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Using Leading Questions During Direct Examination

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USING LEADING QUESTIONS DURING DIRECT EXAMINATION

CHARLES W. EHRHARDT* AND STEPHANIE J. YOUNG**

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I. INTRODUCTION

Historically, limitations upon a party's impeaching its own witness¹ and upon using leading questions during direct examination² have been intertwined. This interplay continued longer in Florida than in most jurisdictions because Florida was slow to abandon the general rule against

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1. See 3 JOHN H. WIGMORE, *EVIDENCE* §§ 896-905 (3d ed. 1940) [hereinafter 3 WIGMORE 1940]; CHARLES T. MCCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* § 38 (1954).

2. See 3 WIGMORE 1940, *supra* note 1, §§ 769-79.

impeachment of a party's own witness. Underlying policies created confusion concerning the permissible use of leading questions during direct examination. Adding to the confusion, similar terms defined impeachment and the exceptions to prohibitions on leading questions.

Clarification of this area began in 1990, when the Florida Legislature amended section 90.608, *Florida Statutes*, to adopt the *Federal Rules of Evidence* view, permitting impeachment of a party's own witness.³ In 1995, the Florida Legislature amended section 90.612(3), *Florida Statutes*, to adopt Federal Rule of Evidence 611(c) providing for the use of leading questions during direct examination.⁴ The Legislature thereby completed the clarification process.

This Article traces the development of the *Florida Rules of Civil Procedure* and the *Florida Statutes* from before the adoption of the *Florida Evidence Code* to the present as they affect the use of leading questions. The Article focuses particularly on the significance of the 1995 action of the Florida Legislature in amending section 90.612(3), *Florida Statutes*.

II. BEFORE ADOPTION OF FLORIDA'S EVIDENCE CODE

A. *An Exception for Leading Questions on Direct Examination*

Traditionally, questions asked a witness during direct examination cannot be in a form suggesting the answer to the witness. The rationale is that witnesses called by a party are presumed to give testimony favorable to that party,⁵ and, therefore, leading questions are not necessary. Courts have barred leading questions on direct examination because a witness should testify to relevant facts personally known by the witness, without counsel's suggesting the desired answer.⁶ If courts permitted the wide use of leading questions on direct examination, the jury could hear the lawyer's testimony instead of the witness's.⁷ Courts do permit leading questions on cross-examination, on the assumption that the cross-examiner needs to suggest answers to the witness in order to explore adequately the reliability of the direct examination and the credibility of the witness.⁸

3. 1990, Fla. Laws ch. 90-174, § 1, 742-43 (codified as amended at FLA. STAT. § 90.608 (1995)).

4. 1995, Fla. Laws ch. 95-179, § 1, 1647 (codified as amended at FLA. STAT. § 90.612(3) (1995)).

5. *Erp v. Carroll*, 438 So. 2d 31, 36 (Fla. 5th DCA 1983).

6. *Id.*

7. *See United States v. Bryant*, 461 F.2d 912, 918 (6th Cir. 1972); *Kembro v. State*, 346 So. 2d 1083 (Fla. 1st DCA 1977).

8. *Erp*, 438 So. 2d at 36.

In 1967, the Florida Supreme Court adopted rule 1.450(a), *Florida Rules of Civil Procedure*, which recognizes an exception permitting a party to examine a hostile or unwilling witness with leading questions during direct examination.⁹ When the witness demonstrates hostility or unwillingness to answer on the witness stand, the witness also demonstrates the need for leading questions.¹⁰ Additionally, the rule permits a party to call an adverse party as a witness and "interrogate that person by leading questions."¹¹ When the adverse party is not a natural person or legal entity, rule 1.450(a) permits an examining party to use leading questions during the direct examination of an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party.¹² Historically, courts presumed the necessity of using leading questions when examining an adverse party with a stake in the outcome.¹³

Florida courts disagreed as to whether an adverse party under rule 1.450(a) must be a person named as a party to the suit. One view was that the rule means that only those who are named as a party to the action may be examined as an adverse party.¹⁴ The broader view was that an adverse party was one who "occupied an adverse position toward the party seeking to call him . . . and could have been named as a party."¹⁵

9. *In re Florida Rules of Civil Procedure 1967 Revision*, 187 So. 2d 598, 625 (Fla. 1966). Rule 1.450(a) of the *Florida Rules of Civil Procedure* provides:

A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party and interrogate that person by leading questions and contradict and impeach that person in all respects as if that person had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also and may be cross-examined by the adverse party only upon the subject matter of that witness's examination in chief.

FLA. R. CIV. P. 1.450(a).

