THE FLORIDA BAR TRIAL LAWYERS SECTION

The Advocate

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MESSAGE FROM THE CHAIR:

Teachers Law School - A Home Run!!

Ted Eastmoore

At some point in their career, most Florida lawyers have asked the question: "What is the organized bar doing for the public image of lawyers?" I know I have had that thought many times over my 30-plus years in the profession. Year after year, the public seems to place lawyers in the same class as used car salesmen. And all of us hear the obligatory lawyer joke at parties and in the movies. We all wish that the public would view lawyering as the noble profession we learned about in law school, the profession which most of us attempt to practice every day. Sadly, the average citizen might like us individually, but they do not like us as a group. The Trial Lawyers Section may have discovered one solution to this problem--The Teachers Law School.

The Second Annual Teacher's Law School was held January 17-18, 2014 at the Tampa Waterside Marriott. The Section invited approximately 80 middle and high school civics teachers from a four-county area to an intense 2-day session focusing on the judicial branch of our state and federal systems. The School focused on the importance of judicial independence to our free and democratic society. The session kicked off with United States District Judge Mary S. Scriven speaking on the court system and included other presentations by Justice Fred Lewis and Florida Bar President Eugene Pettis. The program concluded with the teachers attending the final round of the Chester Bedell Mock Trial competition in the ceremonial courtroom in the Sam Gibbons Federal Courthouse.

Of course the purpose of the Law School was not to promote the public image of lawyers. Rather, it was to stress the importance of Judicial Independence and the Courts. But, the significant side benefit was just that, the teachers walked away with a better view of lawyers, a much better view. We received positive comment after positive comment. The teachers were impressed, even overwhelmed, with the quality and enthusiasm of the speakers and the breadth of the topics and materials- materials which are readably usable in the classroom. But what they liked most of all was the fact that they, the teachers, were treated as professionals by all of us.

These 80 teachers interact with thousands and thousands of students each year. They will impart a new respect for the judicial system, and yes too for the lawyers which make it work. I can honestly say that in my 30 years of bar work, the Teachers Law School is the most significant project in which I have been involved.

The Teachers Law School is a Home Run, a Home Run for the teachers, a Home Run for their students, and a Home Run for lawyers and our public image!

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Spotting a Leading Question: Not Always as Easy as It Seems

By Julia Sturgill and Professor Michael J. Dale*

Every lawyer can define a leading question. A leading question is a question that "suggests" the answer. As basic a text as the *American Jurisprudence for Evidence* defines leading questions as "those which suggest to the witness the answer desired." 81 Am. Jur. 2d Witnesses 716. The Florida Jurisprudence for Evidence, for example, has a similar definition, describing a leading question as "one that suggests or puts the desired answer into the mouth of the witness, or one that assumes the existence of material facts that have not been proved." 24 Fla. Jur. 2d Evidence and Witnesses 862.

I. Understanding What "Suggests" Means

There are at least two reasons why determining whether a question is leading is not as easy as it seems. The first reason involves the use of the word "suggests." A question may be leading because the suggestion is based not just upon the words in the question, but also or even only upon the questioner's demeanor, including facial expression, gestures, and tone of voice. The second reason involves the discretionary decision-making authority of the judge—meaning that a question is leading if the judge says it is. The judge's decision may be based not only upon the words used but upon the questioner's demeanor, which, of course cannot be detected from reading a transcript on appeal. How much of a hint is enough to "suggest" the answer is "surely" to some degree subjective.

The courts have almost primarily defined leading questions based upon the words used in the question as where the questioner, in effect, "puts words in the witness's mouth so the testimony is really that of the questioner, and not the witness." *State v. Ward*, 347 P.2d 865, 867 (Utah 1959). The court in *Ward* recognized that "this usually occurs in so framing a question that it assumes a fact to be true, or in reciting a fact and merely seeking affirmation from the witness, or in so phrasing the question as to suggest the desired answer." *Id.* Thus, if the question describes a fact and asks whether the fact occurred, the question is to be considered leading because the natural inference is that the lawyer expects the witness to answer the question affirmatively. *Id.* On the other hand, in *State v. White*, the court stated that "[a] question is not leading where it directs the witness toward a specific matter to be addressed without suggesting an answer." *State v. White*, 508 S.E.2d 253, 267 (N.C. 1998) (quoting *State v. Burrus*, 344 N.C. 79, 90, 472 S.E.2d 867, 875 (1996)).

