

Tulsa Law Review

Volume 40

Number 4 *The Scholarship of Lawrence M.
Friedman*

Volume 40 | Number 4

Summer 2005

Admissions (Don't Have to Be) against Interest

Christopher Blair

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Christopher Blair, *Admissions (Don't Have to Be) against Interest*, 40 Tulsa L. Rev. 751 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol40/iss4/9>

This Article is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

ARTICLE

ADMISSIONS (DON'T HAVE TO BE) AGAINST INTEREST

Chris Blair*

I. INTRODUCTION

“Admissions against interest” is a phrase that is commonly used by lawyers, judges, and commentators alike to explain the admissibility, vis-à-vis the hearsay rule, of certain out-of-court statements made by either a party opponent or a now unavailable declarant. Unfortunately, there is no such concept in the law of hearsay. This brief article will first describe the requirements of the distinct concepts of “admissions by a party opponent” and “declarations against interest.” The article will then try to explain the origins of the phrase “admissions against interest” and why it is simply confusing and inappropriate to even use the term.

II. DECLARATIONS AGAINST INTEREST

Both the Federal Rules of Evidence and the Oklahoma Evidence Code provide that hearsay¹ is not admissible “except as provided.”² Historically, hearsay has been excluded because it is generally considered unreliable. The traditional method of determining the reliability of evidence has been to require witnesses who provide the evidence to testify under oath in court and be subjected to cross-examination before a

* Associate Professor of Law, University of Tulsa College of Law; LL.M., Columbia University; J.D., Ohio State University.

1. Federal Rule of Evidence 801(c) and Oklahoma Statutes Title 12, § 2801(3) define “hearsay” as a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”

Federal Rule of Evidence 801(a) and Oklahoma Statutes Title 12, § 2801(1) further define a “statement” as “an oral or written assertion, or non-verbal conduct of a person, if it is intended by [the person] as an assertion.” Federal Rule of Evidence 801(b) and Oklahoma Statutes Title 12, § 2801(2) also define a “declarant” as a “person who makes a statement.”

2. Federal Rule of Evidence 802 specifically states, “[h]earsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.” Oklahoma Statutes Title 12, § 2802 provides, “[h]earsay is not admissible except as provided by law.”

jury that can observe their demeanor as a way of assessing their credibility. Since an out-of-court hearsay statement has generally not been subjected to this traditional method of determining reliability it has been excluded as unreliable.³ Despite this concern over the unreliability of hearsay, it has long been recognized that not all hearsay statements are inherently unreliable and that exceptions ought to be made for those out-of-court statements that possess "circumstantial guarantees of trustworthiness"⁴ and, thus, either do not need to be subjected to cross-examination or are considered sufficiently reliable on some other basis.⁵

The Federal Rules of Evidence and the Oklahoma Evidence Code have continued and refined this tradition by providing for four different sets of "exceptions" to the general ban on hearsay. One set of exceptions applies even though the declarant may be available as a witness.⁶ A second group of exceptions applies only upon a showing that the declarant is unavailable as a witness.⁷ A third category, which includes certain prior statements by a testifying witness and admissions, or statements, by a party opponent, are not actually referred to as "exceptions," but rather as not being hearsay in the first place.⁸ Since the statements in this category can be used to prove the truth of the matter asserted, and thus function in the same way as those statements actually referred to as exceptions, it is best to view this category as a separate group of "exceptions." Finally, both codes provide for a "catch-all" exception for those particularly reliable hearsay statements that do not fit any of the other categorical exceptions.⁹

3. *McCormick on Evidence* § 245 (John W. Strong ed., 5th ed., West 1999) [hereinafter *McCormick*].

4. Fed. R. Evid. 803 (Advisory Comm. Notes).

5. *McCormick*, *supra* n. 3, at § 245.

6. Federal Rule of Evidence 803 provides that the "following are not excluded by the hearsay rule, even though the declarant is available as a witness" and then goes on to list twenty-three separate exceptions ranging from present sense impressions and excited utterances to judgments as to personal, family, or general history, or boundaries. Oklahoma Statutes Title 12, § 2803 provides a similar list of exceptions.

7. Federal Rule of Evidence 804(b) provides that the "following are not excluded by the hearsay rule if the declarant is unavailable as a witness" and then lists the exceptions for "Former testimony," "Statement under belief of impending death," "Statement against interest," "Statement of personal or family history," and "Forfeiture by wrongdoing." Oklahoma Statutes Title 12, § 2804(B) provides for the same exceptions, except for "Forfeiture by wrongdoing."

8. Federal Rules of Evidence 801(d) provides that a "statement is not hearsay" if the statement fits one of three categories of prior statements by a witness or one of five different types of admissions by a party opponent. Oklahoma Statutes Title 12, § 2801 contains similar provisions, although it does not use the term "admission" with respect to the latter category.