10. *Foremost Dairies, Inc. v. Cutler*, 212 So. 2d 37, 40 (Fla. 4th DCA 1968); see *Erp*, 438 So. 2d at 31, 36.

11. FLA. R. CIV. P. 1.450(a).

12. *Id.* Rule 1.450 was based on former FED. R. CIV. P. 43(b) (1974).

13. 3 JOHN H. WIGMORE, EVIDENCE § 774 (Chadbourn rev. 1970) [hereinafter 3 WIGMORE 1970]; 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE § 611[05] (1987) [hereinafter WEINSTEIN].

14. *Foremost Dairies, Inc.*, 212 So. 2d at 40 ("An adverse party would by simple definition simply be a party to the litigation who had an adverse interest in its outcome.").

15. *Smith v. Fortune Ins. Co.*, 404 So. 2d 821, 823 (Fla. 1st DCA 1981); see also *Botte v. Pomeroy*, 497 So. 2d 1275, 1277 (Fla. 4th DCA 1986), *rev. denied*, 508 So. 2d 15 (Fla. 1987) (stating that employee of an adverse party who could have been named in the suit as an adverse party could be examined as an adverse party).

B. Voucher Rule Barred Impeaching a Party's Own Witness

Prior to Florida's adoption of the Evidence Code in 1976, Florida recognized the "voucher rule," whereby a party could not impeach or attack the credibility of a witness called by that party.¹⁶ This rule resulted primarily from a belief that the party who called a witness to testify guaranteed that witness's credibility to the court.¹⁷ However, opposing counsel could attack or impeach the credibility of a witness.¹⁸

Two exceptions permitted a party to impeach a witness called by that party. Section 90.09, *Florida Statutes*, now repealed, created a limited exception to the voucher rule by permitting a party to attack the credibility of a witness called by that party when the witness proved adverse.¹⁹ Judicial decisions supplied a two-part test of adversariness: the witness's testimony must have surprised the party calling the witness, and the witness's testimony must have been prejudicial from the jury's perspective.²⁰ If counsel calling the witness learned of the testimony before the witness took the stand, the necessary surprise was not present.²¹

Section 90.09 restricted permissible impeachment to prior inconsistent statements and contradictions.²² The statute specifically prohibited impeachment by "general evidence of bad character."²³

Rule 1.450(a), *Florida Rules of Civil Procedure*, created a second exception to the voucher rule.²⁴ It allowed a party to call an adverse

16. *Poitier v. State*, 303 So. 2d 409, 410-11 (Fla. 3d DCA 1974); *Johnson v. State*, 178 So. 2d 724, 727 (Fla. 2d DCA 1965).

17. 3A JOHN H. WIGMORE, EVIDENCE § 898 (1970 Chadbourn rev.) [hereinafter 3A WIGMORE 1970]; WEINSTEIN, *supra* note 13, § 607[01].

18. *Nelson v. State*, 128 So. 1, 1 (Fla. 1930).

19. Section 90.09 of the *Florida Statutes* (1975) provided:

A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness proves adverse, contradict him by other evidence, or prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he made such statement.

FLA. STAT. § 90.09 (1975) (repealed 1976).

This statute was apparently based on a similar English statute enacted in the mid-1800s. 3A WIGMORE 1970, *supra* note 17, § 905.

20. *Hernandez v. State*, 22 So. 2d 781 (Fla. 1945); *Foremost Dairies, Inc. v. Cutler*, 212 So. 2d 37, 40 (Fla. 4th DCA 1968).

21. *Okey v. Monarch Ins. Co. of Ohio*, 392 So. 2d 57, 58 (Fla. 5th DCA 1981); *Foremost Dairies, Inc. v. Cutler*, 212 So. 2d 37, 40 (Fla. 4th DCA 1968).

22. FLA. STAT. § 90.09 (1975).

23. *Id.*

24. FLA. R. CIV. P. 1.450(a).

party as a witness and "contradict and impeach that person in all respects as if that person had been called by the adverse party."²⁵ The rule did not limit a party's impeachment of an adverse party to prior inconsistent statements.²⁶ A party could use any method permitted under the Evidence Code. This exception to the voucher rule was in addition to other language in rule 1.450(a), which permitted a party to use leading questions during the direct examination of a hostile or evasive witness or an adverse party.²⁷

Confusion centered around the significance of labeling a witness a hostile witness, an adverse witness, or an adverse party.²⁸ A party could ask leading questions during the direct examination of a hostile witness or an adverse party, but usually not during direct examination of an adverse witness.²⁹ On the other hand, the party calling the witness could not impeach a hostile witness unless the witness was an adverse witness or an adverse party. A court might determine a single witness to fit any, or all, of the above definitions.

