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Federal Rule of Evidence 611(c): Leading a Witness on Direct Examination

By Christina J. Kang

Trial attorneys are familiar with the general admonition against asking leading questions during direct examination of witnesses they call to testify at trial. Leading questions are those that suggest an answer to the witness.[1] Trial attorneys are also familiar with the broad discretion afforded the trial court in the mode and manner of witness examinations, including the discretion to permit the use of leading questions during a direct examination. The exercise of that discretion is guided by Federal Rule of Evidence 611(c).

Rule 611(c)

Rule 611(c) sets forth the general rule that leading questions should not be used on the direct examination of a witness. That rule stems from a premise that a witness called to testify at trial may be influenced by a question's suggestive nature to give a favorable answer rather than a candid response.[2] It is

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Federal Rule of Evidence 611(c)

Continued from page 1

recognized, however, that such potential dangers may be outweighed or eliminated by other considerations in certain circumstances. Rule 611(c) thus permits the use of leading questions on a direct examination "as may be necessary to develop the witness' testimony," or where the witness is "hostile," an "adverse party," or "identified with an adverse party."[3]

These exceptions are not mandatory, but allowed at the trial court's discretion.[4] Rule 611(c) neither explains when leading questions may be "necessary to develop the witness' testimony," nor specifies when a witness is "hostile," "adverse," or "identified with an adverse party." Such determinations have been left for the courts to develop and issue.

Necessary Leading Questions

In general, where the witness would be unable to answer a question or the examination would be unnecessarily extended if leading questions were not permitted, trial courts have permitted the use of leading questions as "may be necessary to develop the witness' testimony."[5]

The Advisory Committee to Rule 611(c) and trial courts have traditionally deemed leading questions on examination of a child witness appropriate to develop the testimony.[6] For instance, in a case involving sexual abuse, the Eighth Circuit upheld the trial court's decision to allow the government to ask leading questions of a nine-year-old victim during the direct examination.[7]

Trial courts have also permitted leading questions on direct examination of an adult witness from whom it may otherwise be difficult to elicit testimony. Where the witness was an adult who had Down Syndrome, the trial court permitted leading questions to develop his direct testimony.[8] Moreover, where an adult witness had the IQ consistent with that of a child between the ages of 10 and 13, leading questions were deemed appropriate.[9]

The Advisory Committee Notes also acknowledge that leading questions may be necessary to develop the testimony of a witness who has "communication problems."[10] In a drug prosecution case, the trial court permitted the government to ask leading questions on direct examination of a witness who spoke little English and testified through a translator.[11] The translation was difficult due to the language involved, and numerous questions posed by the government required the witness to affirm or deny government statements. The Second Circuit on appeal held that the trial court did not abuse its discretion in permitting the government to lead the witness, even if the witness had the benefit of a translator.

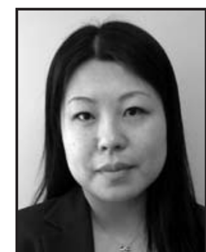
Courts have also permitted leading questions on direct examination of a witness who is "unusually soft-spoken and frightened."[12] Similarly, leading questions have been allowed where a witness was reluctant to testify or was evasive or unresponsive.[13] In one case, a government witness, who had entered into a plea agreement with the government and was related to one of the codefendants ultimately convicted at trial of drug charges, was evasive on the stand about the types of drugs involved in the conspiracy. The trial court's decision to then allow the government to lead the witness was upheld on appeal.[14] The Advisory Committee Notes also recognize the propriety of leading questions when necessary to jog a witness's memory.[15]

Rule 611(c) also permits leading questions on matters that are preliminary, such as a witness's occupation or educational history, provided the matters are not in dispute or vital to the case.[16] Trial courts have permitted leading questions in these circumstances because they serve interests of efficiency by moving the trial along and saving time. What matters are considered preliminary will generally depend on the facts of each case. In one case, the Third Circuit held that the use of leading questions on direct examination did not warrant a new trial because those questions did not result in "putting words in the witness' mouth," but elicited testimony that was forthcoming anyway.[17] In another case involving claims against a doctor for medical negligence, the Tenth Circuit upheld the use of leading questions relating to defendant's office and billing practices, which were not vital to the issues at hand.[18]

