Leading Questions on Direct Examination: A More Pragmatic Approach

Kenneth J. Melilli[†]

Abstract

Professor Kenneth Melilli discusses whether it might be both more accurate and more useful to treat leading as a relative concept rather than an absolute quality that a question either possesses or does not possess.

Leading questions are generally prohibited on direct examination.[1] The proscription presupposes that all questions are either leading or non-leading. Once a suitable definition of "leading question" is obtained, compliance with the general rule is accomplished simply by disallowing on direct examination all questions within the definition, and by permitting all questions outside the definition. The task would appear to be made even more facile by the universally-accepted proposition that a leading question is a question that suggests the desired answer.[2]

[†]B.A. (1976), Yale University; J.D. (1979), New York University Law School. The author is a Professor of Law at Creighton University School of Law. Professor Melilli gratefully acknowledges the contributions of Leticia Plucknett and Patrice Andersen.

[1]FED. R. EVID. 611(c).

[2]*See* ROBERTO ARON ET AL., CROSS-EXAMINATION OF WITNESSES, THE LITIGATOR'S PUZZLE § 8.05, at 118 (1989); 2 EDWIN C. CONRAD, MODERN TRIAL EVIDENCE § 1180, at 341 (1956); R. ROGER DUNN & KAREN HIRSCHMAN, TRIAL OBJECTIONS § 440, at 4-112 (Supp. 2002); J.W. EHRLICH, THE LOST ART OF CROSS-EXAMINATION 188 (1970); 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 611.8, at 263 (5th ed. 2001); HAND BOOK ON THE LAW OF EVIDENCE § 1172, at 939 (Arthur C. Blakemore & Dewitt C. Moore eds., 1919); ROBERT E. KEETON, TRIAL TACTICS AND METHODS 50 (1973); MASON LADD & RONALD L. CARLSON, CASES AND MATERIALS ON EVIDENCE 122 (1972); 3 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 339, at 459 (1979); DAVID W. LOUISELL ET AL., CASES AND MATERIALS ON EVIDENCE 10 (3d ed. 1976); CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 6, at 9 (1954); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE § 6.27, at 773 (1995); THOMAS STARKIE, A PRACTICAL TREATISE OF THE LAW OF EVIDENCE 146 (10th ed. 1876); SIR JAMES FITZJAMES STEPHEN, A DIGEST OF THE LAW OF EVIDENCE § 129, at 320 n.2 (2d ed. 1898); JOHN E. TRACY, CASES AND MATERIALS ON THE LAW OF EVIDENCE 362 (1938); H.C. UNDERHILL, A TREATISE ON THE LAW OF EVIDENCE § 333, at 470 (1894); JON R. WALTZ & ROGER C. PARK, CASES AND MATERIALS ON EVIDENCE 12 (8th ed. 1995); 3 JOHN HENRY WIGMORE, EVIDENCE IN

Problems arise, however, because there is neither consensus nor clarity as to which questions suggest the desired answers. Some authority, particularly older influences, suggests that any question which calls for a yes-or-no answer is leading, or nearly always so.[3] This rule has the virtue of presenting a clear, bright-line test. Undoubtedly for this reason, virtually every trial lawyer, even if not a disciple of the rule, can supply anecdotal accounts of members of the bench and bar who do, at least presumptively, subscribe to this or some similar view of what renders a question leading.

Notwithstanding the seductive appeal of such a bright-line rule, it cannot be, and surely is not, embraced absolutely. For example, it is difficult to imagine even the most stringent jurist sustaining a "leading" objection to a question put to a witness called to testify to the defendant's character: "Do you know the defendant?"

