"Your Honor What I Meant to State was . . .": A Comparative Analysis of the Judicial and Evidentiary Admission Doctrines as Applied to Counsel Statements in Pleadings, Open Court, and Memoranda of Law

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I. INTRODUCTION

From tabloids to treatises, it is almost commonplace today for one to learn about the exploits of attorneys who have "saved" their clients' cases. We frequently read how an attorney's closing argument successfully marshalled the evidence and persuaded the jury to accept his or her client's position. Equally significant, but much less frequently addressed, is the potentially devastating impact that an attorney's factual statements concerning his or her client's case can have on the outcome of that case. An attorney's role in litigation necessarily includes making

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1. David Zemen, Several Trials Have Held Nation Transfixed Over Past 100 Years, DET. FREE PRESS, Sept. 26, 1994, at 1A (relating how noted attorney Clarence Darrow convinced a jury in the notorious Leopold and Loeb murder case that, although guilty, his clients had suffered enough); Verdict Against Terrorism, WASH. POST, Mar. 5, 1994, at A18 (discussing how prosecutors successfully pieced together forensic and circumstantial evidence in the World Trade Center bombing case to get a conviction despite the lack of eyewitnesses or confessions).
factual assertions concerning his or her clients' case. These factual assertions, however, are sometimes incorrect or inconsistent with their clients' previously asserted position. It is neither unusual nor imprudent for opposing counsel to take advantage of such statements, known as admissions. The impact of these admissions on the outcome of the case varies greatly, depending on when, where, and how the admission was made.

Imagine an attorney, in an action to enforce a loan guaranty, admitting in an answer that his or her client signed the guaranty despite the fact that the client did not actually do so. The trial court in turn grants the opposing party's motion for summary judgment based upon the admission in the answer. Such were the facts in Missouri Housing Development Commission v. Brice, where the government brought an action to enforce a guaranty of a loan. The answer, which was the response of several defendants, admitted that they signed the guaranty. The government then moved for summary judgment. While the motion was pending, one defendant denied signing the guaranty in his answers to the government's request for admissions, interrogatories, and during his deposition. Despite this fact, the district court granted the motion for summary judgment. On appeal, defendant's counsel argued that the admission in the answer was invalid for two reasons. First, the admission had been rebutted by other evidence. Second, the government waived the right to rely on the answer by asking the defendant whether he signed the guaranty during discovery. Despite this argument, the Eighth Circuit Court of Appeals affirmed the lower court's ruling and bound the defendant to his admission in the answer.

The Brice decision is only one example of how an attorney's inadvertent or mistaken admission, in addition to potentially causing serious client relations problems, can have a tremendous impact on the out-

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2. See infra notes 4-9 and accompanying text.
3. See infra notes 4-9 and accompanying text.
4. 919 F.2d 1306 (8th Cir. 1990) [hereinafter Brice].
5. Id. at 1308.
6. Id. (this loan was made in connection with the lease of a nursing home).
7. Id.
8. Id.
9. Id.
10. Id. at 1314.
11. Id. at 1315.
come of a case. This result can occur despite having an abundance of evidence to disprove the factually incorrect statement.

The theory behind using admissions made by an attorney against his or her client rests upon the legal doctrine that any statement made by a party can subsequently be used against that party. Courts have not questioned the theory that counsel, while not the actual party, speaks for and as the party, particularly in litigation. However, not all attorneys' factual admissions are deemed binding or consequential to the case. Courts vary greatly on the significance given to attorneys' factual statements. Courts have the discretion to: (1) bind the attorney's client to the statement and remove the factual issue from the case; or (2) admit the statement into evidence as an evidentiary admission; or (3) not use the statement for any purpose.

12. See, e.g., Best v. District of Columbia, 291 U.S. 411, 415 (1934) ("the exercise of [power to direct a verdict based upon a judicial admission] in a proper case is not only not objectionable, but is convenient in saving time and expense by shortening trials").

13. Jones v. Morehead, 68 U.S. 155, 165 (1835) (holding that despite evidence to the contrary, a client is bound by his counsel's statements); Brice, 919 F.2d at 1314 (stating a party is bound to its admission despite later producing evidence contrary to those admissions); Davis v. A.G. Edwards and Sons, Inc., 823 F.2d 105, 106 (5th Cir. 1987) (holding that despite affidavit conflicting with complaint, the client is bound to admission in complaint).

14. 4 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 1058, at 26 (Chadbourn rev. ed. 1972) [hereinafter 4 WIGMORE] (stating the rule that statements by an opponent may be admissible against him); JOHN W. STRONG ET AL., 2 MCCORMICK ON EVIDENCE § 254, at 447-49 (4th ed. 1992) [hereinafter MCCORMICK] (summarizing rule and various views of its applicability).

15. FED. R. EVID. 801(d) (a statement is not hearsay if it is "the party's own statement in either an individual or representative capacity"); MCCORMICK, supra note 14 § 244, at 520; 2 JONES, EVIDENCE § 368, at 673 (5th ed. 1958 & Supp. 1971) ("During... trial attorneys stand in the place of their clients and may perform acts which the client might perform in person. Hence there is scarcely any limit to the admissions which they may make."); Laird v. Air Carrier Engine Serv. Inc., 263 F.2d 948, 953 (5th Cir. 1959) ("an attorney has wide authority in the conduct of litigation. He is chosen to speak for the client in court. When he speaks in court, whether it be on a formal trial or in an informal pretrial, he speaks for and as the client."); Kungig Jarnvagsstyrelsen v. Dexter & Carpenter, 32 F.2d 195, 198 (2d Cir.) (holding that a statement by counsel in a pleading is a statement made for and by counsel's client), cert. denied, 280 U.S. 579 (1929).

16. See infra notes 80-93.

17. See infra notes 60-79.

18. See infra notes 55-57.
The following three scenarios illustrate this discretion. First, if an attorney makes an incorrect statement in a pleading such as a complaint or an answer, the court will almost always treat the statement as a judicial admission. A judicial admission concedes a fact, removing that fact from any further possible dispute. It also obviates any need for the opposing party to prove the fact admitted. Second, if an attorney makes the same factual statement in open court, it will likely be treated as a judicial admission as long as the statement was clear and unambiguous. If the admission is instead made in other documents submitted to a court, in particular a memorandum of law, the court, despite having the power to treat the statement as a judicial admission, will not likely treat the statement as such.

This article analyzes the law regarding party admissions; specifically as applied to statements in pleadings, open court, and memoranda of law. In particular, this article will: (1) provide a detailed description of the two types of admissions counsel make; (2) address courts' treatment of attorneys' admissions in different circumstances; and (3) provide an argument for treating attorneys' admissions in memoranda of law similar to admissions in open court or in pleadings. The goal of this article is to provide a blueprint of the law on admissions, an area of law where all too often counsel pays little attention, and to advocate a change in the treatment of attorneys' admissions in memoranda of law.

Courts have failed to adequately articulate why statements made in open court, which are often spontaneous and not well thought out, should be treated as judicial admissions, whereas statements made in memoranda of law, which are typically well thought out and deliberate, should not be treated as such. Courts justify the difference in the treatment of these statements by noting that statements in memoranda of law are not part of the official record. While this may be true, courts have not hesitated to hold attorneys accountable for statements

19. See, e.g., Best Canvas Products & Supplies, Inc. v. Ploof Truck Lines, Inc., 713 F.2d 618, 621 (11th Cir. 1983) ("A party is bound by the admissions in his pleadings.").

20. Id.

21. See, e.g., In re Eagson Corp., 37 B.R. 471, 482 (Bankr. E.D. Pa. 1984) ("If unequivocal and made within the scope of his authority, statements made by an attorney . . . are . . . binding upon the attorney's client."); United States v. Benton, 947 F.2d 1353 (9th Cir. 1991) (finding that closing statement constituted judicial admission); United States v. Wilmer, 779 F.2d 495 (9th Cir. 1986) (attorney's statement during oral argument was judicial admission).

22. See, e.g., City Nat'l Bank v. United States, 907 F.2d 536, 544 (5th Cir. 1990) (refusing to conclude that there was a judicial admission stemming from counsel's statement which the court described as patently inaccurate).

23. See infra notes 106-25, 126-53 and accompanying text.

24. See infra notes 142-53 and accompanying text.
made and positions taken in documents not part of the record under Federal Rule of Civil Procedure 11 and the doctrine of judicial estoppel.

By treating attorneys' statements in memoranda of law as judicial admissions, efficiencies in the judicial process would be created and greater guidance would be provided to the bar and judiciary. For instance, consistent application of the judicial admission doctrine to statements in memoranda of law will force attorneys to be more cautious when presenting their client's version of the facts, especially when counsel is considering making overly aggressive factual arguments in motions and supporting memoranda of law. As Professor Wigmore argued:

The doctrine of Judicial Admissions has long had a large future before it, if judges would but use it adequately. In the first place, the judge could apply it to all informal, as well as formal, admissions by counsel during trial. It is easy to see how large a mass of needless skirmishing can thereby be eliminated, how much time would be saved, and how much confusion of the jury would be avoided. And this would be attained by the mere application of an existing principle.29

II. ADMISSIONS: JUDICIAL VERSUS EVIDENTIARY

An admission is a statement made by a party that can subsequently be used in a trial against that party.30 Any statement made by a party regardless of when, where, or how made, can be used against that party. Both the common law and, more recently, the Federal Rules of Evidence recognize that a factual statement made by an attorney can be used as an admission of the party that the attorney represents.31

There are two types of factual admissions that an attorney can make: (1) judicial admissions (also known as stipulated facts)32 and (2) evidentiary33 (or quasi-judicial) admissions.34 Below is a detailed description of these two types of admissions and their significant differences.

