OBJECTION: LEADING QUESTION!
By Fred A. Simpson¹ and Deborah J. Selden²

What’s a leading question? Many lawyers would respond with the classic example “Are you still beating your wife?” Some might say a leading question is one that suggests a specific answer.³ Others may explain that a leading question contains the answer the examiner wants, and can only be answered by a “yes” or “no.”⁴ In 1891, the Texas Supreme Court laboriously defined a leading question as one that
... admits of an answer simply in the affirmative or negative, or which, embodying a material fact, suggests the desired answer.⁵ A question which contains “a series or group of facts,” and admits of a complete answer by a bare affirmation or negation, is clearly leading.⁶ A question is leading if it enables the witness “to echo back” the language of the examiner, and enables the examiner to lead even an honest witness in such a manner as to give the testimony a false color, and even grossly distort it.⁷

In 1996, the Texarkana Court of Appeals very simply said that “[a] leading question phrases a question so that it either suggests the answer desired or assumes the truth of a disputed fact.”⁸

Formal definitions aside, most lawyers can identify the inquiry, “Did Mary then barge into the master bedroom and shoot Michael with this 9mm Glock pistol?” as a leading question. They can also tell you that, in the same context, the question, “What then, if anything, did Mary do?”, is “fuzzy and aimless,”⁹ but not leading.

Leading questions on direct examination are usually impermissible because such questions suggest desired answers and diminish the likelihood that witnesses will answer truthfully.¹⁰ On the other hand, the right to effectively cross-examine witnesses would be rendered almost meaningless if attorneys were denied the tool of the leading question.¹¹ Despite its importance in the mechanics of a trial, not one reported case in over a century of Texas law has held that an improperly asked leading question is reversible error.

The Anatomy of a Leading Question

Every question is leading in the sense that it calls the witness to focus attention on a particular event or topic.¹² However, a leading question is not always defined simply by its form. Sometimes the interrogator’s tone of voice, emphasis on certain words, or nonverbal conduct or body language may suggest the desired response to a witness.¹³

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⁴ Long v. McCauley, 3 S.W. 689 (Tex. 1887).
⁶ San Antonio & A.P. Ry. Co, 50 S.W. at 124 (citing Lott v. King, 79 Tex. 292, 15 S.W. 231 (1891)).
⁷ Id.
⁸ Id.
¹¹ Beals, 11 Me. B.J. at 709.
When a party calls a witness to testify on direct examination, it is presumed their testimony will be favorable to that party. In theory, the prohibition of leading questions on direct examination prevents examining counsel from testifying through or placing answers in the mouths of witnesses, and encourages witnesses to testify about their own personal knowledge of relevant facts.

While the admonition, “Thou shalt use leading questions on cross-examination,” is one of the conventional Ten Commandments of successful trial technique, at least one federal case holds that the right to ask leading questions on cross-examination is not absolute. Some Texas cases hold that leading questions should be allowed only on matters up to the point of controversy, but should not be allowed on materially contested issues. In 1992, Justice E. Grady Jolly, explained that leading questions should be limited to non-controversial topics or to elicit background information.

As we all are fully aware, any good trial advocate who is allowed leading questions can both testify for the witness and argue the client’s case by the use of leading questions. This practice must not be allowed.

Commentators offer a variety of explanations as to why leading questions can be harmful on direct examination, including

1. They tend to prompt a “false memory” of events.
2. They tend to induce an acquiescence to the examiner’s version of events for any one or more of these possible reasons:
   a. The courtroom is an unfamiliar, formal, public, and intimidating place for the witness.
   b. Normally, the witness is involved in polite social conversations where imprecision is acceptable and goes relatively unchallenged.
   c. The witness does not fully understand the consequences of his testimony.
   d. The witness hopes to “move things along” by cooperating.
3. They distract the witness from important details in favor of the limited amount of detail actually contained in the question.

