UTCLE The University of Texas School of Law

2020

Car Crash Seminar

August 27-28, 2020
Austin, Texas

CROSS EXAMINATION: A QUESTION OF CONTROL

Mike Davis

©2020 Mike Davis
SLACK DAVIS SANGER, LLP
6001 Bold Ruler Way, Suite 100
Austin, Texas 78746
(512) 795-8686 (telephone)
(512) 795-8787 (fax)
mdavis@slackdavis.com

TABLE OF CONTENTS

Preparation 1
Who Is The Witness 1
Subject Matter for Fact Witness 2
Subject Matter for Expert Witness 2
Information about Expert Witness 3
Deposition 3
Remote Depositions 5
Set-Up 5
Appearance 6
Logistics 6
Cross-Examination 7
Additional Cross-Examination Tips 9
Impeachment 10
Scope of Cross Examination 11
Texas 11
Federal 13
Qualification Of Expert Witness 14
Impeachment 15
Litigation Experience 15
Financial Interest In The Outcome Of The Case 17
Prior Testimony Of Expert 17
Use Of Treatises And Literature 18
No Impeachment On Collateral Matters 19

TABLE OF AUTHORITIES

Cases

Barrios v. Davis, 415 S.W.2d 714 (Tex. App.—Houston [1st Dist.] 1967, no writ)..... 15
Bierschwale v. Oakes, 497 S.W.2d 506 (Tex.Civ.App.—Houston [1st Dist.] 1973),
rev'd on other grounds, 516 S.W.2d 125 (Tex.1974) 19
Cantu v. Del Carmen Pena, 650 S.W.2d 906
(Tex. App.—San Antonio 1983, writ ref'd n.r.e.)..... 15
Christie v. Brewer, 374 S.W.2d 908 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.)..... 19
CPS Int'l, Inc. v. Harris & Westmoreland, 784 S.W.2d 538
(Tex. App.—Texarkana 1990, no writ)..... 12
Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993)..... 14, 15
Davis v. Marshall, 603 S.W.2d 359 (Tex. Civ. App.—Houston [14th Dist.] 1980,
writ ref'd n.r.e.) 19
E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995)..... 14, 15
French v. Brodsky, 521 S.W.2d 670 (Tex. Civ. App.—Houston [1st Dist.] 1975……19
Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713 (Tex.1998)..... 14
General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977) 17
Gravis v. Physicians and Surgeons Hospital of Alice, 415 S.W.2d 674
(Tex. Civ. App.—San Antonio 1967), writ granted and judgment rev'd on other grounds,
427 S.W.2d 310 (Tex. 1968)..... 18
Hanover Ins. Co. v. Johnson, 397 S.W.2d 904
(Tex.Civ.App.—Waco 1965, writ ref'd n.r.e.)..... 19
Hogue v. Kroger Store No. 107, 875 S.W.2d 477
(Tex. App.—Houston [1st Dist.] 1994, writ denied) 12
Horton v. Houston & T.C. Ry. Co., 103 S.W. 467 (Galveston 1907, writ ref'd)..... 17
In re Doctors' Hospital of Laredo, 2 S.W.3d 504
(Tex. App.—San Antonio 1999, orig. proceeding)..... 16
In re Plains Mktg., L.P., 195 S.W.3d 780 (Tex. App.—Beaumont 2006, orig. proceeding)..... 16
In re Wharton, 226 S.W.3d 452 (Tex. App.—Waco 2005, orig. proceeding)..... 16
King v. Bauer, 767 S.W.2d 197 (Tex. App.—Corpus Christi 1989, writ denied)..... 19
Leyendecker v. Strange, 204 S.W.2d 845
(Tex.Civ.App.—Galveston 1947, writ ref'd n.r.e.)..... 19
Mauldin v. State, 14-08-00419-CR, 2010 WL 1486959
(Tex. App.—Houston [14th Dist.] Apr. 15, 2010, no pet.)..... 17
Milkie v. Metni, 658 S.W.2d 678 (Tex. App.—Dallas 1983, no writ)..... 14
Moore v. Standard Fire Ins. Co., 461 S.W.2d 213
(Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.)..... 19
Norrid v. State, 925 S.W.2d 342 (Tex. App.—Fort Worth 1996, no pet.) 13

