

A plaintiff sued a defendant for breach of a commercial contract in which the defendant had agreed to sell the plaintiff all of her requirements for widgets. The plaintiff called an expert witness to testify as to damages.

The defendant seeks to show that the expert witness had provided false testimony as a witness in his own divorce proceedings.

Should the defendant's evidence be admitted?

- A. No, because it is impeachment on a collateral issue.
- B. No, because it is improper character evidence.
- C. Yes, if elicited from the expert witness on cross-examination.
- D. Yes, if the false testimony is established by clear and convincing extrinsic evidence.

Explanation:

Methods of impeaching witness

Method	Description	Means
Character for truthfulness	Reputation or opinion testimony	Extrinsic evidence
	SIC involving bad act	Intrinsic evidence
	SIC involving criminal conviction of felony or crime of dishonesty	Intrinsic or extrinsic evidence
Self-interest / bias	Motive to lie or partiality to party	
Prior inconsistent statement	Witness's prior statement inconsistent with present testimony	
Specific contradiction	Evidence directly contradicting witness's testimony on material issue	
Sensory abilities	Evidence showing witness's senses were impaired by physical / mental condition or environmental factors	

SIC = Specific instance of conduct.

The defendant seeks to impeach the plaintiff's expert witness by attacking his **character for truthfulness**. This can be done by introducing **extrinsic evidence**—ie, evidence elicited from sources other than the expert's own testimony—to:

show the expert's **reputation** for untruthfulness

present another witness's **opinion** on the expert's truthful character *or*

prove a **specific instance of conduct** (SIC) involving a **criminal conviction** of a felony or crime of dishonesty.

But extrinsic evidence cannot be used to prove a SIC involving a **prior bad act**—ie, an illegal, immoral, or impermissible act that did *not* result in a criminal conviction. A bad act can **only be introduced** through **intrinsic evidence**—ie, evidence elicited during a witness's own testimony (usually on cross-examination)—if:

the bad act is probative of the witness's truthful character *and*
the inquiry into that bad act is made in good faith.

This is true even if the prior bad act (eg, the expert's false testimony) can be established by **clear and convincing** evidence **(Choice D)**. Therefore, evidence of the expert's false testimony should be admitted if it is elicited from the expert on cross-examination.

(Choice A) The collateral-evidence rule prohibits the use of *extrinsic* evidence to impeach a witness on a collateral issue—ie, one that is *irrelevant* to the outcome of the case. But it does not apply here since *intrinsic* evidence would be used to impeach the expert and prior falsity is *relevant* to present credibility.

(Choice B) Character evidence is generally improper when it is used to show that a person acted in accordance with his/her character on the occasion at issue (ie, to prove liability). But it can be used for other purposes, like attacking a witness's credibility (as seen here).

Educational objective:

A witness's character for truthfulness can be attacked by introducing a specific instance of conduct involving a prior bad act only on cross-examination if (1) the bad act is probative of the witness's truthful character and (2) the inquiry is made in good faith.

References

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

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