27. See supra note 14-15 and accompanying text.
28. MCCORMICK, supra note 14, § 254; 9 WIGMORE, supra note 25, § 2588, at 821.
29. MCCORMICK, supra note 14, § 254, at 142.
30. Although Professor Wigmore uses the term "quasi-judicial" admission, most courts and this Article use the term "evidentiary admission." See, e.g., White v. Arco/Polymer, Inc., 720 F.2d 1391, 1396 (5th Cir. 1983).
A. Judicial Admissions

A judicial admission has been described as "a formal act, done in the course of judicial proceedings, which waives or dispenses with the production of evidence, by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true." In fact, admissions are not actually evidence, but "formal concessions in the pleadings in the case or stipulations by a party or its counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." In other words, a fact that is judicially admitted is no longer a fact at issue in the case—the party making the judicial admission has conceded to it.

Federal courts have not wavered in describing this doctrine. The Eighth Circuit held that a judicial admission "acts as a substitute for evidence in that it does away with the need for evidence in regard to the subject matter of the judicial admission." Similarly, the Eleventh and Fifth Circuits have held that "judicial admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them." In sum, a judi-

31. 4 WIGMORE, supra note 14 § 1058, at 27.
32. MCCORMICK, supra note 14 § 254, at 449.
33. Despite the above quoted language, judicial admissions are found in documents other than a pleading or stipulation. See, e.g., Kurek v. Pleasure Driveway & Park Dist., 557 F.2d 580, 595 n.13 (7th Cir. 1977), vacated by, 435 U.S. 992 (1978) (treating a statement in a brief as a judicial admission).
34. McCormick, supra note 14, § 254, at 449.
35. 9 WIGMORE, supra note 22, § 2590, at 822-23. Significant distinctions exist between the theory of judicial admissions and the doctrine of estoppel. Estoppel, like a judicial admission, has the effect of concluding any dispute concerning a fact. Unlike a judicial admission, however, "estoppel is an obligation made by a rule of substantive law," which typically "requires some additional act of detriment to the obligee." Id. at 822. The doctrine of judicial estoppel, sometimes known as the doctrine of preclusion of inconsistent statements, prevents a party from asserting a position contrary to an earlier successful position in another proceeding. In other words, under the doctrine of judicial estoppel, where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not, simply because his interests have changed, take a contrary position in a subsequent case. See Patriot Cinemas, Inc. v. General Cinema Corp., 834 F.2d 208, 211-15 (1st Cir. 1987); 1 JOHN MOORE, MOORE'S FEDERAL PRACTICE § 8.3[9], at 106-07 (1994).
36. Whether courts have wavered in the application of the doctrine is the thrust of this Article, and it is asserted that they have.
cial admission conclusively concedes the truth of a fact alleged and relieves the opposing party of the need to introduce any further evidence on the admitted fact.\textsuperscript{39}

Although courts do not differ in describing the judicial admission doctrine, they have disagreed on its usefulness. Some courts have opined that judicial admissions play the important role of achieving "just, speedy, and inexpensive determinations."\textsuperscript{40} Other authorities have expressed skepticism about the use of judicial admissions due, in part, to the potential severe impact they can have on a claim.\textsuperscript{41}

Typically, judicial admissions arise from statements made by a party's counsel.\textsuperscript{42} "Judicial admissions commonly appear by way of stipulations, pleadings, statements in pretrial orders, and responses to requests for admissions."\textsuperscript{43} Often, however, they are the product of mistake or inadvertence rather than conscious decisions to finalize a contested issue.\textsuperscript{44} In fact, judicial admissions can arise from an "involuntary act" of a party.\textsuperscript{45} Courts have held that "any" clear and unequivocal statement, either written or oral,\textsuperscript{46} made in the course of judicial proceedings qualifies as a judicial admission.\textsuperscript{47} However, there is authority for the proposition

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\textsuperscript{39} Id.
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\textsuperscript{40} See, e.g., Best v. District of Columbia, 291 U.S. 411, 415 (1934) ("the exercise of the power [to direct verdict based upon a judicial admission] in a proper case is not only not objectionable, but is convenient in saving time and expense by shortening trials"); Prestwood v. Watson, 20 So. 600, 600 (Ala. 1896) ("Agreements of this character, intelligently and deliberately made,—whether made by the parties . . . or by their attorneys . . . are encouraged and favored. Their purpose, generally is to save costs and to expedite trials . . .").
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\textsuperscript{41} 9 WIGMORE, supra note 22, § 2591, at 824; see Pietsch v. Pietsch, 92 N.E. 325, 326 (Ill. 1910) (mocking the idea that a judge could decide a case based on the opening statements alone).
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\textsuperscript{42} 9 WIGMORE, supra note 25, § 2594, at 832-33.
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\textsuperscript{43} In re Applin, 108 B.R. 253, 258 (Bankr. E.D. Cal. 1989); see also Best Canvas Prod. & Supplies, Inc. v. Ploof Truck Lines, Inc., 713 F.2d 618, 621 (11th Cir. 1983).
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\textsuperscript{44} See Note, Judicial Admissions, 64 COLUM. L. REV. 1121, 1121 (1964).
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\textsuperscript{45} See United States v. Belculfine, 527 F.2d 941, 944 (1st Cir. 1975) ("a judicial admission can arise from an 'involuntary' act of a party"); Best v. District of Columbia, 291 U.S. 411, 415 (1934) ("[t]here is no question as to the power of the trial court to direct a verdict for the defendant upon the opening statement of plaintiff's counsel where that statement establishes that the plaintiff has no right to recover").
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\textsuperscript{46} In re Laftas Gen. Partner No. 1017, 153 B.R. 804, 807 (Bankr. N.D. Ill. 1993) (citing Erisiqn v. Pennsylvania, 227 U.S. 592 (1913)).
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\textsuperscript{47} Collins v. Texas Co., 267 F.2d 257, 258 (5th Cir. 1959) (party bound by counsel's opening statement).
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\textsuperscript{48} See Wheeler v. John Deere Co., 935 F.2d 1090, 1097-99 (10th Cir. 1991) (affir-
that judicial admissions should rarely result from inadvertent statements made by an attorney. Nonetheless, it appears from the case law that judicial admissions arise from any purposeful or inadvertent statement of counsel and occur at any stage of litigation, including pleadings, discovery, pre-trial agreements, and statements made in open court.

While there has been debate as to the usefulness of judicial admissions in all circumstances, there is little question that they can have a substantial impact on the outcome of a matter. For instance, a judicial admission may (1) prove a fact that could not otherwise be proven by competent evidence; (2) prevent the introduction of damaging evidence; and (3) even create a fact that is otherwise nonexistent. Thus, depending upon what is admitted, judicial admissions can easily determine or at least greatly influence the outcome of a case. Largely because of the potentially devastating impact of judicial admissions, trial courts have the discretion to accept or reject treating a statement as a judicial admission.

49. See, e.g., Belcufine, 527 F.2d at 944 (arguing that "considerations of fairness dictate that the class of 'involuntary' admissions be narrow"); Stockton v. Tester, 273 S.W.2d 783, 786 (Mo. Ct. App. 1954) ("Normally, . . . a judicial admission is an act or statement formally and deliberately made or done, as distinguished from an unintentional or quasi-admission"); accord New Amsterdam Cas. Co. v. Waller, 323 F.2d 20, 24 (4th Cir. 1963) (judicial admissions "serve a highly useful purpose in dispensing with proof of formal matters and of facts about which there is no real dispute"); cert. denied, 376 U.S. 963 (1964); Prestwood v. Watson, 20 So. 600, 600 (Ala. 1896) (judicial admissions are useful in that they dispense with uncontroverted facts).

50. See supra note 42 and accompanying text.


53. Judicial Admissions, supra note 44, at 1122; accord Fuentes v. Tucker, 187 P.2d 752, 755 (Cal. 1947) (holding that the trial court was incorrect in permitting evidence regarding circumstances surrounding deaths after defendant admitted liability for wrongful deaths).

54. See Jones v. Morehead, 68 U.S. 155, 164-65 (1863) (stating that despite there being no evidence of infringement, defendants were bound by an answer which stated that they used plaintiff's design).

55. See supra note 26, § 2590 (1981); see, e.g., In re Aplin, 108 B.R. 253, 259 (1989) (stating "the conclusive effect of a judicial admission, the policies underlying modern liberal rules of pleading and the alternative . . . to be used as evidence under Federal Rule of Evidence 801 are all factors that coalesce to warrant a reluctance to base the imposition of a judicial admission on an inadvertent statement"); United States v. Belcufine, 527 F.2d 941, 943 (1st Cir. 1975) ("considerations of fairness dictate that the class of 'involuntary' admissions be narrow"). For additional examples of the courts' discretion see L.P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co.,
While the doctrine of judicial admissions may apply to "any fact whatever," courts have exercised their discretion to not be bound to a stipulated fact when the fact stipulated may be characterized as an "ultimate" fact. Notwithstanding their discretion, courts have judicially admitted a wide variety of facts including those that may be considered ultimate. In light of a trial court's discretion to accept or reject treating a factual statement as a judicial admission, it is all the more peculiar that courts as a general matter do not hesitate to treat statements made in pleadings or in open court as judicial admissions, but are unwilling to recognize statements made in memoranda of law as judicial admissions.

While judicial admissions concede facts, courts have generally rejected stipulations as to matters of law. In certain instances, however, parties may stipulate as to the governing law (unless such agreements are deemed contrary to public policy). For instance, parties may stipulate

253 F. 914 (7th Cir. 1918); McCarthy v. Kepreta, 139 N.W. 992 (N.D. 1913); State v. Nebraska St. Sav. Bank, 259 N.W. 46 (Neb. 1935); Morton v. Central Nat'l Bank, 43 P.2d 394 (Okla. 1935); Steinberg v. Merchants Bank, 67 S.W. 2d 63 (Mo. 1933).

56. See, e.g., Platt v. United States, 163 F.2d 165, 168 (10th Cir. 1947) (stating "parties may not stipulate the findings of fact upon which conclusions of law and the judgment of the court are to be based").

57. See, e.g., H. Hackfield & Co. v. United States, 197 U.S. 442 (1905) (stating "[w]e think the parties were entitled to have this case tried upon the assumption that these ultimate facts, stipulated to in the record, were established"); Jones v. Morehead, 68 U.S. 155, 164 (1863) (binding client in an infringement action to answer admitting use of the plaintiff's methods).