Hostile Witness

A witness will be deemed hostile where his or her actual hostility, bias, or reluctance to testify can be demonstrated to the trial court's satisfaction.[19] Such a finding will depend on the facts and circumstances of each case.[20] Nevertheless, cases illustrate that several characteristics can establish the hostility of a witness, which hostility generally indicates a witness who "sympathizes with the opponents [sic] cause or are unwilling for any reason to reveal what they know."[21]

A witness was deemed hostile and adverse to the examining party in a labor proceeding by virtue of his ownership of a member of the defendant trade association and his former employment by the defendant.[22] The court reasoned that those facts suggested that his "interests and sympathies were clearly aligned with" the defendants. In another case, a witness was deemed hostile after she gave testimony against her relative that was inconsistent with her previous testimony.[23]



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The anticipation that a witness will give testimony favorable to the adverse party, without more, has been deemed insufficient to render a witness hostile.[24] In that medical malpractice case, the trial court permitted the plaintiff to ask leading questions of a doctor she called to testify and whom the defendants had identified before trial as their expert witness. The First Circuit found that the trial court abused its discretion, noting the expert's lack of connection to the events involved in the case or the relationship to the defendants by employment or otherwise.

A case that involved a criminal prosecution for theft presents an illustrative archetype of a hostile witness.[25] The defendant appealed his jury conviction and alleged that the district court erred in declaring as hostile a witness called by the prosecution as part of its case-in-chief. That witness was a close friend of the defendant's, and suffered from faulty memory caused by his abuse of alcohol and drugs. The witness himself emphasized that he was susceptible to suggestion by the last person he spoke to, and it was established that he spoke at length with the defendant up until trial. Evidence also suggested that the witness had participated in the crime. Based on these facts, the First Circuit held that the district court did not abuse its discretion in declaring the witness hostile *sua sponte* and without a motion by the prosecution.

Adverse Party

Where a party calls the adverse party in the litigation as a witness, the hostility of the witness will be presumed,[26] and the attorney may use leading questions during the direct examination of an adverse party. The definition of "adverse party" has not generated much discussion by the courts. An issue may arise, such as in those cases where the adverse party is a corporation or other entity, as to whether individuals associated with the adverse party are also deemed adverse under the rule. This issue is addressed by the witness identified with an adverse party exception.

Witness Identified with an Adverse Party

Courts have treated an employee of an adverse party as a witness identified with that party.[27] In one case involving claims for products liability arising out of a car accident, the plaintiffs sought to call an employee of the defendant car manufacturer as part of their case-in-chief.[28] The district court refused to permit the plaintiffs to ask the employee leading questions, reasoning that if they called him as part of their case, the employee would be considered their witness. On appeal, the Fifth Circuit agreed with the plaintiffs that the employee was a witness identified with an adverse party by reason of his employment and that leading questions would have been appropriate. That error did not warrant, however, a reversal inasmuch as the plaintiffs were unable to show that they were prejudiced by it.

An employment relationship that identifies a witness with the adverse party is not limited to current employees, but has been extended to former employees.[29] In a case involving breach of contract and Title VII claims arising out of the plaintiff's employment with the defendant, the district court permitted the plaintiff to ask leading questions during the direct examination of the defendant's former employee.[30] The court noted that, even though the witness was no longer employed by the defendant, the witness was clearly identified with the defendant due to her previous employment and ongoing relationship with the defendant's corporate representative at trial.