There are reported decisions that do recognize that demeanor, or tone of voice, can cause a question to be leading. The court in *State v. Weese* stated that the "particular form or phrasing of a question does not necessarily determine whether it is leading. A question may become leading if the interrogator's tone of voice, emphasis on certain words, or nonverbal conduct suggests the desired response." *State v. Weese*, 424 A.2d 705, 709 (Me. 1981). The court in *State v. Barnes* also stated a similar understating of how a question can become leading, holding that "[t] he tenor of the desired reply can be suggested in any number of ways, as, for example, by the form of the question, by emphasis on certain words, by the tone of the questioner or his non-verbal conduct, or by the inclusion of facts still in controversy." *State v. Barnes*, 552 N.W.2d 857, 860 (Wis. Ct. App. 1996) (citing 4 *Weinstein's Federal Evidence* § 611.06(2)(a)). Thus, courts have recognized several ways that a questioner can suggest the desired response, whether it be the form of the question, the tone of the questioner's voice, the non-verbal conduct of the questioner, or the questioner's emphasis on certain words. The essence of a leading question is that the question in any of a variety of ways suggests the answer sought by the questioner.

II. Misconception: Leading Questions are Yes or No Questions

A common misconception is that a leading question is one which can be answered yes or no. "A leading question has been defined as one which suggests the desired response which may frequently be answered 'yes' or 'no.' However, a question is not always considered leading merely because it may be answered yes or no." *State v. White*, 508 S.E.2d 253, 267 (N.C. 1998) (quoting *State v. Burrus*, 472 S.E.2d 867, 875 (N.C. 1996)). In NITA training programs, this is often referred to as a "closed end" question. Malone and Hoffman, *The Effective Deposition* (NITA 4th ed. 2012) at § 5.1.

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I Was Sued and I Didn't Like It

By Sherman Knight*

At dinner parties, when people would ask what I do for a living, I would respond in a joking way, "I make people's lives miserable." They would quickly come back with, "Ah, you must be an attorney."

As a practicing trial attorney for two-and-a-half decades, I never understood just how accurate my description was. I didn't try to make lives miserable; it's just the result of a process they taught us in law school known as litigation.

Then it happened: my wife and I were sued over the remodel of our home. I was about to experience what "miserable" really means.

During construction I was too busy to inspect the work. I was not too concerned because I had hired someone who was highly recommended. Near the end of my remodel, there were some things that bothered me, so I hired a different builder to come in and inspect the home. The list of defects he found left me dazed.

I provided the list to my builder and withheld further payment. Two weeks later, the builder left the job, filed a mechanics lien, and sued my wife and me.

Initially, I knew we were going to cream this guy, so I shrugged it off. After all, I am an attorney and an architect and have represented both contractors and homeowners in hundreds of construction defect cases over the years. Nevertheless, as time passed, doubt began to creep in.

My wife did not like the idea of being sued, especially after she was served at her office. She was not happy. Although I tried to convince her that the contractor did not stand a chance, I was surprised how the lawsuit affected our relationship. If we lost, the total bill could be over $150,000 (his claim, his attorney's fees, and my attorney's fees), and I would still have to repair the defective work out of my pocket. When I explained the cost if we lost to my wife, our relationship further soured. Over the next two years, doubt continued to build as the builder went through three different attorneys, each one seemingly starting over with new and different demands.