58. See, e.g., Young v. United States, 315 U.S. 257, 259 (1949) (stating "our judgments are precedents, and proper administration of the criminal law cannot be left merely to the stipulation of parties"); Swift & Co. v. Hocking Valley Ry., 243 U.S. 281, 289-90 (1916) ("If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law."); New Amsterdam Cas. Co. v. Waller, 323 F.2d 20, 24 (4th Cir. 1963) (stating "[t]he doctrine of judicial admissions has never been applied to counsel's statement of his conception of the legal theory of the case"); cert. denied, 376 U.S. 963 (1964); Clark v. Mobil Oil Corp., 1981-Trade Cas. (CCH) par. 63,903 (N.D. Mo. 1980). See generally Judicial Admissions, supra note 44, at 1124. Nevertheless, as is discussed below, counsel who switch arguments may suffer certain consequences.

59. See RESTATEMENT (SECOND) CONFLICTS OF LAWS § 187 (1971) (stating "the law of the state chosen by the parties to govern their contractual right and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue"); Reighley v. Continental Ill. Nat'l Bank & Trust Co., 61 N.E.2d 29 (Ill. 1945) (stating that parties may stipulate to governing law as long as the agreement is not contrary to public policy).

In civil matters, however, parties can admit liability, leaving only damages to be
that the law of a particular jurisdiction applies for the interpretation of a contract.60

B. Evidentiary Admissions

It is one of the most well known and often repeated tenets of law that an out-of-court statement offered for its truth is hearsay and is not admissible in court. Nevertheless, evidentiary admissions, which are exceptions to the hearsay rule, are statements made by a party or its agent, regardless of whether it is made out of court or in court, typically used to contradict or otherwise impeach the party’s current assertion.62 Evidentiary admissions can also assist in proving the truth of the matter asserted, depending on the circumstances surrounding the making of the statement. They are exempted from the definition of hearsay under the Federal Rules on the theory that their admissibility into evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.63 This is because the foundation of evidentiary admissions rests upon the trustworthiness of the information sought to be admitted, and the belief that party admissions, unlike other exceptions to the hearsay rule, contain guarantees of trustworthiness.64

It is now well accepted that statements made by an attorney during the course of litigation, whether oral or written, are presumed to be authorized by the client, and thus constitute admissions by that party.66

60. Reighley, 61 N.E.2d at 32.
61. See infra notes 63-64.
62. FED. R. EVID. 801(d); see, e.g., United States v. Horton, 847 F.2d 313, 324 (6th Cir. 1988) (stating an admission must only be adverse to the defendant’s position at trial); Gaspard & Co. v. Guam, 427 F.2d 276, 278 (9th Cir. 1970) (stating “a declaration by a litigant contrary to his position in the lawsuit is admissible under an exception to the hearsay rule as an admission”). See generally JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE ¶ 801(d)(2)(01), at 801-232-33, 801-250-51 (1993) [hereinafter WEINSTEIN’S EVIDENCE].
64. WEINSTEIN’S EVIDENCE, supra note 62, at 801-43. This commentator also argues that evidentiary admissions need no such guarantees of trustworthiness.
65. MCCORMICK, supra note 14, at 163; see United States v. GAF Corp., 928 F.2d 1253, 1259 (2d Cir. 1991) (holding “statements made by an attorney concerning a matter within his employment may be admissible against the party retaining the attorney”) (quoting United States v. Margiotta, 662 F.2d 131, 142 (2d Cir. 1981), cert. denied, 461 U.S. 913 (1983)); United States v. Valencia, 826 F.2d 169, 173-74 (2d Cir. 1987) (stating in a criminal case “[t]he trial judge must be accorded considerable discretion [in] determining the application of Rule 801(d)(2) to statements of an attorney offered by [a] prosecutor” against defendant); Williams v. Union Carbide Corp.
In fact, Rules 801(d)(2)(B),(C), and (D) of the Federal Rules of Evidence provide that any relevant statement made by a party or his agent acting in the scope of his employment, which is offered against that party, is generally admissible into evidence as an evidentiary admission.66

Rule 801(d)(2) provides in pertinent part:

(d) A statement is not hearsay if—
(2) The statement is offered against a party and is . . .
(B) [A] statement of which the party has manifested an adoption or belief in its truth, or
(C) [A] statement by a person authorized by the party to make a statement concerning the subject, or
(D) [A] statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship.67

The Advisory Committee Note provides that subsection (B) codifies traditional principles of adoptive admissions.68 The Advisory Committee Note explains that subsection (C) is intended to encompass statements made by agents or employees to third parties. Subsection (C) in essence codifies the traditional view that a declarant’s statements are admissible if the declarant is authorized by the party to speak on behalf of the party.69 The Advisory Committee Note suggests that subsection (D) was

790 F.2d 552, 555-56 (6th Cir. 1986) (stating “[i]t is the general rule that ‘statements made by an attorney concerning a matter within his employment may be admissible against the party retaining the attorney’”) (quoting United States v. Margiotta, 662 F.2d 191, 142 (2d Cir. 1981), cert. denied, 461 U.S. 913 (1983)), cert. denied, 479 U.S. 992 (1986); United States v. Martin, 773 F.2d 579, 583 (4th Cir. 1986) (holding statements made by attorney to an IRS auditor at the pretrial stage was admissible); United States v. McKeon, 738 F.2d 26, 27-34 (2d Cir. 1984) (holding an opening statement made by an attorney is admissible in a later lawsuit against his client); In re AOV Indus. Inc., 62 B.R. 973, 977 (D.C. 1986) (holding a statement by an attorney in a letter was an admission of his client); United States v. D.K.G. Appaloosas, Inc., 630 F. Supp. 1540, 1564 (E.D. Tex. 1986) (stating the general rule that “statements made by an attorney concerning any matter within the scope of his employment are admissible” against his client, but “[g]overnment attorneys in criminal cases are exempt from this rule since they supposedly are uninterested in the outcome of the trial”), aff’d, 829 F.2d 532 (5th Cir. 1987), cert. denied, 485 U.S. 976 (1988). 66. FED. R. EVID. 801(d); see also United States v. Kattar, 840 F.2d 118, 130 (1st Cir. 1988) (discussing Federal rule of Evidence 801); Comment, Vicarious Admissions, The Admissibility Against His Principal of an Agent’s Extra-Judicial Statement, 10 KAN. L. REV. 74 (1961) (discussing the admissibility of vicarious admissions).

67. FED. R. EVID. 801(d)(2)(B), (C) and (D).

68. FED. R. EVID. 801(d) Advisory Committee’s notes.

69. Id.
intended to embody the results from recent cases which permitted statements of agents or employees made in the scope of their employment to be received as evidence against their principals or employers. Counsels' statements to a third party, such as the court, fall squarely within both subsections (C) and (D). If the lawyer makes the statements to the third party in the presence of his client, they may also be considered admissions by adoption under subsection (B).71

Unlike judicial admissions, evidentiary admissions are merely considered another item in evidence and are not binding or conclusive on the trier of fact.72 Like any other evidence, evidentiary admissions are subject to contradiction or explanation.73 Thus, the classification of a statement as either an evidentiary or a judicial admission has a tremendous impact on the way an issue is treated because “[a]n evidentiary admission is an item in the mass of evidence that the jury can consider, while a judicial admission is a waiver, relieving the opposing party from the need of any evidence that the statement is true.”74 This difference in how a court classifies the admission, as either judicial or evidentiary, may in some circumstances decide the case. For instance, in a real estate action, where the statute of frauds presumably applies, if plaintiff's counsel incorrectly states that the contract was oral, the court may bind the plaintiff to his or her counsel's statement and dismiss the case for failure to satisfy the statute of frauds.75

In light of the potential effect of attorneys' admissions, judicial or evidentiary, counsel should take great care when asserting facts on behalf of their clients, because counsel speaks "for and as the client."76 Counsel should also be ready to recognize and capitalize on admissions made by adversaries.77 There is little comfort in the assumption that a client will "pipe up" if his trial lawyer misspeaks at any point during a trial.78 “[L]itigants are usually so unfamiliar with courtroom procedure (or their attorney's strategy) that they are in no position to correct factual errors.”79

70. Id.
71. Id.
72. 9 Wigmore, supra note 25, § 2500, at 823.
73. McCormick, supra note 14, § 254, at 142; Aide v. Taylor, 7 N.W.2d 757, 759 (1943).
74. McCormick, supra note 14, § 259, at 142.
76. Laird v. Air Carrier Engine Service, Inc., 263 F.2d 948, 953 (5th Cir. 1959); see also Fed. R. Evid. 801 (d) (discussing impact of agent's admissions).
78. Id.
79. Id.
III. JUDICIAL ADMISSIONS

A. Pleadings

The now well recognized view that a statement made by an attorney may be used against the attorney's client was stated by the Supreme Court over 100 years ago. In *Jones v. Morehead*, the Supreme Court proclaimed that statements admitted by the defendants in an answer were binding despite the fact that no evidence of the truth of the matter was introduced in the case, and the Court itself did not believe the statements to be true. *Jones*’ holding is widely accepted and the prevailing view on the issue of admissions by party opponents can be summarized as follows:

A party may at any and all times invoke the language of his opponent's pleading on that particular issue as rendering certain facts indisputable; and . . . in doing this, he is on the one hand neither required nor allowed to offer the pleading in evidence in the ordinary manner, nor on the other hand forbidden to comment in argument without having made a formal offer . . . .

This quote also illustrates that a statement in an unamended or superseded pleading may be used as a judicial admission in the action where the pleading was filed. Judicial admissions, however, are not found

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80. *Jones v. Morehead*, 68 U.S. 155 (1864) (holding that it would be inequitable and against sound judgment to allow attorneys to retract statements admitted in answers); see also DAVID F. BINDER, HEARSAY HANDBOOK 459-60 (3d ed. 1991) (examining vicarious admission doctrine).