A witness can be identified with an adverse party for reasons other than a current or former employment relationship. In a prosecution for armed bank robbery, the trial court permitted the government to ask leading questions on the direct examination of the defendant's girlfriend.[31] By logical extension, and if no facts exist that would negate their connection to or bias in favor of the adverse party, it follows that a court would likely find that a family member or a close friend of the adverse party to be a witness identified with that adverse party.

One court has held that two doctors who were codefendants in a medical malpractice action stood adverse to each other in that action and, as between them, the trial expert retained by one was as to the other a witness identified with an adverse party.[32] The doctors had no professional association and were alleged by the plaintiff to have at separate times misdiagnosed her condition. In affirming the trial court's application of the rule, the court reasoned that the nature of the relationship between the doctors was adverse due to comparative negligence principles, and the fact that they were independent actors in the litigation and never alleged that the other was not negligent.

Conclusion

Rule 611(c) arms the trial court with the discretion to permit the use of leading questions during a direct examination when warranted by the circumstances. While the distinction between a hostile witness and one identified with an adverse party is sometimes blurred by trial courts, the appellate courts for the most part have deferred to the trial court's exercise of discretion under Rule 611(c). In that respect, Rule 611(c) is no different from other evidentiary rules vesting the

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trial judge with broad discretion, and the chances of success on appeal of a trial court's decision to permit or deny leading questions are low unless the appellant can make a convincing showing of prejudice suffered as a result of the trial court's abuse of discretion.[33]

