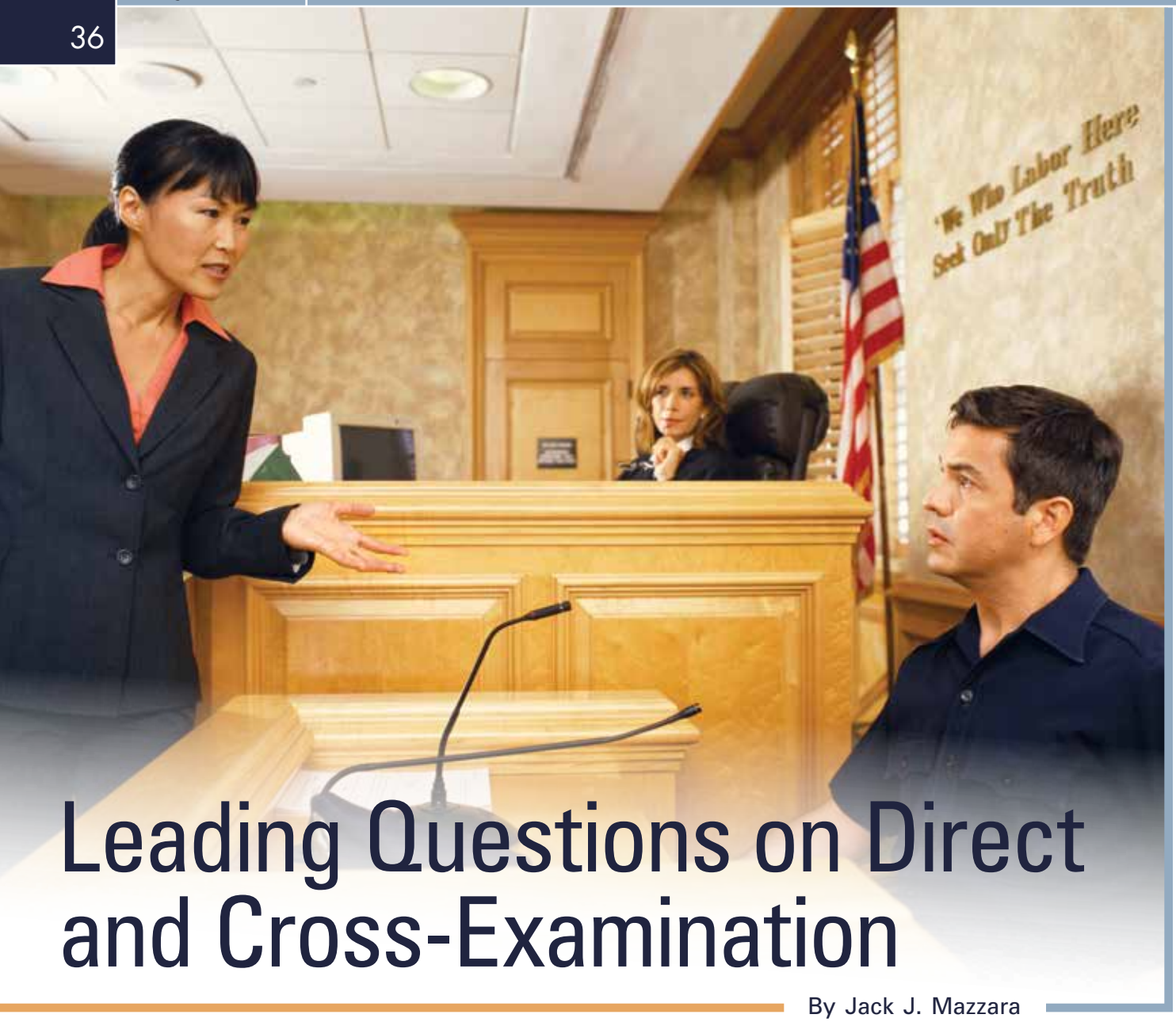

Leading Questions on Direct and Cross-Examination

By Jack J. Mazzara

The "rules" on leading questions are commonly understood to be (1) a leading question is one that calls for a yes or no answer, (2) leading questions are improper on direct examination, but (3) a lawyer has the right to use leading questions on cross-examination. None of these statements is completely accurate. In fact, the courts permit a fair amount of flexibility in the use of leading questions. This article reviews the proper and improper use of leading questions under Michigan Rule of Evidence 611(d) and Federal Rule of Evidence 611(c) as reflected in the decisions of the state and federal courts in Michigan.

What is a Leading Question?

Black's Law Dictionary defines a leading question as: "A question that suggests the answer to the person being interrogated; esp., a question that may be answered by a mere 'yes' or 'no.'"[1]

FAST FACTS

An improper leading question is one that suggests the specific answer desired by the examiner. A question is not leading simply because it calls for a yes or no answer.