9. Federal Rule of Evidence 807, titled "Residual Exception" provides in part:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will best be served by admission of the statement into evidence.

Oklahoma Statutes Title 12, § 2804.1, titled "Hearsay exception—Exceptional circumstances," provides in part:

A. In exceptional circumstances a statement not covered by Section 2803, 2804, 2805, or 2806 of this title but possessing equivalent, though not identical, circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the court determines that:

1. The statement is offered as evidence of a fact of consequence;
2. The statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and

Both codes provide for an exception that has traditionally been known as a "declaration against interest,"¹⁰ although the Federal Rules of Evidence now refer to the exception as a "statement against interest" and the Oklahoma Evidence Code simply defines it without labeling it anything. The pertinent language, which is virtually the same in both codes, is:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

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 the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.¹¹

The rationale for why such an out-of-court statement should be considered sufficiently reliable to constitute an exception to the hearsay ban is that "people generally do not lightly make statements that are damaging to their interests."¹² As the Advisory Committee's Note to the Federal Rules of Evidence has stated, "The circumstantial guarantee of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true."¹³ Thus the key to a declaration against interest is that the statement be against interest at the time of its making.

III. ADMISSIONS BY A PARTY OPPONENT

If one party to litigation wants to introduce an out-of-court statement by the opposing party and have that statement considered for the truth of the matter asserted, it is clear that the statement would fit the definition of hearsay.¹⁴ Although there has been some disagreement over whether such admissions should be classified as "exceptions" to the hearsay rule or simply classified as being outside the hearsay rule,¹⁵ admissions by a party opponent have never been excluded by the hearsay rule. Both the Federal Rules of

-
3. The general purpose of this Code and the interests of justice will best be served by admission of the statement into evidence.

(footnote omitted).

10. *McCormick*, *supra* n. 3, at § 316.

11. Fed. R. Evid. 804(b)(3); Okla. Stat. tit. 12, § 2804(B)(3) (West Supp. 2005). Oklahoma Statutes Title 12, § 2804(B)(3) also contains the following at the end of the section, which the Federal Rule does not: "A statement or confession offered against the accused in a criminal case, made by a codefendant or other individual implicating both the codefendant or other individual and the accused, is not within this exception."

12. *McCormick*, *supra* n. 3, at § 316.

13. Fed. R. Evid. 804.

14. *See supra* n. 1.

15. "Morgan's view was that admissions are received as an exception to the hearsay rule." *McCormick*, *supra* n. 3, at § 254, 136 (citing Edmund M. Morgan, *Basic Problems of Evidence*, 265-66 (Am. L. Inst. 1963)). Wigmore suggested that admissions were unlike other hearsay statements in that the declarant of the statement (the party opponent) "does not need to cross-examine himself." *Id.* (quoting John Henry Wigmore, *Evidence* vol. 4, § 1048 (Little, Brown & Co. 1972)). In Wigmore's view, the hearsay rule is satisfied because the party "now as opponent has the full opportunity to put himself on the stand and explain his former assertion." *Id.*

Evidence and the Oklahoma Evidence Code provide that "admissions by a party opponent" are not excluded by the hearsay rule. The pertinent language is as follows: "A statement is not hearsay if—

. . . [t]he statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity"¹⁶

Under the Federal Rules of Evidence "admissions by a party opponent" are excluded from the definition of hearsay "on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule."¹⁷ As a result, the exclusion of admissions by a party opponent from the hearsay ban is not based on the guarantees of trustworthiness inherent in the circumstances under which they were made, but rather in the theory that the party opponent who made the statement "does not need to cross-examine himself."¹⁸ As the Advisory Committee specifically stated, "[n]o guarantee of trustworthiness is required in the case of an admission."¹⁹ More specifically, a true admission by a party opponent has never been required to be against the interest of the declarant.²⁰

An admission by a party opponent probably ought to be the simplest exclusion from the hearsay rule. As one commentator has put it, "Under the federal rules, a party's own statement offered against him or her is defined as nonhearsay. Period! It is that simple. It need not be against the party's interest at the time of trial, it need not have been against the party's interest at the time it was said."²¹ And unlike a declaration against interest, an admission requires no showing of the unavailability of the declarant.

IV. ADMISSION AGAINST INTEREST

Although there may be times when their application may overlap,²² the law of evidence clearly makes a distinction between the requirements of an "admission by a party opponent" and a "declaration against interest." However, despite this clear distinction, the law of evidence has unfortunately created a hybrid of these two concepts

16. Fed. R. Evid. 801(d)(2)(A); Okla. Stat. tit. 12, § 2801(B)(2)(a) (1993). Both codes also include the following other types of admissions:

(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, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Fed. R. Evid. 801(d)(2)(A). The Federal Rule specifically titles these provisions as "Admission by Party-Opponent" while the Oklahoma Evidence Code simply defines the statements without labeling them.

