

**CROSS EXAMINATION:
Overcoming the Problem Witness**

Presented by:
PAULA SWEENEY, *Dallas*
Slack & Davis

Written by:
MIKE DAVIS, *Austin*
Slack & Davis

**UT Law CLE's 2021 Winning at Deposition: Skills
and Strategy**

April 21, 2021

**Paula Fisette Sweeney
Slack & Davis, L.L.P.
3500 Maple Ave., Suite 1250
Dallas, Texas 75219
214.528.8686
psweeney@slackdavis.com
www.slackdavis.com**

Paula Sweeney practiced in Dallas with her partner John Howie for 22 years, until his untimely death, at the firm Howie & Sweeney, which they founded. She is now happily Of Counsel in the Dallas office of Slack & Davis, L.L.P.

She is a Fellow of the American College of Trial Lawyers, and has been a Fellow of the International Society of Barristers and the International Academy of Trial Lawyers. She is Past President of the Texas Trial Lawyers Association (1998), the Dallas Trial Lawyers Association (1991), and ABOTA-Dallas (2000) and previously served as a Governor of The Association of Trial Lawyers of America and as a Director of the State Bar of Texas. She served for 15 years on the Supreme Court Rules Advisory Committee and has also served on the Supreme Court Task Force on Medical Malpractice Discovery and the Supreme Court Task Force on The Jury Charge. Honors include: Recognition in 2013 by the Dallas Bar Association as its Trial Lawyer of the Year, being named a Legend of Trial Law by the DBA in 2012, Texas Nurses' Association Health Care Professional of the Year award, Alumna of Distinction from the University of Dallas, *D Magazine's* Best Lawyers in Dallas, every year since 2001, *Texas Monthly's* Super Lawyers every year since 2003, and Texas Lawyers' "Extraordinary Women in Texas Law" (2008) and Top 50 Women Lawyers in Texas (2009). She was also featured in a *Texas Monthly* article "The Crusader" for her work on behalf of malpractice victims, and in 2003 received the Defender of Democracy Award from Common Cause, Texas, in recognition of her work to protect the citizens of Texas from the lobby-driven onslaught against their right to access the courts. Her annual survey article on Health Care Law in Texas has been recognized as Best Continuing Legal Education Paper from the State Bar of Texas and Best Non-Judicial Article from the Texas Judicial Council. In 2009 she was awarded the State Bar of Texas' prestigious Gene Cavin Award for lifetime achievement in supporting Continuing Legal Education in Texas. She is A.V. rated by Martindale-Hubbell and has been Board Certified in Personal Injury Trial Law since 1986, and is featured in the publications *Best Lawyers in America*, *Who's Who in American Law*, *The Bar Register of Preeminent Lawyers* and in the Million Dollar Arguments audiotape series.

