Witness Credibility - How To Prepare, Achieve, And Destroy It

Prepared and Presented by: John Zavitsanos

John Zavitsanos
AHMAD, ZAVITSANOS & ANAIPAKOS, P.C.
1221 McKinney, Suite 3460
Houston, TX 77010
713-655-1101
Fax: 713-655-0062
www.azalaw.com

Taking and Defending Effective Depositions in Texas

Witness Credibility - How To Prepare, Achieve, And Destroy It

I. SCOPE OF ARTICLE

This article focuses on methods of attacking witness credibility. The paper contains a discussion of the applicable Federal and Texas rules governing impeachment, impeachment techniques and suggestions for rehabilitation. The goal of the paper is to provide a practical overview of impeachment in order to allow lawyers to better prepare for direct and cross-examination.

II. INTRODUCTION

Cross-examination is critical during litigation. Whether you represent a plaintiff or a defendant, the other side will inevitably have control over the proof you need (i.e. the witnesses and the documents). You often have to prove your case in whole or in part through witnesses that are adverse to you or, in some cases, employed by the other side. As a result, impeachment can be the most effective weapon a lawyer can use at trial. Impeachment techniques that are effectively implemented can devastate an opponent's case. Even as you prepare for direct examination, you should understand how your witness can be impeached. If you are prepared for cross-examination, you can blunt its impact through your direct examination or well-planned rehabilitation.

III. TECHNICAL CONSIDERATIONS FOR EFFECTIVE CROSS-EXAMINATION

A. Keep it Short – Hit the High Points Only

Too many cross-examinations get mired in muck, which destroys their effectiveness. It is far better to hit only the high points. Avoid going out of the way for minor points, and keep the examination short. Since a jury sympathizes more with a witness than the lawyer, the cross examiner has little to gain by subjecting the witness to a grueling and/or petty cross-examination. Frequently, the client seeking vindication will want precisely that type of cross-examination. Avoid that temptation or the jury will make you and them pay for it.

B. Ask Short, to the Point, Leading Questions

This is classical cross-examination advice, and I think important. It goes without saying that generally you want to ask leading questions. Asking any other type of question is an invitation to the witness to argue his or her side of the story to the jury. Furthermore,

it broadcasts to the jury that this witness can be trusted to tell the truth and has something important to tell the jury.

Moreover, too many lawyers on cross-examination ask confusing questions which neither the jury nor anyone else can understand. Long convoluted questions are easier to argue with because if the witness disagrees with any part of the question then he or she can simply deny the question. It is far better to ask a few short questions, rather than one long one. This approach also has the advantage of allowing you to repeat the same point without drawing an objection.

For example, you are trying to prove that your client was a good employee. Rather than ask "Ms. Jones was a hard worker, who came in early, left late and always volunteered for additional work?" It is far better to split the question as follows: "Ms. Jones came early"; "She worked late frequently"; and "She regularly volunteered for additional work." If you want to drive the point home even further, you can sum upthe line of questioning with "She was a very hard worker, was she not?"

C. Exercise Discipline and Self Control

Trials are already stressful enough without witnesses trying to play games with you, evading questions, obstructing the process, etc. Therefore, you should control the witness during cross-examination and not vice-versa. It is important for you to be calm and composed at all times no matter what the witness does. Otherwise, the jury loses confidence in your ability to lead them in the right direction. Good leaders never lose control. You should demonstrate to the jury that you will not either.

It is important in exercising self control and composure, for example, not to react to an unfavorable answer. Simply act naturally and continue on with your cross-examination without delay as if nothing has happened. The jury takes a cue from the lawyers, and if a lawyer acts as if the witness has hurt the Plaintiff, the jury will conclude that as well.

D. Use Demonstratives to Summarize Key Points

I like to write down a critical portion of the witness' testimony on a pad on an easel so that I can remind the jury of that testimony throughout the trial (i.e. with other witnesses and at closing). This helps reinforce the critical points that I want the jury to remember, and because I do it while the witness is testifying, the jury knows it is not just my argument, it is something that the witness agreed to.

E. Listen to the Testimony

While your goal on cross-examination should certainly be to argue to the jury through the witness, it is not only your questions that are important. In the stress of trial, at times it

may seem that you are too busy reading your questions or looking for your next question or impeachment cite, to even listen to the testimony. This is a critical mistake. It is important to listen to the testimony that is not only elicited by the opposing attorney on direct, but also the testimony on cross-examination. Witnesses will say the strangest things at times, and occasionally they are very damning for the opposing party. It is important to notice those times and pick up on them.

F. Use Cross-Examination as an Argument to the Jury

With few exceptions, I do not believe in reserving a point for closing argument. By that time, the jury has likely made up its mind. Rather, I believe in using cross-examination to argue your case through the witness.

1. Ask Questions That Further Your Case

Cross-examination as argument involves asking a question that furthers your argument and that the witness must agree to. I do not believe in asking questions just for the sake of having the witness deny it. Some lawyers think that as long as they make a statement, regardless of what the answer is, a jury will find it believable. This elicits such ridiculous questions as: you discriminated against my client because of her race, didn't you? The truth is that the strategy of asking a question, regardless of the answer, is a technique that only works in rare circumstances. Today, it is misused and overused.

2. Have a Deposition or Exhibit Reference for Each Question

Since most witnesses will be adverse, they will not want to agree to anything. To get them to agree, they need to know that they will be impeached if they don't. Therefore, it is imperative to have a deposition or exhibit reference for each question so that if the witness dares to veer off the path of the argument, they are quickly put in their place.

Here is an example of a prepared outline, in a sexual harassment case. The witness is the chair of the sexual harassment panel assigned to investigate the client's sexual harassment complaint against his supervisor. In this case, the client complained of sexual harassment against his supervisor reluctantly (because of fear of retaliation). After word of the complaint had leaked to the supervisor, he complained of retaliation from the employer.

The plaintiff's theme was that the harasser was so well-regarded that the employer did nothing to stop the harassment and retaliation. The plaintiff was also trying to defeat the employer's affirmative defense that they acted reasonably to correct and prevent sexual harassment, by showing that the board felt that they had no duty to do so, and in fact did not.