17. Fed. R. Evid. 801(d)(2) (Advisory Comm. Notes).

18. *McCormick*, *supra* n. 3, at § 254, 136 (citing Wigmore, *supra* n. 15, at § 1048).

19. Fed. R. Evid. 801(d)(2) (Advisory Comm. Notes).

20. *See McCormick*, *supra* n. 3, at § 254, 138-39.

21. G. Michael Fenner, *Law Professor Reveals Shocking Truth About Hearsay*, 62 UMKC L. Rev. 1, 83 (1993) (footnote omitted).

22. For example, a statement by a criminal defendant, confessing to the charged crime, would generally be admissible as an admission by a party opponent under the Federal Rules of Evidence 801(d)(2)(A). Since the defendant would be considered unavailable at trial because of the privilege against self-incrimination and the statement, when made, would have tended to subject the declarant to criminal liability, the statement could also generally be considered admissible as a declaration against interest under Federal Rule of Evidence 804(b)(3).

known as the "admission against interest." The obvious problem with this term is that it erroneously suggests either that an admission must be "against interest," or that an actual declaration against interest must also qualify as an admission, which in turn suggests that it can only be made by a party opponent. Since it is clear that an admission does not have to be against interest²³ and that a declaration against interest does not have to be made by a party opponent,²⁴ no purpose but confusion can be served by the continued use of the phrase "admission against interest."

Although the precise origin of "admission against interest" is unclear, it appears to have arisen from the early debates over the proper rationale for the admissibility of admissions by a party opponent. In an important article in the *Yale Law Journal* in 1921,²⁵ Professor Edmund Morgan explained and refuted some of the more common theories that had been put forth to justify the general admissibility of extra-judicial statements by a party. One theory was that such statements were treated the same as judicial admissions in that they amounted to a "waiver of the privilege of requiring the opponent to produce proof of a particular point in issue."²⁶ Professor Morgan dismissed that explanation by pointing out that while judicial admissions were treated as conclusive evidence of the point for which they were offered, the courts treated extra-judicial admissions as simply evidence of the point stated which could be refuted by other evidence.²⁷ Another theory was that admissions were not received as direct evidence of the truth of the matter asserted, but rather as circumstantial evidence of the belief of the party opponent in the facts contained in the admission, which "state of mind in turn furnishes the ground for an inference to the facts which produced the state of mind."²⁸ Professor Morgan countered that this "process of double inference" would lead to the same result as if the admission had been admitted for its truth, and that such an application would be "altogether too tenuous for practical application" by pointing out the difficulty in "attempting to expound it to the average jury!"²⁹

Two other theories, however, get to the heart of the confusion that has led to the development of the "admission against interest" language. Professor Morgan pointed out that some courts and commentators sometimes characterized admissions as declarations against interest, assuming that if admissions "are to be received at all as exceptions to the rule against hearsay, they must be brought within the exception of declarations against interest."³⁰ Of course, Professor Morgan also pointed out that admissions did not have to be against interest when made and that the admissibility of an admission did not require a showing of the unavailability of the declarant, which was a requirement for a

23. See *supra* nn. 14-20 and accompanying text.

24. *Id.*

25. Edmund M. Morgan, *Admissions as an Exception to the Hearsay Rule*, 30 *Yale L.J.* 355 (1921).

26. *Id.* at 356.

27. *Id.*

28. *Id.* at 357.

29. *Id.* Professor Morgan's skepticism about this theory accounts for the provision in the "state of mind" exception to the hearsay rule in Federal Rule of Evidence 803(3), which excludes from that exception "a statement of memory or belief to prove the fact remembered or believed." For a criticism of Morgan's criticism of the "double inference" theory, see John S. Strahorn, Jr., *A Reconsideration of the Hearsay Rule and Admissions*, 85 *U. Pa. L. Rev.* 564, 579 (1937).

