admission of factual statements in prior pleadings. It briefly explores how we might think about choosing between these conflicting positions. It poses questions that can be applied to evaluating a variety of disputes about evidence rules that involve competing claims between "truth" and its rivals.

I. What Are the Rival Claims?

Professor Clark asserts that the admission of prior pleadings will serve the value of "truth" in the adversary system. This is not, it seems, because he thinks that admitting prior pleadings will provide information to the factfinder that increases the rationality of its decision. Indeed, Professor Clark appears to eschew any reliability-based argument for admission.[6] Rather, he believes that admission of prior pleadings will serve truth because it will improve parties' adherence to the requirements of "honest pleading" under Federal Rule of Civil Procedure 11.[7] It will deter parties from pleading practices that ill serve our justice system, including the pleading of "baseless allegations, or . . . pleadings intended to harass adversaries or cause delay."[8] Such pleadings, presumably in violation of Rule 11, are the "major potential difficulty" with liberal pleading rules.[9] Admitting them against the pleading party later is "our best line of

5. *See, e.g.*, Mansfield, *supra* note 4, at 711-12 ("[T]he 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.").

6. *See* Clark, *supra* note 1, at 565. This comment evaluates Professor Clark's claim in his own terms. Yet, it should be acknowledged that the admissibility of prior pleadings increases the amount of relevant evidence presented to the factfinder, and should therefore increase the accuracy of the factfinder's decision. Indeed, if such prior pleaded statements are inconsistent with the party's current theory of the case, they may be highly probative. Since the central premise of the Federal Rules of Evidence is that the admission of *more*, rather than *less*, probative evidence yields more accurate factfinding, the admission of prior pleadings is supported by our traditional understanding of how best to serve the value of "truth" in the adversary system.

7. *See id.* at 567.

8. *Id.* at 574.

9. *Id* at 575.

defense against the abuse of liberal pleading rules.... Make what factual allegations you choose, says our pleading system, but keep in mind you may be asked to explain them."[10]

This is an instrumental argument. It asserts that an evidence rule admitting prior pleadings will deter undesirable out-of-the-courtroom behavior, and that the long-term effect on "truth" of this deterrence is an important justification for the rule.

The opposing position, which prefers exclusion of prior pleadings, also relies on an instrumental claim about out-of-the-courtroom behavior.[11] It asserts that admission of such pleadings will detract from the search for truth because it will overly deter parties from pleading factual theories for which they do have a reasonable basis. Parties will not want prior pleadings—particularly factual allegations in support of alternative theories—used against them later should those theories turn out to be wrong.[12]

Both positions, therefore, rely on the instrumental justification of promoting "truth," defined more broadly by Professor William Twining as "rectitude of decision," which he describes as "the correct application of valid substantive laws to facts established as true."[13] Choosing between these two positions requires evaluation of two different ways in which rectitude of decision—the value of "truth" in adjudication—is better served: by reducing the excesses of "unconstrained pleading"[14] or by encouraging the judicial consideration of all of a party's possibly meritorious claims.

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10. *Id.*

11. Professor John Mansfield states the justification for a bright line rule in terms of predicting the instrumental effect of exclusion: "If conduct of the parties [for purposes of this comment, liberal pleading under Federal Rule of Civil Procedure 8(e)] furthers an important objective of the litigation process and there is a substantial likelihood that this conduct will be deterred by the threat of evidential use, the evidence should be excluded.... if there is no significant likelihood of such an effect, the evidence should come in." Mansfield, *supra* note 4, at 701-02.

12. Professor Mansfield's concern that a party may be discouraged from pleading all of his potentially valid claims was articulated in an Eighth Circuit opinion overturning a district court's admission of a dismissed pleading against the plaintiff: "A pleader in the Federal Courts should not have to forego a potential claim rather than run the risk of having such a claim used as an admission." Garman v. Griffin, 666 F.2d 1156, 1160 (8th Cir. 1981).