FRE 611(c) and MRE 611(d) do not impose a blanket prohibition on leading questions during direct examination, and there are numerous contexts in which the courts allow leading questions on direct examination. Similarly, there is no absolute right to use leading questions on cross-examination. Rather, the mode of questioning on both direct and cross-examination is left to the sound discretion of the trial court.

However, whether a question is an improper leading question is more nuanced than simply one that calls for a yes or no answer.

A question is not an improper leading question merely because it is suggestive.[2] Leading questions are those:

> which so suggest the *specific tenor of the reply as desired by counsel* that such a reply is likely to be given irrespective of an actual memory [of the witness]…The essential notion, then, of an improper (commonly called a leading) question is that of a question which *suggests the specific answer desired*.[3]

A question that assumes the truth of a controverted fact as part of a question on another fact is also an improper leading question.[4]

Leading questions on direct examination present two dangers. The first is that suggestive questions may supply "a false memory for the witness—that is, to suggest desired answers not in truth based upon a real recollection."[5] The second is that the examiner may use a friendly witness to parrot the lawyer's view of the evidence.[6]

> The reason for restricting leading questions is that we prefer testimony of the witness over testimony of the lawyer. If the witness is sympathetic to the lawyer's cause (as is ordinarily the case when the witness is called on direct) the risk is that he will be too easily led to simply affirm the closed-ended statement of the lawyer.[7]

It is not merely the *form* of the question that renders it leading. The context in which the question is asked, the words used, and the tone all go to determine whether it is impermissibly leading. "Any question may be or may not be suggestive. The *form* is immaterial."[8] "The tenor of the desired reply can be suggested in any number of ways, as, for example, by the form of the question, by emphasis on certain words, by the tone of the questioner or his or her non-verbal conduct, or by the inclusion of facts still in controversy."[9] Thus, a question is not leading simply because it calls for a yes or no answer.[10] To be a leading question, it must suggest only one answer.[11]

Trial Courts Have Broad Discretion to Permit or Deny Use of Leading Questions

MRE 611(d) and FRE 611(c) govern the use of leading questions.

MRE 611(d) Leading Questions.

(1) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony.

(2) Ordinarily leading questions should be permitted on cross-examination.

(3) When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions. It is not necessary to declare the intent to ask leading questions before the questioning begins or before the questioning moves beyond preliminary inquiries.

FRE 611(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.

The text of the rules differs only in that MRE 611(d)(3) expressly states that "[i]t is not necessary to declare the intent to ask leading questions before the questioning begins or before the questioning moves beyond preliminary inquiries."

The trial court has broad discretion to permit or deny the use of leading questions.[12] An appellate court can reverse a trial court's decision on this point only when there was a clear abuse of discretion and the error resulted in substantial prejudice.[13]

The Advisory Committee note to FRE 611(c) observes that the appellate courts have manifested an "almost total unwillingness" to reverse a trial court's decision to allow or deny leading questions. However, appellate courts have found an abuse of discretion in allowing leading questions that served as the vehicle to introduce otherwise inadmissible evidence purportedly in an attempt to refresh recollection or impeach the witness.[14]

Leading Questions on Direct Examination

The direction of FRE 611(c) and MRE 611(d)(1) that leading questions *should* not be used on direct examination of a witness is only one of guidance, not a prohibition. MRE 611(d)(1) "is short of a categorical statement that such questions 'shall not be used.'"[15] The federal courts take the same view of FRE 611.[16] Rule 611 reflects the long-established view that use of leading

questions on direct examination is left to "the sound discretion of the trial judge, who sees the witness, and can therefore determine, in the interest of truth and justice, whether the circumstances justify leading questions to be propounded to a witness by the party producing him."[17]

There are "numerous and growing" exceptions to the general rule against leading questions on direct.[18] Some are expressly identified in Rule 611: a hostile witness, an adverse party, or a witness identified with an adverse party.[19] Others are judicially recognized exceptions that flow from the trial court's authority to allow leading questions "as may be necessary to develop the witness' testimony" and its overarching control over the mode of interrogating witnesses under Rule 611(a).

Preliminary, Foundational, or Undisputed Matters

Leading questions are permitted to establish preliminary, foundational, or undisputed matters.[20] This flows from the trial court's authority under Rule 611(a) to control the mode of questioning "to avoid needless consumption of time." Leading questions are also permitted when the testimony is cumulative or tangential to the central issue[21] or as follow-up questions on redirect examination.[22]

Child Witnesses, Witnesses of Limited Capacity, Frightened or Evasive Witnesses

Leading questions are permissible to develop testimony of witnesses because of age, limited capacity, or infirmity.[23] "Children are a classic category of witnesses for whom leading questions may be necessary."[24] In criminal cases, the judge may allow the prosecutor "a fair amount of leeway in asking questions of young children called in his case-in-chief."[25] This rule especially applies when the testimony is of a sexual nature.[26]

> "The reason for restricting leading questions is that we prefer testimony of the witness over testimony of the lawyer."

