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JUDGES SHOULD ENCOURAGE 'LEADING' AT BENCH TRIALS

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At a bench trial, which is a judge's main stage in matrimonials, the prohibition against leading questions of a witness-proponent has become an anachronism. Although the public and the business world now thrive on their rapid access to information, judges continue to lag behind by allowing their records to become obfuscated and their trials delayed by tolerating and even tacitly encouraging repeated objections over the form of a question.

Like all outmoded technologies, however, even the rules of evidence must be periodically overhauled. That means that the enduring prohibition against leading questions can no longer be blindly followed. Instead, to expedite the court's information gathering function, judges must learn to be more receptive to leading questions and thereby reap the benefits derived from shortened trials and far more pristine records.

It would be blasphemous, of course, to completely eradicate the prohibition against leading questions. For example, the proscription will always have a home at jury trials. However, before we address those situations where the judicial bent against leading questions is most troublesome, the rule prohibiting an attorney from asking a leading question must be defined and explained. Simply stated, a leading question suggests the answer sought to be elicited[FN1] or assumes fact in controversy[FN2] and cannot be asked of the proponent of the witness testifying, regardless which party may have called that witness.[FN3] Hill v. Arnold, 226 AD2d 232 (1st Dept. 1996).

With the court's discretion as its guide, exceptions to the prohibition against asking leading questions amorphously abound.[FN4] If the witness is hostile, leading questions are generally permitted to enable the examiner to limit the witness to the specific evidence sought to be introduced.[FN5] Courts also tend to allow leading questions where the examiner's goal is to focus a witness on a particular point in time[FN6] or to explore matters that are preliminary in nature.[FN7] Expanding that list of exceptions at bench trials to include any fact that is not being seriously contested would eliminate the litigation costs connected with having to endure the intellectually reluctant, unfocused, garrulous, tedious, confused, inattentive and other equally unhelpful witness testimony that frequently retards the movement of proof that is not being substantively challenged.

Historically, the forbidden leading question had as its primary foil the potential manipulation of the ultimate decision-maker. Because judges make the decisions as well as the evidentiary rulings in matrimonials, they may 'suffer' leading questions without the fear of being reversed.[FN8] Based upon their sense that the testimony being elicited is not being manufactured by a crafty litigator, judges are therefore free to move the testimony along by actively encouraging the use of leading questions. When issues central to the case require an assessment of the witnesses' credibility, the court remains free to prohibit the use of leading questions. Cross-examination af-

fords a second layer of protection against the possibility the court will be misled or manipulated by the use of leading questions.

Judges are obligated to ‘keep the respective parties focused upon the succinct presentation of evidence relevant to the issues to be decided [and to]...insure an orderly and expeditious trial‘[FN9] London v. London 21 AD3d. 602 (3rd Dept. 2005). As most litigators are aware, the ‘leading‘ objection is for the most part interposed to throw an examiner off his/her stride, to wake up an inattentive jurist, or simply to hear one's voice bellowing ‘Objection. Leading!‘ Arguments over whether a question is technically leading are almost universally record wasting sideshows not worth attending, especially given the examiner's right to rephrase the question to a form more to the court's liking.

As fact finders, **judges should** naturally gravitate toward the uninterrupted flow of evidence. Yet, many of our judges are inexplicably entertained by their role as referee to such nonsense and misguidedly rule in favor of the fencing that goes on between counsel over whether the answer to the inquiry can be somehow found in the question. With potential prejudice or manipulation as its mantra, judges must use their discretionary power to decide whether the leading questions posed by counsel will facilitate the flow of information or contaminate it. If the answer to be given is utterly obvious, preliminary, effectively conceded, or simply not a pivotal credibility concern, a leading question pragmatically trumps the historically favored open-ended question.

While open-ended questions may effectively introduce a topic, the answers often leave out necessary details that can only be brought to light by leading questions crafted to augment a client's rusty or stress-disaffected memory. A movement away from the salutory ‘where,‘ ‘why,‘ ‘how,‘ ‘when‘ and ‘what‘ questions, that too often lead to stumbling, splintered testimony from litigants who go uncomfortably blank once they are sworn in, will only quicken the pace of justice.

At the end of the day, if judges admonished counsel at the outset of trial that leading questions would be permitted when advancing information that is not being seriously disputed, trials would be measurably shortened, transcripts more readable and the court's ability to decide complex claims necessarily heightened.

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FN1. Cope v. Sibley, 12 Barb. 521 (N.Y. 1850)

FN2. People v. Slover, 232 N.Y.S. 264 (1921)

FN3. Bennett v. Crescent Athletic-Hamilton Club, 270 N.Y. 456 (1936)

FN4. Downs v. New York Cent. R. Co., 47 N.Y. 83 (1871).

FN5. Becker v. Koch, 104 N.Y.S. 394.

FN6. Cope v. Sibley, 12 Barb. 521 (N.Y. 1850)

FN7. Id. at 521.

FN8. Downs v. New York Cent. R. Co., 47 N.Y. 83 (1871).

FN9. Douglas v. Douglas, 81 A.D.2d 709, 710-711 (2001)
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