In this case, the defendant played a game of hot potato regarding who was responsible for stopping the harassment or retaliation. Ultimately, no one stepped up and accepted that responsibility.

Here is what the outline looked like:[1]

Reference	Cross-Examination
Exhibit 1, p. 1	He was the Chair of the Sexual Harassment Panel
Exhibit 153, p.1, Depo, p.	Plaintiff complained about continually being retaliated against after complaining about sexual harassment
Depo, p.	He and the sexual harassment board had no duty to prevent or correct any sexual harassment
Depo, p.	The Board had no power to stop retaliation or further harassment
Depo, p.	He did nothing to stop the harassment
Depo, p.	He did nothing to stop the retaliation
Depo, p.	Only President Low can stop the harassment and retaliation
Depo, p.	He knows nothing the President did to stop the harassment or retaliation

Notice the outline is organized fact by fact; each row contains no more than one fact. This, by the way, is not the way to formulate the words of the question. You should not write out your questions verbatim. Instead, you should use this type of preparatory document to indicate what the deposition or exhibit states, and then formulate simple leading questions from there. In case the witness tries to veer off course, you want to have the words in the deposition or exhibit verbatim so that the witness has little room to argue with the question.

Here is an edited transcript of the cross-examination as it played out at trial:

Q You were the head of the Sexual Harassment Board that investigated Dr. Mota's complaint.
A I was the head of the panel of the Sexual Harassment Board.
. . .

[1]My thanks to Joseph Ahmad for providing me with this outline and the transcript of the cross-examination.

Q Now -- during the investigatory process, Dr. Mota complained again during the process that he was still being subjected to harassment. Is that true?

A When I interviewed him, yes, he did.

. . .

Q Can you look at Exhibit 153, Tab 153. Do you see that document, sir?

A Yes. This is the letter, personal and confidential, dated June 9th, 1997, to a Ms. Rose Mary Valencia.

. . .

Q And I see at the bottom that you received a copy of this letter. Is that correct?

A That's what it says.

Q Okay. Now, in here he mentions that he had been -- on several occasions subsequent to his complaint had asked for protection from further harassment and retaliation. Do you see that?

A Yes.

Q And you remember him mentioning this to you orally?

A During the interview. Yes.

. . .

Q Sir, the board could do nothing to stop the harassment or the retaliation?

A That's correct.

. . .

Q They had no duty themselves to correct or prevent harassment, did they?

A That's correct.

Q They had no power to do that?

A That is correct.

Q And the only person you know that had that power was President Low?

A That is correct.

Q And you don't know of anything he did to stop the harassment?

A That's correct.

Q Or prevent the retaliation?
A That's correct.

(President Low incidentally testified that it was *not* his responsibility to stop the harassment and retaliation).

There are times, although rare, when you will want to ask a question for which there is no impeachment cite. In fact, the lawyer may not even know what the witness will say to the question. There are only a few reasons to do this. First, this can be done effectively when any answer the witness gives helps your case. This may be because common sense and logic compels a particular answer, and the witness will look foolish if she testifies otherwise. Also, it may be the case that whichever way the witness testifies, you have alternative methods of cross examining the witness to prove the point that you are trying to make. In that case, you need to be prepared for either answer and have two alternative cross-examinations prepared depending upon which answer the witness gives.

Finally, there are times when it is worth taking the risk of asking a question when you don't know the answer if it will help prove an important cross-examination point and you have a real chance of getting a favorable answer. For example, if the question is innocuous enough, the witness might just give you the answer that you are looking for because the witness does not yet know what the implication of the answer is, and what you intend to do with the answer. Sometimes it works; sometimes it does not. If it does not work, you can simply move on acting as if nothing had happened. In any event, for the strategy to be worth the risk, it must be a major cross-examination point you are trying to achieve. Otherwise, it is probably not worth taking the chance.

IV. SUBSTANTIVE RULES ON IMPEACHMENT

In addition to procedural tactics mentioned above, in order to effectively cross examine a witness, a lawyer must have a firm grasp of the substantive rules governing cross-examination and impeachment.

A. Impeaching Your Own Witness

Texas and Federal rules do not prohibit a party from impeaching his own witness. Under the common law, where a party's own witness provided damaging testimony, the party was permitted to contradict that evidence with evidence from another party witness. However, direct impeachment through prior inconsistent statements, convictions, bias, prejudice, reputation or other means was generally prohibited. Rule 607 of both the Federal and Texas Rules of Evidence have modified the common law. Accordingly, under Rule 607, parties are permitted to impeach any witness that is on the stand, even their own.

B. Extrinsic Evidence Not Admissible on Collateral Issues

You can cross-examine a witness on collateral issues but you cannot introduce independent evidence of the collateral facts you inquire about. For example, impeachment by bad acts is generally collateral. You may ask the witness a question about a prior bad act, but once you do you must accept the witness's answer. If the prior bad acts are denied, you may not introduce independent evidence to show the denial was false. Prior inconsistent statements not relevant to an issue in the case are also collateral issues.

C. Extrinsic Evidence Permitted on Non-Collateral Issues

You can introduce impeachment evidence on non-collateral facts. For example, a prior inconsistent statements on material matters is not collateral. As a result, extrinsic evidence of a prior inconsistent statement on a material matter may be introduced. In addition, there are matters which, although not necessarily material issues in a case, are not collateral and can be established through independent proof or evidence. These include: (1) bias, prejudice, interest and motive; and (2) criminal convictions. For example, if you question a witness about personal bias such as a financial interest in the other side, you can offer independent proof of the issue if the witness denies a fact.

V. SPECIFIC AREAS TO ATTACK CREDIBILITY AND IMPEACH

A. Lack of or Deficient Personal Knowledge

l. The Substantive Rules on Personal Knowledge

Lack of personal knowledge is technically a challenge to a witnesses' competency and therefore a basis for excluding testimony altogether. *See* FED. R. EVID. 602; TEX. R. EVID. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Lack of personal knowledge is rarely used to attack competency, however; because most witnesses will deny that they lack actual knowledge of the events or, if they do, they will not be called to testify at all.