Leading questions are permitted to develop the testimony from a "frightened" witness[27] or a reluctant or evasive witness.[28] They may also be used when it is necessary to develop personally painful testimony.[29] Similarly, a trial court may allow leading questions on direct examination when the witness exhibits difficulty in understanding questions or has deficient language skills.[30] However, a trial court does not abuse its discretion when it refuses to allow leading questions on direct examination of a hearing-impaired witness whose testimony is "crucial" to the case.[31]

Refreshing Recollection, Correcting or Clarifying Testimony

Leading questions may be allowed to refresh a witness's memory about a prior statement or correct or clarify the witness's testimony.[32] However, as discussed above, leading questions cannot be used to introduce extended unsworn remarks or otherwise inadmissible evidence through the guise of refreshing recollection.

Leading Questions on Cross-Examination

The Advisory Committee note to FRE 611(c) describes the use of leading questions on cross-examination as "a matter of right." However, this right is not absolute and ultimately is subject to the trial court's discretion under Rule 611(a).[33]

The trial court generally should not allow leading questions on cross-examination when the witness is essentially a witness for, or identified with, the side of the cross-examining attorney.[34] Nevertheless, both the federal and Michigan rules make clear that leading questions are permitted on cross-examination of a party or adverse witness called by the opposing party.[35]

Unlike MRE 611(c), which permits cross-examination "on any matter relevant to any issue in the case," cross-examination under FRE 611(b) generally is limited to the subject matter of the direct examination. Accordingly, when the cross-examination of a witness extends beyond the scope of the direct examination in federal court (e.g., establishing an affirmative defense), the examination should proceed as if on direct, and consequently, leading questions generally should not be allowed.[36]

Conclusion

FRE 611(c) and MRE 611(d) neither impose a blanket prohibition on leading questions during direct examination nor grant an absolute right to use leading questions on cross-examination. Moreover, it is not simply the form of the question but also the specific tenor of the reply sought and the context in which it is asked that determine if it is an improper leading question. These determinations are left to the broad discretion of the trial court over the mode of questioning. The trial court's decision to allow or deny leading questions will rarely warrant reversal, and then only when the leading questions caused actual prejudice to a party's rights, typically when the questions were used to put otherwise inadmissible evidence before the jury. ■