30. Morgan, *supra* n. 25, at 359. See also Wigmore, *supra* n. 15, at § 1049.

declaration against interest.³¹ Another popular theory at the time was that admissions were “offered and received solely to contradict the position taken by the admitter in the action”³² and that they simply performed the same impeaching function as a prior inconsistent statement.³³ While it is true that such statements may sometimes have an impeaching effect, Professor Morgan again made the point that courts clearly allowed admissions to also be used for the truth of the matter asserted.³⁴ So, it appears that the “admission against interest” phrase may have had its origins in the inaccurate attempt to equate admissions with declarations against interest. This confusion was further compounded by the equally inaccurate suggestion that admissions were only useful because of their contradicting effect at trial, which suggests that such admissions are in some way against or disserve the interest of the declarant’s position at trial. This source of confusion seems to be supported by a suggestion in a 1944 *Harvard Law Review* article that stated, “If a court desires to emphasize the disserving character of an admission, the phrase ‘admission against interest’ is useful and less confusing than classification as a declaration against interest.”³⁵ Ironically, this suggestion appears in a passage in which the author actually laments the fact that the “failure of courts to appreciate the difference between these three exceptions [personal admissions, vicarious admissions, and declarations against interest] has led to the development of inaccurate terminology and confusing results.”³⁶

Since the use of the phrase “admission against interest” has itself led to “the development of inaccurate terminology and confusing results,” commentators have repeatedly warned against the continued use of this confusing and inaccurate phrase. *McCormick on Evidence* comments that “the common phrase ‘admissions against interest’ is an invitation to confuse two separate theories of admitting hearsay [admissions by a party opponent and declarations against interest] and erroneously engraft an against-interest requirement on admissions.”³⁷ In an aptly named article, *Law Professor Reveals Shocking Truth About Hearsay*, Professor G. Michael Fenner takes modern courts to task for continuing to “get it wrong” by using the “admission against interest”³⁸ phrase and thereby confusing the requirements of an admission by a party opponent with the requirements of the common law declaration against interest. The *Leff Dictionary of Law* defines “admission against interest” as a “common and confusing locution which obliterates the important distinctions between a ‘declaration against interest’ and a ‘party admission.’”³⁹ Professor Leff further laments the fact that “many

31. Morgan, *supra* n. 25, at 359.

32. *Id.* at 357.

33. *Id.*

34. *Id.*

35. Bernard S. Jefferson, *Declarations Against Interest: An Exception to the Hearsay Rule*, 58 *Harv. L. Rev.* 1, 64 (1944).

36. *Id.* at 63.

37. *Supra* n. 3, at § 254, 138-39 (footnote omitted).

38. See Fenner, *supra* n. 21, at 83.

39. Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 *Yale L.J.* 1855, 1945 (1985).

lawyers and judges, to the despair of those trying to keep things straight, have the terrible habit of referring loosely to both as an admission against interest.”⁴⁰

Despite the fact that there is almost universal agreement, at least among those who have thought about it, that the “admission against interest” phrase should be abandoned, “the phrase continues to appear with embarrassing frequency.”⁴¹ A Westlaw search of the phrase “admission against interest” reveals literally thousands of instances of its use in cases and law reviews and other periodicals.⁴² Even the United States Supreme Court in *Jaffe v. Redmond* made reference to “admissions against interest by a party.”⁴³

Although the use of the “admission against interest” phrase makes it unclear whether one is referring to an admission by a party opponent or a declaration against interest, it does appear that in the overwhelming majority of instances in which the phrase appears it is used to refer to an admission by a party opponent. However, the potential for confusion caused by the use of the term is starkly illustrated by the way in which two frequently cited legal authorities describe “admissions against interest.” *Black’s Law Dictionary* clearly defines the term as meaning the same thing as an admission by a party opponent.⁴⁴ Although it contrasts the concept with a declaration against interest, *Black’s* does not even mention the confusion caused by use of the phrase.⁴⁵ In contrast, though, *American Jurisprudence* (“*AMJUR*”) describes the “admission against interest exception to the hearsay rule” as encompassing declarations against pecuniary and proprietary interest, a clear reference to the actual declaration against interest exception.⁴⁶ Thus, *Black’s* treats an admission against interest as an admission by a party opponent, while *AMJUR* treats it as a declaration against interest. There is no question that the continued use of the phrase “admission against interest” continues to contribute to this useless confusion.

V. CONCLUSION

It is as clear as can be that the Federal Rules of Evidence and the Oklahoma Evidence Code provide for the separate and distinct treatment of admissions by a party opponent and declarations against interest within the hearsay rule. An admission is simply the party’s own statement offered against him or her. In contrast, a declaration against interest must be against the interest of the now unavailable declarant. Under the rules, there is no such thing as an “admission against interest.” “Period! It is that simple.”⁴⁷

40. *Id.*

41. *McCormick*, *supra* n. 3, at § 254, 138 n. 18.

42. A Westlaw search ran on October 7, 2005 in the database for all state cases reported thousands of documents. A search on the same day in the database for law review and periodicals also reported thousands of documents.

43. 518 U.S. 1, 12 (1996).

44. *Black’s Law Dictionary* 51 (Bryan A. Garner ed., 8th ed., West 2004).

45. *Id.*

46. 29A Am. Jur. 2d *Evidence* § 788 (2002).

47. *Fenner*, *supra* n. 21, at 83.