**Historical Examples of Leading Questions**

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13 Weese, 424 A.2d at 709.
14 Erp v. Carroll, 438 So. 2d 31, 36 (Fla. App. 1983).
15 See United States v. Bryant, 461 F. 2d 912, 918 (6th Cir. 1972).
17 Oberlin v Marlin American Corp., 596 F.2d 1322, 1328 (7th Cir. 1979).
19 Stine v. Marathon Oil Co., 976 F.2d 254, 266 (5th Cir. 1992).
While the Texas Supreme Court and courts of appeals of yesteryear freely and routinely corrected errors associated with leading questions, there is a dearth of contemporary case law on the subject. To learn how to identify a leading question and how to respond if your adversary uses one on direct examination, we must turn to early Texas cases.

**Tinsley v. Carey, Reese & Company (1862)**

The Texas Supreme Court heard a case in 1862 where a defendant was accused attempting to defraud his creditors by diverting proceeds he received from a judgment in an unrelated lawsuit. The court found the following deposition question to be unduly leading:

Q. Did or did not said Tinsley get said money on or about the 1st of January, 1857, from the sheriff of Bastrop county?

A. I think said money was got about the last of January, 1857.

The supreme court reversed and remanded the case. While the court did not find that the words “did or did not” transformed the question into a leading question, it did find the question was leading because it was “framed as to suggest to the witness the desired answer.” The question touched the substance of the lawsuit and did not merely direct the mind of the witness to the subject matter about which he was asked to speak. A later supreme court opinion explained that the case was reversed because the question introduced “the facts desired to be produced,” and was harmful because the language of the question touched on the ultimate issue to be resolved by the finder of fact.

**Maloney v. Roberts (1869)**

This civil action arose after a man was threatened with hanging by a mob unless he confessed to being a horse thief. The supreme court reviewed existing law on leading questions on direct examination and approvingly cited to “1 Greenl. Ev. § 435,” stating that “when and under what circumstances, a leading question may be put, is a matter resting in the sound discretion of the court, and not a matter which can be assigned for error.” The court found no error in the undisclosed deposition questions at issue, even though the record did not show the witness was unwilling to testify, or that he suffered memory loss and needed a reminder of some admitted facts. The court opined that while the deposition questions were “liable to criticism” because they went beyond matters introductory to the material points in issue, they did not constitute reversible error.

**Rangel v. State (1887)**

In a cattle rustling case, the state brought in an accomplice as its witness. After the witness was shown an example of a cattle brand, the state asked him, “Is this the brand that was on the animal killed?” Under the prevailing standard that

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22 Tinsley, 26 Tex. at 353.
23 Tinsley, 26 Tex. at 353.
26 Maloney, 32 Tex. at 140.
27 Id.
“[a] leading question is one which may be answered by yes or no, and suggests the desired answer,” this question constituted reversible error.29

**Long v. McCauley (1887)**

In another 1887 case, the supreme court reviewed a breach of contract claim involving the river-floatation of logs to a sawmill.30 The court found the following exchange between the plaintiff and his attorney was questionable, but curable after the court granted a new trial on other grounds:

Q. Could you have run the remainder of the timber put in during the contract period?
A. I could. I could have run ten times as much.

Observing that no single definition of a leading question had been developed that was applicable to every case, the supreme court defined a leading question as a one embodying a material fact conclusive to the matter at issue, capable of being answered in the affirmative or negative, and suggesting the answer desired.31 The court observed that a question which can be answered “yes” or “no” enables a witness to respond to the question in the language of the question and allows the interrogator to unduly influence testimony.

**Majors v. State (1911)**

The Court of Criminal Appeals addressed the issue of the leading question in a 1911 burglary case. In the following excerpt, the district attorney asked the witness about a key piece of evidence, a suitcase (known in those days as a “grip”):32

Q. Do you think you would know that grip if you was to see it?
A. I do not know; I think I would.

Q. How does that [grip] compare with it?
A. That kinder [sic] looks like the color of the grip [the alleged perpetrators] had.

Q. Do you know whether it is or not?
A. No, sir; I do not know exactly whether that is it or not, but I know that was the color and make of the grip.