When faced with a witness who doesn't have personal knowledge, you can attack their credibility by exposing the witness's lack of first hand knowledge. Since lack of personal knowledge goes to the witness's capacity to testify, it may be proved through extrinsic evidence.

2. Discrediting Testimony through Lack of Personal Knowledge.

Where the witness is familiar with the events in question but was not actually a witness to the events or the transactions themselves, one method of impeachment is to

demonstrate that the witness' knowledge was learned through others. A good example of such an impeachment involves an expert witness. The cross-examination could proceed as follows:

Q. Mr. Jones, you were hired by the defendant's attorney in this case?

A. Yes.

Q. All of the information you have about this case came from the defendant or his attorney, isn't that true?
A. Yes.

Q. Did you see the accident?
A. No.

Q. You were not at the scene right after the accident, isn't that correct?
A. That's correct.

Q. You did not conduct your own investigation into the accident, did you?
A. No, I didn't.

3. Discrediting Testimony Through Lack of Reliability

You can also attach a witness' by demonstrating the lack of reliability in their testimony. This can be done through showing defects in her ability to observe and recollect events. For example, where a witness testifies that she witnessed an sudden accident, the cross-examination can show that she could not accurately observe what really happened:[2]

Q. Ms. Jones, is it fair to say that you weren't expecting an accident that day?
A. Yes.

Q. So you were driving the way you usually would just before the accident, weren't you?
A. Yes.

Q. You had a passenger in the car, correct?
A. Yes.

---

[2]This example is taken from Mauet, Thomas S., *Fundamentals of Trial Techniques*, p. 226-227 (3d. ed. 1992).

Q. You were talking with him while driving, weren't you?
A. Yes.

* * *

Q. Both Maple and Elm have buildings on both sides of the street, don't they?
A. Yes.

Q. As you were driving toward the corner, you couldn't see traffic on Maple other than the intersection, could you?
A. No.

Q. That's because the buildings were blocking your view, weren't they?
A. Yes.

Q. So you couldn't see two cars involved in the accident until they were actually in the intersection, could you?
A. No.

B. Challenging the Witness With Selective Memory

Adverse witnesses who testify vividly about events on direct routinely forget events when cross-examined. Challenge them on this directly by reminding them about other events that they remember (preferably events they should be more likely to forget than the event you asked them about) and asking the final question (or some variant) "But you are telling us that you can't remember [Fill in the blank]."

Another tactic in handling the witness with selective memory is to actually highlight the witness's lack of knowledge. For example, if you are preparing for a witness you anticipate will have a selective memory, carefully scrutinize the witness's deposition for all questions to which his response was that he did not know the answer. All of these questions could then be repeated on cross-examination. If the witness "happens to remember" the answer he can be impeached with his prior inconsistent statement in the deposition. If he doesn't remember the answer he'll have to answer "I don't know" to a long string of questions, sometimes unrelated, that give the impression he really knows very little about the case, or is simply being evasive with you.

C. Impeach Through Bias/Interest.

Bias of a witness is always considered relevant as well it should be. If the witness is there to hurt you, you must focus at least in part on the bias of a witness. A witness can be impeached by showing that he has a reason for lying about or misrepresenting facts,

because he is biased in favor of a party, prejudiced against a party, or has an interest in the outcome.

For expert witnesses, it is important to bring out how much the individual is being paid by the defendant to testify, how many times the expert has been hired by the defendant or the defendant's law firm, how many times the expert testifies for employers as opposed to employees, defendants as opposed to plaintiffs, and how much, percentage wise, the witness makes from testifying as opposed to non-forensic work.

Although there is no federal rule on the matter, proof of bias, prejudice, interest or motive is never considered collateral. As under Texas Rule of Evidence 613(b), bias and interest may be proved through extrinsic evidence (documents or the testimony of other witnesses) as well as through cross-examination of the witness. *See Recer v. State,* 821 S.W.2d 715, 717 (Tex. App. Houston [14th Dist.] 1991, no pet.). *See also Walker v. Packer*, 827 S.W.2d 833, 839 n. 5 (Tex. 1992). A majority of jurisdictions, however, will require a foundation for extrinsic proof of bias or prejudice, though foundation may not be required where indisputable issues of bias, such as family ties, are involved. Moreover, a court may limit the scope of cross-examination to avoid prejudice, confusion, or harassment of a witness. *See Lagrone v. State*, 942 S.W.2d 602, 613 (Tex. Crim. App. 1997).

1. Examples for Attacking Credibility: Bias/Interest.

A witness may be biased in favor of a party, or prejudiced against another party because of some family, employment or other relationship that renders the witness incapable of objectivity. For example, demonstrating bias can be very effective in the case of a witness who is paid by one of the parties to appear and testify.

2. Attacking Credibility: Motive

The motive behind a witness's testimony can create numerous areas for impeachment. For example, the witness may be a former, disgruntled employee motivated by anger and revenge to testify against his former employer. The witness might be a former spouse or lover motivated by bitterness or hatred. The witness may be a parent, motivated by love or remorse to "cover up" the actions of a wayward child. Regardless of the type of motive, cross-examining the witness on areas which might be motivating his or her testimony will diminish the credibility of the witness.

3. Collateral/Non-Collateral

Impeachment based on bias, interest, prejudice or motive is never collateral; such inclinations may always be proved by extrinsic evidence. However, if in state court, the examiner must comply with the requirements set forth in Texas Rule of Evidence 613(b):

(1) The witness must be told the circumstances supporting the claim of bias or interest or the details or content of such a statement, including where, when, and to whom the statements were made. If written, the writing need not be shown to the witness at that time, but on request, the same shall be shown to opposing counsel.

(2) The witness must be afforded the opportunity to explain or deny such circumstances or statement.