III. ADOPTION OF FLORIDA'S EVIDENCE CODE

A. Section 90.608: Impeaching an Adverse Witness

When Florida adopted its Evidence Code, the drafters and the Legislature chose to reject the modern view of the *Federal Rules of Evidence*, which permits a party to impeach its own witness,³⁰ and to retain, in section 90.608(1), the pre-Code statutory provision prohibiting a party from impeaching its own witness.³¹ However, section 90.608(2) continued to permit a party to impeach that party's own witness, by using prior inconsistent statements or evidence that contradicted the witness's testimony, when the witness proved adverse.³²

25. *Id.*

26. *Id.*

27. *In re Florida Rules of Civil Procedure 1967 Revision*, 187 So. 2d 598, 625 (Fla. 1966). See text of Rule 1.450(a) of the *Florida Rules of Civil Procedure*, *supra* note 9.

28. *Erp v. Carroll*, 438 So. 2d 31, 36 (Fla. 5th DCA 1983).

29. *Id.* at 35.

30. FED. R. EVID. 607.

31. 1978, Fla. Laws ch. 78-361, § 14, 988-99 (codified as amended at FLA. STAT. § 90.608(2) (1995)). A technical amendment to section 90.608(2) provided that "a party calling a witness" could impeach a witness under certain circumstances. *Id.* The substitution of the word "calling" for the word "producing" was made to provide consistency between subsections (1) and (2). *Id.* In addition, subsection (2) was amended to provide that, if an adverse witness could be impeached pursuant to the subsection, leading questions could be used during that impeachment. *Id.*

32. Section 90.608(2) of the *Florida Statutes* (1977) provided:

A party producing a witness shall not be allowed to impeach his character as provided in section 90.609 or section 90.610, but, if the witness proves adverse, such party may

The subsection provided that surprise at the trial during a witness's testimony was no longer a prerequisite for applying the adverse witness rule.³³ Before a witness was adverse under section 90.608(2), the witness had to have given testimony that was affirmatively harmful or prejudicial to the party calling the witness.³⁴ The fact that the witness failed to give the testimony that counsel expected and that the testimony was not so beneficial as a witness's prior statement was not sufficient to label a witness adverse.³⁵ The party's testimony before the jury actually had to have harmed the case of the party calling the witness.

Defining an adverse witness was a complex task. An adverse witness could be friendly to the party calling the witness.³⁶ On the other hand, a witness who was hostile or unwilling or who had a relationship with one of the parties was not necessarily adverse.³⁷ Under section 90.608(2), if the witness did not remember a fact when testifying, the witness was not adverse and a party could not impeach the witness.³⁸ In the eyes of the jury, such testimony had not affirmatively harmed the case of the party calling the witness.

B. Section 90.612(3): Use of Leading Questions

Because of Florida's constitutional vesting of exclusive jurisdiction of procedural matters in the Florida Supreme Court and substantive matters in the Florida Legislature,³⁹ the drafters of the Evidence Code determined that the Legislature should not amend or recodify, within the Evidence Code, then-existing rule 1.450(a), *Florida Rules of Civil Procedure*. Rather, the Florida Legislature adopted section 90.612(3), which generally prohibited the use of leading questions on direct and redirect examination but permitted a party's use of them on cross-

contradict the witness by other evidence or may prove that the witness has made an inconsistent statement at another time, without regard to whether the party was surprised by the testimony of the witness.

FLA. STAT. § 90.608(2) (1977) (amended 1990).

33. *Id.*

34. *Shere v. State*, 579 So. 2d 86, 91 (Fla. 1991); *Adams v. State*, 34 Fla. 185, 15 So. 905, 908 (1894); *Pitts v. State*, 333 So. 2d 109, 111 (Fla. 1st DCA 1976).

35. *Jackson v. State*, 451 So. 2d 458, 462 (Fla. 1984), *appeal after remand*, 522 So. 2d 802 (Fla.), *cert. denied*, 438 U.S. 871 (1988); *Mazzara v. State*, 437 So. 2d 716 (Fla. 1st DCA 1983), *rev. denied*, 444 So. 2d 417 (Fla. 1984); *Smith v. State*, 547 So. 2d 281, 282 (Fla. 5th DCA 1989).

36. *Erp v. Carroll*, 438 So. 2d 31, 37 (Fla. 5th DCA 1983).

37. *Shere*, 579 So. 2d at 94; *Austin v. State*, 461 So. 2d 1380, 1383 (Fla. 1st DCA 1984).

38. *Parnell v. State*, 500 So. 2d 558, 561 (Fla. 4th DCA 1986), *rev. denied*, 509 So. 2d 1119 (Fla. 1987).