13. WILLIAM TWINING, THEORIES OF EVIDENCE: BENTHAM AND WIGMORE 14 (1985). Professor Twining asserts that "implementation of substantive laws by the determination of the truth about allegations of fact on the basis of evidence is a necessary condition of achieving ... justice under the law." *Id.*

14. Clark, *supra* note 1, at 574.

II. Do the Rival Claims Rely on Predictions of Out-of-the-Courtroom Behavior?

Underlying both positions is the proponents' shared belief that parties should make factual allegations in their pleadings only if they have reasonable, substantial support;[15] in short, that parties should adhere to Rule 11. Resolving the conflict between them focuses on conflicting predictions about pleading behavior at the *margin* of Rule 11. When a factual allegation may or may not "have evidentiary support" after inquiry "reasonable under the circumstances,"[16] the proponents predict behavior that, they believe, will affect the long-run functioning of the justice system as a search for truth.

Professor Clark believes that without a rule generally admitting prior pleadings, parties will more frequently be tempted to ignore the requirements of Rule 11 and will draft and file unsupported pleadings.[17] An adjudication system flooded with baseless (and perhaps harassing) allegations is the harm Professor Clark predicts if there *is not* a rule of admissibility. The opposing commentators predict the harm of a "chilling effect." Parties will not make substantive claims (and defenses) that they could justly plead under Rule 11 in fear of a rule of subsequent admissibility.[18]

Which prediction is more accurate? Will fear of the future impact of admission make the pleader exercise "honest caution" in refraining from drafting unsubstantiated (and particularly harassing) allegations? Or, will such fear promote a "fearful restraint" that overly deters the filing of potentially meritorious claims?

How do we decide between these rival predictions?

III. Are There Empirical Answers?

Empirical research might determine which prediction of pleading behavior is more accurate. Two empirical questions are raised by all attempts to justify evidence rules with claims about their effects on out-of-the-courtroom behavior. First, do the relevant actors know about the rule of evidence and understand its potential

15. *See id.* at 15-18; Mansfield, *supra* note 4, at 711-12.

16. FED. R. CIV. P. 11(b)(3).

17. *See* Clark, *supra* note 1, at 567, 576, 588-89.

18. "Maintaining the right to present to the tribunal for authoritative determination all contentions for which a party has substantial support is an important objective of the litigation process . . . . " Mansfield, *supra* note 4, at 712. Professor Mansfield also contends that a rule of admissibility will cause pleaders to avoid specificity in pleading, thus disserving the "notice" function of pleading which relates to fairness values that are also important in our litigation process. The chilling effect on substantive claims is, however, his most important concern. *Id.* at 711-12.

impact? Second, does this knowledge operate as an incentive or deterrent on the actors' out-of-the-courtroom behavior?

On the first question of knowledge and understanding, a rule concerning the admissibility of prior pleadings operates primarily on attorneys who decide what factual statements to include in their clients' pleadings. These attorneys are the relevant actors. They are (we assume) educated in the basic rules of evidence; they have learned (even if only to pass the bar exam) that their clients' own statements (including authorized statements) may be admissible against the client because not subject to the hearsay ban. Knowledge of the potential future impact of pleadings is thus accessible to these attorneys, although it may not be at the forefront of their minds. However, this affirmative answer to the first question does not resolve the dispute between the two rival predictions. Both assume that such knowledge exists and will influence attorneys' behavior.

The second question asks whether the risk of future admission operates as an important consideration in drafting factual statements in pleadings. If it does not, then instrumental arguments over the costs and benefits of a rule admitting prior pleadings should evaporate.[19] We would simply rely on Federal Rules of Evidence 401 and 403 to determine admissibility of prior pleadings—which ends up being Professor Clark's preferred result. Only if future admissibility is an operative consideration in drafting pleadings must we consider whether it will push attorneys to "honest caution" or, even further, to "fearful restraint."

The academic commentators in this dispute offer contradictory predictions of how attorneys will behave. On what are their views based? The context in which attorneys act makes prediction very difficult. Various complex factors affect an attorney at the moment(s) of drafting and filing a pleading. These include the client's access to relevant facts; the resources available to the attorney to conduct pre-filing investigation; the availability of neutral sources of information; access to the opponent's facts; time constraints, including the running of the statute of limitations; and the skill, experience and ethical principles of the lawyer.