Because the foundation for the ultimate question was framed earlier in the interrogation, the court found that, although the question was leading, it was not error. In its reasoning the court defined a leading question as “one that suggests the answer to the witness; the answer being framed as to indicate the answer desired.”33

**Roth v. Travelers' Protective Association of America (1909)**

One January day in 1905, plaintiff Roth hit his head while skating on a frozen pond near Henryetta, (Indian Territory).34 Six weeks later, he died. His estate claimed benefits under an insurance policy. The deceased’s boarding house manager was deposed with this written question:

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29 Rangel, 3 S.W. 788, (citing to Mathis v. Buford, 17 Tex. 152 (1856); 1 Whart. Ev. (2 Ed.) § 499; Tinsley v. Carey, 26 Tex. 350 (1862)).
30 Long v. McCauley, 3 S.W. 689 (Tex. 1887).
31 Long, 3 S.W. at 689, (citing to Able v. Sparks, 6 Tex. 350 (1851); Mathis v. Buford, 17 Tex. 152 (1856); Tinsley v. Carey, 26 Tex. 350 (1862); Greenleaf on Evidence (volume 1, § 434)).
32 Majors v. State, 63 Tex. Cr. R. 488, 140 S.W. 1095 (1911).
33 Id.
Q. State how (Mr. Roth’s) appearance was after the time that he is said to have fallen on the ice, whether he was right mentally and physically. Did he seem to be sick or stupid, or was there any difference in his appearance and in his conduct after the time he is said to have fallen on the ice, and previous to that time?

A. Mr. Roth was not right. He did not step any more like he had, his steps were slow and he lost his cheerfulness. There was all the difference in the world in his manner after he had that fall. He was stupid, and was never well any more in my house.

The defendant objected and properly preserved error. The Texas Supreme Court found most of the manager’s answer to be opinion testimony and held that it should have been stricken. Finding the answer, “he was stupid,” was made in response to a leading question, the court held that it, too, should have been removed from the deposition prior to use before the jury.

**Lott v. King (1891)**

In an appeal of a trespass to try title case, the supreme court reviewed several questions in written interrogatories. Of the contested questions, one was found to be not leading and one was.35 The following exchange presents the non-leading question and its answer:

Q. If you state that you were acquainted with Barnes Parker, now please state whether or not you ever sold and conveyed the [land] to said Barnes Parker.

A. I never did.

The question was not a leading question because an observer could not determine from the form of the question whether the examiner wanted a “yes” or “no” answer.

However, the supreme court upheld defendant’s objection to the following exchange and found the question to be leading:

Q. Please state whether or not you ever had any business transaction with said Barnes Parker, in which he paid you the sum of five hundred dollars.

A. I never did have any business transaction with said Barnes Parker in which he paid me five hundred dollars, or any other sum of money.

Notice the compound nature of the question and the precision with which the witness parrots the vocabulary of the question in his answer. The supreme court found the trial court properly suppressed the inquiry as a leading question, because it was so framed as to be material to the issues being tried.

**Galveston, H. & S. R. Company v. Duelm (1894)**

After being hit by a train, plaintiff sued the railroad. Plaintiff was riding in his horse-drawn wagon at the time of the accident and claimed the train did not sound any bells or whistles as it approached the crossing.36 The railroad called the train engineer as a witness and asked,

> From your knowledge and experience as an engineer, was it possible to have stopped the train after you saw plaintiff, in his wagon, coming on the track at the crossing, and prevented a collision with it?

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34 *Roth v. Travelers’ Protective Ass’n of America*, 102 Tex. 241, 115 S.W. 31 (1909).
The trial court sustained plaintiff’s objection and did not allow the witness to answer. The supreme court affirmed the trial court’s ruling and offered these suggestions:

This objection was well taken. The question admitted of an answer “Yes” or “No,” and not only suggested the negative response, but was calculated to put into the mouth of the witness the very words of the examining counsel. After the objection[,] the question should have been so framed as to have permitted the witness to state the fact in his own way.

This 1894 holding is difficult to reconcile with other supreme court decisions. Because the train’s engineer could have answered “I do not think so,” he was not limited to a mere “yes” or “no” answer. However, the holding is consistent with that of the following case.