For example:

Q. Mr. X, you dislike the defendant, don't you?
A. No, I'm a fair man.

Q. Before this lawsuit was filed, you spoke to Mr. Jones about the defendant, didn't you?
A. I may have.

Q. In fact, you spoke to him on December 1, 1999 at an annual meeting, didn't you?
A. Yes, I remember attending that and probably spoke with him on that occasion.

Q. And you told him at that time that the defendant should be banned from the industry because they didn't have the good sense to market your product line?
A. Yes, I probably said words to that effect.

D. Prior Inconsistent Statements

A highly effective means of attacking a witness's credibility is through the use of prior inconsistent statements that directly contradict a witness's trial testimony.

1. The Rules on Inconsistent Statements.

Rule 613 of both the Federal and Texas Rules of Evidence permit a cross-examiner to inquire about prior inconsistent statements. If the witness unequivocally admits having made such a statement, extrinsic evidence is prohibited. TEX. R. EVID. 613(a). If the witness denies having made prior statements material to an issue in the case, extrinsic proof may be introduced.

Under the common law, confrontation was a prerequisite to impeachment with prior inconsistent statements. Before introducing a prior inconsistent statement, whether written

or oral, collateral or direct, the witness had to be confronted with the particulars of his prior statement, have his attention directed to the time, place and circumstances under which the prior inconsistent statement was made, and asked if he made it. If he admitted making the statement, extrinsic evidence was disallowed. If the witness denied it and the statement was written, he had to be shown the statement, permitted to read it, and given the opportunity to explain or deny it. If he denied ever making the statement, and it was not collateral to the issues being tried, his prior statement could then be proved by extrinsic evidence.

Federal Rule of Evidence 613 dispenses with the strict requirement for confrontation. Provided that the statement is disclosed to opposing counsel or opposing counsel is provided a copy upon request, the witness need not be given a copy. The cross-examiner need only afford the witness an opportunity to explain or deny the statement and afford the opposing counsel an opportunity to interrogate the witness thereon if he intends to present extrinsic proof of the same. FED. R. EVID. 613(b).

Contrary to the Federal rule, Texas Rule of Evidence 613(a) maintains a qualified version of the common law "confrontation" requirement:

> (1) The witness must be told the contents of the prior statement, as well as the time, place and person to whom it was made.
>
> (2) The witness must be afforded with the opportunity to explain or deny the prior statement.

TEX. R. EVID. 613(a). *See also Downen v. Texas Gulf Shrimp Co.*, 846 S.W.2d 516, 512 (Tex.App.–Corpus Christi 1993, writ denied).

Similar to the Federal rule, however, the cross-examiner no longer needs to show the witness an impeaching writing before using it; it must only be shown to opposing counsel if requested. Of course, it is usually more effective to show the witness his prior written statement so that his admission of having written or signed the document may be obtained.

Pursuant to Federal Rule of Evidence 801(d)(1)(A) and Texas Rule of Evidence 801(e)(1)(A), evidence of prior inconsistent statements may be introduced, not only to cast doubt upon the credibility of the witness, but also to prove the truth of the statement previously made if it was made "under oath and subject to the penalty of perjury." When prior statements are not made under oath, their use is restricted to impeachment on cross-examination, and they may not be introduced for purposes of proving their truth. However, even this use of a prior statement is objectionable if the primary purpose for calling the witness is simply to elicit the otherwise inadmissible statement. *See Arrick v. State*, 107 S.W.3d 710, 722-23 (Tex. App.–Austin 2003, no pet.).

2. Impeachment by Prior Inconsistent Statements.

a. Make sure that the witness has truly testified contrary to a prior statement (Try to lift the words verbatim from your impeachment cite into your question).

Strangely, lawyers often try to impeach with statements that are not truly contradictory. This only boosts sympathy for the witness and destroys the credibility of the lawyer in the jury's eyes. Therefore, it is crucial that before you try to impeach, you make sure you have testimony that is directly contradictory to a prior statement. After all, since the witness does not want to help you, he will look for any way he can to weasel out of the question. And if you give the witness that opportunity, that is exactly what the witness will do.

For example, if you ask a witness whether the woman was wearing dark clothes and your impeachment cite is that she had a dark jacket, the witness can and will argue with you. It is far better, whenever possible to use exactly the same words that the witness used in their previous statement. That way, the witness cannot quibble with your words because you are only using the witness' words.

This is particularly effective when cross examining about characterizations. Generally, of course, it is better to cross examine specifically on facts so the witness cannot argue with you. However, if the witness herself used the characterization you can go ahead and ask it that way too. For example, question: You made the statement about why Mr. Jones was fired to a lot of people. That question can easily draw an argument over what constitutes "a lot of people." However, if the witnesses use that specific phrase I think you can too with impunity. If the witness attempts to argue with you, you can simply ask, well these were your words, were they not, or well, that's how you chose to characterize the number of people, is it not, or you felt that it was a lot of people, did you not.

Again, it is helpful to keep in mind at the deposition stage that since your cross-examination is going to be based upon a deposition, you want as clean of an answer as possible. Well coached witnesses at deposition will tend to throw so much gobbley gook in their answer so as to prevent you from being able to use it on cross-examination. Do not allow this. Insist on a clear clean answer.

b. Make sure the impeachment is material.

Just like you want your cross-examination to hit the high points only, your impeachment should be on major points, not trivial ones. Juries generally believe that inaccuracies regarding less important points are the product of an innocent mistake, not deliberate prevarication. On trivial points, just gently refresh the witness' recollection as to the truth (as if it were an innocent mistake), rather than resorting to full-blown impeachment.

c. Techniques for impeachment with prior inconsistent statements.

A simple impeachment technique is as follows:

1. Commit the witness to contradictory testimony

2. Ask if the witness made the inconsistent statement (e.g., "did you testify differently at your deposition").

3. If they say, as they usually will, that they do not remember, repeat what they just stated on the witness stand, getting another commitment

4. And then refer them to page and line reference of the deposition testimony or other statement that is contradictory, while you (not the witness) reads the testimony or statement.

Step 3 is optional, and sometimes draws an objection. Steps 1, 2, and 4 are critical.

