

# Leading Questions and Child Witnesses

Updated June, 2011

Please Note: This area of law is highly dependant on case law to determine whether or not a state will allow the use of leading questions with child witnesses. If your state is not listed, please check for binding case law.

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## **Alabama**

### **ALA. CODE § 15-25-1 (2010). Prosecution for physical or sexual offense or exploitation involving child under age 16 -- Leading questions of victim or witness under age 10.**

In any criminal prosecution for a physical offense or a sexual offense wherein the alleged victim is a child under the age of 16 years and in any criminal prosecution involving the sexual exploitation of a child under the age of 16, the court may allow leading questions at trial by the prosecution or defense of any victim or witness in a case who is under the age of 10, if the court determines that the allowance of leading questions will further the interests of justice. The court may on motion of the prosecution or the defense, or on its own motion, limit the scope and extent of any leading questions.

## **Arizona**

### **\*\*\*No statutory law exists; the matter has been settled by the Supreme Court of Arizona\*\*\***

In *State v. Godsoe*, 498 P.2d 4 (Ariz. 1973), the defendant was convicted on child molestation. The victim was nine years old, and in direct examination, the trial court allowed the prosecutor to use leading questions. On appeal, the Arizona Supreme Court held that this was not in error. Relying on three cases from the 1940s, the justices held that it is within the trial court's discretion to allow leading questions for child witnesses or "where the delicate nature of the subject matter prevents detailed answers to general questions." *State v. Pierce*, 129 P.2d 916 (Ariz. 1942); *State v. King*, 182 P.2d 915 (Ariz. 1947); *State v. Upton*, 174 P.2d 622 (Ariz. 1946). The decision did caution that testimony elicited through leading questions may not have the force of voluntary testimony.

## **Arkansas**

### **\*\*\*No statutory law exists; the matter has been settled by the Supreme Court of Arkansas\*\*\***

In *Clark v. State*, 315 Ark. 602, 608-610 (1994), two of the key witnesses were the four and five year old victims. Defense objected to leading questions by the prosecution in "critical areas" of the testimony of those witnesses, but the trial court overruled the objection. The Arkansas Supreme Court referenced its decisions in *Jackson v. State*, 290 Ark. 375 (1986) and *Wallace v. State*, 177 Ark. 892 (1928) in holding that the trial judge did not abuse his discretion and listing the six reasons to allow leading child witnesses in rape cases:

“(1) the seriousness of the crime, (2) the natural embarrassment of the witness about the incident, (3) the child's fear of being in a courtroom full of people, (4) the necessity of testimony from a victim, (5) threats toward victims from those perpetrators, and (6) to avoid the possibility that an accused might escape punishment for a serious offense merely because of the victim's reluctance to testify.” *Clark*, 315 Ark. at 609 (citing *Jackson*, 290 Ark. at 720).

## California

### **CAL. EVID. CODE § 767 (2011). Leading questions**

(a) Except under special circumstances where the interests of justice otherwise require:

(1) A leading question may not be asked of a witness on direct or redirect examination.

(2) A leading question may be asked of a witness on cross-examination or recross-examination.

(b) The court may, in the interests of justice permit a leading question to be asked of a child under 10 years of age or a dependent person with a substantial cognitive impairment in a case involving a prosecution under Section 273a, 273d, 288.5, 368, or any of the acts described in Section 11165.1 or 11165.2 of the Penal Code.

## Colorado

### **\*\*\*No statutory law exists; the matter has been settled by the Supreme Court of Colorado\*\*\***

In *Warren v. People*, 213 P.2d 381 (Colo. 1949), the defendant was convicted of taking indecent liberties with a 10 year old girl. His appeal claimed error in part on the use of leading questions in the examination of three child witnesses. The Colorado Supreme Court held that this allowing the questions was permissible. The decision stated that greater latitude should be allowed when dealing with young witnesses and intimate questions, referencing *Wills v. People*, 66 P.2d 329 (Colo. 1937).

## Connecticut

### **CONN. CODE EVID. § 6-8 (2011). Scope of Cross-Examination and Subsequent Examinations; Leading Questions**

(a) *Scope of cross-examination and subsequent examinations.* Cross-examination and subsequent examinations shall be limited to the subject matter of the preceding examination and matters affecting the credibility of the witness, except in the discretion

of the court.