**International & G.N.R. Company v. Dalwigh (1899)**

After reviewing authority from a diversity of sources, the supreme court reversed an 1899 railroad crossing case because the trial court allowed impermissibly leading questions. A witness for the injured plaintiff was questioned by plaintiff’s counsel as follows:

Q. Up to the time you saw [the plaintiff], did you hear any whistle blown or bell rung by the approaching train.?

A. No, sir; I did not hear the whistle blow nor the ringing of the bell. I did not hear any signal.

Using the standard of review that “a question is not necessarily leading because it admits of a direct affirmative or negative answer, but that, to make it objectionable when but a single fact is sought to be elicited, it must also suggest the desired answer,” the supreme court found error and reversed the trial court’s judgment.

In grappling with the issue of leading questions, the Texas Supreme Court presented a useful list of controlling authorities its 1899 *Dalwigh* opinion:

1. Questions to which the answer “Yes” of “No” would be conclusive would certainly be objectionable, and so would any question which plainly suggested to the witness the answer which the party or his counsel hoped to extract.

   Starkie, Ev. p. 166.

2. Questions are objectionable, as leading, not only when they directly suggest the answer which is desired, but also when they embody a material fact, and admit of an answer by a simple negative or affirmative, though neither the one nor the other is directly suggestive.


3. Questions [which suggest the answer desired] are also objectionable, as leading, which, embodying a material fact, admit of an answer by simple negative or affirmative.

   1 Greenl. [Simon Greenleaf, A Treatise on the Law of Evidence (1853)] Ev. § 434. See also Rap. Wit §1 241.

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38 *Dalwigh*, 51 S.W. at 501 (citing to *Lott v. King*, 79 Tex. 292, 15 S.W. 231 (1891)).

39 *Dalwigh*, 51 S.W. at 501.
4. If questions are asked to which the answer “Yes” or “No” would be conclusive, they would certainly be objectionable.

Lord Ellenborough in *Nichols v. Dowding*, 1 Starkie, 81.

5. A question is not necessarily leading because it admits of a direct affirmative or negative answer, but that to make it objectionable when but a single fact is sought to be elicited, it must also suggest the desired answer.


6. “Did you not hear,” etc. has been held to suggest the answer.


7. “Did you,” etc. suggests, though in a lesser degree, a negative answer. Very high authorities hold that such a question is leading.


8. The question put in the power of the witness, by the simple answer “No,” to echo back the words of counsel, and to give a desired answer in a desired form upon a most material point in the case.

*Railway Co. v. Hammon*, 50 S.W. 123, 92 Tex. 509 (1887).

9. And here it may be proper to advert to a distinction which has often occurred to me, and was referable to the preceding case, between the word used by, and proceeding form, the witness, as his own, and his giving an answer of “yes” or “no” to a question proposed to him; the former being an indication of his own impressions and recollections upon the subject of inquiry; the latter being the result, the adoption, or rejection of an intrinsic suggestion.

2 Evans, Poth. Obl. 214 [W.D. Evans, 2 *Notes to Pothier* (1806)].

10. The questions suggested to a person of the lowest capacity the answers desired. As such, these questions should not have been permitted to be put to a witness, and the court should have sustained the objections to them. While a large discretion is necessarily vested in the presiding judge relative to the form of questions, or the mode of interrogating a witness, under a particular state of feelings, intellect, or information, yet, to justify or sanction a departure from the established rules of evidence to so great a degree, and on matters of vital interest to the accused, as was permitted in this case, the explanation or statement of the reason for such departure should be shown in connection with the bill of exceptions taken. No reason is stated in the record.

*Davis v. State*, 43 Tex. 189 (1875).


The turn of the century saw a noticeable change in the court’s attitude towards leading questions. Ms. McCutcheon, the plaintiff, complained that on four separate occasions during the winter of 1902 she was forced to wait for a tardy train in a unheated railroad depot waiting room. She suffered a “severe cold in her womb and ovaries” which produced an incurable disease, and incapacitated her to such a degree she was unable to work as a music teacher. Over defense objections, the

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41 McCutcheon, 77 S.W. at 233.
trial court allowed plaintiff’s lawyer to ask, “Where was the suffering? Was it in any way connected with your menstruation?” The trial court then justified its ruling as follows: This was a white woman, and this was a very delicate question. There was no effort on the part of counsel of plaintiff to lead the witness to say anything, but a number of questions had been asked, and the witness failed to answer, because of her modesty, and the question and answer were permitted simply to relieve the witness from using the language.