Others reject the notion that the mere fact that a question calls for a yes-or-no answer renders that question leading.[4] The issue, we are told, is more complex, depending upon many factors, including phrasing, context, tone, inflection, facial expressions, voice dynamics, gestures, intelligence of the witness and the importance of the testimony.[5]

This latter approach is generally preferable to its more rigid alternative because it avoids handcuffing oneself to intuitively unsatisfactory results. However, this flexibility does come at a cost. The "many factors" test of identifying leading questions is, in reality, no test at all. I may know that height, weight, hair color and facial features are factors in eyewitness

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TRIALS AT COMMON LAW § 769, at 155 (James H. Chadbourn ed., 4th ed. 1970); Ralph Adam Fine, *Irving Younger Was Wrong When He Commanded, 'Use Only Leading Questions'*, 67-APR WIS. LAW. 25, 26 (1994); Donald F. Paine, *Do You Know What a Leading Question Is?*, 34-APR TENN. B.J. 16 (1998); Fred R. Simpson & Deborah J. Selden, *Objection: Leading Question*, 61 TEX. B.J. 1123-24 (1998).

[3]*See, e.g.*, GRAHAM, *supra* note 2, § 611.8, at 264; JOHN M. MAGUIRE ET AL., CASES AND MATERIALS ON EVIDENCE 232 (5th ed. 1965); TRACY, *supra* note 2, at 362; UNDERHILL, *supra* note 2, § 333, at 470; WALTZ & PARK, *supra* note 2, at 12; WIGMORE, *supra* note 2, § 772, at 163; Simpson & Selden, *supra* note 2, at 1123.

[4]CONRAD, *supra* note 2, § 1180, at 340; HAND BOOK ON THE LAW OF EVIDENCE, *supra* note 2, § 1172, at 939; LOUISELL & MUELLER, *supra* note 2, § 339, at 462; LOUISELL ET AL., *supra* note 2, at 10; MAGUIRE ET AL., *supra* note 3, at 232; MCCORMICK, *supra* note 2, § 6, at 9; MUELLER & KIRKPATRICK, *supra* note 2, § 6.27, at 773; WALTZ & PARK, *supra* note 2, at 12; WIGMORE, *supra* note 2, § 772, at 163-64; Paine, *supra* note 2, at 1.

[5]LOUISELL & MUELLER, *supra* note 2, § 339, at 462; LOUISELL ET AL., *supra* note 2, § 170, at 477; MAGUIRE ET AL., *supra* note 3, at 232; MUELLER & KIRKPATRICK, *supra* note 2, § 6.27, at 773; TRACY, *supra* note 2, at 362-63.

identification of criminals, but such generalized knowledge hardly assists me in determining whether a particular person is the perpetrator of a particular crime. Indeed, one commentator has admitted the "impossibility of laying down any standard test" and has confessed that "no standard rule or measure" exists for identifying leading questions.[6] Unremarkably, rulings on "leading" objections are entirely discretionary, perhaps to a degree unmatched by any other evidentiary ruling.[7] The chances of appellate reversals on such rulings are extremely remote,[8] although not absolutely nonexistent.[9]

The virtually unfettered trial court discretion, combined with a rule that is either impractical, uncertain or both, has produced a good deal of inconsistency about such a seemingly straightforward matter. What is blatantly leading before one judge may well be routinely acceptable in the courtroom next door. Indeed, it is often impossible to discern a consistent principle underlying the "leading question" rulings made by a single judge in a single trial.

In order to make some sense in this area, it would be helpful to reexamine the premise that all questions are either leading or non-leading. Instead of treating "leading" as an absolute quality that a question either possesses or does not possess, it might be both more accurate and more useful to treat "leading" as a relative concept. In other words, while there might be significant dispute about whether a particular question is leading or not, it is usually manifest that one form of a question is relatively more leading than another form of the same question. For example, consider three alternative questions, each designed to elicit testimony from the witness that she entered the bank on October 12:

A. Where did you go on October 12?
B. Did you enter the bank on October 12?
C. You entered the bank on October 12, didn't you?

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[6]TRACY, *supra* note 2, at 362; *see also* MAGUIRE ET AL., *supra* note 3, at 232 (stating "[t]here is no easy, foolproof test for a leading question").