*(b) Leading questions.* Leading questions shall not be used on the direct or redirect examination of a witness, except that the court may permit leading questions, in its discretion, in circumstances such as, but not limited to, the following:

- (1) when a party calls a hostile witness or a witness identified with an adverse party,
- (2) when a witness testifies so as to work a surprise or deceit on the examiner,
- (3) when necessary to develop a witness' testimony, or
- (4) when necessary to establish preliminary matters.

\*\*\**See State v. Juan V.*, 951 A.2d 651 (Conn. App. 2008) (holding that the use of leading questions with children, when appropriate, does not necessarily render their responses untrustworthy)

## **Delaware**

### **DEL. R. EVID. §611 (2010). MODE AND ORDER OF INTERROGATION AND PRESENTATION**

*(a) Control by Court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

*(b) Scope of Cross-Examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

*(c) Leading Questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions.

## District of Columbia

### D.C. R. DOM. REL. §43 (2011). Evidence

(a) *Form and Admissibility.* In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these Rules. All evidence shall be admitted which is admissible under applicable statutes, or under the rules of evidence applied in the District of Columbia. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

(b) *Scope of Examination and Cross-Examination.* A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party and interrogate the witness by leading questions and contradict and impeach the witness in all respects as if the witness had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject of the examination in chief.

(c) *Record of Excluded Evidence.* If an objection to a question propounded to a witness is sustained by the Court, the examining attorney may make a specific offer of what the attorney expects to prove by the answer of the witness. The Court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The Court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

(d) *Interpreters.* The Court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the Court may direct, and may be taxed ultimately as costs, in the discretion of the Court.

## Florida

### **\*\*\*No statutory law exists; the matter has been settled by the Supreme Court of Florida\*\*\***

In *Anderson v. State*, 101 So. 202 (Fla. 1924), the Florida Supreme Court held that allowing leading questions is within the trial court's discretion and not reviewable on writ of error by an appellate court. Additionally, in *Ellis v. State*, 6 So. 768 (Fla. 1889), the Florida Supreme Court held that no error occurred where the trial judge allowed the prosecutor to use two leading questions with a 13 year old victim-witness.

## Georgia

### **GA. CODE. ANN. § 24-9-63 (WEST 2010). Leading questions; discretion of court**

Leading questions are generally allowed only in cross-examination. However, the court may exercise discretion in granting the right to the party calling the witness and in refusing it to the opposite party when, from the conduct of the witness or other reason, justice shall require it.

\*\*\**See Maner v. State*, 472 S.E. 2d 716, 719 (Ga. Ct. App. 1996) (holding that the trial court may allow direct examination of a child witness and is reviewed only for abuse of discretion); *see also Anglin v. State*, 327 S.E.2d 776, 780 (Ga. Ct. App. 1985) (holding that allowance of leading questions is within the discretion of the trial court).

## Hawaii

### **HAW. REV. STAT. § 626-1, Rule 611 (2010). Mode and order of interrogation and presentation**

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

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#### Rule 611 COMMENTARY

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Subsection (c): This rule conforms to the traditional common-law ban on the use of leading questions on direct examination and to the traditional exceptions for the hostile, reluctant, and unwilling witness, the child witness, the adult with communications problems, or the witness whose memory is "exhausted," as well as the customary "preliminary matters" exception. McCormick § 6.

## Illinois

**\*\*\*No statutory law exists; the matter has been settled by the Appellate Court of Illinois\*\*\***

In *People v. Ridgeway*, 551 N.E.2d 790 (Ill. App. 1990) the Appellate Court of Illinois held that allowing leading questions, when examining children of tender years, is clearly within the discretion of the trial court and they will not unduly limit the trial court's discretion in allowing children to be questioned and allowed. Further, the Court stated that such action would interfere with the truth-serving process and would interfere with the enforcement of the laws concerning sexual abuse of children.

