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ELIMINATION OF THE AGENCY FICTION IN THE VICARIOUS ADMISSIONS EXCEPTION

I. INTRODUCTION

Although the Washington Judicial Council has recommended that the State Supreme Court adopt most of the Federal Rules of Evidence, it has proposed retention of the common law version of the vicarious admissions exception as presently applied by the Washington courts.¹ Washington's adoption of Federal Rule 801(d)(2)(D) would involve a significant departure from established precedent² but would be consistent with a widely noted modern trend toward liberalizing restrictions on admissions by agents.³ Since the Judicial Council's proposal was contrary to this trend and was rationalized only by the cryptic statement that existing Washington law "reflected better policy,"⁴ a more detailed analysis of the vicarious admissions exception seems appropriate.

This note will compare the Washington courts' application of the common law vicarious admissions exception to the broad rule embodied in Federal Rule 801(d)(2)(D). Furthermore, it will identify and analyze the policies upon which the vicarious admissions rule is grounded and will compare the effectiveness of the common law rule and the federal or "broad" rule in fulfilling those policies. It will demonstrate how, in focusing on the substantive law of agency rather than directly on those circumstances which tend to assure a statement's trustworthiness, both rules share a fundamental flaw and, as a result,

¹. PROPOSED WASH. R. EVID. 801, Comment 801, Paragraph (d).
². See Parts II and III infra (comparison of Federal Rule 801(d)(2)(D) and the common law vicarious admissions exception as currently applied in Washington).
⁴. PROPOSED WASH. R. EVID. 801, Comment 801, Paragraph (d).
accomplish only imprecisely the basic purpose of admitting the maximum amount of reliable evidence. Finally, this note will suggest a third formulation of the rule which inquires directly into the against-interest nature of an agent's admission, the feature most commonly emphasized as the basis of such statements' reliability.

II. THE OPERATION OF WASHINGTON'S PRESENT VICARIOUS ADMISSIONS EXCEPTION

The Washington courts have generally applied the common law vicarious admissions exception called the "speaking agent" test. Under this test, an agent's out-of-court statements are admissible against his principal at trial only "if the agent was authorized to make the statement or was authorized to make, on the principal's behalf, any statements concerning the subject matter." The "speaking agent" test primarily focuses on whether the declarant was authorized to make the statement which the principal's adversary is trying to introduce. Under some circumstances, authority to do an act includes the authority to make statements about the act. Under others, it does not. For example, the employment contract of a supermarket manager may not expressly authorize her to explain to an injured customer that


The Washington Judicial Council's proposed Rule 801(d)(2)(D) was drafted to embody current Washington law. PROPOSED WASH. R. EVID. 801, Comment 801, Paragraph (d). The proposed rule reads: "A statement is not hearsay if ... the statement is offered against a party and is ... a statement by his agent or servant acting within the scope of his authority to make the statement for the party." PROPOSED WASH. R. EVID. 801.

7. See notes 8-15 and accompanying text infra (discussion of when, under the "speaking agent" rule, the Washington courts are willing to infer the authority to speak from the authority to act). RESTATEMENT (SECOND) OF AGENCY § 288(2) (1958) reads: "Authority to do an act or to conduct a transaction does not of itself include authority to make statements concerning the act or transaction." Id.
the cause of the customer's fall was water on the store's floor. However, in performing those duties with which she is expressly charged, the manager must inevitably speak with the store’s customers about problems which arise in the store. Thus, the store manager would be considered a “speaking agent,” and despite her lack of express authority, her statements would be admissible against her principal (presumably the store owner) in an action brought by the injured customer. A janitor whose sole responsibility was mopping the floor, however, would probably be found to be a “non-speaking agent.” His statements, if made long enough after the event not to qualify as spontaneous utterances, would be inadmissible against the owner even if they related to the condition of the floor, a matter clearly within the scope of the janitor's responsibility.

Disagreement about the application of the “speaking agent” rule typically arises when the court must determine whether a declarant has implied authority to speak on behalf of the principal. The Washington courts' willingness to find implied speaking authority has been somewhat unpredictable. In Kadiak Fisheries Co. v. Murphy Diesel Co., the court found that an employee, charged with maintaining his employer's fishing vessels and reporting to his superiors on the vessels' condition, lacked the authority to make statements about the vessels to persons who were not fellow employees. The court distinguished Hartman v. Port of Seattle, an earlier Washington case, in which a field engineer was found to have authority to make statements concerning the cause of an accident largely because of his responsibility for making accident reports and for conferring with

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8. This hypothetical is based on the factual situation in Griffiths v. Big Bear Stores, Inc., 55 Wn. 2d 243, 347 P.2d 532 (1959), which is one of the Washington Supreme Court's more recent treatments of the vicarious admissions exception. The court held that the supermarket manager was a “speaking agent” whose out-of-court statements were admissible against the store owner. Id. at 247, 347 P.2d at 535.

9. Under current Washington law, retention of which was proposed by the Washington Judicial Council, Proposed Wash. R. Evid. 803(1)-(2), out-of-court statements made while the declarant was perceiving the event or made under the stress of excitement caused by the event are admissible despite their hearsay nature. Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939).

