

Leading Questions and Child Witnesses

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Please Note: This area of law is highly dependant on case law to determine whether or not a state will allow the use of leading questions with child witnesses. If your state is not listed, please check for binding case law.

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Federal Rules of Evidence

Fed. R. Evid. 611 - Mode and Order of Interrogation and Presentation

(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.

Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions.

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

Subdivision (c).

The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. **Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters.** 3 Wigmore §§ 774-778. An almost total unwillingness to reverse for infractions has been manifested by appellate courts. See cases cited in 3 Wigmore § 770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command.

Alabama**Ala. Code §15-25-1 (2008) - Leading questions.**

In any criminal prosecution for a physical offense or a sexual offense wherein the alleged victim is a child under the age of 16 years and in any criminal prosecution involving the sexual exploitation of a child under the age of 16, the court may allow leading questions at trial by the prosecution or defense of any victim or witness in a case who is under the age of 10, if the court determines that the allowance of leading questions will further the interests of justice. The court may on motion of the prosecution or the defense, or on its own motion, limit the scope and extent of any leading questions.

California

Cal. Evid. Code § 767 (2007) - Leading questions

(a) Except under special circumstances where the interests of justice otherwise require:

(1) A leading question may not be asked of a witness on direct or redirect examination.

(2) A leading question may be asked of a witness on cross-examination or recross-examination.

(b) The court may, in the interests of justice permit a leading question to be asked of a child under 10 years of age or a dependent person with a substantial cognitive impairment in a case involving a prosecution under Section 273a, 273d, 288.5, 368, or any of the acts described in Section 11165.1 or 11165.2 of the Penal Code.

Hawaii

Haw. Rev. Stat. § 611 (2008) - Mode and order of interrogation and presentation

(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. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

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

Subsection (c): This rule conforms to the traditional common-law ban on the use of leading questions on direct examination and to the traditional exceptions for the hostile, reluctant, and unwilling witness, **the child witness**, the adult with communications problems, or the witness whose memory is "exhausted," as well as the customary "preliminary matters" exception. McCormick § 6.

Louisiana

La. Code Evid. Ann. art. 611 (2008) - Mode and order of interrogation and presentation

A. *Control by court.* --Except as provided by this Article and Code of Criminal Procedure Article 773, the parties to a proceeding have the primary responsibility of presenting the evidence and examining the witnesses. The court, however, 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. However, in a civil case, when a party or person identified with a party has been called as a witness by an adverse party to testify only as to particular aspects of the case, the court shall limit the scope of cross-examination to matters testified to on direct examination, unless the interests of justice otherwise require.

C. *Leading questions.* --Generally, leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony and in examining an expert witness on his opinions and inferences. However, when a party calls a hostile witness, a witness who is unable or unwilling to respond to proper questioning, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. Generally, leading questions should be permitted on cross-examination. However, the court ordinarily shall prohibit counsel for a party from using leading questions when that party or a person identified with him is examined by his counsel, even when the party or a person identified with him has been called as a witness by another party and tendered for cross-examination.

D. *Scope of redirect examination; recross examination.* --A witness who has been cross-examined is subject to redirect examination as to matters covered on cross-examination and, in the discretion of the court, as to other matters in the case. When the court has allowed a party to bring out new matter on redirect, the other parties shall be provided an opportunity to recross on such matters.

E. *Rebuttal evidence.* --The plaintiff in a civil case and the state in a criminal prosecution shall have the right to rebut evidence adduced by their opponents.

In general, it has not been considered to be an abuse of discretion to allow a party to lead his witness when doing so is necessary to elicit the witness' testimony, as in the case of **children** (*State v. Vanderhoff*, 415 So. 2d 190 (La. 1982)) or of "witnesses so

ignorant, timid, weak-minded, or deficient in the English language, that they cannot otherwise be brought to understand what information is sought" (McCormick, supra at 13), or to revive the memory of a witness whose memory is exhausted (State v. Boyd, 359 So. 2d 931 (La. 1978)). Leading questions also may be used on direct examination when posed for clarification (State v. Feeback, 414 So. 2d 1229 (La. 1982)) and when covering preliminary or other matters not substantially in dispute (State v. Francis, 337 So. 2d 487 (La. 1976)). The use of leading questions in the last mentioned situations, although technically not "necessary," is seldom objected to and would rarely if ever be reversible error.