## Indiana

IND. CODE ANN. § 611 (WEST 2011). **Mode and Order of Interrogations and Presentations**

**(a) Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

**(b) Scope of Cross-Examination.** Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

**(c) Leading Questions.** 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. Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

\*\*\*Subsection (c) of this statute has been interpreted by the Indiana Supreme Court to allow leading questions in the examination of young witnesses, and that court entrusts wide discretion to trial judges with reversal only for abuse of discretion. See, e.g., *Williams v. State*, 733 N.E.2d 919 (Ind. 2000); *Bussey v. State*, 536 N.E.2d 1027 (Ind. 1989); *Altmeyer v. State*, 519 N.E.2d 138 (Ind. 1988).



## **Iowa**

### **IOWA CT. R. 5.611 (2011). Mode and order of interrogation and presentation**

a. *Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

b. *Scope of cross-examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

c. *Leading questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop that witness's testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

\*\*\* *See State v. Jones, 271 N.W.2d 761 (Iowa 1978)*(Viewing record as a whole, defendant was not deprived of a fair trial in first-degree murder prosecution as result of prosecutor's continued use of leading questions, which were not "loaded," but rather designed to encourage testimony from young witnesses who came across in transcript as unenthusiastic about their role in trial.)

## **Kansas**

### **KAN. STAT. ANN. §38-2249 (2010). Rules of evidence**

(a) In all proceedings under this code, the rules of evidence of the code of civil procedure shall apply, except that no evidence relating to the condition of a child shall be excluded solely on the ground that the matter is or may be the subject of a physician-patient privilege, psychologist-client privilege or social worker-client privilege.

(b) The judge presiding at all hearings under this code shall not consider or rely upon any report not properly admitted according to the rules of evidence, except as provided by K.S.A. 38-2219, and amendments thereto.

(c) In any proceeding in which a child less than 13 years of age is alleged to have been physically, mentally or emotionally abused or neglected or sexually abused, a recording of an oral statement of the child, or of any witness less than 13 years of age, made before the proceeding began, is admissible in evidence if:

(1) The court determines that the time, content and circumstances of the statement provide sufficient indicia of reliability;

(2) no attorney for any party or interested party is present when the statement is made;

(3) the recording is both visual and aural and is recorded on film, videotape or by other electronic means;

(4) the recording equipment is capable of making an accurate recording, the operator of the equipment is competent and the recording is accurate and has not been altered;

(5) the statement is not made in response to questioning calculated to lead the child to make a particular statement or is clearly shown to be the child's statement and not made solely as a result of a leading or suggestive question;

(6) every voice on the recording is identified;

(7) the person conducting the interview of the child in the recording is present at the proceeding and is available to testify or be cross-examined by any party or interested party; and

(8) each party or interested party to the proceeding is afforded an opportunity to view the recording before it is offered into evidence.

(d) On motion of any party to a proceeding pursuant to the code in which a child less than 13 years of age is alleged to have been physically, mentally or emotionally abused or neglected or sexually abused, the court may order that the testimony of the child, or of any witness less than 13 years of age, be taken:

(1) In a room other than the courtroom and be televised by closed-circuit equipment in the courtroom to be viewed by the court and the parties and interested parties to the proceeding; or

(2) outside the courtroom and be recorded for showing in the courtroom before the court and the parties and interested parties to the proceeding if:

(A) The recording is both visual and aural and is recorded on film, videotape or by other electronic means;

(B) the recording equipment is capable of making an accurate recording, the operator of the equipment is competent and the recording is accurate and has not been altered;

(C) every voice on the recording is identified; and

(D) each party and interested party to the proceeding is afforded an opportunity to view the recording before it is shown in the courtroom.

(e) At the taking of testimony under subsection (d):

(1) Only an attorney for each party, interested party, the guardian ad litem for the child or other person whose presence would contribute to the welfare and well-being of the child and persons necessary to operate the recording or closed-circuit equipment may be present in the room with the child during the child's testimony;

(2) only the attorneys for the parties may question the child; and

(3) the persons operating the recording or closed-circuit equipment shall be confined to an adjacent room or behind a screen or mirror that permits such person to see and hear the child during the child's testimony, but does not permit the child to see or hear such person.

