

In a civil trial for fraud arising from a real estate transaction, the defendant claimed not to have been involved in the transaction. The plaintiff called a witness to testify concerning the defendant's involvement in the fraudulent scheme. To the plaintiff's surprise, however, the witness testified that the defendant was not involved and denied having made any statement to the contrary.

The plaintiff has now called a second witness to testify that the first witness had stated, while the two were having a dinner conversation, that the defendant was involved in the fraudulent transaction.

Is the testimony of the second witness admissible?

- A. No, because a party cannot impeach the party's own witness.
- B. No, because it is hearsay not within any exception.
- C. Yes, but only to impeach the first witness.
- D. Yes, to impeach the first witness and to prove the defendant's involvement.

Explanation:

A **prior inconsistent statement** is a past statement that is contrary to a witness's present testimony. These statements are **inadmissible** to prove the truth of the matter asserted therein (ie, for **substantive purposes**) **unless** they are **excepted or excluded** from the **hearsay rule**. Since there is no indication that the first witness's prior statement falls within a hearsay exception or exclusion, the second witness's testimony about that statement is *not* admissible to prove the truth of the defendant's involvement **(Choice D)**.

However, prior inconsistent statements are **admissible to impeach** a witness. **Intrinsic evidence** is always admissible for this purpose. But extrinsic evidence (eg, the second witness's testimony) is admissible only if the impeached witness has the opportunity to explain or deny—and the adverse party can examine the witness about—the inconsistent statement (or if justice so requires). Since the first witness can be recalled to testify, the second witness's testimony is admissible to *impeach* the first witness **(Choice B)**.

(Choice A) Any party may impeach a witness—including the party who called the witness.

Educational objective:

A witness's prior inconsistent statement that is inadmissible as *substantive* proof of the truth of the matter asserted therein may still be admissible for *impeachment* purposes.

References

Fed. R. Evid. 801(d)(2) (when opposing party's statement is nonhearsay).

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

Fed. R. Evid. 607 (who may impeach witness).

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Use of witness's prior inconsistent statement