10. Controversy seldom arises when the declarant was expressly authorized by the party to make a statement on the party's behalf. The comment to Federal Rule 801(d)(2)(C) states: “No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party.” Fed. R. Evid. 801(d)(2)(C), Advisory Comm. Note. See also Model Code of Evidence rule 507, comment a, at 247 (1942).

11. 70 Wn. 2d 153, 442 P.2d 496 (1967).

other persons working on the project. The ground for the distinction was the amount of authority delegated to the agent. The court in Hartman, however, cited with approval an early Washington case in which the court inferred speaking authority from a cannery foreman's responsibility for overseeing the operation of the cannery's machinery.

In these three cases, the factors examined in determining the existence of speaking authority included the degree to which the principal relied on the judgment of the agent, the extent of the agent's expertise on the subject about which he had made the statement, and the types of reports the agent was expressly authorized to make. These cases typify the circumstances to which the "speaking agent" test has been applied and illustrate the difficulty of predicting, even after identifying the relevant elements of inquiry, whether the court will find an implied authority to speak.

III. THE DEVELOPMENT AND OPERATION OF THE BROAD RULE

The impetus to expand the vicarious admissions rule came from a growing dissatisfaction by various courts and scholarly authorities with the exclusion of many apparently reliable statements by non-speaking agents. For example, had the janitor described in Part II told the injured customer that there was water on the floor where the customer had fallen, the statement would be inadmissible under the common law rule despite the existence of certain circumstances which tend to produce reliability. Some courts began to admit these types of statements by liberally inferring speaking authority, while others abandoned the speaking agent requirement outright.

13. 70 Wn. 2d at 163, 442 P.2d at 503 (1967).
15. For a more detailed discussion of the factors relevant in determining speaking authority see Comment, Admissions of Agents, 40 Mo. L. Rev. 55, 63–69 (1975); Note, Negligence at Work: Employee Admissions in California and Federal Courts, 9 U.C. Davis L. Rev. 89, 95 (1976).
17. See Parts IV–C and V–C infra (discussion of the circumstances which tend to make vicarious admissions reliable).
18. For a thorough discussion of the frustration of various courts with the narrowness of the "speaking agent" rule and their various means of admitting reliable statements in spite of the rule, see Harvey, Evidence Code Section 1224—Are an Employee's Admissions Admissible Against His Employer?, 8 Santa Clara L. Rev. 59, 61–68 (1967).
Vicarious Admissions Exception

Federal Rule 801(d)(2)(D) reads: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship." This rule eliminates entirely the requirement of the agent's speaking authority.\(^{19}\) The court need examine the scope of agency only to determine whether the statement concerned a matter within the scope of the declarant's responsibility.\(^{20}\) Admissible under this rule are those statements previously excluded because of the agent's lack of authority to speak on behalf of his principal. For example, the janitor's explanation to the injured customer about the cause of her fall would be admissible against the store owner, under the broad rule, because it concerned the condition of the floor, a matter within the scope of the janitor's employment.\(^{21}\)

The broad rule, in substantially the same form as the present Federal Rule, was first promulgated by the drafters of the Model Code of Evidence.\(^{22}\) The Model Rule was adopted verbatim in the Uniform Rules of Evidence enacted in two states.\(^{23}\)

The Washington Judicial Council is not alone in resisting the trend toward adopting the broad rule. The California Law Revision Committee recommended adoption of a broad vicarious admissions rule

\(^{19}\) The effect of the broad rule has also been described as the conclusive presumption that the authority to act implies the authority to speak about those acts. Falknor, supra note 3, at 856.

\(^{20}\) The only foundational requirements for Federal Rule 801(d)(2)(D) are that the statement concern a matter within the scope of the agency and that it be made prior to the agency's termination. Fed. R. Evid. 801(d)(2)(D). Whether the agent must have spoken from personal knowledge or been competent as a witness at the time the statement was made has not been conclusively determined. See Annot., 54 A.L.R.2d 1069 (1957). The primary focus of this note, however, is the agency element of the foundation, and the analysis of these other possible requirements is beyond the scope of this note.

\(^{21}\) An especially illustrative example of an agent's statement the admissibility of which turned on the court's willingness to apply the broad rule is Rudzinski v. Warner Theatres, Inc., 16 Wis. 2d 241, 114 N.W.2d 466 (1962), in which the majority applied the common law rule to exclude an usher's admission about the cause of a customer's fall in a theater lobby. A concurring judge argued for the adoption of the broad rule, application of which would have allowed the statement since, regardless of the usher's implied authority to make statements on behalf of his principal, the statement clearly related to a matter within the scope of the usher's authority. 114 N.W.2d at 470 (Gordon, J., concurring).

\(^{22}\) Model Code of Evidence rule 508(a) (1942) reads:
Evidence of a hearsay declaration is admissible against a party to the action if the judge finds that . . . the declaration concerned a matter within the scope of an agency or employment of the declarant for the party and was made before the termination of the agency or employment.

but withdrew its proposal after receiving comments from the California bar expressing doubts about the guarantees of trustworthiness under such a rule.24

There is general agreement that the common law rule excludes many statements which are clearly reliable, but even proponents of the broad rule concede that the elimination of the “speaking agent” requirement admits some unreliable statements as well.25 Neither rule accomplishes with much precision the basic goal of admitting the maximum amount of reliable evidence.26 The disagreement about the comparative merits of the two rules seems to be based on differing judgments of whether the reliable statements by “non-speaking agents” admitted under the broad rule are of sufficient value to justify the admission of the unreliable statements which the broad rule also allows.