Olinger v. Curry, 926 S.W.2d 832 (Tex. App.—Fort Worth 1996, orig. proceeding) 15
Perry v. State, 236 S.W.3d 859 (Tex. App.—Texarkana 2007, no pet.) 12
Republic Nat'l Life Ins. Co. v. Heyward, 568 S.W.2d 879
(Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.) 17
Russell v. Young, 452 S.W.2d 434 (Tex. 1970) 15
Scurlock Oil Co. v. Smithwick, 724 S.W.2d 1 (Tex. 1986) 17
Shepperd v. Troilo, 513 S.W.2d 813 (Tex. 1974) 17
Sparks v. State, 943 S.W.2d 513 (Tex. App.—Fort Worth 1997, pet. ref'd) 17
St. Louis & S.F. Ry. Co. v. Clifford, 148 S.W. 1163
(Tex. Civ. App.—Dallas 1912, writ ref'd n.r.e.) 17
Texas Turnpike Authority v. McCraw, 458 S.W.2d 911 (Tex. 1970) 12
Torres v. Danny's Serv. Co., Ltd., 266 S.W.3d 485
(Tex. App.—Eastland 2008, pet. denied) 12
Traders and Gen. Ins. Co. v. Robinson, 227, 266
(Tex. Civ. App.—Texarkana 1949, writ ref'd) 15
U.S. v. Tomblin, 46 F.3d 1369 (5th Cir. 1995) 13
Walker v. Packer, 827 S.W.2d 833 (Tex. 1992) 16
Wendell v. Central Power and Light Co., 677 S.W.2d 610
(Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.) 18

Rules

Fed. R. Evid. 611 13
Fed. R. Evid. 611(b) 13
Tex. R. Civ. P. 192.3(e)(5) 16
Tex. R. Evid. 401 12
Tex. R. Evid. 602 1
Tex. R. Evid. 611 12
Tex. R. Evid. 611(a) 12
Tex. R. Evid. 611(b) 11
Tex. R. Evid. 613(a) 10
Tex. R. Evid. 613(a)(1) 10
Tex. R. Evid. 613(a)(2) 10
Tex. R. Evid. 613(a)(3) 10
Tex. R. Evid. 613(a)(4) 11
Tex. R. Evid. 702 14
Tex. R. Evid. 803(18) 18

CROSS EXAMINATION: A QUESTION OF CONTROL

Mike Davis
SLACK DAVIS SANGER, LLP
6001 Bold Ruler Way, Suite 100
Austin, Texas 78746
Telephone: 512-795-8686
Email: mdavis@slackdavis.com

Control is the key to effective cross-examination. Preparation is the first step in taking control. Effective cross-examination begins with learning about the witness and the subject matter, fully exploring the witness' testimony in deposition, and knowing the applicable law. With this framework, you can develop a cross-examination strategy.

PREPARATION

Who Is The Witness

How you prepare and what you do to prepare will depend upon the witness. Is the witness a fact witness or an expert witness? A witness who is not an expert witness may testify only if the witness has personal knowledge of the subject matter. Tex. R. Evid. 602. Consequently, areas of inquiry of a fact witness might include:

- The witness' opportunity to observe or know the facts.
- The witness' ability to recall the facts.
- Whether the witness has a bias.
- Prior inconsistent statements by the witness.

Areas of inquiry for an expert witness could include:

- The witness' qualifications to testify on the subject matter.
- The witness' methodology in forming opinions.
- Whether the witness has sufficient data to form opinions.
- What the witness' opinions are.

- What information the witness used to reach each opinion.
- An explanation of the witness' reasoning for each opinion.
- Any favorable admissions where the witness agrees with your expert or your case theme.
- Whether the witness has a bias.
- Prior inconsistent statements by the witness.

Subject Matter for Fact Witness

It is critical to learn as much as you can about the subject matter about which the witness is going to be testifying. Before deposing a fact witness in a car wreck case, you may want to visit the scene, make sure you have read the crash report, and talk to the investigating officers and any eyewitnesses. If the witness has given a statement to the investigating officer, or anyone else, get it if you can. You may be able to learn some additional information about the witness through social media. If you have an expert on a subject that the fact witness is likely to address, you may want to talk to your expert about any facts that you should try to develop.

Subject Matter for Expert Witness

While you cannot expect to achieve the same depth of knowledge that the expert witness may have on a particular subject, you need to have a good understanding of the subject matter, related concepts, and terminology. If you have your own expert, he or she can help you understand the subject and suggest areas of inquiry. If you do not have an expert, you will have to do your own research on the topic, including finding any articles authored by the witness or his or her coworkers. In addition, if the expert has used software to help formulate opinions, get the operating manual for the software, and get course materials from any courses or training that the expert has attended.

UT LAW CLE THE UNIVERSITY OF TEXAS TEXASLAW

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the UT Law CLE eLibrary (utcle.org/elibrary)

Title search: Cross Examination: A Question of Control

Also available as part of the eCourse
2020 The Car Crash eConference

First appeared as part of the conference materials for the
2020 Car Crash Seminar session
"From Deposition to Cross-Examination: Finding It, Organizing It, and Using It"