An opposing party’s statement
(formerly known as “admission.”)

Fed. R. Evid. 801(d)(2)
Example

Defendant said, “I’m sorry, it was my fault. I was fiddling with my radio instead of looking at the road ahead.”

The statement is later offered by the plaintiff to prove the truth of the matter asserted.
Statements of an opposing party are admissible as a result of --

1. satisfaction of the requirement of trustworthiness.
2. the adversarial system.
Advisory Committee’s Note to Rule 801(d)(2):

“[T]heir admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule * * * * No guarantee of trustworthiness is required in the case of an admission.”

Casebook, p. 1094. (We’ll discuss what this means later.)
Often statements of a party opponent are trustworthy because they are against interest when made. But even if they were not against interest when made, they are still admissible.

Examples:

-- provenance of painting
-- “It was the truck driver’s fault”
The theory may be abstruse, but the rule is short and simple. *Anything* a party says can be used against him by the opposing party.

... so far as the hearsay rule is concerned.
In order to qualify as an “opposing party’s statement” under Rule 801(d)(2), the declarant’s statement must be

1. A confession by a party opponent
2. A concession by a party opponent
3. A statement by a party opponent
4. More than one of the above.
Restyled rule 801(d)(2)(A)

A statement that meets the following conditions is not hearsay . . .

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity
Revisiting the Advisory Committee’s note to Rule 801(d)(2):

“[T]heir admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule.”

What does that mean?

Casebook, p. 1178. (continued next slide)
By saying there is no “satisfaction of the conditions of the hearsay rule,” the Advisory Committee means that the trustworthiness condition is not satisfied.
Receiving statements of a party opponent can be justified as a “result of the adversary system” because . . . .

1. You can’t claim it’s unfair that you didn’t get to cross-examine yourself.
2. The concern that proponents might manufacture hearsay to avoid cross-examination of their witnesses is not present here.
3. Adversaries would feel that they were unfairly treated if they couldn’t use their opponent’s statements.
4. All of the above.
The statement of a party opponent is --

1. Hearsay, but admissible under an exception

2. Not hearsay even if offered to prove its truth.

3. Not hearsay because it is not being offered to prove its truth.
The reason that the Advisory Committee decided to classify statements by opposing parties as not hearsay, instead of classifying them as hearsay falling under an exception, is that--

1. statements by opposing parties are not trustworthy enough to qualify as a hearsay exception.

2. Such statements are more trustworthy than are statements falling under the hearsay exceptions.
Reed v. McCord, p. 250
Court of Appeals of New York, 1899

What argument did the opponent make against admitting the evidence?

How did the court rule?
The *Reed* court stated that the rationale for receiving admissions is that it is improbable a person will make a statement against interest unless it is true. Is this the rationale for admitting statements of an opposing party under Fed. R. Evid. 801(d)(2)(A)?

1. Yes
2. No
Under the federal rules, are statements by the opposing party received even when the declarant had no personal knowledge?

1. Yes.
2. No
Yes, they are.

See Advisory Committee Note, pp. 1178:

“The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness . . ., and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.”

See also Mahlandt, p. 260.
 Defendant’s girlfriend said:

“That ain’t nothing, you should have seen the money we had in the hotel room . . . . [We had] sacks of money.”

Why was her statement admissible?
Suppose that defendant had not heard his girlfriend’s statement. Would it still have been admissible?

1. Yes.
2. No.

74% Yes. 26% No.
Suppose there’s a factual dispute about whether the defendant heard the girlfriend’s statement. The judge would decide that issue of fact in ruling on the hearsay objection.

1. True
2. False
In the following examples, the out of court statement is offered against a party opponent who heard or read the statement and made no response. Pick the statement, if any, that ought to be received in evidence as being adopted by the opposing party.

1. At a wedding, someone makes scurrilous comments while toasting the bride.
2. Defendant got a postal notice saying she owed a debt. She did not answer.
3. An angry truck driver accuses a timid motorist of stopping suddenly.
4. As the President is entering his limo, someone shouts an accusation at him.
5. None of the above.
Test for adoption by silence

“Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue.” -- Adv. Comm. Note to FRE 801(d)(2)(B), quoted in Hoosier case.
D’s wife yelled at him, “you liar, you got them from shooting up in the bedroom with all your stupid friends!”
In *Carlson*, the court held that the question whether the defendant’s head-shake signified his adoption of the wife’s statement was --

1. a preliminary question of fact for the judge to decide. The judge should exclude her statement unless persuaded that defendant intended to adopt it.

2. A question of conditional relevancy, so that her statement and his reaction are admissible when there is evidence sufficient to support a finding that he intended to adopt her statement.
Rule 104(a) standard: the proponent must persuade the judge that the foundation fact is true by a preponderance of the evidence.

Rule 104(b) standard: the proponent need only provide the judge with evidence sufficient to support a finding that the foundation fact is true.
As a matter of policy, is it a good idea to treat the question whether the defendant in *Carlson* intended to adopt the statement as a 104(a) question?

1. Yes.
2. No.

**Chart:**
- Yes: 93%
- No: 7%
One of the challenged statements was Mr. Poos’s note saying “Sophie bit a child that came into our yard.”
Was Mr. Poos’s statement admissible against the company?

1. Yes
2. No
Suppose that you’re arguing the case and you want to have Mr. Poos’s note admitted. The opponent argues that the note should be excluded under Rule 403 because, in the absence of personal knowledge, it is prejudicial and a waste of time. A good counterargument would be --

1. The rulemakers faced this issue and decided not to require personal knowledge.
2. He *did* have personal knowledge.
3. His lack of personal knowledge does not affect probative value.
"There is left only the question of whether the trial judge’s rulings . . . are justified under Rule 403. He clearly found that the evidence was not reliable, pointing out that none of the statements were based on the personal knowledge of the declarant. . . . “[T]hat problem was faced by the Advisory Committee . . . .”

[The court then quoted the Advisory Committee Note on the freedom that the admissions rule has enjoyed from the rule requiring first hand knowledge.]
Suppose that the security guard employed by the company back at headquarters had written the note about Sophie biting the child. Would the note have been admissible?

1. Yes
2. No

According to the chart, 62% voted Yes and 38% voted No.
Was the statement by the company’s Board of Directors admissible against Mr. Poos?

1. Yes
2. No
The end

(Optionalal hypos follow)
An admission within an admission is admissible.

Example: Worker repeats what boss said, when both are agents acting within the scope of employment.
Plaintiff offers evidence that a temporary worker hired by an airline to clean up debris after an airline disaster said that he heard the airline’s investigators say that the disaster was due to pilot error. Objection, hearsay.

1. Sustain
2. Overrule
The police questioned the accused through an interpreter. A police officer testifies that the interpreter said that the suspect said that he cut his hand while fixing his car. This statement is offered against the accused at trial. Objection, hearsay.

1. Overrule
2. Sustain
• The End

• [Barry Bonds video]
The *Bonds* case raised a debatable legal issue about whether ____ was admissible as the statement of a party’s agent.

1. Bond’s statement
2. The trainer’s statement
3. The lab’s statement