

## IN PRACTICE

# Where You Can Use Leading Questions

The potential risks of calling an adverse party witness to testify at trial are often a cause for concern to trial counsel.<sup>1</sup> The new New Jersey Rules of Evidence undoubtedly will alleviate these concerns.

*The author is an associate in the litigation department of Cooper, Rose & English in Summit. He wishes to thank name partner Frederick Rose for his guidance on the article. Rose and the author recently represented the defendant in Kane Carpet Co. v. McDonnell Douglas Corp., Docket No. W-25260-89 (Law Div. Hudson County). At trial, the defendant prevailed on a motion to use leading questions on the defendant's direct examination of the plaintiff's president and chief operating officer. For reasons unrelated to the issues discussed in this article, the testimony of the witness eventually led to a mistrial. See 136 N.J.L.J. 1416 (1994).*

The focus of this article will be the relevant law regarding the form of direct examination, as well as cross-examination, to elicit testimony in a manner most favorable to the party calling the adverse party witness. That is, using leading questions on direct examination and precluding the use of such questions on cross-examination.

### Leading Questions on Direct

New Jersey statutory law provides that "[e]xcept as otherwise provided by law, when a party is called as a witness by the adverse party he shall be subject to the same rules as to examination and cross-examination as other witnesses." N.J.S.A. 2A:81-11.

A reading of the statute alone leaves one with the mistaken impression that an adverse party called as a witness may not be examined by leading questions on direct examination. But as discussed below, it is clear that leading questions may now be used on the direct examination of

an adverse party or a witness identified with such a party.

In the past, the court has allowed "broad latitude" on the direct examination of adverse parties and witnesses identified with such parties. For example, in *State v. Rajnai*, 132 N.J. Super. 530, 541 (App. Div. 1975)(citation omitted), the Appellate Division stated that "broad latitude may be allowed in examining a hostile witness, especially a party called by his adversary in a civil action."

## EVIDENCE LAW

By Gianfranco A. Pietrlesca

A year later, in *Application of Howard Savings Bank*, 143 N.J. Super. 1, 7 (App. Div. 1976), the Appellate Division, citing the *Rajnai* decision, stated that "[i]t is now recognized that broad latitude may be allowed in examining a hostile witness."

In 1990, in *Lerman v. Lerman*, 245 N.J. Super. 312 (Ch.Div. 1990), the court noted that this "broad latitude" brought New Jersey closer to the Federal Rules of Evidence. The court stated:

The Federal Rules of Evidence state that 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). This rule is an exception to the traditional proposition that leading questions are improper. The rule also deals with categories of witnesses to be automatically regarded and treated as hostile. See Fed. R. Evid. 611(c) Advisory Committee's Note. ... However, New Jersey has not adopted this federal rule as its own. New Jersey law states that "[e]xcept as otherwise provided by law, when a party is called as a witness by the adverse party he shall be subject to the same rules as to examination and cross-examination as other witnesses." N.J.S.A. 2A:81-11. Thus, based only on a reading of the statute, an adverse party called as a witness by the other side cannot be asked leading questions. Yet case law has recently given broader discretion to the court and has brought New Jersey closer to the more liberal federal rules.

*Id.* at 316 (citing *Howard Savings Bank and Rajnai*).<sup>2</sup>

In 1991, New Jersey adopted new Rules of Evidence. N.J.R.E. 611(c), which follows Fed. R. Evid. 611(c) almost verbatim, provides:

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 an adverse party or a witness identi-

fied with an adverse party, or when a witness demonstrates hostility or unresponsiveness, interrogation may be by leading questions, subject to the discretion of the court.

N.J.R.E. 611(c)(emphasis added). With the adoption of N.J.R.E. 611(c), an adverse party or a witness identified with such a party may be examined by leading questions on direct examination, subject only to the court's discretion.

In his comment to N.J.R.E. 611(c), Richard Biunno notes that prior to the rule's enactment, "the 'broad latitude' which is allowed in examining an adverse party presumably included the right to use leading questions, ... but the rules contained no explicit authorization for such a practice." Biunno, "New Jersey Rules of Evidence" (Gann 1993-1994), Comment to N.J.R.E. 611 at 607.

Biunno contends, however, that a party is required to demonstrate that the adverse party witness refuses to answer questions responsibly before using leading questions; in other words, the witness must exhibit "hostility" to the examining attorney. Biunno states:

Accordingly, if an adverse party refuses to answer questions responsibly, the examining attorney may properly seek permission from the court to suggest the answers he is looking for. Absent such behavior by the witness, however, there is no greater latitude to use leading questions on direct examination when an adverse party is called to testify than there is generally.

Biunno, New Jersey Rules of Evidence (Gann 1993-1994), Comment to N.J.R.E. 611 at 608.