IV. THE RATIONALES UNDERLYING THE VICARIOUS ADMISSIONS EXCEPTION

Three distinct rationales underlying the vicarious admissions exception have been identified. This exception, like the admissions exception generally, has been characterized as a natural attribute of the adversary system. The exception has been justified by its consistency with the substantive law of agency, and it also has been described as affording circumstantial guarantees of a statement’s trustworthiness. It is important to weigh the underlying rationales behind the two rules.

24. Harvey, supra note 18, at 67; Note, supra note 15, at 115. See also Note, Admissibility of an Agent’s Declarations Against His Employer Under Evidence Code Section 1224, 19 Hastings L. J. 1395 (1968). The fairness of eliminating the speaking agent requirement is discussed in the text accompanying note 51 infra.

25. See Boyce, supra note 3, at 324, for a discussion of the strengths and weaknesses of the broad rule by a proponent. The author notes that opponents of the broad rule “deny that under modern conditions of unionized employee groups the employer has a real and effective economic control through his right to discharge, and they further deny that the unity of interest between employer and employee is sufficient to insure respect for the employer’s interests.” Id. See also Report, New Jersey Supreme Court, Committee on Evidence 165–67 (1963), reprinted in 4 Weinstein, supra note 3, ¶ 801(d)(2)(D)[01], at 801–139 (1977), in which the Committee concludes its endorsement of the broad rule: “[W]hile there is some danger here of manufactured evidence, the Rule reflects the view that this would seldom occur and that the greater vice by far is the exclusion of valuable evidence.” Id.

26. See the Advisory Committee’s Introductory Note to Article VIII of the Federal Rules of Evidence for a discussion of the practical need to balance the need for evidence against the desire to assure complete trustworthiness.
Vicarious Admissions Exception

A. The Vicarious Admissions Exception as a Fair and Natural Attribute of the Adversary System

The traditional rationale, and that advanced in the comments to the Federal Rules,\(^{27}\) is that the admissions exception is a natural incident of the adversary system.\(^{28}\) The comments make clear that trustworthiness plays no part in this rationale. Hence, none of the ordinary guarantees of trustworthiness is required.\(^{29}\) The rule allowing into evidence a party’s own out-of-court inconsistent statements predates the development of the hearsay rule\(^ {30} \) and is based more on an intuitive sense of fairness than on any current theory of evidence law.\(^ {31} \) This underlying notion of the self-evident fairness of the admissions exception is exemplified by Professor Morgan’s early discussion of the exception:

\[
\text{[I]t is too obvious for comment that the party whose declarations are offered against him is in no position to object on the score of lack of confrontation or of lack of opportunity for cross-examination. It seems quite as clear that he ought not to be heard to complain that he was not under oath.}^{32}\]

The fairness of the admissions exception in many instances ceases to be self-evident when the out-of-court statements admitted were made not by the party but by the party’s agent. For example, in the supermarket hypothetical, had the store owner herself informed the injured customer about the water on the floor, the owner would be in no position to object to the introduction of her own statement at trial. The owner “ought not to be heard to complain” that her own out-of-court statements were so unreliable as to be inadmissible. Even if a

\(^{27}\) Because the admissibility of a party’s admissions is not based on any inherent guarantee of trustworthiness but is an incident to the adversary system, Rule 801(d)(2) defines admissions as non-hearsay, rather than as a hearsay exception. FED. R. EVID. 801(d)(2), Advisory Comm. Note.

\(^{28}\) Falknor, supra note 3, at 864.

\(^{29}\) FED. R. EVID. 801(d)(2), Advisory Comm. Note. Professor Hetland earlier observed: “Hearsay exceptions, other than admissions, can be said in varying degrees to have some rational basis for assuming a probability of truth for admissions.” Hetland, supra note 3, at 309.

\(^{30}\) Morgan, Admissions, 12 WASH. L. REV. 181, 182 (1937).

\(^{31}\) In discussing the policy basis for vicarious admissions, Dean McCormick commented: “This notion that it does not lie in the opponent’s mouth to question the trustworthiness of his own declarations is an emotion so universal that it may stand for a reason.” C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 239, at 503 (1st ed. 1954). See also Hetland, supra note 3, at 309; 43 HARV. L. REV. 936, 940 (1930).