Although I was sure of the outcome, the possibility of losing $150,000 and how that might affect my wife, my kids' college education accounts, and countless other possibilities never left my mind. I was surprised how much I thought about the matter. I was distracted at work and my stress level climbed as trial approached. When I had free time, the lawsuit was the only thing on my mind. Dreams about the dispute woke me up in the middle of the night. I had concerns with the judge appointed to the case and wondered if the judge would see through the other side's lies. I remember thinking, *why is this lawsuit affecting me like this? I do this for a living.* For the first time, I understood what my response, "I make people's lives miserable," really meant.

> Litigation, what we were taught in school, is miserable - I know - I was sued

A week before trial, a mediation resolved the dispute when the builder's insurance company wrote a check. Although the lawsuit was over, the stress on the relationship between me and my wife was not. It took a while before things returned to normal. The emotional turmoil of two years was not worth the impact on my family and the lost time and costs will never be recovered. Given the amount of personal stress I went through, I can't begin to imagine the stress and emotional turmoil that a non-attorney would suffer through. There must be other options.

In hindsight, I saw that before the lawsuit was filed, I had everything I needed to mediate. My second builder provided a report and an estimate for repair. I took some pictures. The builder was there every day. He knew what transpired and what it would cost to fix it. Two years of discovery, motions, and trial preparation did not change the outcome that early mediation may have obtained.

Early mediation would have alleviated most of my misery. And saved a lot of money. As young minds in law school, we are taught the process of litigation. The process is fairly rigid and has little room for a creative response. As attorneys, we are taught to become forensic thinkers and leave no stone unturned. Between the rigid process and forensic thinking, the law is expensive.

Early mediation is less expensive, but in every case there still needs to be enough discovery to make a good presentation. While early mediation may leave some stones unturned, the risk is acceptable when the chance of missing something is outweighed by the saved time, reduced emotional distress, and expense.

This is most obvious when the value of the dispute is too large to ignore but so small that any recovery will disappear in cost and legal fees. In these cases, the forensic training received by attorneys, which forces them to leave no stone unturned, is simply not cost-effective.

Early mediation is a natural fit if there is a desire to preserve a relationship before the parties become so polarized that resolution is difficult and the parties become combative. When two neighbors are longtime friends, their friendship may be saved when early mediation resolves disputes over something shared such as a fence or property line. Employee/employer relationships can be saved

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where the employer wants to retain the employee or the employee wants to keep their job.

There are also relationships that might not be so obvious to attorneys. Contractors have special relationships with subcontractors who always finish on schedule and with little fuss. Contractors want to maintain a relationship with owners who might have repeat business. If continuing the relationship is important, early mediation will foster an atmosphere of working together, rather than fighting over and defending your position. The tone of early mediation is very different, often looking for creating solutions that are never available in late mediation.

Other early-mediation cases might include:

- When a party just wants it over with. No more discovery, no trial, no appeals. This is usually someone who has been to trial before.
- When a party cannot afford the lost time of litigation.
- When a party does not have the emotional or physical strength to handle several years of litigation.
- When the parties cannot afford litigation.
- When neither party has the ability to recover attorney's fees.
- When a party has skeletons they wish to remain hidden.
- Commercial leasing – landlord/tenant disputes.
- When one of the parties is looking for an apology.
- When one of the parties seeks something other than just money.
- Warranty issues on new construction. If the roof leaks, solve it now!

Even when early mediation is unsuccessful, it still provides a reality check of the strengths and weaknesses in your case early in the litigation, which will allow the parties to make better, less emotional decisions, before they become financially and emotionally vested in continuing the case.

In addition, early mediation provides benefits that normally do not occur in litigation. Counsel has a unique opportunity to learn about the case. Spending an entire mediation with their client, talking to them about the case, and listening to argument and evidence provided by the opponent provides insights in the case that typical discovery does not. Mediation is not a discovery tool, since doing so would violate the letter and the spirit of the "good faith" rule. Yet it cannot be denied that the information learned in a single day of mediation will benefit the parties in the form of refined discovery, early witness evaluation, and streamlined trial preparation.

Currently, early mediation is rare because it requires thinking outside the box, something the rigid and forensic process known as the law does not encourage. Nevertheless, it only takes two things to make early mediation happen: the two attorneys (or parties) who see the benefits of early mediation. Without their vision, the parties may be doomed to draining their bank account, endless months of emotional turmoil, and destroyed relationships.