(f) If the testimony of a child is taken as provided by subsection (d), the child shall not be compelled to testify in court during the proceeding.

(g)(1) Any objection to a recording under subsection (d)(2) that such proceeding is inadmissible must be made by written motion filed with the court at least seven days before the commencement of the adjudicatory hearing. An objection under this subsection shall specify the portion of the recording which is objectionable and the reasons for the objection. Failure to file an objection within the time provided by this subsection shall constitute waiver of the right to object to the admissibility of the recording unless the court, in its discretion, determines otherwise.

(2) The provisions of this subsection shall not apply to any objection to admissibility for the reason that the recording has been materially altered.

## **Louisiana**

### **LA. CODE EVID. ANN. ART. 611 (2011) - Mode and order of interrogation and presentation**

A. *Control by court.* --Except as provided by this Article and Code of Criminal Procedure Article 773, the parties to a proceeding have the primary responsibility of presenting the evidence and examining the witnesses. The court, however, shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

B. *Scope of cross-examination.* --A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. However, in a civil case, when a party or person identified with a party has been called as a witness by an adverse party to testify only as to particular aspects of the case, the court shall limit the scope of cross-examination to matters testified to on direct examination, unless the interests of justice otherwise require.

C. *Leading questions.* --Generally, leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony and in examining an expert witness on his opinions and inferences. However, when a party calls a hostile witness, a witness who is unable or unwilling to respond to proper questioning, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions. Generally, leading questions should be permitted on cross-examination. However, the court ordinarily shall prohibit counsel for a party from using leading questions when that party or a person identified with him is examined by his counsel, even when the party or a person identified with him has been called as a witness by another party and tendered for cross-examination.

D. *Scope of redirect examination; recross examination.* --A witness who has been cross-examined is subject to redirect examination as to matters covered on cross-examination and, in the discretion of the court, as to other matters in the case. When the court has allowed a party to bring out new matter on redirect, the other parties shall be provided an opportunity to recross on such matters.

E. *Rebuttal evidence.* --The plaintiff in a civil case and the state in a criminal prosecution shall have the right to rebut evidence adduced by their opponents.

In general, it has not been considered to be an abuse of discretion to allow a party to lead his witness when doing so is necessary to elicit the witness' testimony, as in the case of **children** (*State v. Vanderhoff, 415 So. 2d 190 (La. 1982)*) or of "witnesses so ignorant, timid, weak-minded, or deficient in the English language, that they cannot otherwise be brought to understand what information is sought" (McCormick, *supra* at 13), or to revive the memory of a witness whose memory is exhausted (*State v. Boyd, 359 So. 2d 931 (La. 1978)*). Leading questions also may be used on direct examination when posed for clarification (*State v. Feeback, 414 So. 2d 1229 (La. 1982)*) and when covering preliminary or other matters not substantially in dispute (*State v. Francis, 337 So. 2d 487 (La. 1976)*). The use of leading questions in the last mentioned situations, although technically not "necessary," is seldom objected to and would rarely if ever be reversible error.

## Maine

### ME. R. EVID. 611 (2011). **Mode and Order of Interrogation and Presentation**

**(a) Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence on direct and cross-examination so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

**(b) Scope of Cross-Examination.** A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the court may limit cross-examination with respect to matters not testified to on direct examination.

**(c) Leading Questions.** 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. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of the state or any political subdivision thereof or of a public or private corporation or of an association or body politic which is an adverse party, and interrogate such a witness by leading questions and contradict and impeach the witness in all respects as if the witness had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief. A witness examined in chief only as to the signature to or execution of a paper may be cross-examined only as to such signature or execution.

**\*\*\*Applied to children:** *See State v. Roman*, 622 A.2d 96 (Me. 1993)(State is accorded much latitude in attempting to elicit relevant testimony from child witness; for example, in embarrassing sex crimes when child would be hesitant to testify, leading questions may be particularly appropriate.) *See also State v. Rouselle*, 559 A.2d 779 (Me. 1989)(State could use leading questions on direct examination of ten-year-old victim and 14-year-old victim of sex crimes.); *State v. Moore* (1977) Me., 377 A.2d 1365 (Me. 1997)(Children may be asked leading questions on direct examination in trial court's discretion.)

