

“OVERCOMING THE PROBLEM WITNESS”

FRANK L. BRANSON
The Law Offices of Frank L. Branson, P.C.
4514 Cole Avenue, 18th Floor
Dallas, Texas 75205
(214) 522-0200 (o)
(214) 521-5485 (f)
flbranson@flbranson.com

WINNING AT DEPOSITION:
SKILLS AND STRATEGY
AUSTIN, TEXAS
APRIL 21, 2021

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	SCOPE AND MANNER OF CROSS-EXAMINATION.....	1
III.	IMPEACHING A WITNESS	1
	A. Impeachment by Reputation of Untruthfulness	2
	B. Impeachment with Prior Inconsistent Statements.....	2
	C. Impeachment with Bias or Interest	3
IV.	WHAT TO DO BEFORE YOU IMPEACH AN EXPERT.....	4
	A. Establish an Early Tempo of Success	5
	B. Modify Opinions	5
V.	PREPARATION FOR IMPEACHMENT OF AN EXPERT	5
	A. Pertinent Records or Documents	5
	B. Applicable Procedures or Principles	6
	C. The Expert's Background.....	6
	D. The Expert's Report.....	6
	E. The Expert's Deposition	7
VI.	THE THEMES OF YOUR IMPEACHMENT OF AN EXPERT	9
	A. The Expert's Lack of Qualifications.....	9
	B. The Expert is Poorly Informed, or Misinformed, About the Facts.....	10
	C. The Expert is Biased or Prejudiced.....	13
	D. The Expert Has Made Prior Inconsistent Statements	13
	E. The Expert's Opinions Are Inconsistent With Accepted Authority	14
	F. The Expert Is Otherwise Not Credible.....	15
	G. The Expert's Opinions Are Unreliable	15
	H. The Expert Does Not Clear "The Four Hurdles"	19
VIII.	CONCLUSION.....	19

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, 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:

Rule 611: Mode and Order of Interrogation and Presentation

(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. A witness may be cross-examined on any relevant matter, including credibility.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

- (1) on cross-examination; and
- (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

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), *aff'd*, 972 S.W.2d 35 (Tex. 1998).

A. Impeachment By Reputation of Untruthfulness.

A party may call a witness to speak about another witness's character for untruthfulness. Tex. R. Evid. 608(a).

Rule 608: A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

Like other lay opinions, however, the examiner must meet a predicate to admit the testimony, which here requires the impeaching witness to be familiar with the other witness's reputation for truthfulness before answering a question about the other witness's reputation for truthfulness. *See* Tex. R. Evid. 701.

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; and (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.

B. Impeachment With Prior Inconsistent Statements.

Rule 613(a) of the Texas Rules of Evidence governs impeachment of witnesses with prior inconsistent statements. The rule provides:

(a) Witness's Prior Inconsistent Statement.

(1) *Foundation Requirement.* When examining a witness about the witness's prior inconsistent statement—whether oral or written—a party must first tell the witness:

- (A)** the contents of the statement;
- (B)** the time and place of the statement; and
- (C)** the person to whom the witness made the statement.

(2) *Need Not Show Written Statement.* If the witness's prior inconsistent statement is written, a party need not show it to the witness before inquiring about it, but must, upon request, show it to opposing counsel.

(3) *Opportunity to Explain or Deny.* A witness must be given the opportunity to explain or deny the prior inconsistent statement.

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: Overcoming the Problem Witness

Also available as part of the eCourse

[2021 Winning at Deposition eConference](#)

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

"Some Depositions are Hard to Overcome"