While these factors vary considerably from pleader to pleader, and from case to case, they are not inaccessible to empirical research. Could not some helpful information be gleaned from empirical inquiry? At a minimum, if hypotheticals were developed, and

19. If risk of future admissibility does not operate as a deterrent or an incentive for attorneys because it is not an important consideration at the moment of pleading, then it will neither promote Professor Clark's desired compliance with Rule 11 nor reduce the abuses of unconstrained pleading. But, neither will it have a chilling effect on the drafting of possibly meritorious substantive claims.

seasoned (and perhaps unseasoned) trial attorneys were interviewed about pleading practices, there might be some light shed on the question whether the rule of admissibility, which most courts currently employ, promotes the benefits claimed by Professor Clark—"honest caution"—or the risk perceived by Professor Mansfield—"fearful restraint." At a more ambitious level, investigation of practices in competing jurisdictions are also possible. Without any such information, it is difficult to know how to decide which is the more accurate prediction.

IV. Should We Reject Instrumental/Empirical Justifications for Evidence Rules?

In the face of uncertainty about the validity of competing predictions about out-of-the-courtroom behavior, we might reject instrumental arguments altogether as the basis for justifying evidence rules. The behavior of attorneys would not be our concern; rather, attention could focus solely on analysis of a prior pleading's probative value versus its risks to accurate factfinding under Rule 403. The claim of serving truth would be limited to the goal of increasing rational factfinding.

But instrumental arguments that evidence decisions can and do affect out-of-the-courtroom behavior are common and, perhaps, necessary. Refusing to take account of the effect of evidence rules outside of the courtroom would further isolate the already artificial world of adjudication from the social context within which it operates. Moreover, the current trend seems to be *more* rather than *less* attention paid to the real-world effects of evidence law.

Consideration of some other instrumental claims about evidence rules may furnish analogies that help to resolve the dispute about prior pleadings. Numerous evidence rules were developed at common law to exclude a party's otherwise relevant admissions, based on predictions of out-of-the courtroom behavior. Foremost are privileges—statements made by a party in the context of specially protected professional-client relationships, such as attorney-client, clergy-communicant, psychotherapist-patient. Party admissions in the form of a party's subsequent remedial measures, or offers to pay medical expenses, were also excluded. And Professor Aviva Orenstein recently argued in favor of excluding those party admissions that could be construed to be "apologies," predicting that such a rule would reward healing behavior and might even "make claims go away" if the injured party were assuaged.[20]

20. Aviva Orenstein, Gender and Race Considerations in Evidentiary Policy, Presentation at the Joint Program of Sections on Evidence, Minority Groups and Women

Protection of a party against these potentially damaging admissions serves values that are "rivals" to truth—promoting (or at least not deterring) valuable societal out-of-the-courtroom behavior such as full and frank disclosures within privileged relationships and beneficial behavior such as repairs and payments of medical expenses. These instrumental justifications are accepted even without empirical research to back them up.[21]

The Federal Rules of Evidence also rely on instrumental justifications, in particular concerning the admissibility of a person's prior sexual behavior when it is (or may be) only minimally relevant to litigation. Rule 412 excludes much evidence of a sexual assault claimant's prior sexual conduct in part to promote both the victims' reporting of sexual assaults and the prosecutors' decisions to prosecute such cases.[22] Both goals are predictions about out-of-the-courtroom behavior. More recently enacted, Rules 413, 414, and 415 admit a defendant's past sexually assaultive conduct, again to promote prosecution of such crimes.[23] Professor Robert Mosteller has argued that legislatures have enacted rules permitting evidence of "battered woman syndrome" in order to shift "the balance of advantage . . . in litigation in favor of battered women who respond violently to their batterers."[24]

Judicial application of Rule 403 may also be motivated by effects on out-of-the-courtroom behavior. For example, both admission of spoliation evidence and exclusion of carelessly preserved forensic evidence may deter behavior that creates risks for the integrity of the factfinding process.

If a party creates false favorable evidence, or tampers with or destroys harmful evidence, proof of such acts of "spoliation" is often

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in Legal Education at the Annual Meeting of the Association of American Law Schools, (Jan. 9, 1998).

21. These rules of exclusion are also justified by the low probative value of some of the excluded admissions. At least for repairs and offers to pay expenses, probative value may be low because of the ambiguity of the essential inference from the party's statement or conduct to the party's *belief* in his or her guilt or fault. Privileged statements, however, are probably not typically ambiguous and are thought to be highly probative.

22. *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.15 (1995).