81. *Jones* involved a patent infringement action concerning the mechanisms of plaintiff's lock. Although Justice Field concluded that "in point of fact, the defendants have not infringed [plaintiff's] patent," the court bound defendants to the statements in their answer that they did make locks as described in plaintiff's patent. *Jones*, 68 U.S. at 164.

82. 4 WIGMORE, supra note 14, § 1064, at 67. Admissions in pleadings can not only be used as judicial admissions, they can also be used to impeach. Professor McCormick recognizes that statements in pleadings are generally considered judicial admissions, but points out that if a party desires to use an averment or admission in his adversary's pleadings to prove the existence of some subordinate fact, courts will allow the statement in the pleading to be read or submitted into the record. See, e.g., MCCORMICK, supra note 14, § 265; see also Frank v. Bloom, 634 F.2d 1245, 1251 (10th Cir. 1980) (reasoning that "[t]he factual matter contained in the pleadings is admissible as an admission by a party made by his agent acting within the scope of his employment" and that such evidence is "admissible for substantive purpose, and need not be received solely for impeachment purposes"); Frederic P. Wiedersum Assoc. v. National Homes Constr. Corp., 540 F.2d 62 (2d Cir. 1976) (holding that evidence of inconsistencies between the complaint and trial testimony regarding a crucial date was erroneously withheld from the jury).

83. See, e.g., Missouri Housing Dev. Comm'n v. Brice, 919 F.2d 1305, 1314 (8th Cir.)
where the statements are ambiguous "assuming arguendo" comments by counsel, or when the statements are made upon inconsistent pleas. Un-
like the treatment of statements made in open court, the decisions addressing statements in pleadings do not focus on the requirement that the statements be "clear and unequivocal." If the incorrect statement is in a complaint, an answer, a counterclaim, or a request for a bill of particulars, the statement removes the issue from the trier of fact and is deemed true. Courts have likewise treated factual assertions in pretrial orders as judicial admissions. By definition, statements made in a request to admit are judicial admissions. Statements made in stipulations are also treated as judicial admissions.

B. Counsels' Statements In Pleadings Can Be Transformed Into Evidentiary Admissions

If a statement in an unamended pleading action is considered a judicial admission, and that pleading is amended or withdrawn, the admission is typically transformed from a judicial into an evidentiary one. As Professor Wigmore explains:

When a pleading is amended or withdrawn, the superseded portion disappears from the record as a judicial admission limiting the issues and putting certain facts beyond dispute. Nevertheless, [the amended or superseded pleading] exists as an utterance once deliberately made by the party. While thus denied all further effect as a pleading, may it not still be used as a quasi admission, like any other utterance of the party.

376 U.S. 963 (1964); In re Applin, 108 B.R. 253 (Bankr. E.D. Cal. 1989) (holding that counsel’s statements as to client’s property equity in bankruptcy court proceedings did not equate to admission as to the value of such property).

85. See supra note 84 and accompanying text.
86. White v. Arco/Polymers, Inc., 720 F.2d 1391, 1396 (6th Cir. 1983).
90. See supra note 81 and accompanying text.
91. See Mull v. Ford Motor Co., 368 F.2d 713, 715 (2d Cir. 1966) (addressing pretrial orders); White v. Arco/Polymers, Inc., 720 F.2d 1391, 1396 (6th Cir. 1983) (discussing pretrial orders and pleadings).
93. American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224 (9th Cir. 1988); Holiday Inns, Inc. v. Alberding, 683 F.2d 931, 935 (5th Cir. 1982) (holding that, in a dispute over "defendant's profits," a party was bound by its pretrial agreement stipulating its profits as "a defendant").
94. 4 WIGMORE, supra note 14 § 1067, at 88.
95. Id. at § 1067, at 88. As with any other purported evidentiary admission, a trial
Courts have also treated amended or superseded pleadings as evidentiary admissions in subsequent litigation involving the party. However, when a statement or plea from another case is sought to be used in a second suit, courts are "careful to allow the opposing party (the declarant's party) a full opportunity to explain the admission to demonstrate that there is an issue of material fact." Professor McCormick, while acknowledging that his theory is "not widely recognized," opines that a possible exception to the use of pleadings as admissions arises when a pleading is amended, withdrawn, or superseded. He feels that these statements should not be considered party admissions because to admit them into evidence contravenes the policy of liberality in amendments.

The court has the discretion to exclude the admission of the prior inconsistent pleading if the potential prejudicial effect of the evidence would outweigh its probative value. See Vincent v. Louis Marx & Co., Inc., 874 F.2d 36 (1st Cir. 1989).

96. United States v. McKeon, 738 F.2d 28, 30-31 (2d Cir. 1984) ("The law is quite clear that [superseded] 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."); see also Dugan v. EMS Helicopters, Inc., 915 F.2d 1428, 1431 (10th Cir. 1990) ("[i]nconsistent allegations contained in prior pleadings are admissible [as evidentiary admissions] in subsequent litigation."); Hardy v. Johns-Mansville Sales Corp., 851 F.2d 742, 745 (5th Cir.) ("[T]here is a well established rule that factual allegations in the trial court pleadings of a party in one case may be admissible in a different case as evidentiary admissions of that party."); reh'g denied, 860 F.2d 1437 (1988); Williams v. Union Carbide Corp., 790 F.2d 552, 556 (6th Cir. 1986) (stating that pleadings from a prior case may be used for impeachment purposes under F.R.E. 613, or as substantive evidence under F.R.E. 801(d)(2)), cert. denied, 479 U.S. 992 (1986); Enquip, Inc. v. Smith-McDonald Corp., 655 F.2d 115, 118 (7th Cir. 1981) ("[A]n admission in a pleading in one action may be received in evidence against the pleader on the trial of another action to which he is a party."); Parkinson v. California Co., 233 F.2d 402, 437 (10th Cir. 1956) (recognizing that prior pleading was an evidentiary admission and rejecting defendant's claim the prior pleading operated as an "estoppel" or was conclusive); McCormick, supra note 14, § 257 ("A party's pleading in one case may generally be used as an evidentiary admission in other litigation."); 4 Wigmore, supra note 14, at § 1066 (discussing prior pleadings in other causes of action); accord Contractor Utility Sales Co. v. Certain-Teed Products, 638 F.2d 1061, 1084 (7th Cir. 1981) ("[A]lthough prior pleadings cease to be conclusive judicial admissions, they are admissible in a civil action as evidentiary admissions.").


98. McCormick, supra note 14, § 257.

99. Id.; see also Garman v. Griffin, 666 F.2d 1156 (8th Cir. 1981); Murray, California Evidence § 7.07.
In a similar vein, courts under certain circumstances have refused to treat amended or withdrawn pleadings as even evidentiary admissions. A number of courts have held that amended or withdrawn pleadings will not necessarily be admitted as evidentiary admissions if the admission in the pleading would contravene the policy and intention behind the liberal pleading provision of Federal Rule of Civil Procedure 8(e)(2). For instance, in a complicated joinder situation involving a claim and answer, a third-party claim and answer, and a third-party cross-claim which was later amended, the amended cross-claim may be introduced into evidence by the original defendant against the third-party defendant in order to point out the inconsistency between the allegations of the third-party answer and the cross-claim. In such a situation, the Fifth Circuit reiterated the basic rule of evidentiary admissions, but stated that:

Strictly applied, however, this rule would place a litigant at his peril in exercising the liberal pleading and joinder provisions of the Federal Rules of Procedure in that inconsistent pleadings under Rule 8(e)(2) could be used, in the proper circumstances, as admissions negating each other and the allegations in third-party complaints and cross-claims seeking recovery over in the event of liability in the principal action could be used in that action as admissions establishing liability. Thus as 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.

Another exception to treating amended or superseded pleadings as evidentiary admissions, in at least one jurisdiction, arises where the

100. Similarly, statements made by the government in a bill of particulars from a prior prosecution could be admitted as evidence in a subsequent trial. United States v. GAF Corp., 928 F.2d 1253 (2d Cir. 1991).
102. Id.
103. Id. at 1298; see also Garman, 666 F.2d at 1159 (adopting Sherman's view on inconsistent pleadings and stating "to allow [inconsistent pleadings] to operate as admissions would frustrate their underlying purpose."); OKI America, Inc. v. Microtech Int'l, Inc., 872 F.2d 312, 314 (9th Cir. 1989) (adopting Sherman); Nichols v. Barwick, 792 F.2d 1520, 1523 (11th Cir. 1986) (stating that the general rule of judicial admissions does not apply when the defendant takes inconsistent positions in its pleadings "in order to lay a basis for establishing the contingent liability of [the plaintiff and third party defendant]"); Giannone v. U.S. Steel Corp., 238 F.2d 544, 547 n. 4 (3d Cir. 1956) ("[A]uthorities generally concede that one of two inconsistent pleas cannot be used as evidence in the trial of the other"). But see Vincent v. Louis Mark & Co., 874 F.2d 36, 40 (1st Cir. 1989) (using a balancing approach under Fed. R. Evid. 403 for determining the admissibility of prior inconsistent pleadings).
amendment to the pleadings only adds allegations, deleting nothing stated in the original pleadings. This type of admission, made in a prior pleading, continued to have conclusive effect.

C. Statements in Open Court

The Supreme Court has long recognized the binding effect of counsels' statements made in open court. Over one hundred years ago in Oscanyan v. Arms Co., Justice Field, writing the opinion for the majority, found that the plaintiff in an action to recover sales commissions was bound by an admission of his counsel during counsel's opening statement. Counsel's statement in Oscanyan, in effect, admitted that the contract in question was against public policy. The Supreme Court reasoned that:

In the trial of a cause the admissions of counsel, as to matters to be proved, are constantly received and acted upon. They may dispense with proof of facts for which witnesses would otherwise be called. They may limit the demand made or the set-off claimed. Indeed, any fact, bearing upon the issues involved, admitted by counsel, may be the ground of the court's procedure equally as if established by the clearest proof.