Every attorney should experience being sued. They will discover what the word "miserable" really means, change the way they counsel their clients, and look for the possibilities of early mediation in every case.

***Sherman Knight** was a licensed architect, attorney and mediator and arbitrator in Washington where a good portion of his practice concerned construction defects. This article is reprinted with permission of the author.

The Trial Lawyers Section of the Florida Bar presents its 2013 Legislative Champion of the Year Award to Senator Joe Negron (R- Palm City), for his invaluable role in protecting the right of access to courts for Florida's citizens, and for assuring the independence of Florida's judiciary. As a trial lawyer, Senator Negron recognizes firsthand the importance of these fundamental principles to his constituents and to all of Florida's citizens.

LEADING QUESTION

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The Florida Supreme Court in *Florida Motor Lines Corporation v. Barry* stated that "[w]e have held that a leading question is one that points out the desired answer." *Florida Motor Lines Corp. v. Barry*, 158 Fla. 123, 126, 27 So. 2d 753, 756 (Fla. 1946) (citing Coogler v. Rhodes, 21 So. 109 (Fla. 1897)). In *Porter v. State*, a Florida intermediate appellate court stated "[t]he proper signification of the expression is a suggestive question, one which suggests or puts the desired answer into the mouth of the witness . . . and that a leading question is one that points out the desired answer, and not merely one that calls for a simple affirmative or negative." *Porter v. State*, 386 So.2d 1209, 1211 (Fla.3d DCA 1980) (quoting *Coogler v. Rhodes*, 21 So. 109, 110 (Fla. 1897). The court explained that "[t]he real meaning of this definition is that a question which suggests only the answer yes is leading; a question which suggests only the answer no is leading; but a question which may be answered either yes or no, and suggests neither answer as the correct one, is not leading." *Porter v. State*, 386 So.2d 1209, 1211 (Fla.3d DCA 1980).

Thus, the determinative factor is whether the question leads the witness to the desired answer by suggesting what the response should be, and not merely whether the question can be answered by a yes or a no. Some yes or no questions will be considered leading questions, and the factor which determines if they are leading is whether the suggestion of the answer is clear from the question asked or how it was asked. As mentioned above, if the questioner recites a fact and is seeking affirmation from the witness, the question would be considered a leading question because the question clearly called for the affirmative response. *State v. Ward*, 347 P.2d 865, 867 (Utah 1959).

The "suggestion" required for a leading question may be found in voice inflection and tone not just in the words used.

III. <u>When Leading Questions Are Permitted</u>

Of course, under certain circumstances leading questions are permitted, Federal Rules of Evidence 611(c) state that "[l]eading questions should not be used on direct examination except as necessary to develop the witness's testimony." In addition, the Rule states that "[o]rdinarily the court should allow leading questions: on cross-examination; and when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party." Fed. R. Evid. 611(c). Thus, Rule 611 allows for the use of leading questions during direct examination when (1) they are "necessary to develop the witness's testimony" and (2) when the party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

The first situation where leading questions are permitted is when they are "necessary to develop the witness's testimony." Fed. R. Evid. 611(c). This occurs when the witness is unable, on his or her own, to provide the testimony necessary without, in effect, being pointed in the right direction, or when, without the use of leading questions, extracting such testimony would delay the court and waste time. Thus, the court has discretion to allow leading questions in such cases, but it requires the court to balance the suggestive nature of the questions against the cost of wasting time or losing the testimony of the witness. Around the country, local practice may refer to this process, referred to in the Rule as developing in the witness's testimony, by the short hand reference to "predicate," "preliminary," or "foundation."

Leading questions are also common in situations where the witness is a minor. For instance, the court in *United States v. Carey*, allowed the prosecutor to asking leading questions to the twelve-year-old victim because the record revealed several times that the witness was nervous and the court previously recognized "that a victim-witness's youth and

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nervousness can satisfy Rule 611's necessity requirement." *United States v. Carey*, 589 F.3d 187, 192 (5th Cir. 2009) (cited in *Rotolo v. United States*, 404 F.2d 316, 317 (5th Cir. 1968)).