3. Impeachment by Prior Testimony.

Prior testimony is the most effective form of impeachment. Prior testimony includes any testimony given under oath such as depositions, evidentiary hearings and/or former trials. Since prior testimony is given under oath and is subject to the penalties of perjury, it carries particular weight when attacking the credibility of a witness and may be introduced to prove the truth of the matter asserted. For example:

An example (based on the preparatory outline in Section III.F. of this paper) is as follows:

Step 1 – Commitment.

Q: Sir, isn't it true that as part of your sexual harassment investigation, you never interviewed the harasser, Mr. X.
A: Yes we did interview him.

Q: (expressing surprise) You did interview Mr. X as part of your investigation?
A: Yes we did.

Step 2 – Ask if he ever testified differently.

Q: Have you ever made a contrary statement, and stated that you never interviewed Mr. X?
A: I don't believe so.

Step 3 (Optional) – Highlight the testimony of the witness

Q: But your testimony today is that you interviewed Mr. X as part of the sexual harassment investigation.
A: Yes.

Step 4 – Read the impeachment and give the page/line cite.

Q. You gave a deposition in this case, didn't you?
A. Yes

Q. And before the deposition began you were sworn to tell the truth, is that right?
A. Yes

Q. And you did tell the truth, didn't you?
A. Yes.

Q. After the deposition was over, it was typed up and you had a chance to read it to make sure your testimony was accurate, didn't you?
A. Yes.

Q. After you read it, you signed it before a notary public, didn't you?
A. Yes.

Q: Sir, if you will turn to your deposition, which I have in front of you, to page 44, line 15, you were asked the question (pause) did you interview the harasser Mr. X as part of your sexual harassment instigation and your answer was "'No." Did I read that correctly?
A: Yes.

Q: So you testified differently at your deposition than you just did now?
A: Well yes but . . .

4. Impeachment by Prior Written Statements.

The following illustration focuses on written statements to impeach the credibility of the witness. These statements are usually given to investigators of some sort in a narrative or question/answer format, and are either written by the witness himself or signed by him.

Q. Mr. X, you've testified on direct examination that the black car ran the red light and crashed into the white car.
A. Yes, I did.

Q. Mr. X, you made a written statement shortly after the accident, didn't you?
A. Yes, I did.

Q. Your statement was made to Deputy Jones, correct?
A. Yes.

Q. After Deputy Jones took your statement, he gave it to you to read and make any corrections, didn't he?
A. Yes.

Q. And you read the statement, didn't you?
A. Yes.

Q. You wanted to be sure that your statement was accurate?
A. Yes.

Q. After making sure the statement was accurate, you signed it, didn't you?
A. Yes.

Q. (Now have the statement marked as an exhibit, show it to opposing counsel, and then show it to the witness.)
Mr. X, I'm am showing you what has been marked as Defendant's Exhibit #1. That is your signature at the bottom, isn't it?
A. Yes.

Q. Exhibit # 1 is the statement you made to Deputy Jones, isn't it?
A. Yes.

Q. In that statement, (refer to page number for the witness and opposing counsel), you indicated that the white car ran the red light?
A. Yes, that is what it says.

5. Impeachment by Prior Oral Statements.

A witness may also be impeached with oral statements made to police officers, investigators, or other witnesses:

Q. Mr. X, you talked to Deputy Jones shortly after the accident, didn't you?
A. Yes.

Q. Deputy Jones asked you how the accident occurred?
A. Yes.

Q. And you told him everything you could remember at the time, didn't you?
A. Yes.

Q. As accurately as you could remember it?
A. Yes.

Q. Deputy Jones took notes during your conversation, right?
A. Yes.

Q. Didn't you tell Deputy Jones that the white car ran the red light?
A. Yes, I did.

If the witness admits the inconsistency, you may not introduce the Deputy's testimony. If, however, the witness denies making such a statement, Deputy Jones may testify that the witness reported otherwise shortly after the accident.

When impeaching with oral statements that are in somebody else's report, it is improper to impeach the witness with the report itself because the witness did not author the report. Therefore, questions such as "Didn't you say in Deputy Jones's report that the white car ran the red light?" are improper.

6. Impeachment by Omission

You may also impeach by omission. Whenever a person has prepared a written report or summary of an event and then testifies to important facts that they omitted, the witness is ripe for this type of impeachment. In these cases, the witness's credibility can be attacked by showing that the facts testified to were omitted from a document that they prepared, even though the document was prepared closer in time to the events in question and the facts were of a type that should have been included in it.

When impeaching by omission it is critical to build up the importance of the document. You must establish that the witness knows which information is important enough to be included, and that the facts testified to during trial should have been included in the document.

7. Extrinsic Evidence to Prove Up Impeachment Prior Testimony.

To prove witness statements previously made under oath during a deposition in the case, simply read the pertinent portions of the deposition or transcript. TEX. R. CIV. P. 203.6(b); TEX. R. EVID. 801(e)(3). If the sworn statement was made in a deposition for another case, you may still use it subject to the Texas Rules of Evidence. TEX. R. CIV. P. 203.6(c).

a. Written Statements

To prove written statements, call a witness who can identify the writing or signature of the witness, or a witness *who saw the* person write or sign the statement. Have the witness read the impeaching statements from the documents.

b. Oral Statements

To prove up oral prior inconsistent statements, call a witness who was present when the witness made the prior inconsistent statement, ask the appropriate foundation questions for oral conversations, and elicit testimony regarding the specific inconsistent statements.

E. Prior Bad Acts

1. The Rules on Prior Bad Acts

Under the Federal Rules of Evidence the trial court may permit a witness to be cross-examined regarding specific instances of conduct if evidence of these prior acts is probative of the "truthfulness or untruthfulness" of the witness. FED. R. EVID. 608(b). There is no absolute right to cross-examine a witness regarding his prior bad acts, however. The court has the discretion to permit or deny such cross-examination.

Under the Texas Rules of Evidence, cross-examination of specific instances of conduct is prohibited, unless they are related to prior convictions, as described in Rule 609, TEX. R. EVID. 608(b). Therefore, before cross-examination is attempted (or disregarded) in this matter, counsel should research the status of prior bad acts in Texas and whether the conduct into which examination is desired falls within its scope.

