

A defendant is on trial for participating in a drug sale. The prosecution calls an undercover officer to testify that, when the dealer sold the drugs to the undercover officer, the dealer introduced the defendant to the undercover officer as "my partner in this" and the defendant shook hands with the undercover officer but said nothing.

Is the undercover officer's testimony as to the dealer's statement admissible?

- A. No, because the statement of the dealer is hearsay not within any exception.
- B. No, because there is no evidence that the dealer was authorized to speak for the defendant.
- C. Yes, as a statement against the defendant's penal interest.
- D. Yes, as the defendant's adoption of the dealer's statement.

### Explanation:

Under Federal Rule of Evidence 801, an **opposing party's statements** are **excluded** from the **rule against hearsay** when they are offered against that party. This includes **statements made by another** that an **opposing party has adopted** explicitly (eg, by verbal agreement) or implicitly (eg, by conduct or silence). Adoption by **silence** occurs when:

the silent party **understood** and had the **ability to deny** the statement *and* a **reasonable person** would have **denied** the statement under similar circumstances if it was untrue.

Here, the defendant implicitly adopted the drug dealer's statement when the defendant shook the officer's hand and remained silent after the introduction. That is because the defendant understood the statement and would have denied it if it were false—just as a reasonable person would have done to avoid criminal liability. Therefore, the officer's testimony as to the defendant's statement is admissible under this hearsay exclusion **(Choice A)**.

**(Choice B)** Statements made by a person authorized to speak for an opposing party that are offered against that party are also excluded from the rule against hearsay. This exclusion does not apply here since there is no indication that the dealer was authorized to speak for the defendant. But the statement is still admissible as the defendant's adoptive admission.

**(Choice C)** A statement against penal interest—ie, one that exposes the declarant to criminal liability—is a hearsay *exception* that applies when the declarant is unavailable as a witness. This exception does not apply here because the dealer's statement is *excluded* from the hearsay rule (ie, is nonhearsay) and there is no evidence that the dealer is unavailable as a witness.

### Educational objective:

Statements adopted by an opposing party are excluded from the rule against hearsay if they are offered against that party. Adoption by silence occurs when (1) the silent party understood and had the ability to deny the statement and (2) a reasonable person would have done so under similar circumstances if it was untrue.

### References

Fed. R. Evid. 801 (nonhearsay statements).

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## Adoption of Statement

Words



Conduct



Silence