\(^{32}\) Morgan, Admissions as an Exception to the Hearsay Rule, 30 YALE L. J. 355, 361 (1921) (emphasis added).
witness testified incorrectly about the owner's statement, the owner would have the opportunity to take the stand and explain. However, were the out-of-court statement of either the manager or the janitor sought to be introduced against the owner, the latter might very well have no idea why the statement was made, and thus her opportunity to explain on the stand would not be a reasonable substitute for the opportunity to cross-examine the declarant.33

Despite the distortion of the fairness rationale which results from extending it to statements by agents, this rationale has nonetheless been advanced as support for the vicarious admissions exception.34

B. Consistency of the Vicarious Admissions Exception with Substantive Vicarious Liability

Another rationale for the vicarious admissions exception, although related to the nature of the adversary system, evolves more directly from the interaction of vicarious admissions and the substantive doctrine of vicarious liability. The basis for this rationale is a nondoctrinal emphasis on consistency, illustrated by Dean Wigmore's observations:

[I]t is absurd to hold that the superintendent has power to make the employer heavily liable by mismanaging the whole factory, but not to make statements about his mismanagement which can be even listened to in court; the pedantic unpracticalness of this rule as now universally administered makes a laughingstock of court methods.35

33. See 43 HARV. L. REV. 936, 940 (1930).
34. The fairness of using the statements of an agent against her principal has been rationalized by the notion that the principal's opportunity to take the stand to explain her agent's statements is a reasonable substitute for the opportunity to cross-examine. 4 J. WIGMORE, EVIDENCE § 1048, at 5 (Chadbourn rev. 1972). The difficulty with this analysis is that in many circumstances the agency will have been terminated by the time of trial, and the principal will not know why the agent made the statement she did. See C. MCCORMICK, supra note 3, § 267, at 641; Comment, Hearsay Evidence and the Federal Rules: Article VIII—Mapping Out the Borders of Hearsay, 36 LA. L. REV. 139, 155 (1975). See also Note, supra note 15, at 89 (1976), in which it is observed:

The reasoning behind the admissions exception is not wholly applicable to vicarious admissions, since the employer is now being required to accept or explain inconsistencies created by someone else. If the employee has said something that contradicts the employer's position in court, the employer might well want to cross-examine the speaker in an attempt to discredit the statement. Id. at 92.
35. 4 J. WIGMORE, EVIDENCE, § 1078 n.2, at 166 (Chadbourn rev. 1972). Wigmore employed analogous reasoning to justify the common law exception for joint obligors. He phrased the principle "the greater may here be said to include the less." 2 J. WIGMORE, EVIDENCE § 1077 (2d ed. 1923).
Vicarious Admissions Exception

The difficulty with this justification for the vicarious admissions rule is that it ignores the difference between the policies of the law of evidence and the law of vicarious liability.\(^{36}\) Under the substantive law of agency, a certain degree of unfairness in holding principals liable for the wrongful acts of their agents may be outweighed by a basic societal judgment about the propriety of holding liable the person who derives the most benefit from the activity which gave rise to liability and who is usually best able to bear the loss and prevent future accidents.\(^{37}\) The focus of evidence law, however, is not loss distribution but accuracy in fact-finding. Thus, logic does not compel modeling evidentiary rules after the rules of substantive law. What Wigmore noted as the absurdity of imputing to a principal the negligence of the agent but not the admissions of the agent may not be a logical absurdity after all, but rather the absurdity which in practice results from the interaction of substantive and evidentiary rules.\(^{38}\)

In the supermarket example, had the customer’s fall been due to the negligence of the janitor, the customer could sue the owner alone, on the basis of respondeat superior, or she could join both the owner and the janitor in the same action.\(^{39}\) Under present Washington law, the janitor’s statement would be admissible against himself as a personal admission,\(^ {40}\) but it would not be admissible against the owner because the janitor was not authorized to speak for the owner.\(^ {41}\) Thus, the owner would be entitled to a limiting instruction whereby the jury could consider the janitor’s out-of-court statement only against the janitor and not against the owner. However, were the janitor’s negligence established on the basis of his own admission, liability would be imputed to the owner as a matter of law.\(^ {42}\) The purpose of the limiting instruction, based on evidence law, would thus be circumvented by

\(^ {36}\) Morgan criticized Wigmore’s use of the logic that “the greater includes the less,” see note 35 supra, pointing out that substantive rules and evidentiary rules may be derived from different policies and thus be different in kind. Morgan, The Rationale of Vicarious Admissions, 42 HARV. L. REV. 461, 470 (1929).


\(^ {38}\) For a detailed discussion of the inherent inconsistency of the common law vicarious admissions rule and the substantive rule of vicarious liability see Harvey, supra note 18. See also 52 TEX. L. REV. 593 (1974).

\(^ {39}\) Under the doctrine of respondeat superior, an employer may be liable for the tortious conduct of her employee regardless of the employer’s personal fault. RESTATEMENT (SECOND) OF AGENCY § 219 (1958).

\(^ {40}\) 5 R. MEISENHOLDER, WASHINGTON PRACTICE § 306 (1965 & Supp.).

\(^ {41}\) See Part II supra (discussion of operation of Washington vicarious admissions rule).

\(^ {42}\) WASHINGTON PATTERN JURY INSTRUCTIONS WPI 50.01 (1967).
the final jury instruction, based on the substantive law of vicarious liability.

C. The Vicarious Admissions Exception as Guaranteeing Trustworthiness

Although the comments to the Federal Rules identify the nature of the adversary system as the only rationale for the vicarious admissions exception, many authorities, and especially those endorsing the broad rule, emphasize trustworthiness as the principal justification for the exception. Two guarantees of trustworthiness are most commonly advanced. First, the statement, at the time it was made, was usually against the principal's interest, and the agent, out of a sense of loyalty or fear of discharge, would not make a statement against her principal's interest unless it were true. Second, the agent could reasonably be expected to have more than average familiarity with the subject about which he spoke, and his perception could thus reasonably be expected to be more accurate than the statement of an ordinary observer. The admissions exception, of course, requires the presence of none of these circumstances, but the rationale is based on the assumption that they will tend to be present if the agency relationship existed at the time the statement was made.