[7]MCCORMICK, *supra* note 2, § 6, at 10; TRACY, *supra* note 2, at 363; WIGMORE, *supra* note 2, § 770, at 157.

[8]MCCORMICK, *supra* note 2, § 6, at 10; TRACY, *supra* note 2, at 363; WIGMORE, *supra* note 2, § 770, at 157.

[9]*See, e.g.*, Straub v. Reading Co., 220 F.2d 177, 179 (3d Cir. 1955) (granting a new trial because of the "unconscionably large extent [of] leading questions").

Absent some extraordinarily creative sophistry, we will all agree that Question C is leading and that Question A is not leading. Some would say that Question B is leading; some would say it is not. Still others would insist that more information was necessary regarding Question B, and still, armed with that information, divide on the question of whether Question B is leading.

However, although the absolute issue of whether Question B is leading may be difficult, the relative issues of whether Question B is more or less leading than Question A or Question C, respectively, are perfectly obvious. Question B is more leading than Question A. Question B is less leading than Question C.

Why does this matter? The answer is contained in the justification for my First Proposal for trial judges in ruling on an objection that a question is leading. Even if the court considers the question to be leading or possibly leading, the court should assess whether there is a relatively less leading alternative question that will effectively present the desired testimony. If the answer to this inquiry is "no," then the objection should be overruled. Always. No exceptions.

Leading questions are disallowed generally on direct examination for three reasons. First, the witness might willingly accede to the suggested version of the events.[10] Second, the question might induce a false memory on the part of the witness.[11] Third, the question might distract the witness from details not included in the question.[12]

None of these rationales is a substantial justification for the prohibition against leading questions. The first rationale–acquiescence by the witness to the questioner's version of the events–presumes that the witness is willing to commit perjury. In the hopefully infrequent instances in which a witness is willing to do so, it is hard to see how a leading question is necessary, or even relevant, to the false testimony. In fact, the lawyer is

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[10]KEETON, *supra* note 2, § 2.18, at 49; LOUISELL & MUELLER, *supra* note 2, § 339, at 460; MUELLER & KIRKPATRICK, *supra* note 2, § 6.27, at 771-72; Simpson & Selden, *supra* note 2, at 2.

[11]LOUISELL & MUELLER, *supra* note 2, § 339, at 459; MUELLER & KIRKPATRICK, *supra* note 2, § 6.27, at 771; WIGMORE, *supra* note 2, § 769, at 155; Simpson & Selden, *supra* note 2, at 2.

[12]LOUISELL & MUELLER, *supra* note 2, § 339, at 460; MUELLER & KIRKPATRICK, *supra* note 2, § 6.27, at 772; Simpson & Selden, *supra* note 2, at 2.

unlikely to know how to phrase the leading question unless the witness has already committed himself to the false version of the events prior to trial.

The second rationale–induced false memory–presupposes some unlikely combination of a weak-minded witness with a hypnotically powerful questioner. Even in the unlikely event that a witness's memory of the event could be altered by leading questions, this would almost always be accomplished during the private and unregulated witness preparation before trial and not for the first time during the trial itself.

The third rationale–the exclusion of details not contained in the leading question–is easily remedied by additional questions on direct or cross-examination, depending upon the identity of the beneficiary of such details.