39. FLA. CONST. art. V, § 2(a); *see Benyard v. Wainwright*, 322 So. 2d 473 (Fla. 1975) (explaining the difference between procedural and substantive matters).

examination.⁴⁰ The provision in its introductory phrase, “[e]xcept as provided by rule of court,” recognized rule 1.450(a), which permitted a party’s use of leading questions during the direct examination of a hostile or unwilling witness or an adverse party.⁴¹

The remainder of subsection 90.612(3) provided the general rule concerning the use of leading questions:

[Except] when the interests of justice otherwise require:

(a) A party may not ask a witness a leading question on direct or redirect examination.

(b) A party may ask a witness a leading question on cross-examination or re-cross-examination.⁴²

The phrase “when the interests of justice otherwise require” recognized that the trial court possesses the discretion to permit leading questions as an exception to the provision’s general principles.⁴³ For example, when the question is preliminary,⁴⁴ a child is a witness or the witness is ignorant,⁴⁵ or when the witness’s memory is exhausted⁴⁶ are all situations in which courts have suggested that leading questions are necessary and appropriate for a party to develop the testimony of a witness on direct examination.⁴⁷

In addition, the last sentence of section 90.608(2), which permitted a party to impeach its own witness when the witness was adverse, provided that a party could use leading questions while impeaching such an adverse witness.⁴⁸ However, the subsection did not provide for the general use of leading questions throughout the direct examination of an adverse witness.

Thus, the policy decisions of the drafters and the Legislature in adopting the Evidence Code compounded the confusion concerning

40. FLA. STAT. § 90.612(3) (1976 supp.) (amended 1995).

41. *Id.*

42. *Id.*

43. CHARLES W. EHRHARDT, FLORIDA EVIDENCE § 612.1 (1995).

44. *Shultz v. Rice*, 809 F.2d 643, 655 (10th Cir. 1986) (finding the physician-witness’s billing procedures and the date he sent his records to another doctor to be preliminary matters).

45. *Rotolo v. United States*, 404 F.2d 316, 317 (5th Cir. 1968); *Begley v. State*, 483 So. 2d 70, 72 (Fla. 4th DCA 1986) (leading questions appropriate where witness is too young and frightened to understand questions).

46. *Roberson v. United States*, 249 F.2d 737, 742 (5th Cir. 1957), *cert. denied*, 356 U.S. 919 (1958).

47. See EHRHARDT, *supra* note 43, § 612.1; see generally 3 WIGMORE 1970, *supra* note 13, § 776; WEINSTEIN, *supra* note 13, § 612; MCCORMICK ON EVIDENCE § 6 (John W. Strong ed., 4th ed. 1992).

48. 1978, Fla. Laws ch. 78-361, § 14, 998-99 (codified as amended at FLA. STAT. § 90.608(2) (1995)).

the significance of whether a witness was a hostile witness, an adverse party, or an adverse witness.

C. 1990 Amendment to Section 90.608

In 1990, the Florida Legislature amended section 90.608(1) and adopted Federal Rule of Evidence 607, which permits any party, including the party calling the witness, to impeach the credibility of a witness.⁴⁹ At the same time, the Legislature removed section 90.608(2), which permitted the calling party to impeach an "adverse witness" with a prior inconsistent statement.⁵⁰ Thus, the party calling a witness can impeach the credibility of the witness without regard to whether the witness is an "adverse witness."⁵¹

D. Evidence Code Amendments Make Rule Unnecessary

The Legislature has amended section 90.608 to permit the general impeachment of a party's own witness.⁵² However, the Florida Supreme Court did not change the portion of Rule of Civil Procedure 1.450(a) that permitted a party to call the adverse party as a witness and impeach the witness. Section 90.608 now broadly permits that which rule 1.450(a) permitted only as a narrow exception. Therefore, portions of the rule permitting impeachment of an adverse party are now redundant and unnecessary.

To avoid confusion, the Florida Bar's Code and Rules of Evidence Committee voted unanimously to propose to legislators an amendment to section 90.612(3) adopting the language of Federal Rule of Evidence 611(c), and to recommend to the Bar's Civil Procedure Rules Committee that rule 1.450(a) be deleted from the *Florida Rules of Civil Procedure*.⁵³ Although some members of the Civil Procedure Rules Committee favored removing 1.450(a), the consensus of that

49. 1990, Fla. Laws ch. 90-174, § 1, 743 (codified as amended at FLA. STAT. § 90.608(1) (1995)).

50. *Id.*

51. EHRHARDT, *supra* note 43, § 608.2.

52. 1990, Fla. Laws ch. 90-174, § 1, 742-43 (codified as amended at FLA. STAT. § 90.608 (1995)).