23. The original Senate proposal for Rules 413-415 stated that "the willingness of the courts to admit similar evidence in prosecutions for serious sex crimes is of great importance to effective prosecution in this area, and hence to the pubilc's security against dangerous sex offenders." 137 CONG. REC. S3191-02, at S3238 (daily ed. Mar. 13, 1991).

24. Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461, 485 (1996). Professor Mosteller asserts that politics—predictions of social outcomes favored by the community—lie behind this rule of admission: "[M]y contention is that the substantive law of self-defense is being altered by changes in evidentiary rules designed, in large part, to aid women who have engaged in self-help." *Id.* at 486.

admitted.[25] It supports an inference that the party has a guilty conscience and, hence, is guilty (or at fault). An instruction on this inference may also be given to alert the jury to its importance. While admission of spoliation on a case-by-case basis may only punish the offender, appellate court rulings that establish a firm pro-admission stance may send a message of deterrence: Such behavior harms the integrity of the judicial process and will be punished through a rule of admission.[26]

A similar message may be sent when judges exclude forensic evidence that has been handled carelessly by law enforcement officials or technicians. Although the standard for authenticating such evidence—such as blood samples, fingerprints, et cetera—is quite lenient under Federal Rule of Evidence 901, Rule 403 can be used to exclude it if the chain of custody and/or security against tampering appear sloppy and risk-laden.[27] In the words of the First Circuit, courts are willing to tolerate a chain of custody that is "adequate—not infallible . . . [where] some links in the chain were rusty, but none were missing . . . ."[28] But discrepancies or gaps in a chain that are unexplained by police or forensic labs can justify exclusion.[29] Careless handling of forensic exhibits, without justification, threatens the integrity (and the appearance of integrity) of the justice system. Exclusion, even on a case-by-case basis, operates as a punishment and as an incentive to law enforcement (and other repeat players in criminal litigation) to do a better job at preserving and securing evidence.

All of the above-discussed examples show how prevalent is the use of predictions of specific out-of-the-courtroom behavior to justify

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25. *See e.g.*, McQueeney v. Wilmington Trust Co., 779 F.2d 916, 917-18 (3d Cir. 1985) (holding that the trial court's exclusion of evidence of possible subornation of perjury by the plaintiff was reversible error). The *McQueeny* court brushed aside concerns about probative value and stated that "[i]ntuition and the unanimity of the commentators and numerous courts . . . suggest . . . that it is powerful evidence indeed." *Id.* at 922-23. The court also required a showing of "particularized" danger of unfair prejudice. Otherwise, the offending party's generalized claim of unfair prejudice could effectively preclude admission of any spoliation evidence, an obviously unacceptable result if the court has deterrence in mind. *See id.* at 923.

26. *See id.* at 922-23.

27. *See, e.g.*, State v. Reese, 382 N.E.2d 1193, 1194-95 (Ohio Ct. App. 1978) (holding that it was error for trial court to admit pills into evidence, where envelope into which pills were placed was not marked by the police, the pills were of an ordinary character, and the envelope was handled by six different people during a nine day span).

28. United States v. Ladd, 885 F.2d 954, 957 (1st Cir. 1989) (upholding the admission of blood sample taken from the body of alleged drug distributor, notwithstanding careless handling in the chain of custody).

29. *See id.* at 957 (rejecting the admission of a blood sample due to erroneous numbering by private labs).

decisions to admit or exclude evidence. These predictions are, however, uncertain. We know how the rules affect behavior,[30] but we do not know *how much* of an effect they will have.

Some degree of uncertainty about the magnitude of effect can be tolerated under a cost-benefit analysis of such evidence rules. The cost inherent in these rules is to "truth"; they exclude relevant evidence or they admit evidence that may have an unfair prejudicial effect on the factfinder. Either way, the rationality of outcomes on a case-by-case basis may be decreased. This cost is justified in theory by the societal value of the predicted out-of-the-courtroom behavior. But the degree of uncertainty about what magnitude of the socially-valued behavior will actually occur should at some point make us unwilling to accept a rule of evidence that may detract from the rationality of outcomes.

Uncertainty is less tolerable in the dispute about admitting a party's prior pleadings because it concerns the very *nature* of the out-of-the-courtroom effect; is it "honest caution" or "fearful restraint?" One result is good, the other is bad. There is more cost and less benefit when we cannot even know whether a positive or a negative result will occur.