The fact that we are not overwhelmed by the concerns underlying the leading question proscription is revealed by the many circumstances in which leading questions are frequently permitted during direct examination. These situations include the direct examination of witnesses who are either children, aged, timid, nervous, weak-minded, scared, confused, infirm, of low intelligence, unable to understand the question, weak in the English language, or are suffering from a lapse in memory.[13] These circumstances are precisely those in which the predicted dangers of leading questions would be most present.[14] Yet we relax the proscription against leading questions in these very situations because enduring the improbable dangers of leading questions is plainly preferable to the alternative of foregoing the presentation of relevant evidence.[15]

The principle that leading questions are preferable to excluding evidence should not merely be recited as a rationale for some well-estab-

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[13]CONRAD, *supra* note 2, § 1180, at 341; GRAHAM, *supra* note 2, § 611.8, at 827; HAND BOOK ON THE LAW OF EVIDENCE, *supra* note 2, § 1172, at 939; LOUISELL & MUELLER, *supra* note 2, at 466; MAGUIRE ET AL., *supra* note 3, at 233 ; MCCORMICK, *supra* note 2, § 7, at 11; CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 299, at 354-56 (1994); WALTZ & PARK, *supra* note 2, at 14; Simpson & Selden, *supra* note 2, at 7.

[14]MCCORMICK, *supra* note 2, § 6, at 9; MUELLER & KIRKPATRICK, *supra* note 13, § 299, at 355.

[15]MCCORMICK, *supra* note 2, § 7, at 11; MUELLER & KIRKPATRICK, *supra* note 13, § 299, at 355; WIGMORE, *supra* note 2, § 776, at 169.

lished exceptions to the leading question proscription. Instead, it should be the guiding principle for ruling upon all leading question objections. After all, if the principle justifies abandoning the leading question ban in the situations in which the concerns about leading questions are greatest, then why would one enforce the leading question restriction in less risky circumstances?

Understanding that the leading question objection should never be a grounds for excluding evidence (as contrasted with requiring that the question be reformulated), the First Proposal that a less leading form of the question be contemplated before sustaining the objection ought to make perfect sense. If the court sustains the objection without conceiving an effective and acceptable alternative form of the question, it risks excluding relevant evidence. In that event, the leading question proscription functions well beyond its intended role, and the greater interests of the rules of evidence as a whole are compromised.

An objection that a question is leading is an objection only to the form of the question. Assuming no other valid objection is presented, the testimony sought is relevant and should be received by the trier of fact in order to facilitate the search for the truth and the accomplishment of justice.

Yet, I suspect that most trial lawyers would agree that this exclusion of evidence by operation of sustained leading question objections occurs with some regularity. Some trial judges with overactive definitions of what constitutes a leading question effectively exclude testimony by enforcing the operation of the rule. The combination of circumstances that permits this to occur includes the failure of the law to provide clear and consistent rules on the definition of leading questions, the inability or unwillingness of some judges to restrict the leading question rule to its limited role as to form only, and the absence of any meaningful appellate review.

Astute trial lawyers adjust their use of the leading question objection in accordance with the behavior of the particular judge. Ordinarily, there is limited value in objecting to a question as leading if the sole consequence is to improve the form of the opponent's question. However, if a sustained objection leaves one's opponent helpless in an attempt to rephrase effectively, the value of the objection could be substantial.

In order to illustrate both the current problem and the advantage of the First Proposal, consider again Questions A, B and C. Question A is non-

leading because a responsive answer may include any location or locations chosen by the witness. Question C is leading because, although both "yes" and "no" are responsive answers, the question plainly directs the witness that "yes" is the "correct" answer. Question B is distinguishable from Question A because only "yes" and "no" are responsive answers to Question B. Question B is distinguishable from Question C because Question B does not, on its face, suggest that "yes" is the "correct" answer. In a real case, it is likely that everyone would know that "yes" is the desired answer from the context of the trial.

As indicated earlier, there are some lawyers and judges who would view Question B as leading, at least in some contexts. Note that the First Proposal would not ordinarily dictate overruling the objection for leading. There clearly is an effective, less leading alternative. Specifically, Question A ought to elicit the same evidence in a relatively less leading manner.

Suppose, however, that we reverse the context originally suggested. Specifically, suppose that the question is designed to elicit testimony that the witness did *not* enter the bank on October 12. Certainly some judges–particularly those wedded to the "rule" that yes-or-no questions are leading–would disallow Question B. With this change in context, however, we get a very different result under the First Proposal. Question B becomes non-leading because an effective, less leading alternative does not exist.

