

“OVERCOMING THE PROBLEM WITNESS”

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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.

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