2. Technique for Attacking Credibility

An example, under the Federal rules for using a prior bad act is as follows:[3]

Q. Mr. Johnson, didn't you fill out a false employment application at Sears last year?
A. I don't think so.

Q Well, you applied there for a job, didn't you?
A. Yes.

Q. You filled out an application form, right?
A. Yes.

Q You submitted it on March 31 of last year, correct?
A. Yes.

Q. And you signed it, didn't you?
A. Yes.

Q. On the line asking for the extent of your education, didn't you write down "received a B.A. degree in economics from U.C.L.A. in 1981?"
A. Yes.

Q. In fact, Mrs. Johnson, you haven't received a B.A. degree from U.C.L.A. or any other college, have you?
A. No.

Because evidence of prior bad acts is collateral to the merits, the cross-examiner is bound by the witness' answer on cross. He may not introduce extrinsic evidence of prior bad acts, even if they are denied by the witness. FED. R. EVID. b08(b). In order to avoid having the technique backfire with a savvy witness, use as much detail as possible. If the witness thinks you have the goods on him, he is more likely to tell the truth.

F. Character Evidence

l. The Rules on Character Evidence

Both the Federal and Texas Rules allow for a witness' credibility to be attached by having another witness testify that the witness was considered untruthful.

---

[3] Mauet, Thomas S., *Fundamentals of Trial Techniques*, p. 242 (3d. ed. 1992).

> The credibility of a witness may be attacked . . . by evidence in the form of opinion or reputation but subject to [the following] limitations: (1) the evidence may refer only to [the witness's] character for truthfulness or untruthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

FED. R. EVID. 608(a); TEX. R. EVID. 608(a).

The fact that only opinion or reputation evidence may be presented with regard to the witness' character *for truthfulness or untruthfulness*, is the most important limitation imposed on the cross-examiner. *See Service Lloyds Ins. Co. v. Martin*, 855 S.W.2d 816, 823 (Tex.App.–Dallas 1993, no writ). Evidence of specific instances of conduct are prohibited by both rules. *See, e.g., Closs v. Goose Creek Consolidated ISD*, 874 S.W.2d 859, 870 n. 7 (Tex.App.–Texarkana 1994, no writ).

Federal Rule of Evidence 608(b) renders inadmissible extrinsic evidence of specific instances of conduct, unless this testimony pertains to a prior conviction, as described in Rule 609. Cross-examination of specific instances of conduct is permissible, however, if it (1) concerns the witness's character for truthfulness or untruthfulness, or (2) concerns the character for truthfulness or untruthfulness of another witness to which character the witness being cross-examined has testified.

To clarify the Federal rule, examples of specific instances of conduct may not be used during the direct examination of a character witness. They may only be used during the cross-examination of the character witness. Because character witnesses have testified to someone's reputation for truth and veracity, it is only logical that their knowledge of this fact be tested. Even the question of "arrests" may be inquired into during the cross-examination of the character witness, not to prove character, but to test the witness's knowledge of the other's reputation.

Contrary to the Federal Rule, Texas Rule of Evidence 608(b) prohibits both the cross-examination of a witness, and extrinsic evidence regarding specific instances of the conduct for the purpose of attacking or supporting the credibility of a witness. Texas Rule of Evidence 608(b) permits the reputation witness to testify regarding the "primary" witness's reputation for truth and veracity in the community, or to give his opinion regarding the witness's tendency towards truthfulness or dishonesty. He may not illustrate his opinion with testimony regarding instances of conduct, unless his testimony pertains to a conviction of a crime as described in Rule 609.

Under both the Federal and Texas rules, however, the principal witness is prohibited from bolstering his testimony by having other witnesses testify as to his truthfulness. Evidence of the truthful character of the "primary" witness will only be allowed after his

credibility has been attacked. The witness will not be permitted to bolster his character through the reputation testimony of other witnesses. FED. R. EVID. 608(a)(2); TEX. R. EVID. 608(a)(2); *Rose v. Intercontinental Bank*, 705 S.W.2d 752, 757 (Tex.App.–Houston [1st Dist.] 1986, writ ref'd n.r.e.) ("[T]he witness's reputation for truthfulness must first be attacked before [the party] can offer rehabilitating evidence.").

G. Prior Convictions

1. The Rules on Prior Convictions

Under the Texas Rules of Evidence any witness's credibility may be attacked with

> evidence that the witness has been convicted of a crime. . . if elicited from [the witness] or established by public record but only if the crime was a felony or involved moral turpitude, regardless of [the] punishment, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to [the] party.

TEX. R. EVID. 609(a).

The Federal rules permit the impeachment of any witness through cross-examination or extrinsic evidence of felonies or crimes involving dishonesty or false statements. Under the Federal rule a misdemeanor conviction must involve dishonesty or false statements; the Texas rule requires that it involve moral turpitude.

Further, admissibility under both rules is predicated upon a prior finding by the trial court that the probative value of such evidence outweighs its prejudicial effect.

The balancing test of the Federal rules differs slightly from that of the Texas rules, however, because distinctions are made between criminal and civil cases, and party and nonparty witnesses. In civil cases, any witness may be impeached with a conviction of a felony or misdemeanor if it involves dishonesty or false statements: evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment. FED. R. EVID. 609 (a)(2). This rule includes the assumption that a witness in a civil trial may not be impeached with a prior felony or misdemeanor if such an offense did not involve dishonesty or false statements.

a. Time Limits

Under both Federal and Texas rules, evidence of a prior conviction will not be permitted if more than ten years have elapsed since the date of the conviction or the date the witness was released from confinement, whichever is the later date, unless the probative value substantially outweighs prejudicial effect. FED. R. EVID. 609(b); TEX. R. EVID. 609(b).

b. Pendency of an Appeal

Under the Federal rules, the pendency of an appeal does not render a conviction inadmissible, though it is a factor considered in the "balancing" test. FED. R. EVID. 609(e). The Texas rules, however, render inadmissible any conviction currently being appealed. TEX. R. EVID. 609(e).

c. Pardon, Annulment or Rehabilitation

Evidence of a prior conviction is inadmissible under Rule 609 of the Federal and Texas Rules of Evidence where:

> (1) the person has been pardoned or the conviction annulled, or the person convicted is deemed rehabilitated, or the equivalent procedure, and that person has not been convicted of a subsequent crime punishable by death or imprisonment for more than one year (under the Federal rules) or convicted of a subsequent crime which was classified as a felony or involved moral turpitude (under the Texas rules); or
>
> (2) the person convicted is pardoned, or his sentence annulled, or other equivalent procedure because of a finding of innocence.