It is true that the examiner could pose Question A to the witness. However, this is not a realistically effective alternative. If one is trying to establish that the witness was not in the bank on October 12, the sensible way to do so would be to ask the witness if she was in the bank on October 12. It would be silly to require the direct examiner to ask the witness where she went on October 12 and then hope that the jury notices that her answer–which might be long, tedious and otherwise immaterial–includes no mention of a bank. Rules of form hardly serve their intended purpose if they require that testimony be presented in a less comprehensible fashion, and the consequence is that important facts are established only by omission.

To use another illustration, suppose defense counsel, who is directing the defendant, wishes to elicit testimony from his client denying commission of the crime charged. Surely the question, "Did you do it?" may be

posed directly in order to elicit "No" as a response. Surely counsel is not limited to inquiring about his client's activities during the relevant time period and hoping that the jury notices that the charged crime was not included in the client's itinerary.[16]

The point can be summarized by my Second Proposal: Questions that call for a yes-or-no answer, neutrally presented, are not leading if the desired answer is "no." The Second Proposal follows from the First Proposal by virtue of the fact that there is no effective alternative to establish the nonexistence of a fact other than to inquire directly to solicit a denial. Precluding such an inquiry on the grounds that it is leading forces the proponent to make the point only indirectly and by inference. Compelling this manifestly inferior presentation serves no legitimate purpose and should not be the consequence of any thoughtful proscription against leading questions on direct examination.

This brings us to the more complex issue of what to do with questions in the form of Question B when the desired answer is "yes." In other words, the question calls for either a "yes" or a "no" response, the question is phrased to present the choice between these options in a completely neutral fashion; however, we know from the context of the trial that the examiner desires a "yes" answer.

If we focus exclusively on the phraseology of the question, the conclusion ought to be that such a question is not leading. On its face, Question B does not suggest the desired affirmative answer. Without some context beyond the mere phrasing of the question, one could not know that the desired answer is "yes." There is no authority for the proposition that a question is leading simply because the desired answer is one of the options suggested by the question.

Moreover, I suggested in the Second Proposal that questions (such as Question B) that neutrally present the witness with a choice of a yes-or-no answer, where the desired answer is "no," are not leading. If we are focusing exclusively upon the phrasing of the question, how could the same question become a leading question simply because the questioner desires a "yes" (rather than a "no") response?

This leads to the Third Proposal: Questions that call for a yes-or-no answer, neutrally presented, are presumptively not leading when the

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[16]*See* LOUISELL & MUELLER, *supra* note 2, § 339, at 462.

desired answer is "yes." The proposal raises three issues. First, what is the justification for the Third Proposal? Second, why is the Third Proposal (as contrasted with the Second Proposal) stated only as a presumption? Third, what circumstances would defeat the presumption?

Taking each of these in turn, the Third Proposal is justified because neutrally-presented yes-or-no questions are often the most effective way to establish certain points. Moreover, the supposed dangers of leading questions are usually nonexistent or trivial in the context of such questions. To illustrate with an example, suppose that, in a bank robbery prosecution, the Government calls a witness who is expected to testify that, from across the street, she observed the bank robber run from the bank, enter a car and drive away, and that the defendant is in fact the robber she observed. During the course of the direct examination of the witness, suppose the prosecutor asks the following question: "Were you able to see the face of the robber?"

Is this question leading? I think not. The prosecutor is surely seeking to establish that there is a basis in fact for the witness to describe the facial features of the robber as well for trusting any in-court identification of the witness. Any sensible juror asked to credit the witness on either of these points would want to know if the witness was able to see the face of the robber. Any sensible juror, left to his own devices, would ask the witness if she was able to see the face of the robber. Why would a sensible legal system prevent the attorney from asking the obviously sensible question?