The Court further determined that there were no unguarded expressions used, nor any ambiguous statements made, and that counsel was fully apprised of all the facts underlying his client's claim. Since the decision in Oscanyan in 1880, federal courts have conclusively bound parties to statements made by their attorneys during trial. The Second Circuit recently applied Oscanyan and noted that "the general admissibil-

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104. See White v. Arco/Polymers, Inc., 720 F.2d 1391, 1396 n.5 (5th Cir. 1983) (stating that where the amendment to the pleadings only adds allegations, deleting nothing stated in the original pleadings, admissions made in the prior pleadings continue to have conclusive effect).
105. Id.
106. 103 U.S. 261 (1880).
107. Id. at 263-66.
108. Id. at 262-63. In plaintiff's opening, counsel stated that plaintiff's sales were made while he was an officer of the Turkish government, and the sale was accomplished through the influence he exerted upon the government's agent. Defendant then moved for a directed verdict which was granted.
109. Id. at 263.
110. Id. at 264.
111. See, e.g., Collins v. Texas Co., 267 F.2d 257, 258 (5th Cir. 1969) (citing Oscanyan, 103 U.S. at 261) (in action for damage to submerged oyster beds caused by defendant in undertaking to exploit mineral leases, plaintiff was bound by admission in opening that defendant had a lease from state to explore for oil in area) (citation omitted); Dick v. United States, 40 F.2d 609, 611 (8th Cir. 1930) (statement of defendant's counsel in opening statement that there was no controversy about defendant's previous conviction for selling liquor held admission binding on defendant); cf. Roades, Inc. v. United Air Lines, Inc., 340 F.2d 481, 484 (3d Cir. 1965).
ity of an attorney’s statement, as well as the binding effect of an opening statement within the four corners of a single trial, are thus well established.\footnote{112}

Examples of how an attorney can bind his client by statements during a trial are numerous. In one situation, an attorney for his defendant client stated in closing argument that the plaintiff likely experienced some discomfort after the car accident in question.\footnote{113} The court found that this statement was an admission that plaintiff suffered injuries.\footnote{114} In another decision, a bank’s attorney, during the course of a hearing, judicially bound his client by stating that the debtor’s obligation to the bank was non-interest-bearing.\footnote{115} Similarly, the Third Circuit held that defense counsel’s acceptance at trial of the authenticity of certain exhibits constituted a binding judicial admission.\footnote{116} Even an attorney’s statement made at the bench has been deemed a judicial admission.\footnote{117}

Another court recently acknowledged the propriety of applying the judicial admission doctrine to statements made in open court, but applied it in a questionable fashion. In \textit{Jacobs Manufacturing Co. v. Sam Brown Co.},\footnote{118} the court initially noted that counsel’s statement waived an issue from the case, but then stated that counsel’s subsequent actions raised a doubt as to whether the statement was unambiguous.\footnote{119} The court first held that the statement was an admission but that the admission was somehow eliminated or reversed by subsequent action on the part of the attorney. The \textit{Jacobs} decision is unsettling because a statement made during the course of a trial, if clear and unequivocal when made, is a judicial admission. By holding otherwise, all judicial admissions could be vitiated by subsequent corrections, a procedure not recognized under the judicial admission doctrine.\footnote{117} Statements that were am-

\begin{footnotes}
\footnotetext[112]{112. United States v. McKeon, 738 F.2d 26, 30 (2d Cir. 1984).}
\footnotetext[113]{113. Childs v. Franco, 563 F. Supp. 290, 291-92 (E.D. Pa. 1983). While counsel’s blunders can severely harm a party’s claims, clients are not typically without recourse against their attorneys. For instance, a party may sue its counsel for malpractice.}
\footnotetext[114]{114. Id.}
\footnotetext[115]{115. \textit{In re Eagson Corp.}, 37 B.R. 471, 480 (E.D. Pa. 1984) (the statement significantly reduced the bank’s potential recovery).}
\footnotetext[116]{116. Glick v. White Motor Co., 458 F.2d 1287, 1291 (3d Cir. 1972).}
\footnotetext[117]{117. United States v. Cravero, 530 F.2d 666 (5th Cir. 1976) (during a bench conference defense counsel conceded that a witness committed perjury).}
\footnotetext[118]{118. 792 F. Supp. 1520 (W.D. Mo. 1992), aff’d in part, rev’d in part, 19 F.3d 1259 (8th Cir.), cert. denied, 115 S.Ct. 487 (1994).}
\footnotetext[119]{119. Id. at 1531-32.}
\footnotetext[120]{120. \textit{See, e.g.}, Missouri Hous. Dev. Comm’n v. Brice, 919 F.2d 1306, 1314 (8th Cir.\textit{.)}}
\end{footnotes}
biguous when made are more defensible as not being admissions when evidence of that fact is demonstrated by counsel’s subsequent actions. However, if one cannot conclude that the statement was ambiguous when made, then an admission, is “an admission, is an admission . . . .”

Although the application of the judicial admission doctrine to statements made in open court dates back to the early days of American jurisprudence, and are prolific in number the more recent decisions addressing this issue do not typically go unnoticed. Indeed, some scholars have called for a more widespread and consistent use of judicial admissions. Greater application of the doctrine of judicial admissions for statements made by attorneys is seen as accomplishing several goals. It will aid the bar, the judiciary, and possibly litigants by forcing attorneys to be accountable for their actions and statements in court. While some might attack the greater use of the doctrine, as inequitable if applied in all circumstances, it should be remembered that trial courts have the discretion to avoid the consequences of a judicial admission. Courts may assess the ramifications and specific consequences of deeming the statement a party admission and simply choose to ignore the statement. If, however, courts would address admissions by attorneys

1990) (holding that the production of contradictory evidence would not allow a party to avoid the impact of the general rule rendering admissions binding); New Amsterdam Casualty Co. v. Waller, 323 F.2d 20, 24 (4th Cir. 1963) (stating that once a judicial admission has been made, subject matter ought not to be reopened in absence of showing of exceptional circumstances); Jones v. Morehead, 68 U.S. 155, 165 (1863) (“an effort has been made by counsel to show that this admission has been waived, by the act of plaintiffs . . . . It would be subversive of all sound practice, and tend largely to defeat the ends of justice, if the court should refuse to accept a fact as settled”).

121. See supra notes 46-51, 84. Another exception to the judicial admission doctrine occurs where counsel’s statement was made under a degree of compulsion, outside the presence of his client, and the information sought was an element of a potential criminal charge. See, e.g., United States v. Freeman, 519 F.2d 67, 70 (9th Cir. 1975).

122. See Alan Mansfield, Lawyers’ Admissions, 12 Litig. 39 (1978) (warning the bar, in light of McKeon, of the potentially damaging effect of opening statements).

123. Id.; see Judicial Admissions, supra note 44, at 1132 (1964) (judicial admissions considered binding on parties in many different situations); Freida F. Bein, Parties’ Admissions, Agents’ Admission: Hearsay Wolves in Sheep’s Clothing, 12 Hofstra L. Rev. 393 (1984) (analyzing different theoretical justifications for admissions); 9 Wigmore, supra note 25, § 2597 at 852.

124. See supra notes 55-57; see also L.P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co., 253 F. 914, 917 (7th Cir.) (“[U]ndoubtedly a litigant has no cause for complaint if the Court accepts his solemn and sworn admissions in pleadings and testimony as true. But we must reject the contention that his adversary has the right to compel the court to do so.”), cert. denied, 248 U.S. 580 (1918).

The issue relating to the viability, usefulness and potential harm of the judicial admission doctrine suggests that further analysis would be useful.

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more consistently and in all forms of court documents and statements, counsel would be aware that they, along with their clients, will be held accountable for imprudent, overly-aggressive or untruthful factual positions taken in documents such as memoranda of law.

As will be discussed further, more consistent and frequent use of the doctrine would also strengthen standards of professionalism and accountability within the bar, assist in achieving quicker resolutions of issues, and avoid the consequences of haphazard application of the law. For instance, when the doctrine is thus used, the likelihood of the appearance of non-judicial motivations behind the decisions would be diminished.25

D. Memoranda of Law

Despite the fact that judges have the discretion to avoid recognizing admissions,125 courts have repeatedly recognized the binding effect of statements by counsel in pleadings.127 Courts have also conclusively bound parties for statements made by their counsel in open court.128 With memoranda of law, however, courts have been inconsistent in their discretion to treat these statements as binding judicial admissions.

The difficulty federal courts have had dealing with counsels’ factual statements in memoranda of law is demonstrated by the Supreme Court's handling of the issue. In United States v. Fruehauf,129 the Supreme Court alluded to, but chose not to address, whether an admission in a memorandum of law should be treated as a judicial admission.30 The appellant in Fruehauf was indicted for unlawfully delivering money to a

125. See, e.g., United States v. McKeon, 738 F.2d 26, 33 (2d Cir. 1984). This deals with an extremely sensitive political issue involving allegations of arms smuggling for terrorists. During the trial there were numerous allegations that the United States government officials sympathetic to the Irish Republican Army were leaking information to defense counsel. After an initial hung jury, there was international criticism and pressure on the United States government. During the second trial, application of judicial admission doctrine proved to be instrumental in the conviction of the defendant. See generally A Fraud Among U.S. Agents, Newsweek, August 13, 1984 (pointing out that the McKeon case was extremely political, involving shipping weapons to alleged terrorists and suggesting that defense counsel may have improperly used government secrets).
126. See supra note 55-57.
127. See supra notes 94-99 and accompanying text.
128. See supra notes 106-17 and accompanying text.
130. Id.
union representative. The district court ruled that a "trial memorandum" filed by the government stating that the transaction at issue was a "loan" constituted a judicial admission. The court thereby absolved the defendant from any wrongdoing because the statute alleged to have been violated did not cover loans. The Supreme Court in Fruehauf, however, refused to consider whether the "admission" had foreclosed the government from proving at trial that the loan was a sham, or otherwise constituted a transfer of something of value apart from an ordinary loan, thus violating the statute. Although the Fruehauf court did not articulate a great deal of analysis before reaching its conclusion, it appears that Fruehauf's conclusion is that an admission in a memorandum of law should not be treated as a judicial admission. The Supreme Court has yet to officially rule on the issue, but subsequently acknowledged that Fruehauf did not squarely address whether statements in a memorandum of law may be considered judicial admissions, and specifically noted that the Fruehauf opinion has never been cited on the issue. Although the Supreme Court has had the opportunity to rule on this specific issue, the court has apparently chosen to allow the lower courts to dispute the matter further.