The appellate court in McCutcheon found the trial court properly exercised its discretion in allowing the questions.43

**American Ry. Express Company v. Truede (1923)**

In 1923, the Galveston Court of Appeals considered the conflicting claims of an express wagon driver that he had been injured in the course and scope of his employment and his employer’s contention that the driver was actually on his way to dinner.44 The defense objected to the series of questions asked by the worker’s lawyer on direct examination as leading questions.

Q. Were you going to the express office before going to dinner?
A. Yes.

Q. Was it or not your duty to go back to the express office and report?
A. Yes.

The appellate court found the questions were not leading because they elicited only a single fact and their form did not suggest a desired answer.45


Fifty-four years after the Truede case, the Waco Court of Appeals considered the issue of leading questions in a slip and fall case against a grocery store.46 At trial, the plaintiff testified he had slipped on grapes that had fallen on a dirty floor. Plaintiff’s counsel then asked

Q. Would you tell the court whether or not the same layer of dirt that was on the floor proceeded to cover the grapes as if they had been there for a great length of time?
A. Yes. It did look like it. It appeared that way.

The appellate court did not find the inquiry constituted a leading question.47

In general, early Texas jurisprudence did not allow the use of leading questions to elicit material facts. If the trial court did admit answers to leading questions touching on material facts, it could create a bill of exceptions to defend its ruling.

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42 Id.
43 McCutcheon, 77 S.W. at 233, (citing “Greenleaf Ev. (16th Ed.) § 435”).
45 Truede, 246 S.W. at 1090 (citing to International & G.N.R.y. Co. v. Dalwhig, 92 Tex. 657, 51 S.W. 500 (1899)).
on the record. The bill was designed to justify the court’s actions by showing the basis for the trial court’s ruling and explaining the reasoning for the admission of the evidence brought forth by leading questions.\(^{48}\)

**When May Leading Questions Be Used On Direct Examination?**

There are several established exceptions to the general prohibition against using leading questions on direct examination.

**Carter v. State (1910)**

In 1910, the Court of Criminal Appeals published a list of exceptions to the general rule that leading questions which “assume unproved facts” may not be asked on direct examination.\(^{49}\)

1. When the questions relate to acts not controverted or where the point sought to be established is already proven and in these questions the established facts may be recapitulated.
2. When the witness is hostile and unwilling to give the evidence.
3. To refresh the witness’s memory when the purpose of justice requires it.
4. To arrive at facts when modesty or delicacy prevents a full answer to a general interrogatory.
5. When the witness is confused or agitated.
6. When questioning an individual who is slow in understanding, has a limited vocabulary, or is ignorant.
7. When the witness is a child.
8. When the witness has given an ambiguous answer, and a leading question may clarify the attested to facts or circumstances.

Leading questions are also appropriate on direct examination if the witness is old, infirm and/or difficult to understand.\(^{50}\)

**The Standard of Review**

The dissent to an 1889 Texas Supreme Court opinion clearly illustrates that, at that time, it was reversible error to admit any material evidence if it were introduced by a leading question.\(^{51}\) By 1895, the supreme court had shifted its stance.

**Davidson v. Wallingford (1895)**

In Davidson, the court found the admission of deposition testimony elicited by leading questions was not reversible error when identical information was adduced in testimony responding to non-leading questions.\(^{52}\) The decision indicates the supreme court recognized the potential for reversible error, but only if the material evidence came in solely by means of a leading question.

In the early days of Texas jurisprudence, there were no published rules of civil procedure and an appellate court could reverse a trial court’s judgment even for harmless errors. This draconian result held especially true for leading questions that elicited testimony on a material issue in a case.\(^{53}\)

\(^{48}\) San Antonio & A. P. R. Co. v. Hammond, 92 Tex. 509, 50 S.W. 123, 124 (1899); Davis v. State, 43 Tex. 189 (1875).