A similar situation where leading questions are necessary is when there is an adult who has difficulty communicating or comprehending the questions being asked. For instance, in *United States v. Rodriguez-Garcia*, the court held that leading questions could be used because the witness did not speak English. *United States v. Rodriguez-Garcia*, 983 F.2d 1563, 1570 (10th Cir. 1993). The court recognized that under the Advisory Committee Notes of Rule 611(c), "leading question[s] may be asked of an adult witness with communication problems." *Id.* (citing Advisory Committee Notes of Rule 611(c)).

Additionally, courts have permitted leading questions where the witness needed his recollection refreshed or if the questioner is unable to ask the question in a way that would not confuse the witness. For example, the court in *United States v. McGovern* recognized that leading questions may be permitted when the witness becomes unable to concentrate or disoriented, or when the witness misunderstands what the questioner is asking. *United States v. McGovern*, 499 F.2d 1140, 1142 (1st Cir. 1974).

Further, the court has permitted leading questions that pertain to facts that are not in controversy. For instance, the court in *United States v. Costa* recognized that leading questions are permitted to when they deal with such preliminary matters. *United States v. Costa*, 691 F.2d 1358, 1363 (11th Cir. 1982).

Thus, there are many different situations in which the court will permit the use of leading questions during direct examination that will be decided on a fact-specific, case-by-case basis.

The second situation in which leading questions will be permitted is where the "party calls a hostile witness, an adverse party, or a witness identified with an adverse party." Fed. R. Evid. 611(c). Originally, a witness had been automatically considered hostile if he or she was "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." Fed. R. Evid. 611(c)(2) Advisory Committee's note. However, the sentence "witness identified with an adverse party" is to be read more broadly, enlarging the category of persons to whom it is possible to ask leading questions. *Id*. Thus, courts have allowed leading questions to be asked to a party's employee because the witness was sufficiently identified with the adverse party. In *Haney v. Mizell Memorial Hospital*, the court held that leading questions should have been allowed because they were directed at a nurse who was an employee of the defendants. *Haney v. Mizell Mem'l Hosp.*, 744 F.2d 1467, 1478 (11th Cir. 1984). Further, courts have recognized that an adverse party's girlfriend was also sufficiently identified with the party to permit the use of leading questions on direct examination. *United States v. Hicks*, 748 F.2d 854, 859 (4th Cir. 1984).

IV. <u>In the Court's Discretion: The Final Answer</u>

It is important to note that "ruling on the admissibility of a leading question is in the sound discretion of the trial court, and these rulings are reversible only for an abuse of discretion." *State v. White*, 508 S.E.2d 253, 267 (N.C. 1998) (quoting *State v. Marlow*, 432 S.E.2d 275, 282-83 (N.C. 1993)). The court in *United States v.Hall* affirmed that the court has "the discretion to allow or disallow leading questions of a witness identified with an adverse party, and once the district court 'exercises his discretion in that regard, [the movant] must establish an abuse of discretion to obtain a reversal.'" *United States v. Hall*, 165 F.3d 1095, 1117 (7th Cir. 1999) (quoting *United States v. O'Brie*n, 618 F.2d 1234, 1242 (7th Cir. 1980)). Thus, if the trial court determines leading questions should be permitted in the interest of justice, it has the discretion to make that decision because "the trial court is in a better position . . . to determine the emotional condition and forthrightness of the witness and the need for counsel to use leading questions to develop the witness's testimony." *United States v. Goodlow*, 105 F.3d 1203, 1207-08 (8th Cir.1997) (citation omitted).

Finally, recognizing the deference appellate courts give to trial court rulings on leading questions, the First Circuit in *United States v. McGovern* held, "[o]n those and other occasions some degree of leading, skirting the fine line between stimulating an accurate memory and implanting a false one, may be allowed; because the circumstances vary from case to case, and because the trial judge is best situated to strike a practical and fair balance, he has extensive discretion over the phrasing of questions." *United States v. McGovern*, 499 F.2d 1140, 1142 (1st Cir. 1974).