Since the early prescriptions of Oscanyan and Jones, where the Supreme Court first bound litigants to the statements of their attorneys, the law regarding the treatment of counsel's admissions in memoranda of law has taken at least two divergent paths. The first federal case to address counsels' admissions in memoranda of law was Young & Vann Supply Co. v. Gulf F. & A. Ry. Co. In Young, the plaintiff brought an action against a railroad company, which purchased supplies from the plaintiff while the railroad company was under the control of a receiver. The railroad company successfully moved to dismiss the action and the plaintiff appealed. The Court of Appeals ruled in favor of the plaintiff, as the railroad company's brief admitted that when the railroad

131. Id. at 147-48.
132. Id.
133. Id. at 148-49, 153.
134. Id. at 157-58.
135. See id.
136. United States v. Sisson, 399 U.S. 312, 316 n.4 (1970) (Burger, C.J., dissenting). The lower court in Fruehauf dismissed the charges against the defendant based upon a judicial admission in the government's memorandum of law. Id. at 316 n.4 (Burger, C.J., dissenting). The appeal presented the question of whether a loan of money was prohibited by the statute. Id. The lower court assumed the transaction was a "loan" based upon the admission in the memorandum of law. Id. The binding affect of the admission, therefore, was before the Supreme court, and should have been resolved.
137. 5 F.2d 421 (5th Cir. 1925).
138. Id. at 422.
139. Id.
company was sold, the creditors' committee acknowledged that the plaintiff was entitled to recover the amounts owed. The appellate court followed Oscanyan, and concluded that it could consider statements in briefs as judicial admissions.

In Taylor v. Allis-Chalmers Manufacturing Co., the court focused on a different analysis and came to an entirely different conclusion than the Young decision. In Taylor, the plaintiff sought to recover damages resulting from an injury, contending that the trial court erred in refusing to permit him to read into evidence admissions made by the defendant's counsel in a pretrial memorandum. Despite the fact that the plaintiff wished to have the admissions "read into evidence," which suggests that plaintiff merely attempted to treat the admissions as evidentiary admissions, the Taylor opinion addressed whether the admissions were judicial admissions. The Taylor court, arguably in dictum, concluded that the admissions were not judicial admissions as "they were not made on the record during the course of the trial, and were not included in a 'pleading.'" The Taylor court also concluded that the admissions "did not have sufficient formality or conclusiveness to be considered judicial admissions." Interestingly, the Taylor court did not cite or distinguish the Young decision which is considered the seminal case on point. In addition to not citing Young, the Taylor opinion did not address the Supreme Court opinions in Jones and Oscanyan, which held that counsels' statements could be treated as judicial admissions. Instead, the Taylor court relied upon decisions which held that memoranda of law and motions are not considered pleadings and therefore not included in the record. This is in conflict with the Supreme Court holding in Oscanyan, which judicially bound a litigant to a statement that was not in a pleading, and with the Fifth Circuit in Young, which bound a par-

140. Id. at 423 (sale was confirmed upon the express condition that some protection would be given to creditors by the creditor's committee as was given by the receiver prior to the sale).
141. Id.
143. Id. at 1384.
144. Id. at 1385 ("pleading" usually includes documents such as complaints, answers, replies and other documents which frame the issues of the case).
145. Id.
ty to a statement in a memorandum of law.\textsuperscript{148} Despite its apparent analytical shortcomings, the \textit{Taylor} decision rather than the \textit{Young} opinion has been followed more frequently or had its reasoning applied by courts addressing this issue.\textsuperscript{149} In \textit{Plastic Container Corp. v. Continental Plastics of Oklahoma, Inc.},\textsuperscript{150} the Tenth Circuit Court of Appeals followed \textit{Taylor}'s analysis and attempted to reconcile \textit{Young} by focusing on the fact that the \textit{Young} court treated the admission in question as a matter of judicial discretion.\textsuperscript{151}

The \textit{Plastic Container} decision is troublesome because one of the tenets of the judicial admission doctrine gives courts the discretion to accept or reject judicial admissions at all times. The power to utilize this discretion, therefore, should not be the basis for the wholesale rejection of the application of the doctrine to statements in memoranda of law. In \textit{Jones} and \textit{Oscanyan}, the first two Supreme Court opinions to apply the judicial admission doctrine, the Court specifically recognized that a trial court has the discretion to accept or reject any party statements as judicial admissions.\textsuperscript{152} \textit{Jones} and \textit{Oscanyan} set a strong precedent and led to the consistent use of the doctrine regarding attorney statements in pleadings and in open court.\textsuperscript{153} Thus, \textit{Taylor} and its progeny are of questionable analytical soundness as they do not comport with the analysis used in these prior decisions.

\section*{IV. AN ANALYSIS OF THE FACTORS COURTS HAVE USED IN ADDRESSING THE TREATMENT OF STATEMENTS IN MEMORANDA OF LAW}

In the cases following \textit{Young} and \textit{Taylor}, federal courts have been inconsistent in the application of the judicial admission doctrine regarding memoranda of law, sometimes treating counsel's statements as judicial admissions or evidentiary admissions, and other times refusing to admit the statements altogether. Citing \textit{Taylor} as the basis of the decision, however, federal courts in most instances have treated statements in memoranda of law as evidentiary, not judicial admissions.

\textsuperscript{148} Young & Vann Supply Co., 5 F.2d 421, 423 (1925).
\textsuperscript{149} See, e.g., Loudermill \textit{v. Cleveland Bd. of Educ.}, 844 F.2d 304, 309 (6th Cir. 1988); \textit{Plastic Container Corp. v. Continental Plastics of Okla., Inc.}, 607 F.2d 885 (10th Cir. 1979), \textit{cert. denied}, 444 U.S. 1018 (1980); \textit{Hub Floral Corp. v. Royal Brass Corp.}, 454 F.2d 1226 (2d Cir. 1972), \textit{aff'd}, 470 U.S. 532 (1985); \textit{Lockert v. Faulkner}, 574 F. Supp. 606, 609 (N.D. Inc. 1983). These decisions in turn have been accepted by other federal circuit courts. \textit{See}, \textit{e.g.}, \textit{American Title Ins. Co. v. Lacelaw Corp.}, 861 F.2d 224, 226 (9th Cir. 1988).
\textsuperscript{150} 607 F.2d 885 (10th Cir. 1979), \textit{cert. denied}, 444 U.S. 1018 (1980).
\textsuperscript{151} \textit{Plastic Container}, 607 F.2d at 906.
\textsuperscript{152} \textit{Jones}, 68 U.S. at 165; \textit{Oscanyan}, 103 U.S. at 263.
\textsuperscript{153} See supra notes 80-83 and 106-12 and accompanying text.
Federal courts have focused on a variety of factors to justify treating statements in memoranda of law as evidentiary admissions. An analysis of these cases demonstrates that the factors used by the courts are questionable. For instance, courts appear to focus on the fact that statements in memoranda of law are not part of the record and, thus, not as conclusive as statements made in pleadings. Although memoranda of law are not officially part of the record on appeal, appellate courts have not had any difficulty reviewing such memoranda for statements made by counsel in situations such as sanctioning counsel for legal positions taken. Additionally, statements made in memoranda of law should be viewed as equally deliberate, if not more deliberate, than statements made in open court. Statements made in open court are often spontaneous and not well thought out, yet are frequently deemed judicial admissions. Therefore, it is only logical that statements in memoranda of law, which have been written out and reviewed by counsel, should in most cases have the same binding effect and also be considered judicial admissions.

154. See, e.g., City Nat'l Bank v. United States, 907 F.2d 536 (5th Cir. 1990) (judgment notwithstanding a verdict context is different than a summary judgment context); American Title, 861 F.2d at 227 (9th Cir. 1988) (non-declarant "did not introduce the statement into evidence or object to the introduction of contradictory testimony"); Loudermi//, 844 F.2d at 309 (6th Cir. 1988) (briefs prepared for oral arguments are not pleadings); Plastic Container Corp., 607 F.2d at 906 ("[b]riefs are not a part of the record . . . . and the alleged admission appears to be contrary to the argument in its brief"); United States v. Belculfine, 527 F.2d 941, 944 (1st Cir. 1975) (the statement was a casual one, which was "made at a time when the party was urging a legal theory under which the accuracy of the statement was irrelevant").

155. See supra note 146.

156. See, e.g., FED. R. CIV. P. 11; Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986) (stating that Rule 11 applies to every paper signed during the course of the proceedings and not only to the pleadings); Massive Paper Mills v. Two-Ten Corporation, 668 F.Supp. 94 (S.D.N.Y. 1987) (opposition to motion for summary judgment was frivolous and, thus, sanctionable); Long v. Quantex Resources, Inc., 108 P.R.D. 418, 417 (S.D.N.Y. 1985) (sanctioning attorney who filed baseless jurisdictional motion); AM Int'l, Inc. v. Eastman Kodak Co., 39 Fed. R. Serv. 2d (Callaghan) 433 (N.D. Ill. 1984) (sanctioning counsel for filing of a brief containing a misleading footnote).

Some may argue that Federal Rule of Civil Procedure 11 is the appropriate way to handle factual misstatements. This argument fails for two reasons. First, unlike in a Rule 11 setting, in a judicial admission scenario opposing counsel wants to use the misstatement to prove his or her clients' case. Second, Rule 11 has often been criticized for creating satellite litigation.

157. See supra notes 106-12.
The lengths to which courts have gone in order to apply the doctrine are demonstrated in an opinion where the court limited the circumstances under which it will treat "involuntary" acts as judicial admissions. The court refused to hold counsel's statement as an admission partly because "considerations of fairness and the policy of encouraging judicial admissions require that trial judges be given broad discretion to relieve parties from the consequences of judicial admission in appropriate cases." Several questions arise from this proposition. First, if the policy is to encourage judicial admissions, should judges be given broad discretion to relieve parties from the consequences of those admissions? Second, the doctrine of judicial admissions arose from involuntary acts of attorneys, and courts have subsequently held admissions to occur from those involuntary acts in all aspects of a case. Does this notion conflict with judicial discretion to relieve admissions? Finally, are statements made in a memoranda of law and filed with the court really less formal than statements made in open court? The cases thus far do not adequately resolve these questions.