V. Other Values Increase Tolerance for Uncertainty

Some evidence rules are justified both by predictions of instrumental effects and by other non-instrumental values and principles. For example, there are constitutionally-grounded exclusionary rules (rules excluding statements made without *Miranda* warnings and excluding evidence obtained through searches conducted without probable cause) that serve values of individual liberty and autonomy. Privileges are justified on the basis of the value of privacy. Rule 412's prohibition against use of a victim's past sexual behavior to prove consent is also grounded on privacy interests of the individual. Admission of spoliation evidence and exclusion of chains of custody with "missing links" uphold the integrity of the judicial system and the individual actors' duties of honesty and responsibility.

When important values such as these combine with instrumental arguments in favor of an evidence rule, greater uncertainty of the

30. That is, exclusion of privileged communications and of evidence of repairs or medical payments, and of sexual behavior of sexual assault victims will probably encourage more communications, more repairs, more medical payments and more sexual assault complaints; admission of prior sexual conduct of sexual assault defendants and of acts of spoliation will probably encourage more sexual assault complaints and prosecutions, and will probably deter the manufacture or despoiling of evidence.

instrumental effect of these rules on out-of-the-courtroom behavior is and should be tolerated. The need to bolster the instrumental argument with empirical evidence declines. When there are no such other important values at stake, as with the exclusion of repair evidence, for example, the lack of empirical evidence to support the instrumental justification is a matter of concern.[32]

Perhaps, then, the dispute over the admissibility of prior pleadings can be resolved by analyzing whether other important values and principles are at stake here. Throughout his paper, Professor Clark asserts that fairness is the primary justification for admitting party admissions (including prior pleadings).[33] It is "fair" to hold parties responsible for their own statements in an adversarial system of justice. Thus, if a party makes an unsubstantiated factual allegation, it is "fair" to force the party to explain it later.[34] Professor Clark notes that Rule 11 allows parties the choice of specifically identifying statements about which they are unsure (in particular if they are unsure about which of two inconsistent statements might actually be true) so long as the party has a reasonable belief that the statements are likely to have evidentiary support after further investigation.[35] If parties fail to make this choice—either because they do not specifically identify such allegations, or they make allegations which are even less substantiated than this standard—then it is "fair" to make them explain their conduct in a subsequent trial.[36]

32. Exclusion of repairs cannot be justified by reference to such important values and principles, and it is the most suspect of these instrumentally-grounded evidence rules. *See e.g.*, Note, *Federal Rule of Evidence 407 as Applied to Products Liability: A Rule in Need of Remedial Measures*, 48 U. MIAMI L. REV. 283, 317-20 (1993) (summarizing critiques of Rule 407 and stating that "[n]o empirical evidence exists to prove that manufacturers behave the way the world presupposes.").

33. *See, e.g.*, Clark, *supra* note 1, at 588 ("Thus, it is not only fair, but it is vital, that citizens be permitted and encouraged to keep one another honest.")

34. In the opening paragraph of his paper, Professor Clark asserts that the doctrine of admitting party admissions "is a product of the adversarial process " and quotes from a treatise that emphasizes that "'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.'" *Id.* at 565-66 (quoting MUELLER & KIRKPATRICK, *supra* note 22, § 8.31). Later he asserts that there are conditions within which pleadings are drafted: "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." *Id.* at 574.

35. *Id.* at 581 (quoting FED. R. CIV. P. 11(b)(3)).

36. Parties confronted with allegations that had no substantial basis when made are not, according to Professor Clark, unfairly prejudiced. If parties have no legitimate basis for an allegation, "then they [are] caught in a violation of Rule 11 and were legitimately impeached for their willingness to file a baseless claim. If [they did have a basis, then the opponent is] . . . well within his rights to introduce that statement for whatever it [is]

However, there are fairness concerns on the other side as well. As Professor Mansfield notes, greater generality and less specificity in pleading—recommended by Professor Clark as an acceptable way for a pleader to avoid making unsubstantiated factual statements[37]—ill serves the goal of providing notice to the opponent. Although pleadings no longer establish the specific issues to be tried, deliberate generality seems less "fair" to the opponent who then has to do more work to determine (and will worry more about) the gist of the pleader's claim. Professor James Joseph Duane also points out in correspondence to Professor Clark and myself that attorneys differ considerably in their talent and skill at artful pleading.[38] A rule of admissibility visits upon the client the pleading choices, inadequacies and/or mistakes of the attorney. Of course most choices, inadequacies and mistakes of lawyers are visited upon clients, but including the artfulness of pleading seems, to Professor Duane, unnecessarily unfair.[39]