The demeanor and physical movement of the questioner can also turn a question in a leading question.

In conclusion, while the definition of a leading question is easy to state, it is important to remember that determining whether a question is in fact leading depends on the discretion of the trial court, which is determined on a case-by-case basis based both on the words used and the demeanor of the questioner.

***Michael Dale** is a Professor of Law at the Nova Southeastern University Shepard Broad Law Center and Program Director and Instructor in numerous NITA trial and deposition programs. Julia Sturgill is a third year law student at the Nova Southeastern University Shepard Broad Law Center. This article is reprinted with the permission of the authors from the NITA NEWS.

The Florida Bar Trial Lawyers Section presents

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HOTEL RESERVATIONS

A block of rooms as been reserved at the Hilton UF Conference Center Hotel, at the rate of $135.00 single/double occupancy. To make reservations, call the Hilton directly at 352-371-3600. The group rate is available until the block is filled or until April 15, 2014, which ever comes first. After that date, the group rate will be granted on a space available basis. When making reservations, please reference The Florida Bar.

Schedule of Events

Tuesday, May 13, 2014

6:15 p.m. - 9:15 p.m.

Registration

Introductory Remarks

Demonstration of Opening Statements

Discussion of Effective and Ethical Opening Statements

Wednesday, May 14, 2014

8:00 a.m. - 5:30 p.m.

Ethics Tutorial

Opening Statements and Case Analysis

Simplicity and Complexity of Cross Examination

Demonstration of Direct Cross of Expert and Lay Witnesses

6:30 p.m. - 8:00 p.m.

Tutorial of Material Science Issues and Reception at UF Hilton

Thursday, May 15, 2014

8:00 a.m. - 5:30 p.m.

Ethics Presentation

Direct and Cross Examination of Material Science Engineers and Sports Science Experts

Jury Selection Tutorial and Jury Selection

The Art, Law and Science of Effective and Ethical Closing Arguments

Friday, May 16, 2014

8:00 a.m. - 5:30 p.m.

Ethics - Jury Misconduct

Direct and Cross of Medical Experts

Ethics from the Bench

Faculty Demonstration of Closing Arguments and Discussion of Ethical and Effective Closing Arguments

7:00 p.m. - 9:00 p.m.

Reception and Dinner at UF Hilton

Saturday May 17, 2014

8:30 a.m. - 1:00 p.m.

Closing Arguments

Inside the Jury Room Discussion

Faculty & Steering Committee

Robert C. Palmer, III, Pensacola — Program Co-Chair

Thomas E. Bishop, Jacksonville — Program Co-Chair

Kurt E. Alexander, Merritt Island

Hon. Linda R. Allan, Clearwater

Hon. Ralph Artigliere, Blue Ridge, GA

Hon. Moses Baker, Jr., West Palm Beach

Hon. James M. Barton, Tampa

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Michael A. Estes, Orlando

S. William Fuller, Jr., Tallahassee

Craig A. Gibbs, Jacksonville

William E. Hahn, Tampa

Clifford C. Higby, Panama City

Hon. Charlene E. Honeywell, Orlando

E. William Hoppe, Jr., Gainesville

J. Charles Ingram, Orlando

Woodson Isom, Jr., Tampa

Hon. Claudia Rickert Isom, Tampa

Hon. Martin Kahn, Miami

Joe “Skooter” Kinman, Tampa

Roy M. Kinsey, Jr., Pensacola

Christopher S. Knopik, Tampa

Justice Jorge Labarga, Tallahassee

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Larry Smith, Deland

Weston S. Smith, St. Petersburg

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Hon. John E. Steele, Ft. Myers

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REGISTRATION FEE (CHECK ONE):

- ❑ Member of the Trial Lawyers Section: $1,250
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- ❑ Enclosed is my separate check in the amount of $50 to join the Trial Lawyers Section.

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