

In a jury trial, the plaintiff sued the defendant for breach of contract. The plaintiff's position was that a woman whom he understood to be the defendant's agent said: "On behalf of [the defendant], I accept your offer." The defendant asserted that the woman had no actual or apparent authority to accept the offer on the defendant's behalf.

Is the plaintiff's testimony concerning the woman's statement admissible?

- A. No, because it is hearsay not within any exception.
- B. No, if the woman does not testify and her absence is not excused.
- C. Yes, provided the court first finds by a preponderance of the evidence that the woman had actual or apparent authority to act for the defendant.
- D. Yes, upon or subject to introduction of evidence sufficient to support a finding by the jury that the woman had actual or apparent authority to act for the defendant.

Explanation:

Nonhearsay statements

(FRE 801(d))

Statement by declarant-witness	Out-of-court statement admissible if witness subject to cross-examination & prior statement: is inconsistent with current testimony & was made under penalty of perjury is consistent with current testimony & offered to (1) rebut charge of fabrication/improper influence or (2) rehabilitate witness <i>or</i> identifies person witness perceived earlier
Statement by party-opponent	Out-of-court statement admissible if offered against opposing party & statement was: made or adopted by party made by person authorized by party made by party's agent/employee on matter within scope of relationship <i>or</i> made by party's coconspirator during & in furtherance of conspiracy

FRE = Federal Rule of Evidence.

Hearsay is an **out-of-court statement** offered to prove the truth of the matter asserted therein and is generally inadmissible. But certain statements, though they meet this definition, are considered **nonhearsay** and can therefore be used as substantive evidence. This includes statements **made by or attributable to an opposing party** when **offered against that party**. One way a statement is attributable to an opposing party is if: the declarant was the **opposing party's agent**—ie, had actual or apparent authority to act on the party's behalf *and*

the statement (1) was made during the **agency relationship** and (2) concerned a matter **within the scope** of that relationship.

The relevance of such statements is conditioned upon the declarant's authority to act on the opposing party's behalf. As a result, the court must determine if there is sufficient evidence for a reasonable jury to find that this preliminary fact exists.

Here, the plaintiff seeks to introduce the woman's statement accepting the plaintiff's offer on the defendant's behalf. If the plaintiff introduces evidence that would allow a reasonable

jury to find that the woman had actual or apparent authority (ie, agency) to act for the defendant, then her statement is admissible nonhearsay **(Choice A)**.

(Choice B) A statement attributable to an opposing party is admissible against that party regardless of the declarant's availability. Therefore, the woman's absence—whether excused or not—and failure to testify do not bar admission of her statement.

(Choice C) Courts typically apply the preponderance-of-the-evidence standard to decide preliminary questions of admissibility—eg, whether a witness is qualified to testify, privilege exists, etc. However, when the *relevance* of evidence is conditioned upon the existence of a preliminary fact (as seen here), the court need only find that there is sufficient evidence to support (but not necessarily establish) the existence of that preliminary fact.

Educational objective:

A statement is attributable to an opposing party and therefore admissible nonhearsay if it is offered against that party and was (1) made by the party's agent (2) about a matter within the scope of an existing agency relationship.

References

Fed. R. Evid. 801(d)(2) (nonhearsay – statement by party-opponent).

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