When May I Lead?

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A leading question is one that suggests the answer to the witness. Consider these examples:

a. What color was the light? (Definitely not leading)

b. Wasn't the light green? (Definitely leading)

c. Was the light green or some other color? (Possibly leading)

d. Was the light green or yellow or red? (Probably not leading)

Whether the question can be answered "yes" or "no" isn't an infallible test for whether it is leading. For example, "Did you go to college?" can be answered yes/no, but it isn't leading, whereas "Did you go to school at Boston College?" probably is. As in all other matters concerning the examination of witnesses at trial, the judge will decide, and judges' opinions vary on what is "leading" and what isn't.

The general rule is that leading questions are for cross examination and open-ended questions are for direct, as reflected in Utah Rule of Evidence 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.

Note that it's fine to lead witnesses on cross examination *if* they are "hostile," even though you called them. An example would be the defendant physician called in the plaintiff's malpractice case-in-chief. The corollary is that leading questions may be improper on cross examination if the witness is not adverse, such as a "neutral" fact witness.

There are other exceptions to the rule with which the trial lawyer needs to be familiar in order to avoid the silly, awkward questioning that's characteristic of the novice's attempt to avoid a perceived restriction on leading. Thus, we have the new lawyer dancing around the question he really wants to ask and seeming to say, "I can't give you any clues, but tell me something interesting that you think bears on this case." This is pure nonsense, easily avoided by understanding the exceptions to the "no leading" rule.

1. **Foundational matters**

Evidence Rule 104(a) states that the court, not the jury, decides preliminary questions of admissibility– and that means foundations– and in making its determination *it is not bound by the rules of evidence* except those with respect to privileges. That means a judge doesn't need to worry about hearsay exceptions or the form of questions when deciding whether a foundation has been laid.

a) Experts. You can and should lead the witness in establishing credentials to testify. (This has the additional benefit of not having the witness seem to brag about her credentials.)[1]

b) Exhibits. You can and should use leading questions to develop the foundation for exhibits, such as the hearsay exception for business records.

c) Personal knowledge of the witness. Don't beat around the bush asking "Mrs. Jones, where were you on or about 3:00 p.m. on June 4, 2006?"– just ask her, "Mrs. Jones, did you see the accident that happened on June 4, 2006?"

[1]Note that in Utah we generally don't follow the procedure common in some states of having the court formally recognize the witness as an expert after his qualifications are set forth.

2. **When the witness is a child or very old**

We cut a break for these witnesses, and leading will be permitted because the witness may not understand the process or the questions. This also includes people who have problems with understanding or speaking English, or difficulties in hearing. *See State v. Kallin*, 877 P.2d 138, 144 (Utah 1994); *State v. Ireland*, 773 P.2d 1375, 1377 (Utah 1989).

3. **When the witness is confused or having a memory lapse**

This is especially useful when a heretofore-coherent witness "freezes" or draws a blank in the middle of testimony. I call this the "give him a break" exception to the no-leading rule.

4. **When the information is undisputed**

You shouldn't waste time asking open-ended questions about things that are not in dispute. (You sometimes may *want* to, for tactical reasons, but you don't *have* to.) "You are the sister of Ms. Gulch?" "And she had three sisters?" "And she was from this city?"

5. **The "catch-all" exception**

Rule 611 states that leading questions may be used anytime they become *"necessary to develop the witness's testimony*," whatever that means (and it's nowhere defined.) The comment to the federal rule gives little more guidance:

> *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.*

In other words, it is totally in the discretion of the trial judge whether you will be allowed

to use the exceptions to the "no leading" rule. Not all trial judges understand the common-law exceptions to the rule against leading on direct, and apply a mechanical prohibition on leading without understanding the reason for the rule: to let the witness, not the lawyer, testify as to important and disputed information, and as to the rest, well, it should come in as expeditiously as possible.

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