Although courts have focused on the fact that statements in memoranda of law are not officially considered part of the record, certain federal courts, in refusing to treat such statements as judicial admissions, have considered other factors in determining whether to consider the statements as judicial admissions. These factors include:

1. that the "alleged admission" appeared to be contrary to the argument in the party's brief;
2. that the opposing side never attempted to introduce the statement into evidence, or objected to the introduction of contradictory testimony at trial;
3. that an "inadvertent" statement by counsel should not conclusively bind the client;

158. Belcufine, 527 F.2d at 944.
160. Best, 291 U.S. at 415; Belcufine, 527 F.2d at 944.
161. Plastic Container Corp., 607 F.2d at 907; American Title, 861 F.2d at 226; Belcufine, 527 F.2d at 944; In re Applin, 108 B.R. 253 (Bankr. E.D. Cal. 1989); Hub-Floral Corp. v. Royal Brass Corp., 454 F.2d 1226 (2d Cir. 1972). But see United States v. Greenberg, 268 F.2d 120, 125 (2d Cir. 1959); In re Wilkes, 55 F.2d 224 (2d Cir. 1932); United States v. A Motion Picture Film, 285 F. Supp. 705 (S.D.N.Y. 1968), rev'd, 404 F.2d 146 (1969); City Nat'l Bank, 907 F.2d at 539.
163. American Title, 861 F.2d at 227.
164. Id.
4) that a judgment notwithstanding the verdict context is unlike admissions of fact in a summary judgment motion which are often treated as judicial admissions;\textsuperscript{166} and

5) that "the statement was a casual one" and "was made when the party was urging a legal theory under which the accuracy of the statement was irrelevant."\textsuperscript{167}

A review of these factors raises questions about soundness of many of these decisions. Looking at the first factor—that the statement was not part of the record and the admission "appeared contrary" to the argument in the party's brief\textsuperscript{168}—raises the following question: If courts are unforgiving when counsel makes statements in open court or in pleadings, why should an attorney's professional standards be any less when the factual assertion is in a brief? This concern is particularly significant considering the backlog courts now face in hearing discovery and other types of motions.\textsuperscript{169}

Some argue that judges should have a great amount of discretion to avoid injustice to litigants. While this argument carries considerable force, it ignores the fact that the doctrine of judicial admissions is often applied to the detriment of litigants.\textsuperscript{170} Courts should not use their discretion in a way which, in effect, precludes the application of the judicial admission doctrine to statements in memoranda of law without explicitly establishing that the doctrine does not apply thereto. There should be a presumption that any such statement is considered a judicial admission unless the court can articulate why it shouldn't be. The way courts currently handle this issue results in inconsistency and confusion by not forcing attorneys to be more cautious and judicious in their written submissions to the court. Although courts retain the discretion to prevent injustices by avoiding labeling statements as judicial admissions, they should not use their discretion as a shield to avoid critical analysis and the creation of objective standards.

The second factor—the opposing side never attempted to introduce the statement into evidence or objected to the introduction of contrary evidence at trial—distinguishes admissions from "judicial admissions." It is unnecessary for opposing counsel to use the admission as evidence

\textsuperscript{166}. \textit{City National Bank}, 907 F.2d at 539.
\textsuperscript{167}. \textit{Belculfine}, 527 F.2d at 944.
\textsuperscript{168}. \textit{Plastic Container Corp.}, 607 F.2d at 407.
\textsuperscript{169}. See July 5, 1994 New York Law Journal (Chief Judge Thomas Platt called to study creating a fifth federal district in New York as a possible solution to caseload problems in New York).
\textsuperscript{170}. \textit{See supra} notes 1-13 and accompanying text.
because the judicial admission, by definition, removes the issue from the case. While opposing counsel should be required to inform the court of a judicial admission, this factor suggests that a "waiver" exception be applied to the doctrine. Such an exception undermines the purpose behind judicial admissions.

The third factor—that the statement is inadvertent—like the first factor, advocates a weakening of the standards of professionalism. As discussed above, courts and scholars have specifically noted that inadvertent statements may constitute judicial admissions. In addition, when courts address admissions in pleadings, they place no emphasis on whether the statement was purposeful or inadvertent. There has yet to be a detailed analysis addressing why attorneys' written representations in memoranda of law deserve less accountability than similar statements made in a pleading.

The fifth factor—that the statement was a casual one and was made when the facts were unimportant—is an attempt by the court to be pragmatic and recognize that counsel are at times called to quickly marshal facts and respond to issues without reviewing the appropriate documents or consulting with their client and should not be penalized by having those kind of statements deemed admissions. For instance, attorneys routinely respond to motions for temporary restraining orders or make offers of proof in evidentiary disputes. In fact, the case discussing this factor specifically noted that the alleged admission was in a brief which was drafted over a weekend following the completion of a hearing before a magistrate. This factor is not inconsistent with the judicial admission doctrine, and even if it is, it nevertheless should be a consideration for a court when determining the treatment to be given to statements in memoranda of law.

While one of the factors federal courts have used when addressing the treatment of statements in memoranda of law merits further application,

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171. See, e.g., Jones, 68 U.S. at 165.

An effort has been made by counsel to show that this admission has been waived, by acts of plaintiffs, in going into the proofs, and otherwise treating it as an open question . . . . It would be subversive of all sound practice, and tend largely to defend the ends of justice, if the court should refuse to accept a fact as settled, which is distinctly alleged in the bill, and admitted in the answer.

Id.; see supra note 146 and accompanying text. The fourth factor—that a judgment notwithstanding the verdict context is different from a summary judgment context—merely begs the question.

172. See supra note 113-17 and accompanying text.

173. See supra note 80-82 and accompanying text.

174. Belcuffine, 527 F.2d at 944.

175. Id.
the others do not. In addition to the difficulty in reconciling Young, federal courts failed to develop a single set of standards or factors when addressing the issue. Exacerbating the problem of analyzing statements made in memoranda of law, courts confronted with this issue have reached different conclusions, often with virtually no analysis. In some circumstances the statements are treated as judicial admissions, while in other circumstances, courts merely proclaim that the statements are evidentiary admissions. Still in other cases, courts refuse to admit the statements altogether. It is unfortunate that courts are able to decide when a party should be punished, giving little or no guidance to the bar, the judiciary, or litigants.

176. See Lockert v. Faulkner, 574 F. Supp. 606, 609 n.3 (N.D. Ind. 1983) (noting that a memorandum created in support of a motion does not constitute a pleading for purposes of a judicial admission); Loudermill v. Cleveland Bd. of Educ., 844 F.2d 304, 309 (6th Cir.) (reasoning that briefs written for oral argument do not constitute pleadings); cert. denied, 488 U.S. 946 (1988); but see In re Southeast Banking Corp., 855 F. Supp. 353, 357 n.2 (S.D. Fla. 1994) (noting that statement in brief that statute of limitations precludes certain claims constituted a judicial admission); Dennis v. Bradbury, 236 F. Supp. 683 (D. Colo. 1964) (reasoning that statement in brief that statute of limitations precludes certain claims constituted a judicial admission); Kurek v. Pleasure Driveway, 557 F.2d 580, 595 n.13 (7th Cir. 1977) (noting that facts stated in defendant's brief constituted judicial admission even though the case is currently on appeal), cert. denied, 439 U.S. 1090 (1979).

177. See supra notes 137-41 and accompanying text.


179. See Dartez v. Owens Illinois, Inc., 910 F.2d 1291, 1293-94 (5th Cir. 1990) (reasoning that post trial briefs filed by manufacturers in a separate declaratory judgment action against their insurers, to establish liability coverage for potential claims, were not party admissions over manufacturers' hearsay objection in subsequent personal inactions), cert. denied, 112 S. Ct. 2301 (1992); Brownko Intern, Inc. v. Ogden Steel Co., 585 F. Supp. 1432, 1438 (S.D.N.Y. 1982) (noting that statements contained in briefs of counsel are not admissions by a party-opponent within the context of Rule 801).

180. Compare United States v. Ramirez, 894 F.2d 565, 570 (2d Cir. 1990) (reasoning that failure to admit affidavit containing party-opponent admissions would not constitute reversible error) with American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988) (noting that admissions in a summary judgment motion are judicial admissions).
V. REASONS FOR CHANGE

Under the current law, courts have the discretion to achieve different results under similar circumstances. In the Second Circuit alone, the inconsistency in the treatment of incorrect statements in memoranda of law typifies why more guidance should be given to practitioners and courts. The most recent Second Circuit case to address the issue determined that statements in memorandum of law do not rise to the level of a judicial admission. In *Hub Floral Corp. v. Royal Brass Corp.*, a copyright infringement action, plaintiff, in a brief in support of a motion for summary judgment, admitted that he had failed to properly register the copyright. Defendants sought to use the admission to dismiss plaintiff's action. The Second Circuit followed the opinion in *Taylor v. Allis-Chalmers Mfg. Co.*, and refused to treat the statement as a judicial admission because the statement was not in a pleading and not part of the record. The *Hub Floral* court repeatedly described the statement as inadvertent as if to suggest that inadvertent statements should not be judicially admitted.

In reaching this conclusion, the *Hub Floral* court did not mention three prior opinions within the jurisdiction, two of which were from the United States Court of Appeals for the Second Circuit itself, which held that factual statements in memoranda of law could be treated as judicial admissions. Normally, the most recent case controls, but a fairly strong argument can be made that in the Second Circuit the rule is unclear.

