

At a defendant's trial for a gang-related murder, the prosecution introduced, as former testimony, a statement by a gang member who testified against the defendant at a preliminary hearing and has now invoked his privilege against self-incrimination.

If the defendant now seeks to impeach the credibility of the gang member, which of the following is the court most likely to admit?

- A. Evidence that the gang member had three misdemeanor convictions for assault.
- B. Testimony by a psychologist that persons with the gang member's background have a tendency to fabricate.
- C. Testimony by a witness that, at the time the gang member testified, the gang member was challenging the defendant's leadership role in the gang.
- D. Testimony by a witness that the gang member is a cocaine dealer.

## Explanation:

### Impeaching witness v. hearsay declarant

Method	Witness	Declarant
<b>Character for truthfulness</b>	Specific instance of conduct involving bad act or criminal conviction of felony/crime of dishonesty Reputation or opinion testimony on truthfulness	
<b>Self-interest/bias</b>	Motive to lie or partiality to party	
<b>Specific contradiction</b>	Evidence directly contradicting testimony on material issue	
<b>Inconsistent statement</b>	<i>Prior</i> statement admissible <i>if</i> witness can explain/deny & be questioned by opposing party (or if justice requires)	Admissible <i>regardless</i> of when statement occurred & whether declarant can explain/deny

When an out-of-court statement is admitted under a hearsay exception—eg, the **former testimony** exception (as seen here)—the **declarant can be impeached** as if the declarant had testified at trial.

For instance, evidence that the declarant was biased or motivated by self-interest when making the out-of-court statement can be used to attack the declarant's credibility. Therefore, the defendant can impeach the gang member through witness testimony that, at the time the gang member testified, he was challenging the defendant's leadership.

**(Choice A)** A witness or hearsay declarant can be impeached with evidence of a prior conviction involving a felony or crime of dishonesty. Since misdemeanor convictions for assault do not involve dishonesty, they are not admissible to impeach the gang member.

**(Choice B)** Only a few courts have allowed experts to testify to a witness's credibility. Therefore, the psychologist's "expert" opinion—ie, that persons with the gang member's background tend to fabricate—is not the evidence *most likely* to be admitted.

**(Choice D)** A witness may be impeached with bad acts that did not result in conviction if those acts are probative of the witness's character for truthfulness and are introduced through the witness's *own* testimony. Therefore, evidence that the gang member is a cocaine dealer cannot be introduced through another witness's testimony.

## Educational objective:

When an out-of-court statement is admitted under a hearsay exception, the declarant can be impeached as if the declarant had testified at trial—eg, by showing that the declarant was biased or motivated by self-interest.

### **References**

Fed. R. Evid. 806 (attacking hearsay declarant's credibility).

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