It is not impermissible to suggest in a question to the witness the subject or topic of the inquiry.[17] Indeed, direct examination is hardly plausible without providing the witness with some direction on the subject matter of the inquiry.[18] The direct examiner in our hypothetical is simply alerting the witness to the fact that the robber's face is the next topic on the agenda and, in neutral terms, is inquiring whether she was able to see it.

It is true, of course, that the prosecutor could have asked the witness what she saw, hoping that she will include the robber's face in her answer. Some judges will insist that the prosecutor do just that. In the event that

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[17]MCCORMICK, *supra* note 2, § 6, at 9-10; WIGMORE, *supra* note 2, § 769, at 154.

[18]GRAHAM, *supra* note 2, § 611.8, at 264; LADD & CARLSON, *supra* note 2, at 123.

the witness, lacking direction on where to head with her answer, fails to include the robber's face, the direct examiner could be blocked. If the trial judge is a slave to inflated versions of formal objections, any follow-up question that includes the word "face" is "leading," and any follow-up question that does not include the word "face" is "asked and answered." The prosecutor might be forced to move on, but the next question–an inquiry about the features of the robber's face–is now vulnerable to a foundation objection regarding personal knowledge.[19]

Throughout this ordeal, no one seriously doubts that the witness saw the robber's face. The direct examiner and the witness are frustrated. The objecting counsel is grateful for the windfall. Courtroom observers admire this triumph of gamesmanship. The judge notices only a few trees (objections as to form), but does not notice that the entire forest (the discovery of the truth) is burning in his courtroom. And even if the mess is eventually sorted out and the witness is permitted to testify about the robber's face, the jurors will wonder why the matter consumed so much time and energy.

I wonder as well. Anecdotal experience suggests that such scenarios are not isolated. Why do we inflict such pain upon ourselves? Presumably we do so to protect ourselves from the trilogy of harms that supposedly arise whenever leading questions are permitted on direct examination.[20] However, these perils do not seem at all realistic in most common scenarios such as our "robber's face" hypothetical.

First, the hypothesis that an attorney, having no reason to believe based upon pretrial contacts that the witness saw the robber's face, would even ask the witness at trial if she was able to see the robber's face, is entirely unrealistic. Second, the notion that a witness, who would not otherwise have falsely testified that she saw the robber's face, would decide spontaneously to perjure herself on this point simply because she is asked at trial if she was able to see the robber's face, is preposterous. Third, the suggestion that a witness who has never before remembered seeing the robber's face will, suddenly and incorrectly, do so for the first time at trial when asked if she was able to see the robber's face, is ludicrous.

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[19]FED. R. EVID. 602. This question is also vulnerable to an objection that it assumes facts not in evidence.

[20]*See supra* notes 10-12 and accompanying text.

To sustain a leading question objection to neutrally-presented yes-or-no questions, simply because the circumstances of the trial allow us to infer that the questioner desires a "yes" response, is to unhinge the objection from any rational connection to the harms the objection is designed to prevent. This does not mean, however, that neutrally-presented yes-or-no questions are never leading. They can be leading, hence the Third Proposal is phrased solely in terms of a presumption that such questions are not leading.

When are neutrally-presented yes-or-no questions leading? The answer is contained in the Fourth Proposal: Questions that call for a yes-or-no answer, neutrally presented, are nevertheless leading if the questions are excessively detailed. A determination of whether such a question is excessively detailed should be based upon the following factors: (1) whether the question would appear to require a follow-up question on the same subject, (2) whether a less detailed or less leading question would be equally effective, and (3) whether there is a realistic possibility of any of the three dangers underlying the proscription against leading questions.

To illustrate these principles, suppose we expand our bank robbery witness examination to include the following questions:

Q1: Were you able to see the robber's face?
A: Yes.
Q2: Did he have blue eyes?
A: Yes.
Q3: Did he have a red beard?
A: Yes.
Q4: Was he about 6'2" tall?
A: Yes.
Q5: Did he weigh about 180 pounds?
A: Yes.