## Michigan

### MI. R. EVID. 611 (2011). **Mode and order of interrogation and presentation**

**(a) Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

**(b) Appearance of Parties and Witnesses.** The court shall exercise reasonable control over the appearance of parties and witnesses so as to (1) ensure that the demeanor of such persons may be observed and assessed by the fact-finder and (2) ensure the accurate identification of such persons.

**(c) Scope of Cross-Examination.** A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination.

**(d) Leading Questions.**

(1) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony.

(2) Ordinarily leading questions should be permitted on cross-examination.

(3) When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions. It is not necessary to declare the intent to ask leading questions before the questioning begins or before the questioning moves beyond preliminary inquiries.

\*\*\* See *People v. Watson*, 629 N.W.2d 411 (Mich. App. 2001)( a considerable amount of leeway may be given to a prosecutor to ask leading questions of child witnesses.); See also *People v. Kosters*, 438 N.W.2d 651 (Mich. App. 1989)( It was within the trial judge's discretion to allow the prosecutor a fair amount of leeway in asking questions of young children called in his case-in-chief.)

## **Mississippi**

### **MISS. R. EVID. 611 (2010). Mode and Order of Interrogation and Presentation**

*(a) Control by Court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

*(b) Scope of Cross-Examination.* Cross-examination shall not be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.

*(c) Leading Questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

\*\*\**See Gordon v. State*, 977 So.2d 420 (Miss. 2008)(State was permitted to ask leading questions of child victim during her direct testimony, in prosecution for statutory rape.)  
*See also Osborne v. State*, 942 So.2d 193 (Miss. 2006) (Children are a classic example of the kinds of witnesses for whom leading questions may be necessary.)

## **Montana**

### **MONT. R. EVID. 611 (2011). Mode and order of interrogation and presentation; re-examination and recall; confrontation.**

*(a) Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

*(b) Scope of cross-examination.*

(1) Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(2) Evidence developed on cross-examination may be considered by the trier of fact as proof of any fact in issue in the case.

*(c) Leading questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

*(d) Re-examination and recall.* A witness may be re-examined as to the same matters to which the witness testified only in the discretion of the court, but without exception the witness may be re-examined as to any new matter brought out during cross-examination. After the examination of the witness has been concluded by all the parties to the action,

that witness may be recalled only in the discretion of the court. This rule shall not limit the right of any party to recall a witness in rebuttal.

(e) *Confrontation*. Except as otherwise provided by constitution, statute, these rules, or other rules applicable to the courts of this state, at the trial of an action, a witness can be heard only in the presence and subject to the examination of all the parties to the action, if they choose to attend and examine.

#### NOTES:

(c) *Leading questions*. This subdivision is identical to Federal Rule 611(c). It recognizes the traditional view that leading questions, that is, questions which suggest the desired answer, are generally undesirable on direct examination, for the witness “... may acquiesce in a false suggestion”. McCormick, Handbook on the Law of Evidence 8 (2d ed. 1972).

## Nebraska

### NEB. REV. STAT. ANN §27-611(2010). **Mode and order of interrogation and presentation; control by judge; scope of cross-examination; leading questions**

(1) The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (a) make the interrogation and presentation effective for the ascertainment of the truth, (b) avoid needless consumption of time, and (c) protect witnesses from harassment or undue embarrassment.

(2) Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(3) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

\*\*\* See *Nebraska v. Brown*, 374 N.W.2d 28 (Neb. 1985)( Trial court may properly permit leading questions in conducting examination of witness who is immature, unaccustomed to court proceedings, inexperienced, agitated, terrified, or embarrassed while on the stand, and lacking in comprehension of questions asked.)



## **Nevada**

### **NEV. REV. STAT. ANN. § 50.115 (2011). Mode and order of interrogation and presentation.**

1. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence:

(a) To make the interrogation and presentation effective for the ascertainment of the truth;

(b) To avoid needless consumption of time; and

(c) To protect witnesses from undue harassment or embarrassment.

2. Cross-examination is limited to the subject matter of the direct examination and matters affecting the credibility of the witness, unless the judge in the exercise of discretion permits inquiry into additional matters as if on direct examination.