For instance, the rationale assumes that the store manager and the janitor feel an identity of interest with the owner and fear that a statement exposing the owner to civil liability might jeopardize their jobs. The presumed mixture of loyalty to employer and fear of discharge would tend to make an agent perceive a statement against his em-

43. FED. R. EVID. 801(d)(2), Advisory Comm. Note.
44. The Model Code shifted the theory underlying vicarious admissions from the employer's self-contradiction to the trustworthiness of the statement. Harvey, supra note 18, at 68. The comments to the Model Code justify the adoption of the broad vicarious admissions rule by the simple assertion that "the agent or servant in speaking about the transaction which it was within his authority to perform is likely to be telling the truth in most instances." MODEL CODE OF EVIDENCE rule 508, comment, at 251 (1942). See also C. McCormick, supra note 3, § 267, at 641; Boyce, supra note 3, at 323.
45. C. McCormick, supra note 3, § 267, at 641.
46. Id.
47. See note 29 supra.
48. See, e.g., Report, New Jersey Supreme Court, Committee on Evidence 165-67 (1963), reprinted in 4 WEINSTEIN, supra note 3, ¶ 801(d)(2)(D)[01], at 801-138 to 801-139 (1977), in which the committee reporter observed that the broad rule assures reliability because "ordinarily employees do not jeopardize their jobs by making false statements which are costly to their employers." Id.
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ployer's interest also to be against his own interest, and it is this against-interest quality which is advanced as the primary guarantee of the statement's trustworthiness.49

V. THE EFFECTIVENESS OF THE BROAD RULE IN SATISFYING THE RATIONALES OF FAIRNESS, CONSISTENCY, AND TRUSTWORTHINESS

The broad rule must be assessed in light of the policies underlying the admissions exception to determine whether simply eliminating the common law speaking agent requirement is the best way to admit those reliable statements by "non-speaking agents" which are presently excluded in Washington.

A. The Broad Rule's Furtherance of the Fairness Rationale

The more distant the principal-agent relationship, the less fair the assumption that the principal and the agent share the same interest and that the principal "ought not be heard to complain" about her lack of opportunity to cross-examine her agent.50 In many cases the practical effect of the federal rule is to admit against the principal statements of an agent whom the principal has entrusted with very little authority. That this extension strains to the breaking point the fairness rationale is illustrated by Professor Falknor's objection to the broad vicarious admissions rule of the Model and Uniform Codes: "Ought I not have the right to employ an experienced and skillful

49. See, e.g., Rudzinski v. Warner Theaters, Inc., 16 Wis. 2d 241, 114 N.W.2d 466 (1962) discussed briefly at note 21 supra, in which the concurring judge, in proposing adoption of the broad rule, stated:
The raison d'être for [the admission-against-interest] exception to the hearsay rule is that trustworthiness surrounds admissions against interest. The same considerations which give credibility to the statement against interest on the part of a principal should apply to his employee. Loyalty to an employer's interests is the rule, rather than the exception.

114 N.W.2d at 471. Professor Hetland has suggested that a statement exposing one's principal to legal liability is sufficiently adverse to one's pecuniary interest in a job to allow it to fall within the declaration-against-interest exception. Hetland, supra note 3, at 328.

50. It seems reasonable to suppose, for example, that a factory owner would be less able to explain the statements of an assembly line worker than the statements of the factory's superintendent. When a principal is far removed from her agent, the principal's opportunity to testify is scarcely a fair substitute for the opportunity to cross-examine the declarant.
truck driver, who may at the same time be a careless, unreliable and erratic talker, without being subject to having used against me his casual utterances made long after an accident?"  

The fairness rationale under the common law rule is weakened by the courts' willingness to infer speaking authority liberally. Nevertheless, retention of the "speaking agent" requirement would further this rationale to some extent by admitting statements by only those agents whom the principal probably selected with some awareness of their likelihood to speak about their job responsibilities. For example, a store owner might reasonably be expected to take into account, when hiring a manager, the prospective employee's ability to communicate with the customers. The owner would be less likely to consider such a qualification when hiring a janitor.

B. The Broad Rule's Furtherance of Consistency Between Vicarious Admissions and Vicarious Liability

Adoption of the broad rule would substantially lessен, if not eliminate, the conflict between the substantive rule of vicarious liability and the evidentiary rule of vicarious admissions. The broad rule admits statements which concern matters within the scope of the agent's authority. Since the principal may be held vicariously liable only for the agent's authorized acts, it is difficult to conceive of a statement by an agent which would be relevant to establishing the principal's vicarious liability and yet not concern a matter within the scope of the agent's authority. It has been argued that the resolution of this conflict is, in itself, sufficient justification for adoption of the broad rule, since a judicial determination of a principal's liability should not depend on such trial tactics as joining the agent as a party defendant.