In my view, and under the Fourth Proposal (which, of course, is just my view with a fancy title), Q1 is not leading; however, Q2, Q3, Q4 and Q5 are leading. The fundamental distinction among these five, neutrally-presented yes-or-no questions is the detail contained in each question. Q1 is general. Q2 is specific as to eye color. Q3 is specific as to facial hair. Q4 is specific as to height. Q5 is specific as to weight.

On application of the three factors contained in the Fourth Proposal, consider first that Q1 clearly sets the stage for more specific follow-up questions concerning the robber's appearance. Q2-Q5, however, all appear to be the last word on their respective topics. The questions, "Did you see his eyes?" and "Did he have any facial hair?" would be acceptable substitutes for Q2 and Q3, respectively, in part because they merely set up predictable follow-up questions eliciting greater detail.

Q1 has no equally effective substitute, although one might get the information with a less leading question. Q2-Q5, however, have obvious substitutes that are both less detailed and less leading. The prosecutor could easily inquire as to eye color, facial hair, height and weight without supplying the specifics in the questions themselves.

Finally, though Q1 presents no realistic danger of acquiescence, false memory or omitted details, Q2-Q5 present at least the last two of these risks. This is especially true given the additional suggestiveness of the defendant's presence (with his blue eyes, red beard, height and weight) in the courtroom and the hazards of eye-witness identifications.

However, our picture is incomplete without a final, Fifth Proposal. Subject to the First Proposal, questions that are not neutrally presented are leading. Everything that has been discussed in connection with the Second, Third and Fourth Proposals presupposes, by the terms of those proposals, that the yes-or-no questions are neutrally presented. If there is anything about the presentation of the question, whether verbal or nonverbal, that is non-neutral, then the question is almost certainly leading. By "non-neutral," I mean words or conduct suggesting that the lawyer desires a "yes" answer, or words or conduct suggesting that the lawyer desires a "no" answer.

The issue is whether the revelation that a particular answer is desired comes from the actual presentation of the question or from anything other than the presentation of the question. Usually, the answer desired by the questioner is perfectly obvious from the substantive impact that such an answer will have upon some issue of fact in the case. This does not render the presentation of the question non-neutral. Only when the phrasing of the question or the lawyer's behavior in connection with the question suggests that a particular answer is desired should the question then be characterized as having been presented in a non-neutral manner.

The qualification that such non-neutral questions are only "almost certainly" leading is because even such questions are preferable to for-

feiting testimony entirely. Hence, questions that are generally considered leading are usually allowed when the witnesses are incapable of testifying in response to non-leading questions.[21] In other words, the First Proposal controls even in this circumstance.

Conclusion

Questions are not leading merely because they call for a yes-or-no response. Nevertheless, there are some rules for the subject of leading questions that can provide desirable consistency and restraint in ruling on such objections. Specifically:

First, the objection should always be overruled if there is not a relatively less leading alternative question that will effectively present the testimony.

Second, questions that call for a yes-or-no response, neutrally presented, are not leading if the desired answer is "no."

Third, questions that call for a yes-or-no response, neutrally presented, are presumptively not leading if the desired answer is "yes."

Fourth, questions that call for a yes-or-no response, neutrally presented, are leading if the questions are excessively detailed. A question may be excessively detailed based upon whether: (1) the question would appear to require a follow-up question on the same subject, (2) a less detailed or less leading question would be equally effective, and (3) there is a realistic possibility of any of the three dangers underlying the proscription against leading questions.

Finally, subject to the First paragraph, questions that are not neutrally presented are leading.

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[21] *See supra* notes 13-15 and accompanying text. "Leading questions should not be used on the direct examination of a witness *except as may be necessary to develop the witness' testimony*." FED. R. EVID. 611(c) (emphasis added).