3. Except as provided in subsection 4:

(a) Leading questions may not be used on the direct examination of a witness without the permission of the court.

(b) Leading questions are permitted on cross-examination.

4. Except that the prosecution may not call the accused in a criminal case, a party is entitled to call:

(a) An adverse party; or

(b) A witness identified with an adverse party, and interrogate by leading questions. The attorney for the adverse party may employ leading questions in cross-examining the party or witness so called only to the extent permissible if the attorney had called that person on direct examination.

\*\*\**See Barcus v. State*, 550 P.2d 411( Nev. 1976)(In a prosecution for lewdness with a child the prosecuting attorney was permitted to ask leading questions of two witnesses who were eight and nine years of age at the time of trial; whether leading questions should be allowed is a matter mostly within the discretion of the trial court, and any abuse of the rules regarding them is not ordinarily a ground for reversal.)

## North Carolina

### **N.C. R. EVID. §8C-1, RULE 611 (2010). Mode and order of interrogation and presentation**

(a) *Control by court.*--The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of cross-examination.*--A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

(c) *Leading questions.*--Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

#### COMMENTARY NOTE:

*Advisory Committee Note:* **Subdivision (c)** continues the traditional view that the suggestive powers of the leading question are as general propositions undesirable. Within this tradition numerous exceptions have achieved recognition: The witness who is hostile, unwilling or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774-778; *State v. Greene*, 285 N.C. 482 [206 S.E.2d 229] (1974). As the Advisory Committee's Note points out: "The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command."

\*\*\**See State v. Hannah*, 316 N.C. 362, 341 S.E.2d 514 (1986) In prosecution for first-degree rape of six-year-old, the trial court did not abuse its discretion in permitting the prosecutor to ask leading questions on direct examination of the victim.

## Oregon

### **OR. REV. STAT. § 40.370. RULE 611 (2011). Mode and order of interrogation and presentation**

(1) The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth, avoid needless consumption of time and protect witnesses from harassment or undue embarrassment.

(2) Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(3) Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

**COMMENTARY:** Subsection (3).

A leading question is one that suggests to the witness the answer that the examining party desires. ORS 45.560. This subsection continues the traditional view that the suggestive powers of the leading question are undesirable. The same tradition recognizes exceptions, however, for the witness who is hostile, unwilling, or biased; the witness with communication problems; the child witness; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore, Evidence sections 774-778 (3d ed. 1940).

The use of leading questions on cross-examination is phrased as a matter of right. 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 the party's own counsel after being called by the opponent (savoring more of re-direct), or of an insured defendant who proves to be friendly to the plaintiff.

The one respect in which adoption of Rule 611 may change current law is the use of leading questions to interrogate adverse parties or witnesses on direct examination. In *Sinclair v. Barker*, 236 Or. 599, 390 P.2d 321 (1964), the court said: “The trial court took the position that when an adverse party is called as a witness [the party] may be examined by leading questions as in cross-examination. The privilege is not quite that broad. Leading questions may be allowed upon the direct examination of an adverse party if [the party] appears to be hostile to the examiner.” 236 Or. at 607. The rule in Oregon thus appears to have been that a witness must be both adverse and hostile before leading questions may be used on direct examination. Subsection (3) of Rule 611 permits leading questions to any adverse party or witness identified with an adverse party, regardless of hostility. To this extent, it overrules *Sinclair v. Barker* and changes Oregon law.

## Rhode Island

### \*\*\*No statutory law exists; the matter has been settled by the Supreme Court of Rhode Island\*\*\*

In *State v. Brown*, 574 A.2d 745, 748 ( R.I. 1990) the Supreme Court of Rhode Island held that leading questions were permitted in connection with direct examination of teen-age female witness in criminal sexual abuse case; witness was extremely distraught and was not aware of legal necessity of establishing that defendant had penetrated her.

## South Carolina

### S.C. R. EVID. 611 (2010). Mode and Order of interrogation and presentation

**(a) Control by Court.** The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

**(b) Scope of Cross-Examination.** A witness may be cross-examined on any matter relevant to any issue in the case, including credibility.

