

**CROSS EXAMINATION:
Overcoming the Problem Witness**

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

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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.

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