51. Falknor, supra note 3, at 856.
52. See note 18 supra.
53. See text preceding note 19 supra (language of Federal Rule 801(d)(2)(D)).
55. Harvey, supra note 18.

The Model Code resolved the inconsistency by making a statement admissible when "one of the issues between the party and the proponent of the evidence is a legal liability of the declarant, and the matter declared tends to establish that liability." MODEL CODE OF EVIDENCE rule 508(d) (1942). The Federal Rules did not, however, incorporate this limitation. See 4 WEINSTEIN, supra note 3, ¶ 801(d)(2)(D)[01], at 801–140 (1977).
C. The Broad Rule's Furtherance of the Trustworthiness Rationale

The elimination of the “speaking agent” requirement would allow admission of statements by agents who might feel little pressure to tell the truth. An agent's loyalty to her principal and her desire to keep her job, the primary sources of trustworthiness,\(^{56}\) would seem less likely to be influential when the agent has no authority to speak on behalf of the principal. The store manager, with whom the owner has entrusted substantial authority, could reasonably be expected to identify more closely with the owner's interests than could the janitor, who may never even have seen the owner.\(^{57}\)

VI. THE PRACTICAL EFFECT OF ADOPTING THE WASHINGTON JUDICIAL COUNCIL'S PROPOSAL

Were the Washington Supreme Court to adopt the recommendations of the Washington Judicial Council,\(^{58}\) including retention of the common law vicarious admissions rule, much of the reliable evidence excluded under the common law rule would be admissible under the liberalized statements-against-interest hearsay exception.\(^{59}\) Under this exception, any statement by an agent which exposed the agent himself, as well as the principal, to civil or criminal liability would be ad-

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56. See Part IV-C supra.

57. Since courts typically find that persons involved in management have speaking authority, see Part II supra (discussion of criteria for speaking authority), it could be argued that elimination of the speaking authority requirement would particularly affect the admissibility of statements by agents who are members of labor unions. If the janitor is a union member, the owner might not be free to fire him without cause, and thus the janitor's concern for his job security would be substantially reduced. Professor Boyce has acknowledged the legitimacy of this concern by those who favor retention of the “speaking agent” requirement. Boyce, supra note 3, at 324.

58. If the court decides to adopt the proposed rules, it should consider deleting part (D) of Rule 801(d)(2) because it seems to restate the rule embodied in part (C). According to Judge Weinstein, 801(d)(2)(C) is merely a formulation of the traditional “speaking agent” rule. 4 WEINSTEIN, supra note 3, ¶ 801(d)(2)(C)(01), at 801–126 (1977). The Judicial Council indicated, however, that Rule 801(d)(2)(D) of the proposed rules was drafted to express Washington's traditional “speaking agent” rule. Proposed WASH. R. EVID. 801 Comment 801, Paragraph (d). If the court construes part (C) as Judge Weinstein does, then (C) and (D) should be combined into a single subparagraph.

59. Washington's present declarations-against-interest exception admits only statements that are against the declarant's proprietary or pecuniary interest. Allen v. Dillard, 15 Wn. 2d 35, 55, 129 P.2d 813, 822 (1942). Federal Rule 804(b)(3), the adoption of which has been recommended by the Washington Judicial Council, admits statements which tend to expose the declarant to criminal or civil liability generally, including tort liability. FED. R. EVID. 804(b)(3), Advisory Comm. Note.
missible against the principal if the agent were unavailable to testify.\textsuperscript{60}

Had the janitor admitted to the injured customer that the janitor's own negligence in failing to mop the floor was the cause of the customer's fall, the agent would have exposed himself to personal liability and exposed the owner to imputed liability. Were the janitor unavailable to testify in the customer's action against the owner, the customer could introduce the agent's out-of-court statement as a statement against interest. Thus, admissibility of the statement would not depend on the janitor's authority to speak.

In cases in which the agent was available or the statement exposed only the principal to liability, the court would still be required to draw the line between implied authority to speak and absence of such authority. For example, had the janitor proclaimed that he had tried to mop up the water but the owner had refused to buy mops which were adequate for the job, the statement would not be within the declaration-against-interest exception since it would not expose the speaker to civil or criminal liability. The statement's admissibility, then, would depend on the court's willingness to find that the janitor had implied authority to speak on behalf of the owner. Similarly, were the declarant available to testify but the customer nonetheless wished to introduce the out-of-court statement, the declaration-against-interest exception would not apply and the court's determination of the implied agency issue would decide the statement's admissibility. Consequently, if the Washington Supreme Court adopts the broad statement-against-interest exception, then, in examining the relative merits of the broad and the common law vicarious admissions rules, the court need only concern itself with those statements by "non-speaking agents" that either expose only the principal to liability or are made by agents who are available to testify at trial.

As discussed in Parts IV and V, the distinction between "speaking" and "non-speaking" agency creates certain practical inconsistencies with the substantive law of vicarious liability\textsuperscript{61} but has some basis in

\textsuperscript{60} Federal Rule 804(b)(3) (statement against interest) permits admission of [a] statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true.

\textsuperscript{61} See Part IV–B supra.
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fairness and reliability. Yet even the distinction's furtherance of these latter two rationales is imprecise and based on debatable assumptions about the nature of the principal-agent relationship.