53. Minutes from The Florida Bar Code and Rules of Evidence Committee Meeting 1 (June 24, 1994) (on file with author); letter from Keith H. Park, member of the Florida Bar Code and Rules of Evidence Committee and committee liaison to the Civil Procedure Rules Committee, to Charles W. Ehrhardt, reporter and drafter of the *Florida Evidence Code* (June 6, 1995) (on file with author) [hereinafter Park Letter].

The suggestion to adopt Federal Rule 611(c) in Florida was first made in *Erp v. Carroll*, 438 So. 2d 31, 36 (Fla. 5th DCA 1983).

committee was to make no recommendation on the rule until after the amendment of section 90.612(3).⁵⁴ The Civil Procedure Rules Committee indicated that, after amendment of the statute containing the Evidence Code, it would consider recommending to the Florida Supreme Court the removal of rule 1.450(a).⁵⁵

Thereupon the Code and Rules of Evidence Committee recommended the following amendment, which was passed by the 1995 Florida Legislature:

(3) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness'[s] 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.⁵⁶

Because of the committee's concern that adopting the amendment might indicate an intention to alter the law as stated in section 90.612(3), the committee drafted and approved the following committee note and forwarded it to the Board of Governors of The Florida Bar and to the Florida Legislature:

Commentary on the 1995 Amendment

Subsection (3). This subsection was amended by adopting the language in Federal Rule of Evidence 611(c). The purpose of this amendment is to clarify the rule pertaining to leading questions by specifically authorizing leading questions when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party. There is no intent to negate the effect of the prior rule that prohibited leading questions on direct or redirect examination and permitted leading questions on cross-examination and recross-examination 'except as provided by rule of court or when the interests of justice otherwise require.'⁵⁷

Both the accompanying Committee Note and the Code and Rules of Evidence Committee Report indicate the committee's intent to clarify,

54. See Park Letter, *supra* note 53.

55. Minutes from the Florida Bar Code and Rules of Evidence Committee Meeting 2 (Jan. 13, 1995) (on file with author); John A. Frusciante, *1995 Report of the Code and Rules of Evidence Committee*, FLA. B.J., June 1995, at 57, 60.

56. 1995, Fla. Laws, ch. 95-179, § 1, 1647 (codified as amended at § 90.612(3) (1995)).

57. Minutes from the Florida Bar Code and Rules of Evidence Committee Meeting 1 (Sept. 9, 1994) (on file with author).

but not change, Florida law relating to a party's use of leading questions.⁵⁸ An analysis of the amended statute and Florida law relating to statutory construction bears out that intent.

1. *Federal Rule 611(c): Leading Questions on Direct Examination*

Amended section 90.612(3) adopts the language of Federal Rule of Evidence 611(c). Determining the significance of amended section 90.612(3) requires examination of judicial decisions interpreting the federal rule upon which the Florida statute is based. Florida courts will construe these federal decisions as providing "persuasive guidelines" for the interpretation of this amendment to the Evidence Code.⁵⁹

The first sentence of Federal Rule of Evidence 611(c) codifies the well-established general rule that a party should not use leading questions on direct examination.⁶⁰ The words "should not" are words of suggestion, not command;⁶¹ application of the prohibition is within the court's discretion.⁶² Hence, despite the rule's implicit admonishment against a party's use of leading questions on direct examination, the rule nonetheless maintains the trial court's discretion to permit them.⁶³

Subsumed in the rule and stated in decisional law is the premise that courts determine, on a case-by-case basis, whether parties may ask leading questions during direct examination. Adopting the wisdom of

58. Frusciante, *supra* note 55, at 57-60.

59. Dinter v. Brewer, 420 So. 2d 932, 934 (Fla. 3d DCA 1982); see Hall v. Oakley, 409 So. 2d 93, 97 (Fla. 1st DCA), *rev. denied*, 419 So. 2d 1200 (Fla. 1982); Rivers v. State, 423 So. 2d 444 (Fla. 4th DCA 1982), *op. quashed on other grounds*, 456 So. 2d 462 (Fla. 1984).

60. Federal Rule of Evidence 611(c) provides in relevant part: "Leading questions should not be used on direct examination of a witness except as may be necessary to develop the witness' [s] testimony." FED. R. EVID. 611(c).

61. United States v. De Fiore, 720 F.2d 757, 764 (2d Cir. 1983), *cert. denied*, 466 U.S. 906, and *cert. denied*, 467 U.S. 1241 (1984).

62. Ellis v. Chicago, 667 F.2d 606, 613 (7th Cir. 1981) (leading case construing rule 611(c)); Rodriguez v. Banco Cent. Corp., 990 F.2d 7, 12 (1st Cir. 1993) (trial judge's decisions concerning use of leading questions and similar matters of trial management are given the widest possible latitude).