**(c) Leading Questions.** Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

**(d) Re-examination and Recall.** A witness may be re-examined as to the same matters to which he testified only in the discretion of the court, but without exception he may be re-examined as to any new matter brought out during cross-examination. After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only in the discretion of the court. This rule shall not limit the right of any party to recall a witness in rebuttal.

\*\*\*See *State v. Hale*, 284 S.C. 348, 326 S.E.2d 418 (Ct.App.1985)(The use of leading questions when examining a child is still permissible under the first sentence of subsection (c) which allows leading questions when “necessary to develop the witness' testimony.”)

## South Dakota

### **S.D. CODIFIED LAWS § 19-14-20. (RULE 611(C)) (2011). Leading questions**

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

\*\*\**See State v. Weisenstein*, 1985, 367 N.W.2d 201 (In prosecution for sexual contact with children under 15, trial court did not abuse discretion in permitting State to use leading questions in its direct examination of victim who was five years old at time of incident and six at time of trial, as State elicited four brief narrative responses before asking a yes or no question and State asked no leading questions until examination centered on events surrounding charge against defendant.) *See also State v. Brown*, 1979, 285 N.W.2d 843, (Permitting use of leading questions is within discretion of trial court in criminal case and that is a broad discretion when witness is a young person.)

## Utah

### **UTAH R. EVID. 611 (2011). Mode and order of interrogation and presentation**

(a) *Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of cross-examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) *Leading questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

\*\*\**See State v. Kallin*, 877 P.2d 138 (Utah 1994)( Prosecutor's use of leading questions to develop testimony of 11-year-old child on alleged rape was appropriate, where witness

had difficult time testifying, she described events in her own words, and one of defendant's objections was sustained, indicating that trial court did not give prosecutor license to testify for witness and leading questions may be necessary on direct examination to develop testimony of child, especially one who is testifying about sensitive and embarrassing subject.) *See also State v. Ireland*, 773 P.2d 1375 (Utah 1989). (Allowance or exclusion of leading questions to elicit testimony from children is within the discretion of the trial court.)

## **Federal Rules of Evidence**

### **FED. R. EVID. 611 (2011). Mode and Order of Interrogation and Presentation**

(a) *Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) *Scope of cross-examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) *Leading questions.* Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

#### COMMENTARY

##### Subdivision (c).

The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. **Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters.** 3 Wigmore §§ 774-778. An almost total unwillingness to reverse for infractions has been manifested by appellate courts. See cases cited in 3 Wigmore § 770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command.