TABLE OF CONTENTS

I. SCOPE OF CROSS EXAMINATION..... 1

 A. Texas.....1

 B. Federal 1

II. QUALIFICATION OF EXPERT2

III. IMPEACHMENT 2

 A. Litigation Experience 2

 B. Financial Interest in the Outcome of the Case 3

 C. Prior Testimony of Expert..... 3

 D. Use of Treatises and Literature 3

 E. No Impeachment on Collateral Matters 4

TABLE OF AUTHORITIES

Cases

<i>Barrios v. Davis</i> , 415 S.W.2d 714 (Tex. App.—Houston [1st Dist.] 1967, no writ).....	2
<i>Bierschwale v. Oakes</i> , 497 S.W.2d 506 (Tex.Civ.App.—Houston [1st Dist.] 1973), rev'd on other grounds, 516 S.W.2d 125 (Tex.1974).....	4
<i>Cantu v. Del Carmen Pena</i> , 650 S.W.2d 906 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.)	2
<i>Christie v. Brewer</i> , 374 S.W.2d 908 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.).....	4
<i>CPS Int'l, Inc. v. Harris & Westmoreland</i> , 784 S.W.2d 538 (Tex. App.—Texarkana 1990, no writ).....	1
<i>Daubert v. Merrell Dow Pharm., Inc.</i> , 509 U.S. 579, 113 S.Ct. 2786 (1993)	2
<i>Davis v. Marshall</i> , 603 S.W.2d 359 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).....	4
<i>E.I. du Pont de Nemours & Co. v. Robinson</i> , 923 S.W.2d 549 (Tex. 1995).....	2
<i>French v. Brodsky</i> , 521 S.W.2d 670 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).....	2
<i>French v. Brodsky</i> , 521 S.W.2d 670 (Tex.Civ.App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).....	4
<i>Gammill v. Jack Williams Chevrolet, Inc.</i> , 972 S.W.2d 713 (Tex.1998).....	2
<i>General Motors Corp. v. Simmons</i> , 558 S.W.2d 855 (Tex. 1977)	3
<i>Gravis v. Physicians and Surgeons Hospital of Alice</i> , 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).....	3
<i>Hanover Ins. Co. v. Johnson</i> , 397 S.W.2d 904 (Tex.Civ.App.—Waco 1965, writ ref'd n.r.e.).....	4
<i>Hogue v. Kroger Store No. 107</i> , 875 S.W.2d 477 (Tex. App.—Houston [1st Dist.] 1994, writ denied)	1
<i>Horton v. Houston & T.C. Ry. Co.</i> , 103 S.W. 467 (Galveston 1907, writ ref'd)	3
<i>In re Doctors' Hospital of Laredo</i> , 2 S.W.3d 504 (Tex. App.—San Antonio 1999, orig. proceeding)	3
<i>In re Plains Mktg., L.P.</i> , 195 S.W.3d 780 (Tex. App.—Beaumont 2006, orig. proceeding).....	3
<i>In re Wharton</i> , 226 S.W.3d 452 (Tex. App.—Waco 2005, orig. proceeding).....	3
<i>King v. Bauer</i> , 767 S.W.2d 197 (Tex. App.—Corpus Christi 1989, writ denied)	4
<i>Leyendecker v. Strange</i> , 204 S.W.2d 845 (Tex.Civ.App.—Galveston 1947, writ ref'd n.r.e.).....	4
<i>Mauldin v. State</i> , 14-08-00419-CR, 2010 WL 1486959 (Tex. App.—Houston [14th Dist.] Apr. 15, 2010, no pet.).....	3
<i>Milkie v. Metni</i> , 658 S.W.2d 678 (Tex. App.—Dallas 1983, no writ)	2
<i>Moore v. Standard Fire Ins. Co.</i> , 461 S.W.2d 213 (Tex. Civ. App.—Amarillo 1970, writ ref'd n.r.e.).....	4
<i>Norrid v. State</i> , 925 S.W.2d 342 (Tex. App.—Fort Worth 1996, no pet.).....	1
<i>Olinger v. Curry</i> , 926 S.W.2d 832 (Tex. App.—Fort Worth 1996, orig. proceeding)	3
<i>Perry v. State</i> , 236 S.W.3d 859 (Tex. App.—Texarkana 2007, no pet.).....	1
<i>Republic Nat'l Life Ins. Co. v. Heyward</i> , 568 S.W.2d 879 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.)	3
<i>Russell v. Young</i> , 452 S.W.2d 434 (Tex. 1970)	2
<i>Scurlock Oil Co. v. Smithwick</i> , 724 S.W.2d 1 (Tex. 1986)	3
<i>Shepperd v. Troilo</i> , 513 S.W.2d 813 (Tex. 1974).....	3
<i>Sparks v. State</i> , 943 S.W.2d 513 (Tex. App.—Fort Worth 1997, pet. ref'd).....	3
<i>St. Louis & S.F. Ry. Co. v. Clifford</i> , 148 S.W. 1163 (Tex. Civ. App.—Dallas 1912, writ ref'd n.r.e.).....	3
<i>Texas Turnpike Authority v. McCraw</i> , 458 S.W.2d 911 (Tex. 1970).....	1
<i>Torres v. Danny's Serv. Co., Ltd.</i> , 266 S.W.3d 485 (Tex. App.—Eastland 2008, pet. denied)	1
<i>Traders and Gen. Ins. Co. v. Robinson</i> , 227, 266 (Tex. Civ. App.—Texarkana 1949, writ ref'd)	2
<i>U.S. v. Tomblin</i> , 46 F.3d 1369 (5th Cir. 1995)	2
<i>Walker v. Packer</i> , 827 S.W.2d 833 (Tex. 1992).....	3
<i>Wendell v. Central Power and Light Co.</i> , 677 S.W.2d 610 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.)	3

Rules

Fed. R. Evid. 611(b).....	2
Tex. R. Evid. 401	1
Tex. R. Evid. 611(a).....	1

Tex. R. Evid. 611(b).....	1
Tex. R. Evid. 702	2
Tex. R. Evid. 803(18).....	3

CROSS EXAMINATION - “Overcoming the Problem Witness”

I. SCOPE OF CROSS EXAMINATION

A. Texas

Texas Rule of Evidence 611 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.

Rule 611 controls the scope of cross examination in Texas state courts. *See* Tex. R. Evid. 611(b). “A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.” *Id.* This wide-open rule permits the cross-examiner to explore relevant and otherwise admissible matters that have not been raised on direct examination. *CPS Int’l, Inc. v. Harris & Westmoreland*, 784 S.W.2d 538, 543 (Tex. App.—Texarkana 1990, no writ).

“Considerable latitude is allowed in cross examination, and it has been said that anything calculated to bias a witness is proper testimony to enable the jury to determine the extent to which his evidence can be relied upon.”

Texas Turnpike Authority v. McCraw, 458 S.W.2d 911, 913 (Tex. 1970).

Tex. R. Evid. 401 defines “relevant evidence” as

“evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”

See Tex. R. Evid. 401. Thus, a witness may be cross-examined on any issue that is probative of the witness’ credibility. *See Perry v. State*, 236 S.W.3d 859, 867 (Tex. App.—Texarkana 2007, no pet.)(relevant adverse evidence that might affect a witness’ credibility should be admitted so that the jury might use it in making the determination of how much weight it should give the testimony).

The trial court, however, has considerable discretion to limit the scope of any cross-examination. *Torres v. Danny’s Serv. Co., Ltd.*, 266 S.W.3d 485, 487-88 (Tex. App.—Eastland 2008, pet. denied). The broad scope of cross examination is not a license to delve into inadmissible material. *See Hogue v. Kroger Store No. 107*, 875 S.W.2d 477, 480-81 (Tex. App.—Houston [1st Dist.] 1994, writ denied). The trial court has discretion to:

“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.”

Tex. R. Evid. 611(a). The trial court may impose reasonable limits on cross-examination based upon concerns about harassment, prejudice, confusion of the issues, and the witness’ safety. *Norrid v. State*, 925 S.W.2d 342, 347 (Tex. App.—Fort Worth 1996, no pet.).

B. Federal

Federal Rule of Evidence 611 provides:

(a) Control by the Court; Purposes.

The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination.

Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness’s credibility. The court may allow inquiry into additional matters as if on direct examination.

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 \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Cross Examination: Overcoming the Problem Witness

Also available as part of the eCourse

[Overcoming the Problem Witness](#)

First appeared as part of the conference materials for the
2021 Winning at Deposition: Skills and Strategy session
"Overcoming the Problem Witness"