A rule of admissibility also appears to foster ethical principles of honesty and candor to the court. It is dishonest (or less honest) pleading that Professor Clark, and Rule 11, seek to deter. But the opponents of the admissibility rule do not advocate dishonesty. Their concern is ethical also—the attorney's duty to represent the client competently and in the client's best interest. In this case, such duties translate into alleging all possible claims (or defenses) which there is reason to think may be meritorious, just as Rule 8(e) of the Federal Rules of Civil Procedure allows.

So far, then, there does not seem to be a compelling argument that resolves these rival assertions of fairness and ethical obligation.

VI. Return to Rule 403?

This comment demonstrates that the dispute over a rule admitting a party's prior pleadings involves rival instrumental claims to truth, rival predictions of out-of-the-courtroom behavior, and rival assertions of other important values and principles. However, none of these rivalries seems to have a clear winner. Thus, none of them

worth as substantive evidence of the fact." *Id.* at 586.

37. *See id.* at 584-85.

38. "[A]ttorneys demonstrate a breathtaking range of ability and imagination and creativity in the drafting of pleadings—all in ways that no client could ever be fairly expected to anticipate or understand." Correspondence from Professor James Joseph Duane, Associate Professor of Law, Regent University Law School, to the author and Professor Sherman J. Clark, Assistant Professor, University of Michigan Law School (Oct. 9, 1997) (on file with author).

39. "[W]e ought to design procedural rules so as to minimize the extent to which parties will be unfairly penalized or advantaged by the wide disparity of their attorneys' competence or cleverness or integrity." *Id.*

resolves the dispute. In such a case of stand-off, and in the unfortunate absence of empirical evidence, resort is had to burdens of proof.

In a dispute about whether to adopt a bright line rule excluding a party's prior pleadings, the burden of persuading courts (and other policy makers) should fall on those advocating exclusion. This is because Rules 401, 402, and 403 establish the central premise of the Federal Rules of Evidence, which is to admit *more*, rather than *less*, relevant evidence in the search for truth. A bright line rule that excludes relevant evidence in all instances of its application violates this central premise; it therefore has to be justified. And such a rule can be justified when justification rests on an instrumental argument that the rule will encourage desirable out-of-the-courtroom behavior. It is the "bright line" nature of the rule, as opposed to a case-by-case "balancing" rule of exclusion, that makes the instrumental arguments work. But when rival instrumental claims, rival predictions of out-of-the-courtroom behavior, and rival assertions of values and principles in effect cancel each other out, a bright line rule of exclusion cannot be justified.

Nor, of course, does the central premise of the Federal Rules of Evidence require a bright line rule of admission. Rule 403 provides grounds for exclusion of a party's prior pleadings on a case-by-case basis.[40] Indeed, the dispute over the admissibility of prior pleadings reveals issues in the application of Rule 403 to prior pleadings that neither side has adequately discussed.

Probative Value. The probative value of a party's prior pleading must be carefully analyzed. A prior pleading can be relevant because it adds a factual assertion that is omitted from, or inconsistent with, what that party currently claims. Under this theory of relevance, prior pleadings are offered to prove their truth. The necessary inference is that the party (or the party's authorized agent) thinks (or has a reasonable basis for thinking) that the allegation is true. If not offered for their truth but to impeach the party, the inference necessary for relevance is that the party is dishonest—because she is now omitting facts, or changing her story, or had no basis for her prior allegation in the first place.

In many cases, estimating the probative value of a prior pleading on either of these theories is a fairly straight-forward task. However, in some instances Rule 11 permits parties to make a factual statement

40. Federal Rule of Evidence 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

in pleadings that lacks a "reasonable basis" if it is specifically identified as "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery."[41] Such a statement would seem to lack probative value to prove the truth of that fact. It does not reflect anyone's *beliefs*, or even anyone's assessment that there are *reasonable grounds for belief*, in a true state of facts. Professor Clark describes the necessary state of mind as "some reason to believe that it might actually be true."[42] This sounds like a suspicion, and suspicions, even good faith suspicions, may be only one cut above a party's "dreaming" about the facts.[43] Even if the "further investigation or discovery" does not yield evidentiary support, it would seem that the allegation made with that state of mind also does not support an inference that the party is dishonest.