It is conceded that federal courts need discretion in handling their cases in order for justice and equity to prevail. This discretion, however, should not be used as a shield to avoid formulating standards and apply-

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181. See infra notes 182-89 and accompanying text.
182. 454 F.2d 1226 (2d Cir. 1972).
183. Id. at 1228.
184. Id.
186. *Id.* But see *American Title Ins. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (admissions in a summary judgment motion are judicial admissions).
188. Id. at 1228.
189. Leslie v. Knight Soda Fountain Co., 55 F.2d 224, 225 (2d Cir. 1932) (binding court to appellant's evaluation in its brief of the item at issue and concluding "we are entitled to take him at his word"); United States v. Greenberg, 268 F.2d 120, 127-28 (2d Cir. 1959) (binding defendant to guilty plea entered in course of trial when defendant was competently and fairly represented by experienced counsel); United States v. Motion Picture Film, 285 F. Supp. 465 (S.D.N.Y. 1968), rev'd on other grounds, 404 F.2d 196 (2d Cir. 1968) (reasoning that government statement in brief that film had "social value" constituted judicial admission in a case where government attempting to confiscate pornographic material).
ing them consistently. Moreover, courts have been able to provide guidance and set forth standards of professionalism when dealing with counsels' factual statements in pleadings or in open court by establishing guidelines for the bar and the judiciary to follow. The same should be true for memoranda of law.

A. The Need for Greater Application of the Doctrine

This Article calls for greater application of the judicial admission doctrine to statements in memoranda of law, and a reconciling of the analysis to be used when addressing counsels' admissions in these documents. Greater use of the doctrine would allow for: (1) more guidance to the bar; (2) faster resolution of issues within a trial; (3) avoidance of the appearance of non-judicial motivations being involved when the doctrine is used; and (4) holding attorneys responsible for the consequences of their actions, not excusing the attorney merely because of reconsideration of previous positions. Concern about the severity of results arising from the greater use of judicial admissions is misplaced. Such concern fails to take into account the reality that the doctrine is often applied, and many times in situations much more "inadvertent" than memoranda of law. Perhaps this concern is really addressing whether there should be a doctrine of judicial admission at all, rather than in which situations it should be applied. Furthermore, the argument raised in this Article calls for greater and more consistent use of the doctrine, not the stripping of a court's power to use its discretion to avoid injustices. Thus, courts should not continue to use the doctrine indiscriminately without providing guidance to the bar. Courts should not use their power to decide whether to apply the doctrine in a manner that usurps the need for well-delineated standards. The doctrine is well-established, therefore, indiscriminate use of the doctrine does more harm than a well-recognized and uniform, albeit stringent, standard. As one writer stated in calling for the doctrine's greater use:

Unlike unwary parties, attorneys are versed in courtroom procedure and the rules governing judicial admissions. They should, therefore, be bound by statements evincing less deliberation and not be permitted to escape preclusion by subsequent disclaimers of intent that frequently result from pressure by clients or reconsidered tactics.

190. See supra notes 75 and 101 and accompanying text.
192. Note, Judicial Admissions, supra note 44, at 1132.
B. The Need for Consistency and Standards for Treating Statements in Memoranda of Law

In evaluating statements made in memoranda of law, courts have been extremely inconsistent. Some courts hold such statements as judicial admissions, others hold them as evidentiary admissions, and still others do not recognize such statements as admissions of any kind. With pleadings, if the statement is made in an unamended or superseded pleading, courts have consistently held such statements as judicial admissions. With statements made in open court, courts have developed an analysis which states that if the statement is clear and unequivocal, then that statement is typically considered a judicial admission.

If ambiguous on the other hand, statements in open court will not usually bind the attorney and his client. As opposed to pleadings and statements in open court, there is a lack of logical analysis regarding statements in memoranda of law. While some courts emphasize that statements made by counsel in memoranda of law are not pleadings or part of the record, as mentioned previously, this adds little to the analysis. The fact remains that statements in memoranda of law are often more deliberate than the statements made by counsel in open court, which are treated as judicial admissions. Accordingly, treating counsels' statements similarly would be more logical.

While it may seem harsh to, in effect, punish clients for counsel's mistakes in legal briefs, it is logical to do so and is consistent with the admissions doctrine. Courts already treat counsels' statements as admissions in some instances, such as statements in pleadings. Nonetheless courts may be reluctant to expand the admissions doctrine for fear of stifling creative and zealous advocacy. While the judiciary may be reluctant to interfere with fellow lawyers' tactics, sympathy for the pressures and difficulties of advocacy provides an unpersuasive rationale for the sporadic and inconsistent application of the admissions doctrine. The doctrine must be applied uniformly, and the bar must have clear guidelines for its use. Moreover, the court as well as counsel will benefit from

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193. See supra notes 126-53 and accompanying text; see also In re Southeast Banking Corp., 855 F.Supp. 353, 357 n.2 (S.D. Fla. 1994); City of Philadelphia v. Public Employees Ben. Servs. Corp., 842 F. Supp. 827, 830-31 (E.D. Pa. 1994) (refusing to take judicial notice of statements made in a memorandum when the statements were off the record and not contained in the pleading).


195. An argument for leniency when dealing with memoranda of law is that statements in pleadings can be amended. However, statements in open court typically cannot be retracted and are binding. In addition, there are restrictions on amending pleadings. See FED. R. CIV. P. 15.
this clarification. If assertions in legal memoranda constitute judicial admissions, lawyers will not be tempted to offer the court arguments that could be construed as admissions. Thus, judicial efficiency will be enhanced by expanding the doctrine. Generally, Oscanyan and Young, which allow courts to construe clear and unambiguous statements in briefs as admissions, illustrate the direction the law should take in this area. However, this Article does not espouse eliminating the court's discretion to recognize judicial admissions. Courts must retain the power to reject judicial admissions when doing so furthers justice. This writer proposes that courts should follow Oscanyan, Jones, and Young, and treat clear and unambiguous statements in memoranda of law as judicial admissions.

VI. GUIDANCE

To provide a consistent standard for applying the admissions doctrine, courts must provide the bar with clear guidelines. This article proposes that courts treat factual statements in legal memoranda similar to statements in open court. Generally, a casual response to a query by the court is too uncertain to constitute a judicial admission. Similarly, a
minor typographic error in a brief would not provide the basis for a judicial admission, particularly if the error contradicts the rest of the document. In addition, if the factual statement in the brief seems inconsequential and unrelated to the legal argument, the court may use its discretion to deny the statement status as an admission. Thus, a statement would not be a judicial admission when the statement is casual, inconsistent with the rest of the brief, a minor typographic error, or irrelevant to the legal argument.

The general standard for judicial admissions in briefs should be that facts must be stated clearly and must pertain to a legal conclusion. The clarity of the statement may be determined by the iterations in the brief. Thus, under the proposal recommended here, repeating a clear, unambiguous statement that provides the basis for a legal conclusion requires the court to find that the statement constitutes a judicial admission.

Attorneys must be more accountable for their assertions. In recent years society has become more litigious, and the resulting lawsuits have become more complicated and protracted. Attorneys must be held responsible for misstatements of fact that keep alive a meritless claim or defense. It is unjust to allow an attorney to prevail on a motion that furthers or defeats an action and then claim different facts at trial. Courts should hold attorneys and clients to the prescriptions of , and bind an attorney to his words when he or she makes a clear and unambiguous factual statement. Further, courts should not distinguish between statements of record and memoranda of law as this distinction does not justly treat one as a judicial admission and not the other. Indeed, Professors Wigmore and Chadbourne argue that:

The doctrine of Judicial Admissions has long had a large future before it, if judges would but use it adequately. In the first place, the judge could apply it to all informal, as well as formal, admissions by counsel during trial . . . . It is easy to see how large a mass of needless skirmishing can thereby be eliminated, how much time would be saved, and how much confusion of the jury would be avoided. And this would be attained by the mere application of an existing principle.

203. Cf. Plastic Container Corp. v. Continental Plastics of Okla., Inc., 607 F.2d 805, 907 (19th Cir. 1979) (statement was "contrary to the argument in [the] brief").
204. See, e.g., United States v. Belcuffine, 527 F.2d 941, 944 (1st Cir. 1975) (a binding admission must not follow from an "involuntary" act and courts must have discretion to "relieve parties from the consequences of judicial admission" for casual statements).
205. Oscanyan v. Arms Co., 103 U.S. 261, 263 (1880) (counsel's statement was unambiguous); Best v. District of Columbia, 291 U.S. 411, 415 (1934) (directing a verdict after opening statement is not proper if statement is ambiguous).
206. See, e.g., Oscanyan, 103 U.S. 261, 264 (counsel "dwelt upon and reiterated the statement").
208. 9 Wigmore, supra note 25, § 2597 at 851-52. Statements should be deliberate
Holding counsel accountable for admissions in memoranda of law would not be an undue burden on courts. Currently, courts hold counsel accountable for statements made in documents that are not part of the record. Further, the law holds attorneys accountable for their representations in other contexts. For example, courts may discipline an attorney who files a document that has no basis in law or fact.

VII. CONCLUSION

The judicial admission doctrine has been a valuable tool for courts to ensure a minimum of accountability by counsel. Under this doctrine, counsel are held to their factual representations and, to some extent, overzealous advocacy is kept in check. However, the doctrine needs to be reformed because its parameters are not clearly defined and some attorneys seek a tactical advantage by misleading the opposing party and the court in legal briefs. Further, expanding the use of the admissions doctrine to include statements in memoranda of law would have a positive impact on the legal profession as a whole. An overburdened judiciary would benefit from broadening the doctrine since this would encourage the expeditious resolution of matters before the courts. Most importantly, reforming the admissions doctrine would resolve the current inconsistencies in this area that have perplexed diligent attorneys and jeopardized the efficiency of the courts.

to be judicial admissions. For instance, statements in letters written to the court should remain evidentiary admissions. Letters are not part of the record and may be written hastily and in the heat of a dispute. Further, a succession of attorneys may be involved in an action, so it may be unfair to hold clients and counsel to the statements of an attorney who is no longer working on the case. For these reasons, letters should not be binding admissions.

209. See supra Part I; cf. FED. R. CIV. P. 11 (providing for sanctions involving "pleadings, motions, and other papers").