63. See, e.g., Ellis, 667 F.2d at 613; United States v. Hewes, 729 F.2d 1302, 1325 (11th Cir.) (use of leading questions is well within the court's discretion afforded by rule 611(c)), *cert. denied*, 469 U.S. 1110 (1985); Caldwell v. United States, 469 U.S. 1110 (1985) (same); United States v. Auten, 570 F.2d 1284, 1286 (5th Cir.) (same), *cert. denied*, 439 U.S. 899 (1978); United States v. Brown, 603 F.2d 1022, 1025 (1st Cir. 1979) (same); United States v. Shoupe, 548 F.2d 636, 641 (6th Cir. 1977) (same); St. Clair v. United States, 154 U.S. 134, 150 (1894) (holding that, in deciding whether leading questions may be used on direct examination, "much must be 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").

courts before it, the United States Supreme Court recognized that "in each particular case there must be some discretion in the presiding judge as to the mode in which the examination shall be conducted in order best to answer the purposes of justice."⁶⁴ Moreover, the trial court may, on its own initiative, instruct counsel to ask leading questions on direct examination.⁶⁵

The language of rule 611 recognizes that a party may use leading questions on direct examination where they are "necessary to develop the witness'[s] testimony."⁶⁶ Generally, the necessity exception has been applied where the witness is very young, timid, ignorant, unresponsive, or infirm.⁶⁷ In *United States v. Nabors*,⁶⁸ a twelve-year-old boy with key testimony connecting the defendants to a bank robbery was hesitant to repeat a "naughty" word in a statement implicating the defendant declarant.⁶⁹ Noting the long-recognized exception permitting a party to use leading questions to develop the testimony of a child witness, the Eighth Circuit held that the district court's decision to allow the questioning deserved deference because the "court was in the best position to evaluate the emotional condition of the child witness and his hesitancy to testify."⁷⁰ Other circumstances that may require a party to use leading questions to develop witness testimony

64. *St. Clair*, 154 U.S. at 150.

65. *See, e.g., Brown*, 603 F.2d at 1026 (finding no abuse of discretion in the trial court's instruction to prosecutor to use leading questions on direct examination after the witness's alcohol- and drug-induced memory lapses demonstrated his failure to understand his own prior oral and written statements, as well as the questions asked).

For the standard of review in rule 611(c) decisions, *see Rodriguez*, 990 F.2d at 13; *see also WEINSTEIN*, *supra* note 13, § 611[05]; *Haney v. Mizell Memorial Hosp.*, 744 F.2d 1467, 1478 (11th Cir. 1984) (requiring a clear showing of prejudice to the complaining party); *Ellis*, 667 F.2d at 613; *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 514 (9th Cir. 1989) (holding that the reversal of a decision on 611(c) will result only if the court's action amounts to the denial of a fair trial), *cert. denied*, 494 U.S. 1056 (1990); *Shoupe*, 548 F.2d at 641 (finding that abuse of discretion under rule 611(c) will not be found absent a showing of prejudice or clear injustice to defendant). *But cf. De Fiore*, 720 F.2d at 764 (stating that the words "leading questions should not be used" are words of suggestion, not command); *Miller*, 885 F.2d at 514 (refusing to reverse the lower court's decision based on a violation of 611(c) where the testimony that was wrongfully elicited did not substantially expand or alter earlier testimony); *Brown*, 603 F.2d at 1026 ("Reversals on the basis of non-compliance with rule 611(c) will be exceedingly rare."); FED. R. EVID. 611(c) advisory committee's note ("An almost total unwillingness to reverse for infractions has been manifested by appellate courts.").

66. FED. R. EVID. 611(c).

67. *Miller*, 885 F.2d at 514 (citing 3 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 339, at 462-63 (1979)); *see, e.g., United States v. Littlewind*, 551 F.2d 244, 245 (8th Cir. 1977) (involving two young girls, alleged rape victims, who each responded hesitantly to questions; one of the girls was understandably reticent).

68. 762 F.2d 642, 651 (8th Cir. 1985).