Endnotes

1. *See, e.g.*, United States v. Haden, No. 96-2950, 1997 U.S. App. LEXIS 15319, at *8 (7th Cir. June 20, 1997), citing *Black's Law Dictionary* 1034 (4th ed. 1968).
2. Jarbough v. Attorney General of U.S., 483 F.3d 184 (3d Cir. 2007).
3. *See* Fed. R. Evid. 611(c).
4. *See* Fed. R. Evid. 611 Advisory Committee Notes.
5. *See generally* Wright and Gold, Federal Practice and Procedure: Evidence § 6168.
6. *See* Fed. R. Evid. 611 Advisory Committee Notes; United States v. Flute, 363 F.3d 676 (8th Cir. 2004), *cert. denied*, 547 U.S. 1009, 126 S. Ct. 1479, 164 L. Ed. 2d 257 (2006); United States v. Castro-Romero, 964 F.2d 942 (9th Cir. 1992); United States v. Nabors, 762 F.2d 642 (8th Cir. 1985).
7. *See* United States v. Butler, 56 F.3d 941 (8th Cir. 1995), *cert. denied*, 516 U.S. 924, 116 S. Ct. 322, 133 L. Ed. 2d 244 (1995).
8. *See* Jordan v. Hurley, 397 F.3d 360 (6th Cir. 2005).
9. *See* United States v. Goodlow, 105 F.3d 1203 (8th Cir. 1997).
10. *See* Fed. R. Evid. 611 Advisory Committee Notes; United States v. Rodriguez-Garcia, 983 F.2d 1563 (10th Cir. 1993).
11. *See* United States v. Ajmal, 67 F.3d 12 (2d Cir. 1995).
12. *See* United States v. Grey Bear, 883 F.2d 1382 (8th Cir. 1989), *cert. denied*, 493 U.S. 1047, 110 S. Ct. 846, 107 L. Ed. 2d 840 (1990).
13. *See* United States v. Mulinelli, 111 F.3d 983 (1st Cir. 1997) (permitting leading questions to witness who was at times unresponsive or showed lack of understanding held not to be abuse of discretion); *Grey Bear*, 883 F.2d at 1393 (permitting leading questions to witness who was "unusually soft-spoken and frightened" held not to be abuse of discretion); United States v. Mora-Higuera, 269 F.3d 905 (8th Cir. 2001) (permitting leading questions to witness who was evasive and unclear held not to be abuse of discretion).
14. *See Mora-Higuera*, 269 F.3d at 912.
15. *See* Fed. R. Evid. 611 Advisory Committee Notes (providing that leading question on direct of a witness "whose recollection is exhausted" is appropriate); *Haden*, 1997 U.S. App. LEXIS, at *11–12.
16. *See* Fed. R. Evid. 611 Advisory Committee Notes (providing that leading questions on direct on "undisputed preliminary matters" are appropriate); *see generally* 3 Wigmore, Evidence § 775.
17. *See* Herman v. Hess Oil Virgin Islands Corp., 379 F. Supp. 1268 (D. V.I. 1974), *aff'd*, 524 F.2d 767 (3d Cir. 1975).
18. *See* Schultz v. Rice, 809 F.2d 643 (10th Cir. 1986).
19. *See generally* Weinstein's Evidence, § 611.06[3].
20. *See* United States v. Brown, 603 F.2d 1022 (1st Cir. 1979).
21. *See generally* Weinstein's Evidence, § 611.06[3].
22. *See* National Labor Relations Bd. v. Southwestern Colorado Contractors Assoc., 379 F.2d 360 (10th Cir. 1967).
23. *See* United States v. DeBose, 410 F.2d 1273 (6th Cir. 1969), *cert. denied*, 401 U.S. 920, 91 S. Ct. 906, 27 L. Ed. 2d 823 (1971).
24. *See* Suarez Matos v. Ashford Presbyterian Community Hosp., Inc., 4 F.3d 47 (1st Cir. 1993).
25. *Brown*, 603 F.2d 1022 (1st Cir. 1979).
26. *See* Fed. R. Evid. 611(c) Advisory Committee Notes; *see generally* Wright & Gold, Federal Practice and Procedure: Evidence § 6168.
27. *See* Haney v. Mizell Mem'l Hosp., 744 F.2d 1467 (8th Cir. 1984); Talbot v. The Village of Sauk Village, No. 97 C 2281, 1999 U.S. Dist. LEXIS 6574 (N.D. Ill. Apr. 27, 1999).
28. *See* Perkins v. Volkswagen of Am., Inc., 596 F.2d 681 (5th Cir. 1979).
29. *See* Chonich v. Wayne County Community College, 874 F.2d 359 (6th Cir. 1989).
30. Stahl v. Sun Microsystems, Inc., 775 F. Supp. 1397 (D. Colo. 1991), *aff'd*, 19 F.3d 533 (10th Cir. 1994).
31. *See* United States v. Hicks, 748 F.2d 854 (4th Cir. 1984).
32. *See* Leskin v. Pottsville Hosp., Civil Action No. 87-2487, 1991 U.S. Dist. LEXIS 6842 (E.D. Pa. May 20, 1991), *aff'd*, 961 F.2d 209 (3d Cir. 1992).
33. *See, e.g.*, *Chonich*, 874 F.2d at 368.

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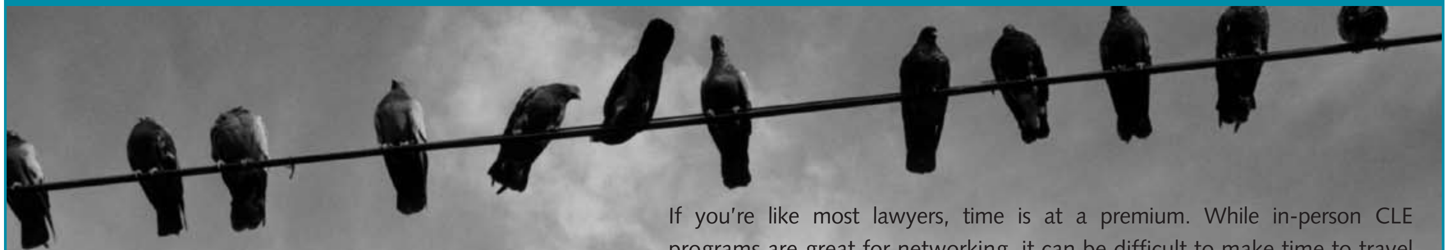

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