

A plaintiff sued a defendant for damages arising out of an automobile collision. At trial, the plaintiff called an eyewitness to the collision. The plaintiff expected the eyewitness to testify that she had observed the defendant's automobile for five seconds prior to the collision and estimated the defendant's speed at the time of the collision to have been 50 miles per hour. Instead, the eyewitness testified that she estimated the defendant's speed to have been 25 miles per hour.

Without finally excusing the eyewitness, the plaintiff then called a second witness, a police officer, to testify that the eyewitness had told him during his investigation at the accident scene that the defendant "was doing at least 50."

Is the police officer's testimony admissible?

- A. No, because it is hearsay not within any exception.
- B. No, because the plaintiff may not impeach his own witness.
- C. Yes, as a present sense impression.
- D. Yes, in order to impeach the eyewitness.

Explanation:

Witness's prior inconsistent statement

Use	Applicability	Methods of introduction
Impeachment	Always admissible to discredit witness's trial testimony	Examining witness about prior statement
Substantive evidence	Admissible to prove truth only if excluded or excepted from hearsay	Introducing extrinsic evidence if: witness can address & opposing party can question witness about statement <i>or</i> justice so requires

Prior inconsistent statements are statements made by a witness in the past that are inconsistent with the witness's current testimony. These prior statements are typically subject to the rule against hearsay and—unless they are **excluded or excepted** from hearsay—cannot be offered to prove the truth of the matter asserted therein. But they *can* be used to **impeach a witness** on a material issue by either:

examining the witness about the statement* *or*

introducing the statement through **extrinsic evidence** if (1) the witness has an opportunity to **explain or deny**—and the opposing party has the opportunity to **question the witness** about—the statement or (2) justice so requires.

Here, the plaintiff seeks to introduce the eyewitness's prior inconsistent statement extrinsically through the police officer's testimony. This hearsay statement cannot be offered for its truth—that the defendant was "doing at least 50"—because it is neither excluded nor excepted from hearsay. But it can be used to impeach the eyewitness's testimony that the defendant's speed was 25 miles per hour (**Choice A**). That is because the eyewitness has *not* been finally excused and can still address or be questioned about the prior statement.

*A party need not show or disclose the contents of a prior inconsistent statement to a witness before questioning the witness on the inconsistency. But the party must, on request, show the statement or disclose its contents to an adverse party's attorney.

(Choice B) Any party, including the party that called the witness, can impeach a witness.

(Choice C) A **present sense impression** is a hearsay exception that applies to out-of-court statements describing an event or condition that are made while or immediately after the declarant perceived it. This exception does not apply here because the eyewitness's statement was made during the police officer's investigation—not during or immediately after the collision.

Educational objective:

A witness can be impeached by examining the witness about a prior inconsistent statement. Extrinsic evidence of can also be used if (1) the witness has a chance to explain or deny—and the opposing party has the opportunity to question the witness about—the statement or (2) justice so requires.

References

Fed. R. Evid. 613 (witness's prior statement).

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