

“OVERCOMING THE PROBLEM WITNESS”

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WINNING AT DEPOSITION: SKILLS AND STRATEGY
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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	SCOPE AND MANNER OF CROSS-EXAMINATION	1
III.	IMPEACHING A WITNESS	1
IV.	WHAT TO DO BEFORE YOU IMPEACH AN EXPERT	2
A.	Establish an Early Tempo of Success	3
B.	Modify Opinions.....	3
V.	PREPARATION FOR IMPEACHMENT OF AN EXPERT	3
A.	Pertinent Records or Documents	3
B.	Applicable Procedures or Principles	4
C.	The Expert's Background.....	4
D.	The Expert's Report.....	4
E.	The Expert's Deposition.....	5
VI.	THE THEMES OF YOUR IMPEACHMENT OF AN EXPERT	6
A.	The Expert's Lack of Qualifications	7
B.	The Expert is Poorly Informed, or Misinformed, About the Facts.....	8
C.	The Expert is Biased or Prejudiced	11
D.	The Expert Has Made Prior Inconsistent Statements	12
E.	The Expert's Opinions Are Inconsistent With Accepted Authority.....	13
F.	The Expert Is Otherwise Not Credible	13
G.	The Expert's Opinions Are Unreliable.....	14
H.	The Expert Does Not Clear "The Four Hurdles"	16
VII.	APPROACHES TO IMPEACHMENT OF AN EXPERT	17
A.	Nice Guy	17
B.	Three Bricks Shy of a Load	18
C.	Command by Apparent Knowledge	18
D.	Kamikaze	18
VIII.	CONCLUSION.....	18

I. INTRODUCTION

Cross-examination of key fact witnesses and opposing expert witnesses is frequently the most challenging and decisive portion of complex litigation. Effective cross-examination usually involves a great deal of thought, planning, and preparation. It can help if the objectives of your cross-examination are established, the plan of attack is formulated, and the necessary preparation is done before the witness takes the stand.

Problem witnesses, whether they are fact witnesses or expert witnesses, usually can be overcome with a combination of patience, intuition, and careful planning and preparation.

II. SCOPE AND MANNER OF CROSS-EXAMINATION

In Texas state courts, the scope and manner of cross-examination is governed by Rule 611 of the Texas Rules of Evidence. That rule provides:

(a) **Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) **Scope of Cross-Examination.** A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

(c) **Leading Questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

III. IMPEACHING A WITNESS

Any party, including the party calling the witness, may impeach a witness. See Tex. R. Evid. 607; *Corning Fiberglass Corp. v. Malone*, 916 S.W.2d 551, 567 (Tex. App.—Houston[1st Dist.] 1996).

Impeachment By Reputation. An impeaching witness must be familiar with the other witness' reputation for truthfulness before the impeaching witness may answer a question about the reputation of other witness for truthfulness.

Impeachment With Prior Inconsistent Statements. Rule 613 of the Texas Rules of Evidence governs impeachment of witnesses with prior inconsistent statements. The rule provides;

(a) **Examining Witness Concerning prior Inconsistent Statement.** In examining a witness concerning a prior inconsistent statement made by the witness, whether oral or written, and before further cross-examination concerning, or extrinsic evidence of, such statement may be allowed, the witness must be told the contents of such statement and the time and place and the person to whom it was made, and must be afforded an opportunity to explain or deny such statement. If written, the writing need not be shown to the witness at that time, but on request,

the same shall be shown to opposing counsel. If the witness unequivocally admits having made such statement, extrinsic evidence of same shall not be admitted. This provision does not apply to admissions of a party-opponent as defined in Rule 801(e)(2).

Impeachment With Bias or Interest. Rule 613 also governs impeaching witnesses concerning their bias or interest in a matter. The rule provides:

(b) **Examining Witness Concerning Bias or Interest.** In impeaching a witness by proof of circumstances or statements showing bias or interest on the part of such witness, and before further cross-examination concerning, or extrinsic evidence of, such bias or interest may be allowed, the circumstances supporting such claim or the details of such statement, including the contents and where, when and to whom made, must be made known to the witness, and witness must be given an opportunity to explain or deny such circumstances or statement. If written, the writing need not be shown to the witness at that time, but on request the same shall be shown to opposing counsel. If the witness unequivocally admits such bias or interest, extrinsic evidence of same shall not be admitted. A party shall be permitted to present evidence rebutting any evidence impeaching one of said party's witnesses on grounds of bias or interest.

IV. WHAT TO DO BEFORE YOU IMPEACH AN EXPERT

One of the objectives of cross-examination is to lead the opposing expert (and the jury, in the process) to the truth, because the expert obviously missed it on direct! Another objective is impeachment, by which you discredit the expert or the expert's opinions. Accomplishing both objectives in your cross-examination is often difficult.

Before impeaching an adverse expert, you should first ask whether you need to impeach. Impeachment is not the only useful and productive purpose of cross-examination. A well planned and executed cross-examination has the potential for accomplishing far more than simply discrediting the testimony of the defendant's expert.

Occasionally, you can get the expert to modify or make a wholesale reversal of his opinions. Artful and precise questioning can often extract concessions and favorable collateral opinions from the opponent's expert. You may also establish that, given the particular facts and circumstances of your case, the expert's opinions are not harmful. In such circumstances, there is no need to impeach the witness as the witness has been rendered, at most, irrelevant, and you can save the thunder for another occasion, and there is an appreciation by the court and the jury of your giving back the time.

Because the opponent's expert can sometimes be made to appear at least partially supportive of the your case, on those occasions when you do decide to impeach the expert, the destruction of his credibility should be carefully timed. If there is a realistic chance of eliciting favorable testimony from the opponent's expert, it is counterproductive to begin by launching a savage attack on his credibility. It doesn't make much sense to try to first establish a witness is untruthful, and to then try to elicit testimony from that same witness supporting your case. An expert that is wholly untrustworthy logically cannot lend support to either side's case. Additionally, you are more likely to succeed in developing favorable information from the witness at an earlier part of your examination, before the hostility and tension levels between you and the witness have become so high that the witness resists every question. Only when you begin to encounter heavy resistance from the witness, and have elicited what favorable information you can, is it time to go on the attack. For example, in the 70s, I was deposing a pediatric psychiatrist

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