FED. R. EVID. 609(c); TEX. R. EVID. 609(c)(1) and (3).

The Texas rules add one more provision, however. Evidence of a conviction is not admissible if probation for the crime for which the person was convicted has been satisfactorily completed and that person has not been convicted of a subsequent crime classified as a felony or involving moral turpitude. TEX. R. EVID. 609(c)(2).

d. Juvenile Adjudications

Under the Federal rules, evidence of the prior adjudication of a juvenile is inadmissible in a trial to attack that witness' credibility. Under the Texas rules:

> [e]vidence of juvenile adjudications is not admissible, except for proceedings conducted pursuant to Title III, Family Code, in which the witness is a party, under this rule unless required to be admitted by the Constitution of the United States or Texas.

TEX. R. EVID, 609(4).

e. Presenting Extrinsic Evidence

Under the Texas rules,

> Evidence of a conviction is not admissible if after timely written request by the adverse party . . ., the proponent fails to give the adverse party sufficient advance written notice of [its] intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

TEX. R. EVID. 609(f)

The Federal rules only require such written notice where the conviction is more than ten years old. FED. R. EVID. 609(b).

Proof of a prior conviction is never collateral. If the witness denies the conviction during cross-examination, proof of the conviction can be established through the use of public records. Prior to 1990, a cross-examiner was required to present evidence of prior convictions during cross-examination. Any such evidence omitted during cross was considered "waived." As the rule now stands; a cross-examiner may wait until the witness has left the stand to present extrinsic evidence of his prior convictions.

H. Impeachment by Contradiction

When the cross-examiner wishes to show that certain facts are different from what the witness claims at trial, he may seek to have the witness admit facts contradictory to his original testimony. If properly presented and structured, the jury will soon understand the inconsistencies in the witness's story.

VI. SUGGESTIONS FOR EFFECTIVE CROSS-EXAMINATION

A. At the Right Time, ask Opinion Questions.

Normally, it is best to ask facts rather than opinions. At times, however, I believe it is entirely appropriate to ask certain opinions. If the witness gives an opinion which is particularly helpful for you, you can bring out that opinion to the jury. Moreover, if a witness has an opinion even a very negative one, that seems heavy handed, harsh, unfair, or illogical, I think it is important to bring that out to the jury to show that the witness is biased, not objective or worse yet, lying.

B. Start with your Biggest Point or Biggest Impeachment.

Depending upon what you are trying to do with the jury, you want to start with either your biggest point or your biggest impeachment. If the object of your cross-examination is

primarily to undermine the credibility of the witness, then start with your biggest impeachment. If the primary objective of your cross-examination is to obtain favorable points from the witness, then start with the biggest and best point you have on cross-examination.

C. End with your Second Biggest Point or Second Biggest Impeachment.

It is important to finish on a high note also. Therefore, similarly, one must take their second biggest point on impeachment or second biggest point on cross-examination and finish with that point.

D. If the Witness Insists on Talking Despite Diligent Efforts to Control the Witness Through Short, Leading Questions, let Them.

There are times, however, that despite your diligent attempts to control the witness, the witness insists on getting out their side of the story.

In employment litigation, we frequently see a type of witness I call the "agenda setter." This witness is usually a chief executive officer or similar type who is not used to being questioned but is used to barking out orders and having people listen without question. They also feel like they are in a personal battle of wills with you, the lawyer, and simply cannot bear to let you argue your case to the jury the way you want too. Rather, this witness is the type who effectively says I'm the one that is going to control the agenda here, not you. Other types are evasive as well, although not quite as defiant, but still pose potential problems for the cross-examiner.

The classical advice on this witness is to cut them off, whine to the judge, object as non-responsive, etc. I could not disagree more. Having the witness fight you on cross-examination while you are asking short, simple, leading questions, is probably the best opportunity you have on cross-examination to score points with jury. It is commonly acknowledged that an admission by a hostile witness is much more valuable than that from friendly witness. I would add that it is that much more valuable when you get a begrudging admission from a witness that fights you every step of the way. The jury concludes that it must be true or the witness would never admit it.

It also creates drama, suspense, and therefore interest on the jury's part when it sees the witness initially fight with the lawyer. At first, the jury is thinking, "is that really true, or is lawyer really making it up?" At the same time the jury realizes that whatever the case, it must be important, because the witness is fighting it. Finally the battle enhances credibility of the lawyer, and diminishes that of the witness when the witness has to admit that the lawyer is right. It appears clear to the jury that this witness cannot be trusted to tell the truth unless he absolutely, positively has to because it is clear from a previous statement. The fight should create a credibility war that the lawyer wins.

Which would you rather have the jury see: You whine to the judge that the witness will not play fair or you make the witness eat crow? Remember Bill Gates? Take advantage of the opportunity the witness creates when she fights the examination.

One qualification: many witnesses elude the question unintentionally. They may honestly misunderstand the question (perhaps because it was too complex), for example. Obviously, you want to reserve your fights for those that are intentionally obstructing your cross-examination or the jury will resent you and sympathize with the witness.

1. How do you beat the unresponsive witness? Repeat the question verbatim.

If you ask a question and get a story which is unresponsive, ask the question again verbatim. If that does not work, ask the question once more verbatim. This usually underscores to the jury that the witness has attempted to evade the question. After the second time, you can say "My question is about [subject matter of the question] and then repeat the question. This, again, serves to underscore that the witness is trying to evade the question.

