

A defendant is on trial for tax evasion. The defendant called his accountant to testify that the inconsistencies in the defendant's tax returns were clerical errors that occurred when the defendant's account information was transferred into a new accounting system. On cross-examination, the prosecutor seeks to attack the accountant's credibility by questioning him about his prior arrest for embezzlement and introducing evidence of his prior conviction for disorderly conduct.

If the defendant objects, how should the court rule?

- A. Admit evidence of the arrest and the conviction, because the witness opened the door to reputation testimony.
- B. Admit evidence of the arrest, but exclude evidence of the conviction because specific instances of conduct must be introduced intrinsically.
- C. Exclude evidence of the arrest and the conviction, but allow the prosecutor to cross-examine the accountant about the underlying conduct that led to the arrest.
- D. Exclude evidence of the conviction, but admit evidence of the arrest because it involves a crime of dishonesty.

## Explanation:

Any party can **impeach a witness** with **reputation or opinion** testimony OR specific instances of conduct (SICs) that are probative of the witness's **character for (un)truthfulness**.<sup>\*</sup> Only **two types of SICs** are admissible for this purpose: (1) convictions for a felony or crime of dishonesty and (2) other bad acts. A **conviction for a felony or crime of dishonesty** can be introduced:

**intrinsically** – through the witness's own testimony *or*

**extrinsically** – through another witness's testimony or any other source.

In contrast, **other bad acts** can only be introduced **intrinsically**.

Here, the prosecutor seeks to introduce extrinsic evidence of the accountant's prior conviction for disorderly conduct. However, disorderly conduct is typically a *misdemeanor* offense that involves *unruly* behavior—not dishonesty. As a result, the prosecutor cannot use this conviction to impeach the accountant (**Choice A**). And though embezzlement is a crime of dishonesty, an arrest is not a conviction.

An **arrest** is also **not a bad act** because an arrest for misconduct is not itself misconduct. This means that the prosecutor cannot cross-examine the accountant about his prior arrest for impeachment purposes (**Choices A, B & D**). In contrast, the underlying conduct (ie, bad acts) that *led* to the embezzlement arrest can be used for impeachment purposes because that conduct is probative of the accountant's character for truthfulness.

<sup>\*</sup>A witness's character for truthfulness may only be supported by reputation or opinion testimony after it has been attacked.

## Educational objective:

Specific instances of conduct involving a conviction for a felony or crime of dishonesty OR other bad acts can be admitted to impeach a witness's character for truthfulness. However, a mere arrest—as opposed to the underlying conduct leading to the arrest—is inadmissible for such purposes.

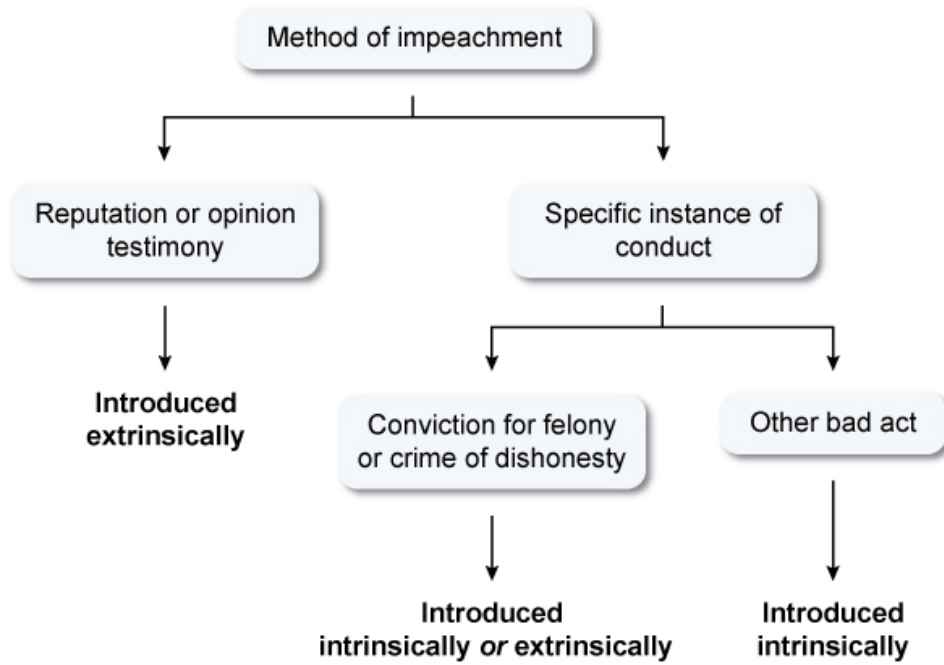
## References

Fed. R. Evid. 608 (witness's character for truthfulness).

Fed. R. Evid. 609 (impeachment by evidence of criminal conviction).

Michelson v. United States, 335 U.S. 469, 482 (1948) (stating that an arrest without more does not impeach the integrity or impair the credibility of a witness).

**Impeaching witness's character for truthfulness**  
(FRE 608 & 609)



FRE = Federal Rules of Evidence