The author respectfully disagrees with Biunno's position and contends that N.J.R.E. 611(c) provides an exception to N.J.S.A. 2A:81-11. N.J.R.E. 611(c) falls under the "[e]xcept as otherwise provided by law" language in the statute. The author notes that the rule's explicit language provides two grounds for the use of leading questions on direct examination: "[w]hen a party calls an adverse party ... or when a witness demonstrates hostility or unresponsiveness ... ." N.J.R.E. 611(c).

Accordingly, New Jersey law allows the use of leading questions on the direct examination of adverse parties or witnesses identified with such parties without a prior showing of hostility. (The author concedes that the court, in its discretion, may require such a showing of hostility; such a showing, however, is not required by the rule's language.)

Support for the use of leading questions on the direct examination of

CONTINUED ON Page 29

NEXT WEEK...

LITIGATION

## IN PRACTICE

# Direct Leading Questions

CONTINUED FROM Page 10

adverse party witnesses is found in the text of two leading commentators on the Federal Rules of Evidence:

[T]he risks of suggestion [by the use of leading questions] are thought to be slight where the witness seems to have an interest in promoting a version of facts contrary to that suggested. As a consequence, ... Rule 611(c) permits leading questions on direct examination when the witness is adverse or hostile to the direct examiner.

28 Wright and Gold, "Federal Practice and Procedure," § 6168 at 417.

Further, "[p]ermitting leading questions to be posed to [an adverse party or a witness identified with an adverse party] makes sense since their predisposition means there is little risk they will be subject to the power of suggestion." *Id.* at 421.

*Under New Jersey law, an adverse party or a witness identified with such a party may be examined by leading questions on direct examination, subject only to the court's discretion, because 'their predisposition means there is little risk they will be subject to the power of suggestion.'*

Therefore, under New Jersey law, an adverse party or a witness identified with such a party may be examined by leading questions on direct examination, subject only to the court's discretion.

### Leading Questions on 'Cross'

In *Greenberg v. Stanley*, 30 N.J. 485, 493-94 (1959), the state Supreme Court, citing to N.J.S.A. 2A:81-11, stated that a defendant called as a witness by a plaintiff may be cross-examined by the defendant's own counsel as well as counsel for co-defendants.

Due to the Court's citation to the statute, the case has been interpreted (in the author's opinion much too broadly) as precluding leading questions on the direct examination of adverse party witnesses and allowing leading questions on the cross-examination of such witnesses. (See,

for example, the article cited in note 2.)

Nevertheless, as discussed above, N.J.R.E. 611(c) allows leading questions on the direct examination of adverse party witnesses subject only to the court's discretion. Further, as discussed below, N.J.R.E. 611(c) provides a basis to preclude leading questions on the "cross-examination" of an adverse party witness by his or her own counsel.

N.J.R.E. 611(c) provides that "[o]rordinarily, leading questions should be permitted on cross-examination." As noted, N.J.R.E. 611 follows Fed. R. Evid. 611 almost verbatim. See 1991 Supreme Court Committee Comment, reprinted in Biunno, "New Jersey Rules of Evidence" (Gann 1993-1994), at 606.

The Advisory Committee's Notes on Fed. R. Evid. 611(c) provide:

The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent. ...

Advisory Committee's Notes on Fed. R. Evid. 611(c), reprinted in *Federal Civil Judicial Procedure and Rules* at 353 (West 1994).

Two leading commentators on the Federal Rules of Evidence have noted that "the courts have held that leading questions may be precluded where the cross-examiner is confronted by a witness who is friendly or who otherwise might be susceptible to suggestion." 28 Wright and Gold, "Federal Practice and Procedure," § 6168 at 428 (and cases cited therein).

Therefore, one can argue that leading questions should be precluded on the "cross-examination" of an adverse party or a witness identified with such a party because the cross-examination is a cross-examination in form but not in substance.

N.J.R.E. 611(c) provides an exception to N.J.S.A. 2A:81-11. Subject to the court's discretion, the rule allows the use of leading questions on the direct examination of an adverse party witness without a prior showing of hostility to the examining attorney. Further, the rule provides a basis to preclude the use of leading questions on the "cross-examination" of such a witness.

### Endnotes

1 See Thomas Lenahan Jr., "Consequences of Calling an Adverse Party as a Witness," *New Jersey Lawyer*, at 13 (Winter 1986) and Bruce Stern, "The Adverse Party as Your Witness," *New Jersey Trial Lawyer*, at 70 (August 1988).

2 In *Lerman*, the court noted that "[g]enerally, a witness may not ordinarily be labeled as 'hostile' merely because he is adverse when he has not been uncooperative nor testified in an unexpected manner." 245 N.J. Super. at 318 (citing *State v. Dover*, 229 N.J. Super. 531, 537 (App. Div. 1989)). Notwithstanding the foregoing, the court held that an adverse party witness in a divorce action may be declared "hostile *per se*" and that a court "may grant the other party the 'broad latitude' to examine the witness."