69. *Id.*

70. *Id.*

include, for example, when a witness is an adult with communication problems,⁷¹ when the witness's memory is exhausted,⁷² or when the witness is testifying to undisputed preliminary matters.⁷³

2. *Federal Rule 611(c): Leading Questions on Cross-Examination*

The second sentence of Federal Rule of Evidence 611(c) provides that "[o]rdinarily leading questions should be permitted on cross-examination."⁷⁴ Although tradition has long supported a party's use of leading questions on cross-examination as a matter of right,⁷⁵ that right is not absolute. The operative word "ordinarily" furnishes a basis for a court to deny a party's use of leading questions when the cross-examination is in form only.⁷⁶ If the witness is actually friendly to counsel, there is no need for a party to ask suggestive questions during such a cross-examination. Consequently, the trial court has the discretion to limit counsel's use of leading questions during cross-examination.⁷⁷

3. *Federal Rule 611(c): Witnesses Subject to Leading Questions*

The final sentence of rule 611(c) deals with categories of witnesses who can be automatically subject to leading questions during direct

71. *United States v. Grey Bear*, 883 F.2d 1382, 1393 (8th Cir. 1989) (leading questions necessary to develop, in murder trial, testimony of female witness who was unusually softspoken and frightened), *cert. denied*, 493 U.S. 1047 (1990); FED. R. EVID. 611(c) advisory committee's note.

72. FED. R. EVID. 611(c) advisory committee's note.

73. *Stine v. Marathon Oil Co.*, 976 F.2d 254, 266 (5th Cir. 1992) (leading questions allowed to speed examination of witnesses); *Shultz v. Rice*, 809 F.2d 643, 655 (10th Cir. 1986) (leading questions allowed to develop testimony and expedite entry into evidence of time-consuming foundational information); FED. R. EVID. 611(c) advisory committee's note.

74. FED. R. EVID. 611(c).

75. *Id.* advisory committee's note.

76. *Oberlin v. Marline Am. Corp.*, 596 F.2d 1322, 1328 (7th Cir. 1979); *Shultz v. Rice*, 809 F.2d 643, 654 (10th Cir. 1986) (holding that mere calling of witness to stand does not "automatically open the door" to use of leading questions on cross-examination when witness is friendly with counsel, and leading questions should not have been allowed as a matter of right); *see also Ardoin v. J. Ray McDermott & Co.*, 684 F.2d 335, 336 (5th Cir. 1982) (holding that district court has power to require party cross-examining friendly witness to use nonleading questions; rule 611(c) not intended to be blanket endorsement of leading questions on cross-examination); *Alpha Display Paging, Inc. v. Motorola Communications & Elecs., Inc.*, 867 F.2d 1168, 1171 (8th Cir. 1989) (explicitly acknowledging that roles of parties are reversed when witness identified with an adverse party is called, hence making leading questions inappropriate on cross-examination).

77. *Morvant v. Construction Aggregates Corp.*, 570 F.2d 626, 635 n.12 (6th Cir.) (explaining court's finding of no abuse of discretion in permitting use of leading questions in cross-examination of defense's own employee), *cert. dismissed*, 439 U.S. 801 (1978).

examination.⁷⁸ When a party examines a witness who is hostile, that party may ask leading questions because they are necessary to control the witness.⁷⁹ A court will not presume that the witness is hostile but will determine whether a witness is hostile at the time of the testimony.⁸⁰ A party is not entitled to examine a witness as hostile simply because the examiner expects the witness to give testimony favorable to the opposing party.⁸¹ If the witness becomes hostile during testimony, a court may permit leading questions.⁸²

Courts automatically consider some witnesses hostile and, therefore, permit a party to ask leading questions during direct examination without a showing that the form of the question is necessary to develop the testimony of the witness.⁸³ A party may examine an adverse party with leading questions because, however cooperative, the adverse party has a built-in incentive to provide self-serving testimony by sliding away from the question or slanting the answer.⁸⁴ Rule 611(c) also provides that a party may ask leading questions during the direct examination of a "witness identified with an adverse party."⁸⁵ Where the witness is a present or former employee of the party, a co-worker of the party, a relative of the party, or has a romantic interest with a party, sufficient commonality may exist to allow a court to decide that

78. Rule 611(c) of the *Federal Rules of Evidence* provides in relevant part: "When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. FED. R. EVID. 611(c); see also *Rodriguez v. Banco Cent. Corp.*, 990 F.2d 7, 13 (1st Cir. 1993) (dicta).

79. *Rodriguez v. Banco Cent. Corp.*, 990 F.2d 7, 13 (1st Cir. 1993); Michael H. Graham, *Examination of a Party's Own Witness Under the Federal Rules of Evidence: A Promise Unfulfilled*, 54 TEX. L. REV. 917, 962 (1976).

Rule 611(c) does not give a party the "unfettered right" to call an adverse party and conduct a broad, lengthy examination. The trial court retains the power to limit the mode and order of questioning to make the presentation of evidence more effective and to avoid the needless consumption of time. See *Elgabri v. Luckas*, 964 F.2d 1255, 1260 (1st Cir. 1992); *Rodriguez*, 990 F.2d at 13.