Risk of Misleading the Jury. The danger to jury reasoning that prior pleadings pose is best analyzed under Rule 403 as the risk of misleading the jury. Professor Clark identifies this danger, but describes it as "unfair prejudice."[44] He states that a prior allegation may contain "technical, legal terminology whose precise meaning or legal significance might not be appreciated by the fact-finder."[45] Professor Clark is concerned that the factfinder will not understand technical language, or will overvalue a statement which has only "special, limited legal significance."[46] Professor Duane also expresses concern that the jury not able to assess the probative value of a prior pleading in a settled claim, or of inconsistent pleadings in civil cases.[47]

This concern is not best characterized as "unfair prejudice." Unfair prejudice is a term usually used to describe the risk of a jury's "improper" use of evidence.[48] While it is common parlance to lump all of the Rule 403 risks under the term "prejudice," in fact, each risk has a specific meaning. In general, a more precise use of Rule 403's terminology should lead to a more careful analysis of the danger to jury reasoning that is involved.

Under Rule 403, it is the risk of being "misleading" that best captures the concerns shared by Professors Clark and Duane—"the

41. FED. R. CIV. P. 11(b)(3).

42. Clark, *supra* note 1, at 580.

43. This is, of course, a reference to the now-famous "dream" statement of the criminal defendant O.J. Simpson, which although admitted at trial, was subject to intense controversy for its lack of probative value as well as its misleading context.

44. Clark, *supra* note 1, at 582.

45. *Id.*

46. *Id.*

47. *See* Duane, *supra* note 43.

48. Improper in that the evidence provokes an irrelevant, emotional response or may be used for a purpose inadmissible under the rules of evidence. *See* RONALD J. ALLEN, RICHARD B. KUHNS & ELEANOR SWIFT, EVIDENCE 163-164 (2d ed. 1997).

risk that the jury will have a particular problem in estimating the probative force of an item of evidence."[49]

Trial judges are used to assessing the potentially misleading—meaning difficult for the jury to evaluate—nature of courtroom evidence such as technical, scientific terminology, and complex statistics and probabilistic statements. Trial judges will do better at evaluating the risk of admitting legal theories and legalistic terminology in pleadings by applying the "misleading the jury" standard than by applying the complicating and conclusory categories of the law versus fact test that Professor Clark proposes.[50]

Unauthorized Admissions. A second danger described by Professor Clark is that a party's prior pleading may have been involuntary or not intended by the party to be an assertion, if, for example, the attorney acts in bad faith and drafts a pleading against the party's wishes.[51] This, he says, could be prejudicial.[52]

Again, unfair prejudice is not the best doctrinal tool to use to evaluate this danger. Agency problems between attorney and client certainly lower the probative value of a factual allegation that is offered to impeach the client's (the party's) dishonesty, and this should be taken into account. Or, if the unauthorized allegation is offered for its truth, it may be unfair to hold the client to it. Concern about an agent's authority can defeat the application of the hearsay exemption for authorized admissions—Rule 801(d)(2)—that is necessary to admit the prior pleading as substantive evidence.

Thus, applying Rule 403 may require exploration of the attorney's basis in fact, and in authority, to make an allegation. This will not result in an extensive mini-trial that is extraneous to the underlying dispute, but will shed light on the probative value of the allegation; on the risk that its real meaning will escape, and thus mislead, the jury; and on the propriety of applying the authorized admission exemption. The party who wishes to undertake this exploration in order to bar the admission of his own prior pleading will have the ability to do so by waiving the attorney-client privilege.

Conclusion

This comment thus returns to the place where it began—with admission and exclusion of prior pleadings primarily governed by Rules 401, 402, and 403. This is the most sensible approach when the dispute over a bright line rule of exclusion cannot be resolved on any

49. *Id.* at 165.

50. *See* Clark, *supra* note 1, at 582-89.

51. *See id.* at 588.

52. *See id.*

grounds. The journey is worth it if, in the process of trying to resolve that dispute, we better understand and appreciate the original place to which we return.