CROSS EXAMINATION:
Overcoming the Problem Witness

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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.

(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.

In federal court, the scope of cross-examination is more limited than in Texas state courts, and the judge is more likely to intervene. Rule 611(b) does provide the federal trial judge some discretion, stating:

> "[t]he court may allow inquiry into additional matters as if on direct examination."

Fed. R. Evid. 611(b). This second sentence of rule 611(b) is an important caveat. The federal rule:

> "allows, but does not require, the district court to permit cross examination that exceeds the scope of direct examination."

U.S. v. Tomblin, 46 F.3d 1369, 1386 (5th Cir. 1995).

II. QUALIFICATION OF EXPERT

Examination of an expert witness concerning his or her professional qualifications is appropriate to help the jury evaluate the credibility of the expert or the weight of his or her testimony in a particular area. *Milkie v. Metni*, 658 S.W.2d 678 (Tex. App.—Dallas 1983, no writ); *French v. Brodsky*, 521 S.W.2d 670 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

> "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> **(b)** the testimony is based on sufficient facts or data;
> **(c)** the testimony is the product of reliable principles and methods; and
> **(d)** the expert has reliably applied the principles and methods to the facts of the case."

Tex. R. Evid. 702.

In addition, trial judges serve a gatekeeper role in determining whether expert testimony is admissible, using a two-part test: 1) is the expert qualified; and 2) is the testimony relevant and reliable. *Daubert v. Merrell Dow Pharm., Inc*., 509 U.S. 579, 590 113 S.Ct. 2786, 2795 (1993); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556-57 (Tex. 1995). Trial judges have broad discretion in deciding whether to allow an expert witness to testify and the scope of the witness' testimony. *See Robinson*, 923 S.W.2d at 558 ("The decision whether to admit evidence rests within the discretion of the trial court."); *see also Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713 (Tex.1998)(discussing judges' role as gatekeeper). To determine relevance, the court must decide if the testimony is "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Daubert,* 509 U.S. at 591. The United States Supreme Court listed four nonexclusive factors for determination or reliability:

1) whether the expert's methodology has been tested or is susceptible to testing;
2) whether the methodology has been peer reviewed;
3) whether there is a known or potential error rate of the methodology; and
4) whether the methodology has been accepted by the scientific community.

Id. at 592-94. The Texas Supreme Court has added two additional reliability factors: 1) non-judicial uses of the methodology; and 2) the extent to which the methodology relies upon subjective interpretation of the expert. *Robinson*, 923 S.W.2d at 557.

III. IMPEACHMENT

A. Litigation Experience

An expert witness:

> "may be cross-examined regarding the number of times he or she has testified in lawsuits, payments for testifying, and related matters."

Russell v. Young, 452 S.W.2d 434 (Tex. 1970); *see also Cantu v. Del Carmen Pena*, 650 S.W.2d 906, 912 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). An expert may be cross-examined concerning the percentage or number of cases where he or she has testified for a plaintiff or defendant. *Barrios v. Davis*, 415 S.W.2d 714, 716 (Tex. App.—Houston [1st Dist.] 1967, no writ); *Traders & Gen. Ins. Co. v. Robinson*, 222 S.W.2d 266, 269 (Tex. Civ. App.—Texarkana 1949, writ ref'd). But, parties are not entitled to conduct pre-trial discovery of specific financial, accounting or income tax records for the sole purpose of impeaching a non-party physician or expert witness whose credibility has not previously been called into question. *Russell*, 452

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