Statements by "non-speaking agents" that do not expose the agent to liability are in some circumstances reliable and in others not. Present Washington law generally excludes such statements. Federal Rule 801(d)(2)(D) generally admits them. Even much of the evidence admitted under the common law rule, criticized as too narrow, has none of the recognized indicia of trustworthiness.

VII. PROPOSED RULE

The debate over the comparative values of the broad and common law rules has apparently reached an impasse. Although proponents of the broad rule generally acknowledge the legitimacy of concerns about the rule's doubtful assurances of trustworthiness, they assert that "non-speaking agents" more often than not speak with their principals' interests at heart. The primary guarantee of reliability under either vicarious admissions exception is the against-interest aspect which often functions when an agent makes a statement adverse to his principal. Those who favor retention of the speaking agency requirement typically pose a set of circumstances in which a "non-speaking agent," who does not identify with his principal's interest,

62. See Parts V-A and V-C supra.
63. See Part IV-C supra.
64. The most important factor in the reliability of an agent's statement, regardless of the agent's speaking authority, will often be the statement's self-exculpatory nature. For example, the janitor's acknowledgement that his own negligence caused the customer's injury might expose the declarant to a loss through civil liability far greater than the loss of his job as floor sweeper. His claim that the cause of the accident was the owner's refusal to invest in an adequate mop, while exposing the declarant to possible dismissal, might, in the light of competing interests, be self-serving.
65. See Part II supra.
66. See Part III supra.
67. Inquiry under the common law rule is limited to the existence of speaking authority. The agent's statement may be self-serving or the product of an animus against his principal but nevertheless be admissible. Even the store manager, who clearly has authority to speak for the owner, may have a greater fear of the civil or criminal consequences of admitting personal fault than of losing her job as a result of diverting liability to the store owner.
68. See note 48 supra.
69. See note 49 supra.
makes an irresponsible statement. For example, if the janitor hates his boss and his job, or because of union membership does not fear dismissal, and makes a statement diverting any blame from himself to the store owner, the statement satisfies no recognized test of reliability. Those who criticize the broad rule on reliability grounds, however, typically fail to recognize that the same criticism can be leveled against the traditional "speaking agent" rule. The store manager may be willing to make a false statement which exposes the owner to liability, and thus jeopardizes the manager's job, when she perceives the civil or criminal consequences of honestly admitting her own fault as a more serious threat. Since both the broad and the common law rules focus on the existence and scope of the agency relationship rather than on the against-interest nature of a statement, neither rule effectively accomplishes the purpose of admitting the maximum amount of reliable evidence.

A rule could be modeled after the liberal statements-against-interest rule, focusing its inquiry directly on those guarantees of reliability which are only incidental attributes of the agency relationship. The total elimination of fairness as a rationale for personal and vicarious admissions has been urged, as has the total elimination of the admissions exception itself. However, the intuitive fairness of calling upon a litigant to explain his own inconsistent assertions is accepted so widely that it may substitute for a more logical rationale. But since admitting evidence based merely on fairness is not consistent with the modern emphasis on trustworthiness, it would seem appropriate to limit the rationale to those circumstances in which the fairness is truly self-evident—that is, to personal admissions. The admissibility of

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70. See note 24 supra (discussion of Professor Falknor's hypothetical, in which the statement is made by an experienced truck driver who is also a "careless, unreliable and erratic talker"). The arguments against the broad rule are summarized in Boyce, supra note 3, at 324.
71. Hetland, supra note 3.
72. See note 31 supra.
73. See note 44 supra. Boyce observes: "[T]he Uniform Rules change the basis of the rule from one of substantive agency law to one of evidence based upon the likelihood of truth in the statement . . . a thing the scholars have long called for." Boyce, supra note 3, at 323.
74. The fairness rationale also applies, with substantial justification, to instances in which a party has instructed a representative to make a particular statement, i.e., when the party approves the content of the statement before it is made. In such a situation, there is no need fictitiously to impute knowledge or consent to the principal. Consequently, such a specifically authorized statement might well be left within the admissions exception.
statements by agents could be tested under the following hearsay exception:

A statement by an agent of the party against whom the statement is offered is admissible if the statement concerned a matter within the scope of the agent's authority and so far tended to jeopardize the agent's employment relationship that a reasonable person, under circumstances similar to those which existed at the time the statement was made, would not have made the statement unless it were true.\textsuperscript{75}

VIII. THE OPERATION OF THE PROPOSED RULE

This rule has important advantages over either the federal or the common law rule. Like the federal rule, it eliminates the doctrinal distortions and the uncertainties involved in an inquiry into the existence of implied speaking authority.\textsuperscript{76} Any statement which concerns a matter within the scope of the declarant's agency would be potentially admissible. More importantly, however, this proposed rule, unlike either the federal or the common law rule, requires the court to inquire directly into those circumstances which determine reliability.\textsuperscript{77}

\textsuperscript{75} The rationale of this rule focuses on the declarant's perception of his own interests at the time the statement was made. As with the statement-against-interest exception of the Federal Rules, this rationale would be more precisely effectuated by the application of a subjective standard rather than the objective "reasonable person" standard which it now incorporates. This proposed rule is drafted to be consistent with the objective federal against-interest rule, and should the Washington Supreme Court decide to adopt a subjective standard for the existing federal rule, the same standard should certainly be incorporated in this proposed rule.