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FOOTNOTES

1. Black's Law Dictionary (9th ed).
2. As one court observed, "In a sense every question is 'leading.' If interrogation did not lead, a trial would get nowhere. Indeed one vice of a question such as, 'What is your position in this case?,' is that it does not lead enough, and thus would deny the opposing party an opportunity to guard against the rankest kind of improper proof. A question must invite the witness's attention to something." *New Jersey v Abbott,* 36 NJ 63, 78–79; 174 A2d 881 (1961).
3. 3 Wigmore, Evidence (Chadbourn rev), § 769 (emphasis in original; footnote omitted).
4. Wigmore, § 771.
5. Wigmore, § 769; see *US v Durham,* 319 F2d 590, 592 (CA 4, 1963).
6. See *Jackson v Bradshaw,* 681 F3d 753, 764 (CA 6, 2012).
7. Capra, *Advisory Committee Notes to the Federal Rules of Evidence That May Require Clarification* (Washington, DC: Federal Judicial Center, 1998).
8. Wigmore, § 769 (emphasis in original; footnote omitted).
9. 4 Weinstein, Federal Evidence § 611.06[2][a].
10. *Gary Harmon Cement Contractor, Inc v Highland Dairy, LLC,* 2012 Mich App LEXIS 858 (2012).
11. See Montz, *Trial objections from beginning to end: The handbook for civil and criminal trials,* 29 Pepp L R 243, 286 (2002). The author describes the prohibition against leading questions on direct examination as "probably one of the most misunderstood objections during a trial." *Id.* at 285. For examples of yes/no questions that were not improper leading questions because they did not suggest the answer, see *People v Alcantar-Munoz,* unpublished opinion per curiam of the Court of Appeals, issued May 10, 2012 (Docket No. 303429), and *People v Elliott,* unpublished opinion per curiam of the Court of Appeals, issued May 13, 2008 (Docket No. 274131). For examples of improper leading questions, see *People v Phipps,* unpublished opinion per curiam of the Court of Appeals, issued February 20, 2007 (Docket No. 265388), and *People v West,* unpublished opinion per curiam of the Court of Appeals, issued May 22, 2007 (Docket No. 269294). However, in neither of these cases did the reviewing court determine that allowing the question was reversible error.
12. See *St Clair v US,* 154 US 134, 150; 14 S Ct 1002; 38 L Ed 936 (1894); *Morvant v Constr Aggregates Corp,* 570 F2d 626, 635 (CA 6, 1978); *Phillips v Mazda Motors Mfg Corp,* 204 Mich App 401, 415; 516 NW2d 502 (1994).
13. See *People v Watson,* 245 Mich App 572, 587; 629 NW2d 411 (2001); *Woods v Lecureux,* 110 F3d 1215, 1222 (CA 6, 1997).
14. See *Rush v Ill Central RR Co,* 399 F3d 705, 717–718 (CA 6, 2004); *US v Shoupe,* 548 F2d 636, 641 (CA 6, 1977).
15. *Elliott,* n 10 *supra* at *6.
16. See *Sanders v NYC Human Resources Admin,* 361 F3d 749, 757 (CA 2, 2004); Imwinkelried, *Evidentiary Distinctions* (1993), p 101.
17. *St Clair,* n 11 *supra* at 150.
18. The suggestion against leading questions on direct examination in FRE 611(c) "is meant to take account of the spirit behind the numerous and growing exceptions to the older 'categorical' rule against leading questions on direct examination applied in some jurisdictions." Rothstein, Federal Rules of Evidence (3d ed, 2011), p 415.
19. For a discussion of the use of leading questions with a hostile witness, an adverse party, or a witness identified with an adverse party, watch for my article, "The Interplay Between the Adverse Witness Statute and MRE 611(d)," in an upcoming issue of the *Michigan Bar Journal.*
20. See, e.g., *US v Bryant,* 461 F2d 912, 918 (CA 6, 1972) (preliminary or uncontroverted matters); *US v Kuehne,* 547 F3d 667, 692 (CA 6, 2008) (to direct a witness's attention to a particular individual or date, or to clarify testimony).
21. See *US v Birdsong,* 330 Fed Appx 573, 583 (CA 6, 2009); *US v Chalkias,* 971 F2d 1206, 1212–1213 (CA 6, 1992).
22. *Elliott,* n 10 *supra* at *6.
23. See *Jordan v Hurley,* 397 F3d 360, 363 (CA 6, 2005) (recognizing that leading questions were permissible during direct examination of a rape victim with Downs Syndrome who had difficulty responding to the prosecutor's questions); *In re Susser Estate,* 254 Mich App 232, 239; 657 NW2d 147 (2002) (noting that "a trial court may allow a fair amount of leeway in asking questions of elderly and infirm witnesses.").
24. Weinstein, § 611.06[b].
25. *People v Kosters,* 175 Mich App 748, 756; 438 NW2d 651 (1989).
26. *Id.*
27. *Birdsong,* n 20 *supra* at 582 (defendant threatened to kill the witness if she testified against him).
28. *Jackson,* n 6 *supra* at 764; *People v Caldwell,* 107 Mich 374, 379; 65 NW 213 (1895).
29. *People v Buchan,* unpublished opinion per curiam of the Court of Appeals, issued December 4, 2007 (Docket No. 273904), *2.
30. See, e.g., *US v Rodriguez-Garcia,* 983 F2d 1563, 1570 (CA 10, 1993) (leading questions were "necessary to develop the witness' testimony" where the witness did not speak English and used an interpreter); *People v Perreault,* unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket No. 293324), *6.
31. *Dehring v Northern Mich Exploration Co, Inc,* 104 Mich App 300, 318–319; 304 NW2d 560 (1981). As may be expected, in *Dehring* there was no indication that the witness could have heard and comprehended a leading question any better than a non-leading one.
32. See *Stone v Standard Life & Acc Ins Co,* 71 Mich 81, 85; 38 NW 710 (1888) (allowing leading questions about the witness's prior statements to refresh his recollection); *Elliott,* n 10 *supra* at *6 (follow-up questions designed to develop witness's testimony are permissible).
33. *Argentine v United Steelworkers,* 287 F3d 476, 486 (CA 6, 2002); *Shuler v Mich Physicians Mut Liability Co,* 260 Mich App 492, 517–518; 679 NW2d 106 (2004) ("As the word 'ordinarily' [in MRE 611] indicates, a trial court is not always required to permit leading questions on cross-examination.").
34. *Phillips,* n 11 *supra* at 416 (trial court's refusal to allow defense attorney to use leading questions on cross-examination was not an abuse of discretion when the witnesses were essentially witnesses for the defense).
35. *Woods, supra* (defendants); *Morvant, supra* (defendant's employees); *Shuler, supra* (defendant).
36. Weinstein, § 611.03[2].