\*\*\* See *U.S. v. Carey*, C.A.5 (Miss.) 2009, 589 F.3d 187, Admission of child victim's testimony about abuse perpetrated against her by defendant, in response to prosecutor's leading questions, was warranted, in prosecution for aggravated sexual abuse of a minor younger than the age of 12; victim was a child, and the record revealed several instances where she appeared nervous, so that the leading questions were arguably necessary to develop her testimony. See also *U.S. v. Wright*, C.A.8 (S.D.) 2008, 540 F.3d 833, Any error in admission, in prosecution for aggravated sexual abuse of a child, of victim's responses to prosecutor's leading questions about the frequency and nature of the abuse, was harmless; questions were necessary to clarify the testimony and establish the precise physiological details of sexual assault, which was necessary to define the crime; *U.S. v. Johnson*, C.A.8 (S.D.) 2008, 519 F.3d 816, District court did not abuse its discretion in allowing prosecution to use leading questions on direct examination of child sexual abuse victim; child was young, subject matter was traumatic, and child was reluctant to testify.; *U.S. v. Withorn*, C.A.8 (S.D.) 2000, 204 F.3d 790, District court did not abuse its discretion when, during testimony of rape defendant's cousin that defendant had forcibly raped her when she was 12 years old, it barred from courtroom some of defendant's family members, as well as cousin's mother, who was opposed to cousin testifying, and permitted government to ask leading questions because of cousin's hesitancy to tell her story, inasmuch as court's actions, which were justified by need to prevent psychological harm to cousin and to enable her to communicate effectively, did not prejudice defendant in jury's eyes.; *U.S. v. Wright*, C.A.8 (S.D.) 1997, 119 F.3d 630, Allowing prosecution to ask leading questions of four-year-old child sexual abuse victim was not abuse of discretion.; *U.S. v. Butler*, C.A.8 (Iowa) 1995, 56 F.3d 941, Although leading questions are generally prohibited during direct examination except as necessary to develop witness's testimony, exception to this rule exists when witness is child.; *U.S. v. Tome*, C.A.10 (N.M.) 1993, 3 F.3d 342, Permitting government to use leading questions during direct examination of child victim was not abuse of discretion in sexual abuse prosecution, where victim was reluctant to testify about her abuse, and questioning was halted several times in order for victim to regain her composure and willingness to discuss events at issue.; *U.S. v. Longie*, C.A.8 (N.D.) 1993, 984 F.2d 955, District court could allow government to use leading questions in its direct examination of alleged child sexual assault victim, who was 12 years old at the time of trial, notwithstanding defendant's contention that victim's ability to understand questions put to her and her articulateness rendered leading questions unnecessary; victim responded tentatively throughout examination, and victim's hesitancy was understandable given nature of case.; *U.S. v. Castro-Romero*, C.A.9 (Idaho) 1992, 964 F.2d 942, Defendant was not denied right to confront his accuser in prosecution for sexual abuse of minor when on direct examination prosecution was allowed to ask leading questions of minor victim; victim was eight-year-old girl, who was so reluctant to testify initially that district court ordered recess during course of her testimony. *U.S. v. Nabors*, C.A.8 (Ark.) 1985, 762 F.2d 642, Trial court's ruling with respect to use of leading questions on direct examination of child witness deserved deference because court was in best position to evaluate emotional condition of child witness and his hesitancy to testify.; *U. S. v. Littlewind*, C.A.8 (N.D.) 1977, 551 F.2d 244, In rape prosecution, wherein alleged victims were both young girls and each responded hesitantly to questions put to her, district court did not abuse its discretion in permitting use of leading questions.

## **Guam**

### **GUAM CODE ANN. TIT. 19, § 5112 (2010). Hearings**

(a) All cases of children shall be dealt with by the court at separate hearings without a jury. The hearing shall be conducted in an informal manner, and may be adjourned, from time to time. Stenographic notes or other transcript of the hearing shall be required. The general public shall be excluded and only such person admitted as the judge shall find to have a direct interest in the case or in the work of the court. The presence of the child in court may be waived by the court at any stage of the proceedings. Any child may be represented by legal counsel and the Attorney General may take part in any hearing.

(b) In all hearings arising out of § 5103(a)(4), the court shall conduct the hearings pursuant to the Guam Rules of Evidence, and other safeguards required by the constitution of the United States and the Organic Act of Guam, but the court may waive provisions of the Rules of Evidence as it deems necessary considering the age and intelligence of any child who may be called as a witness in the proceedings.

#### **COMMENT:**

The modification in P.L. 17-12:2 deleted the clause in the final sentence of Subsection (a) which says 'and on request of the court'. The result is that the Attorney General may take part in any hearing as a matter of right. It is the belief of this drafter that the Attorney General should have the right to appear and take part in any hearing to represent the government of Guam. The decision should be his and those participating on behalf of the Government. Obviously, if the Attorney General has not indicated his participation, the court may order him to do so, at least in the initial stages of the proceeding. In the past, the court has ordered the Attorney General to file a petition, but the Attorney General has sometimes declined because, in his opinion, there was insufficient evidence to proceed.

Subsection (b) has been added because many persons concerned with the juvenile code felt that, where the juvenile is being accused of what is an adult crime he should be given more safeguards than in other cases. In any event, the U.S. Supreme Court is favoring the position that juveniles accused of crimes are entitled to almost the full panoply of rights granted to criminal defendants. They have not come that far yet, but the trend does exist. Nevertheless, when questioning young children, following the strict Rules of Evidence may be impossible if one is to get at the questions at hand. Therefore, the judges are allowed to vary the rules, such as the 'hearsay' rule and the rule against leading questions, if they determine that the evidence is reliable and there is not other way to obtain it.



