MASSACHUSETTS LAWYERS WEEKLY

Direct examination B: to lead or not to lead

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Federal Rule of Evidence 611(c) provides that leading questions "should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony."

Too many lawyers consider that rule as a mere technicality — or as a rule to violate as often as you can get away with it. And when a lawyer leads, often the opposing counsel doesn't object.

Don't fall into the trap. Learn how to do it right, and maintain the discipline necessary to keep doing it that way.

For those of you who need a refresher, a leading question is one that suggests the answer. Sometimes, leading questions are proper on direct — such as when dealing with an adverse witness or laying an evidentiary foundation. Normally, they're not.

The easiest way to avoid leading is to begin your questions with the letter "w." In the words of Rudyard Kipling:

I keep six honest serving-men

(They taught me all I knew);

Their names are What and Why and When

And How and Where and Who.

Nearly all of your questions on direct should be short and simple "w" questions. ("How" is an honorary "w" word for these purposes.) Use them unless there is a compelling reason to do otherwise.

Who was at the meeting?

When did it happen?

Where was it held?

Why did you attend?

Those kinds of questions aren't less sophisticated or less "lawyerly." They're usually superior in every way.

Even if you can get away with it, there are lots of reasons not to lead on direct. One is that it changes the nature of the presentation, and generally not for the better.

The witness, not you, is supposed to be telling the story. Leading questions focus the attention on the lawyer and away from the witness. With rare exceptions, the person on the stand is the more effective and believable witness, not the lawyer. When a witness responds with "yes" or "no" answers, the narrative that lends the testimony force (and gives it credibility) begins to recede or even disappear entirely.

Leading on direct also tends to rush the presentation. Leading questions are like shorthand: Pretty soon, you and the witness are racing through the story together. It may not move so fast that the jury is lost, but the story may lose much of its impact. At a minimum, the testimony is likely to feel clipped or rushed.

Excessive leading is also lazy and undisciplined. It's easy to acquire bad habits, and hard to get rid of them. Stay in the habit of asking proper questions.

Finally, it violates the rules. Most judges dislike it, and some hate it. If you lead, the judge has to work harder. He or she has to listen more carefully to your questions and consider whether intervention is required. Worse, the judge

may have the impression that you are either (a) the kind of lawyer who doesn't know how to ask a proper question, or (b) the kind of lawyer who cuts corners.

And don't just sit there when your opponent leads. If you need a shorthand way to remember when to object, listen for "tag phrases" and words that begin with "D" or "C."

- "Tag phrases" are what lawyers put at the beginning or end of leading questions on cross-examination, such as: "Isn't it true …" or "Wouldn't you agree …" and the like. If the question has a tag phrase, it's leading.
- "D" or "C" words are not as easy to spot, but usually signal a leading question. If a question begins with a word such as "did," "do," "can" or "could," there's a pretty strong likelihood that what follows suggests the answer. If you are opposing counsel and hear one of these words, perk up. The question may not be leading, or it may not really matter, but be ready to object.

Leading on direct is, unfortunately, pandemic. Again, some lawyers seem to think that the object of the game is to get away with as much leading as they can.

You may get away with it, but it won't make your case any stronger, and it won't endear you to the judge.

Previous installments of Tried & True can be found at masslawyersweekly.com. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.