\textsuperscript{76} See Part II \textit{supra}.

\textsuperscript{77} In explaining the Model Code's elimination of certain traditional bases of admissibility, Professor Morgan stated:

There is no reason why a hearsay declaration of an available witness, which is self-serving or which has no indicium of verity should be received against a party merely because he happens to be in relation of joint obligor, or joint owner, or predecessor in interest with the declarant.

\textit{MODEL CODE OF EVIDENCE} rule 508, comment (1942).

Professor Morgan's reasons for eliminating the joint-obligation and the joint-ownership exceptions from the Model Code equally justify elimination of the vicarious admissions exception. Statements by agents against their principals, like statements by one joint tenant against another, tend to be reliable because they tend to be in some way against the declarant's interest. Recognizing that property and contract law have no necessary connection to reliability, Professor Morgan drafted the Model Code to admit statements by joint obligors and joint tenants only if they qualified under the declarations-against-interest exception. Although he retained the vicarious admissions exception, subsequent commentators have pointed out that Professor Morgan's reasoning would require elimination of that exception as well. See, \textit{e.g.}, Falknor, \textit{supra} note 3, at 856; Hetland, \textit{supra} note 3, at 320.
Excluded under this exception would be all those statements by agents whose motives were self-serving or whose loyalty to their principals or fear of discharge was so weak that the statement would not be found reliable under the reasonable person test. For example, before admitting the statement by the store manager, the court would examine the competing interests of the manager in the particular circumstances under which the statement was made. The owner could oppose the admission of the manager's statement by introducing evidence that the manager held an animus against her or feared being sued. As with the present federal statement-against-interest rule, the manager's statement would be admitted only if the court determined, after balancing the competing interests, that a reasonable person would not have made the statement unless it were true. The same inquiry would apply to the janitor's statement. The difference in interests resulting from the different types of jobs would be balanced as one of the factors relevant to determining the against-interest nature of the statement.

In most other respects, the proposed "statement-against-employment-interest" rule would function similarly to the federal vicarious admissions rule. It would, however, be so similar in rationale and application to the federal exception for statements against interest that it would seem consistent with the scheme of the federal rules to include it in Rule 804. Rule 804, unlike Rule 801, requires that the declarant be unavailable to testify at trial. The requirement of un-

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78. The manager's personal feelings toward the owner, while certainly significant in determining the statement's reliability, might be difficult to incorporate into the objective standard of the proposed exception. This difficulty illustrates one of the advantages of a subjective standard. See note 75 supra.

79. This "statement-against-employment-interest" exception retains the requirement of the federal rule that the statement concern a matter within the scope of the declarant's agency, and thus retains that assurance of reliability which is based on the declarant's particular familiarity with the subject matter of her declaration. The federal rule's requirement that the agency still exist at the time of the declaration is implicit in this test as one of the elements relevant to determining the significance of the threat to the declarant's employment interest. Treating the nature of the employment relationship at the time of the statement as a balancing factor rather than an unqualified requirement has the advantage of allowing flexible analysis of statements made during periods of suspension or during other abridgments of the employment relationship short of termination.
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availability depends upon whether the out-of-court statement is likely to be more reliable than testimony given by the declarant at trial.\textsuperscript{80}

For a statement to be admissible under the proposed rule, the statement’s proponent generally would have to establish that the agent felt some identification with the principal’s interest at the time the statement was made.\textsuperscript{81} If the agency relationship still exists at the time of trial, there would be reason to believe the agent could be susceptible to the pressures of his principal. This contingency could be addressed by an addition to the proposed rule to the following effect:

Where the agency still exists at the time of trial, the agent's unavailability is not required for the operation of the above exception.

IX. CONCLUSION

Federal Rule 801(d)(2)(D) and present Washington law share the same fundamental flaw. Neither test inquires directly into those circumstances which produce trustworthiness. Both reliable and unreliable statements may be admitted under either test, and no modification in the type of agency required can remedy this difficulty. By changing the focus of inquiry to the against-interest aspect of agents’ admissions, the proposed “statement-against-employment-interest” rule eschews those dubious assumptions about the principal-agent relationship which form the basis of both vicarious admissions exceptions.

\textit{Norman B. Page}

\textsuperscript{80} “When unavailability of the declarant is made a condition precedent to admitting his hearsay statement, a rule of preference is in fact being stated. His personal presence in court, under oath and subject to cross-examination, would be preferred.” C. McCormick, supra note 3, § 253, at 608.

\textsuperscript{81} The absence of the unavailability requirement for vicarious admissions under the federal rules may be justified on the ground that the principal’s pressure on the agent between the time of the statement and the time of trial would render the agent’s testimony at trial less reliable than her earlier out-of-court statement. This defense of the federal rule depends on certain factual assumptions which may or may not be valid in a given case. It is entirely possible that the agent may have been discharged between the time of the statement and the time of trial, in which case there would be no reason to suppose the agent’s testimony would be distorted by pressures from her former principal.

\textsuperscript{81} As discussed in Part IV-C, this identification with the principal’s interest could result from a concern for job security or from a sense of loyalty.