\(^{50}\) Navy v. State, 249 S.W. 859, 860, 93 Tex. Cr. R. 655, 656 (1923).

\(^{51}\) Fort Worth & Denver C.R. Co. v. Thompson, 75 Tex. 501, 12 S.W. 742, 744 (1889).

\(^{52}\) Davidson v. Wallingford, 88 Tex. 619, 32 S.W. 1030, 1031 (1895).

Texas Employers’ Insurance Company v. Hughey (1954)

A partial history of the evolution of the modern rules of Texas procedure is set out in a 1954 Fort Worth court of appeals opinion explaining the “harmless error” standard of review as it then applied to leading questions. The opinion starts its review in 1912, with the adoption of Texas Court Rule 62a, the first “harmless error” rule in the Texas Rules of Civil Procedure. Rule 62a placed the burden of proof on the complaining party to prove, among other things, that the answers to leading questions so prejudiced its case that the trial court committed reversible error in admitting the answers into evidence. Rule 62a modified the previous practice of automatically reversing judgment when testimony on material issue of a case was introduced by leading questions.

Because of the broad discretion vested in the trial court under the modern rules of procedure, use of and information elicited by leading questions today is seldom grounds for reversal. The party seeking reversal must show (1) the trial court abused its discretion; and (2) the resulting error was reasonably calculated to cause and probably did cause the rendition of an improper judgment. If an objection to a leading question is raised and sustained after the witness answers, the complaining party must also move to strike the testimony. Unless struck, the answer remains in the record and is subject to appellate review.

The Modern Rules

The Texas Rules of Evidence allow parties to use leading questions in select circumstances, similar to those specified in the federal rules.

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

The Commentary to Rule 611 indicates that leading questions on cross examination are traditionally a matter of right. As under “prior Texas practice and common law,” leading questions on preliminary matters may, at the court’s discretion be used to 1) refresh a witness’s memory; 2) question children; or 3) frame questions to ignorant or illiterate persons.

54 Texas Employers’ v. Hughey, 266 S.W.2d at 458.
55 See 149 S.W. at p.(x) for the “Amendments To Rules” adopting Rule 62a, “Reversals.” Rule 62a later became TEX. R. CIV. P. 434 (repealed September 1, 1986) and is substantially former TEX. R. APP. P. 81(b), entitled “Reversible Error,” and the basis for today’s TEX. R. APP. P. 44.1 and 61.1.
56 But see Coffey v. Fort Worth & Denver Railway Co., 285 S.W.2d 453, 461 (Tex. Civ. App. - Eastland 1955, no writ). The opinion explains that “before enactment of the Texas Rules of Civil Procedure,” the complaining party was required to show prejudice resulting from the improperly-allowed leading question as grounds for reversal.
57 Matter of L.G., 728 S.W. 2d 939, 942 (Tex. App. -- Austin 1987, writ ref’d n.r.e.).
59 Traders & General Ins. Co. v. Randolph, 467 S.W. 2d 88, 97 (Tex. Civ. App.-- Corpus Christi 1976, writ ref’d n.r.e.).
61 Marshall, 506 S.W.2d at 916.
62 TEX. R. CIV. EVID. 611 (see also TEX. R. CRIM. EVID. 610, which is not gender neutral).
63 TEX. R. CIV. EVID. 611.
A 1994 Corpus Christi case illustrates how leading questions may be used freely on direct examination to develop testimony on preliminary matters. Although the modern rule does not allow leading questions to summarize a witness’s earlier testimony, appellate review may find no reversible error in such a question even though the form of the question violates the rules of evidence.

Who Is “A Witness Identified With An Adverse Party?”

One of the things the commentary to the modern rules does not tell us is how to identify or define the “witness identified with an adverse party” who may be properly examined by leading questions.