Montana

Mont. Code Anno. Ch. 10, Rule 611 (2007) - Mode and order of interrogation and presentation; re-examination and recall; confrontation.

(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.

(1) Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(2) Evidence developed on cross-examination may be considered by the trier of fact as proof of any fact in issue in the case.

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

(d) Re-examination and recall. A witness may be re-examined as to the same matters to which the witness testified only in the discretion of the court, but without exception the witness may be re-examined as to any new matter brought out during cross-examination. After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court. This rule shall not limit the right of any party to recall a witness in rebuttal.

(e) Confrontation. Except as otherwise provided by constitution, statute, these rules, or other rules applicable to the courts of this state, at the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.

NOTES:

(c) *Leading questions.* This subdivision is identical to Federal Rule 611(c). It recognizes the traditional view that leading questions, that is, questions which suggest the desired answer, are generally undesirable on direct examination, for the witness "...may acquiesce in a false suggestion". McCormick, Handbook on the Law of Evidence 8 (2d ed. 1972).

The exception found in the first sentence, allowing leading questions to develop a

witness' testimony, is intended to recognize situations where leading questions can be used. Advisory Committee's Note to Federal Rule 611(c), 56 F.R.D. 183, 275 (1972). **Among those recognized are "the witness who is hostile, unwilling, or biased; the child witness or an adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters"**. *Id.* citing 3 Wigmore Evidence, Sections 774-778 (Chadbourn Rev. 1970). The subdivision also recognizes that leading questions should ordinarily be allowed on cross-examination because the purpose of cross-examination is to discredit testimony and this is where leading questions are most effective. The use of the word "ordinarily" in the second sentence is intended to allow a court to deny use of leading questions when cross-examination is in form only, such as cross-examination of a party by his counsel after being called as an adverse witness or of a friendly witness. The use of leading questions is ultimately a question for the trial court under Rule 611(a).

Nevada

Nev. Rev. Stat. Ann. § 50.115 (2008) - Mode and order of interrogation and presentation.

1. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence:

(a) To make the interrogation and presentation effective for the ascertainment of the truth;

(b) To avoid needless consumption of time; and

(c) To protect witnesses from undue harassment or embarrassment.

2. Cross-examination is limited to the subject matter of the direct examination and matters affecting the credibility of the witness, unless the judge in the exercise of discretion permits inquiry into additional matters as if on direct examination.

3. Except as provided in subsection 4:

(a) Leading questions may not be used on the direct examination of a witness without the permission of the court.

(b) Leading questions are permitted on cross-examination.

4. Except that the prosecution may not call the accused in a criminal case, a party is entitled to call:

(a) An adverse party; or

(b) A witness identified with an adverse party,

and interrogate by leading questions. The attorney for the adverse party may employ leading questions in cross-examining the party or witness so called only to the extent permissible if he had called that person on direct examination.

Child witness.

In a prosecution for lewdness with a child the prosecuting attorney was permitted to ask leading questions of two witnesses who were eight and nine years of age at the time of trial; whether leading questions should be allowed is a matter mostly within the discretion of the trial court, and any abuse of the rules regarding them is not ordinarily a ground for reversal. Barcus v. State, 92 Nev. 289, 550 P.2d 411, 1976 Nev. LEXIS 592 (1976).

North Carolina

N.C. Gen. Stat. §8C-1, Rule 611 (2008) - Mode and order of interrogation and presentation

(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 his testimony. 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.

NOTES:

Leading Questions Held Proper -- In prosecution for first-degree rape of six-year-old, the trial court did not abuse its discretion in permitting the prosecutor to ask leading questions on direct examination of the victim. State v. Hannah, 316 N.C. 362, 341 S.E.2d 514 (1986).

Washington

Wash. Rev. Code Ann. § 5.60.050 (2008) - Who are incompetent

The following persons shall not be competent to testify:

(1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and

(2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

NOTES:

A determination of whether the child witness meets the test under this section and whether leading questions will be allowed is for the sound discretion of the trial court, which determination will not be disturbed on appeal in the absence of a manifest abuse of such discretion. State v. Wilson, 1 Wn. App. 1001, 465 P.2d 413, review denied, 78 Wn.2d 994 (1970).