2. Ask if the opposite is true.

Sometimes witnesses will continue to struggle and may even protest that they cannot answer the question. At times it may be effective then to ask the opposite question. You are again underscoring to the jury that the witness is simply evading the question. Moreover, the witness looks silly if she will not agree to X or not X, a silly position which just demonstrates to the jury that the witness is simply refusing to cooperate and has something to hide.

An example of these techniques, while having an impeachment cite (but saving it until the end) is as follows:

Q: Mr. CEO, Ms. Jones never missed a day of work in the ten years that she worked for ABC Corporation?

A: ABC Corporation has an extensive sick leave and vacation leave policy. We are very good to our employees about that. For example, we are one of the few employers that actually gives employees a total of four weeks off from the very first day they start employment with ABC Corporation. No other company in our business is so generous to their employees in terms of time off. And frankly it does not matter to me whether an employee takes one day off or four weeks off.

Q: Sir, Ms. Jones never missed a day of work in the ten years she worked there, did she?

A: Again sir, I don't think that matters. Whether they miss one day or four weeks is irrelevant under our policies.

Q: Sir, my question is not about your polices or whether it matters in your policies. My question is simply, she never missed a day of work in the ten years that she was there?
A: Well, I know there were times when she was gone so you have to understand this is not a situation in which your client was there every minute of every day.

Q: Sir, are you testifying that there were days in which Ms. Jones did not show up to work?
A: Look, there were times when she was gone. That's what I'm saying.

Q: Sir, was it, was she ever gone for an entire day?
A: She was gone for hours.

Q: She was gone for hours, though, but not days, sir, isn't that right?
A: She was gone for hours. That is what I'm saying.

Q: Sir, I am handing you what has been marked as exhibit 5, that is Ms. Jones' personnel file and excerpts of her personnel file, is it not?
A: It looks like it.

Q: And it looks like she has never missed a day in the ten years that she worked there at ABC?
A: Looks like it.[4]

Q: But Ms. Jones never missed an entire day of work in the ten years she was there, did she?
A: Not an entire day, no sir.

How does the witness come off in this exchange? The jury thought the witness was despicable for not having the decency to even credit the Plaintiff for not missing an entire day of work in the years that she had worked for the company. It was obvious the witness was doing everything he could to hurt the Plaintiff and was not willing to even concede the smallest point to help the Plaintiff. In doing so the witness came off as evasive and lacking credibility. All of this only helps your case when you try to show that the employer is lying about the reasons why your client was terminated.

---

[4] Obviously I could have cut the witness short by using this exhibit in the beginning demonstrating that she never missed a day of work. However, the witness' evasion of my questions, I felt at the time, was so helpful, that I delayed using this exhibit to show the jury what kind of a witness this person really was.

It is important to remember, however, to employ these techniques only when the witness is truly being unresponsive. Otherwise it is you who looks argumentative, not the witness.

E. Housekeeping Matters - Having Everything set up for Your Cross-Examination

I like to use notebooks for exhibits. I have one of them for every member of my team, the judge, the defense attorneys, the witness (this copy of the notebook remains on the witness stand at all times) and one for each of the juror. Most of the time, the judge will allow me to hand to the jury at the outset of trial notebooks containing all exhibits that are pre-admitted, and then to add to it, as additional documents are added.

Before you start cross-examining a witness you want to have with you:

1) Your outline containing impeachment cites (a partial example is contained on Section __ of this paper);

2) a copy of the witness' deposition; and

3) The Exhibit Notebook which has all remaining impeachment cites as referenced in your outline.

On the witness stand should be

1) The Exhibit Notebook(s); and

2) A copy of the witness' deposition.

Much of this is just personal preference, but having everything set up like this minimizes shuffling papers, depositions, time, and reduces the chance of error, at least it has for me.

F. Should you call the Witness Adverse in your Case in Chief?

Finally, one must decide whether to call a witness adverse as part of your case in chief, or wait until your opponent calls the witness. Sometimes, of course, you have no choice. The witness is out of subpoena range, so you will have to wait. When you have the choice, however, I generally opt for calling the witness in our case in chief.

Although some worry that by doing so you may be giving some credence to the testimony, or that you may lose the ability to ask leading questions. I have not found that to be the case. Moreover, it throws the defense lawyers off. They have a prepared direct

examination, which if they stick to, looks foolish after you have scored points on cross-examination. For example, in the sexual harassment case mentioned above, after a cross-examination that demonstrated 1) that the employer took no action to stem the harassment or retaliation of the plaintiff, and 2) that a letter from the president of the University to the plaintiff contained inaccurate accusations against the plaintiff, this was the start of the direct testimony after this cross-examination:

> Q Dr. Stancel, would you describe for the jury briefly -- very briefly what your background is -- your educational background, what you do currently as the Dean of the Graduate School of Biomedical Sciences.
>
> A Okay. I have a degree in chemistry. I have a Ph.D. in biochemistry and did some additional training in physiology. At present I'm the Dean of the Graduate School, which means that I oversee the teaching and academic work of the graduate faculty and the graduate students, monitor their progress and so on and so forth. But, basically, I'm responsible for the academic work and the administration of the Graduate School of Biomedical Sciences.
>
> Q Do you also engage in biomedical research personally?
>
> A Yes, I do.
>
> Q And in the course of doing that, can you describe briefly what you do. I mean, you conduct experiments.
>
> . . .

This is an example of the defense lawyer sticking with the direct testimony, going over the background information, etc., immediately after their case had been seriously damaged. This would have made sense at the beginning of the witness' testimony, but not after cross-examination. More often than not, instead of immediately stopping the bleeding, the jury will see the defense lawyer go into topics which appear irrelevant.

VII. CONCLUSION

Good impeachment depends on good judgments, persuasive content, and effective delivery. Sometimes better judgment dictates you do not use your impeachment weapons. When you do, however, make sure that what you deliver has the potential for persuasive impact and is delivered with precision, brevity, and control.