80. MICHAEL H. GRAHAM, HANDBOOK ON FEDERAL EVIDENCE § 611.8 (3rd ed. 1991); *Suarez Matos v. Ashford Presbyterian Community Hosp., Inc.*, 4 F.3d 47, 50 (1st Cir. 1993) (distinguishing two categories of witnesses under application of rule 611(c): "hostile in fact" and "hostile in law"); *United States v. Bryant*, 461 F.2d 912, 916 (6th Cir. 1972).

81. *Suarez Matos*, 4 F.3d at 50 (holding that trial court erred in automatically allowing expert to be treated as hostile, but refusing to find plain error affecting substantial rights where defendants did not object to cross-examination).

82. *Id.*; see *United States v. Brown*, 603 F.2d 1022, 1026 (1st Cir. 1979) (explaining that court declared witness hostile, not because witness was contemptuous or surly, but because he was evasive to government).

83. These witnesses are sometimes called "hostile in law." See Graham, *supra* note 79, at 964.

84. *Rodriguez v. Banco Cent. Corp.*, 990 F.2d 7, 13 (1st Cir. 1993).

85. FED. R. EVID. 611(c).

the witness identifies with the adverse party and therefore is automatically subject to examination by leading questions.⁸⁶

IV. CONCLUSION

As Florida law recognizes, Federal Rule of Evidence 611(c) permits a party to use leading questions during direct examination when necessary, that is, when a question is preliminary, when the witness is a child, or when the witness's memory is exhausted.⁸⁷ The 1995 amendment to Florida's section 90.612 restates and clarifies the circumstances where a party may use leading questions. Section 90.612(3) now clearly identifies the witnesses a court will automatically consider hostile, and, therefore, subject to leading questions. A court should consider a witness to be hostile if he or she is an officer, director or managing agent of a corporation, partnership, or association that is an adverse party. That category of witness is included within the phrase "witness identified with an adverse party" in the amended section 90.612(3).⁸⁸ The phrase also removes uncertainty as to whether a witness must be a named party in the action to be deemed an adverse party. In adopting the phrase "witness identified with an adverse party," the amendment recognizes that allowing leading questions on direct examination of these witnesses is desirable because of the underlying relationship between the witness and the adverse party.⁸⁹

The legislative adoption of Federal Rule 611(c) completed Florida's statutory codification of provisions of the *Federal Rules of Evidence* dealing with impeachment of a party's own witness and the use of leading questions. These actions eliminate confusion and bring Florida in line with the modern view of the majority of states.

However, the application of rule 1.450(a) remains confusing because the rule does not reflect recent legislative action permitting impeachment of a party's own witness. In fact, the rule is no longer necessary, and the Florida Supreme Court should delete it. The only matter remaining in rule 1.450(a) that is not covered more broadly in

86. *Haney v. Mizell Memorial Hosp.*, 744 F.2d 1467, 1477-78 (11th Cir. 1984); *Perkins v. Volkswagen of Am., Inc.*, 596 F.2d 681, 682 (5th Cir. 1979) (stating that employee of a party is clearly identified with the party); *Stahl v. Sun Microsystems, Inc.*, 775 F. Supp. 1397, 1398 (D. Colo. 1991) (allowing plaintiff to ask leading questions of defendant's former administrative secretary); *Ellis v. Chicago*, 667 F.2d 606, 613 (7th Cir. 1981) (allowing plaintiff to lead police officers who worked closely with defendant police officer); *United States v. Hicks*, 748 F.2d 854, 859 (4th Cir. 1984) (allowing plaintiff to lead defendant's girlfriend); *Brown*, 603 F.2d at 1026 (allowing prosecutor to lead witness who was close friend of defendant and a participant in crime).

87. See *supra* notes 67-73 and accompanying text.

88. FLA. STAT. § 90.612(3) (1995).

89. See *supra* note 86 and accompanying text.

the Evidence Code is the use of leading questions during direct examination, a matter more properly addressed within the Evidence Code than in the Rules of Civil Procedure. Legislators did address the matter of leading questions on direct examination by adopting, in the 1995 amendment to section 90.612(3), language that restates circumstances where leading questions are appropriate.

If the Florida Supreme Court chooses to amend rule 1.450(a) by using different language to describe circumstances where leading questions are permitted during direct examination, the difference in wording will only create further confusion. The Civil Procedure Rules Committee of The Florida Bar has continued the clarification effort by voting to recommend the deletion of rule 1.450(a).⁹⁰ The Florida Supreme Court's adoption of this recommendation will eliminate confusion and clarify Florida law.

90. Civil Procedure Rules Committee, The Florida Bar, meeting in Orlando, Fla. (Jan. 12, 1996) (minutes on file with the author).