The language of former Rule 182 permitted the leading of a witness “in control of the particular matters and things under investigation.” Under that rule it was possible to establish reversible error if the trial court refused to allow leading questions. On the other hand, the cases show potential reversible error if leading questions were asked of a non-party who was not a hostile witness. Under the rule, a party could ask leading questions of hostile witnesses, adverse parties, or in cases of an adverse corporate party, its agents. In a 1956 case decided under this rule, an employee of a non-corporate party was deposed with leading questions. The appellate court affirmed the trial court’s exclusion of the questions, finding that, because the witness answered all the deposition questions fairly, he was not an adverse or hostile witness under Rule 182.

In keeping with historical precedent, today’s trial court has broad discretion in allowing leading questions. The refusal to allow leading questions will seldom be grounds for reversal when a non-party witness is not hostile and willingly answers questions when confronted with simple non-leading questions. Conversely, if the trial court allows leading questions on direct examination, the complaining party must show the trial court abused its discretion and how the party was unduly prejudiced by the questions.

In Roberts v. Capitol City Steel Co. (1963), the appellant’s motion for mistrial was based on appellee’s excessive use of leading questions at trial. The trial court had sustained 11 of appellant’s 22 objections to leading questions, but denied his motion for mistrial. Appellant’s theory on appeal was that, although no single question during the week-long trial was harmful enough to support a mistrial, “there was a persistent course of such questioning as to be prejudicial.” The appellate court found it entirely proper to lead a witness “up to the point of controversy,” and found no error in stating undisputed facts
in leading questions.\textsuperscript{77} Pointing to the length and complexity of the trial, the appellate court found no reversible error and affirmed the judgment of the trial court.

In hearings on motions for new trial based on jury misconduct, testifying jurors are not witnesses for either side. Because the jurors are therefore not identified with an adverse party, neither side may ask them leading questions.\textsuperscript{78} Sometimes neutral witnesses are in fact hostile, requiring an extra degree of skill and understanding on the part of the examining lawyer. One commentator discusses five reasons why supposedly neutral witnesses may be biased or uncooperative.\textsuperscript{79}

1. They are a product of their environment.
2. They resent the inconvenience of being forced to come to court.
3. They “don’t want to get involved.”
4. They have a preconceived idea of who should prevail at trial, even though they “have no dog in the fight.”
5. Despite their facade of neutrality, they actually have an interest in the outcome of the lawsuit.

**Leading Questions in Depositions and Interrogatories.**

At the turn of the century, Texas cases law allowed no exceptions to the rule prohibiting leading questions, even in depositions or interrogatories.\textsuperscript{80} As noted earlier, in the absence of a “harmless error rule,” judgments were routinely reversed because of improper leading questions. As the rules of civil procedure and evidence evolved, however, they allowed an adverse party’s testimony to be taken by written interrogatory,\textsuperscript{81} and expressly allowed the use of leading questions.\textsuperscript{82}

**Employees, former employees and hostile witnesses**

In 1946, the El Paso court of appeals held that parties were allowed to ask leading questions when taking depositions of hostile witnesses, including corporate representatives.\textsuperscript{83} However, when corporate employees had no personal involvement in the issues under examination, leading questions were found to be improper.\textsuperscript{84} Likewise, when leading questions were proper, the adverse party rule no longer applied to an officer, agent or employee who severed relations with a corporate party.\textsuperscript{85}

In *San Antonio River Authority v. Garrott Brothers*, (1975),\textsuperscript{86} a witness who had been city manager at the time of the events in controversy, was deposed with leading questions. On appeal, the appellate court found no prejudicial error.

\textsuperscript{77} Id.
\textsuperscript{80} *San Antonio & A.P. R. Co. v. Hammond*, 50 S.W. 123, 125, 92 Tex. 509 (1899), citing *Mahis v. Buford*, 17 Tex. 152.
\textsuperscript{81} TEX. R. CIV. P. 188 (1950) (repealed January 1, 1967) (previously TEX. REV. CIV. STAT. art. 3769).
\textsuperscript{82} TEX. R. CIV. P. 182 (1976) (repealed January 1, 1988) (previously TEX. REV. CIV. STAT. art. 3769c), appeared with the comment that TEX. R. CIV. EVID. 607 and 610 fully satisfy all needs served by the previous rule.
\textsuperscript{84} See *Mix*, 193 S.W. at 550.
\textsuperscript{85} *Longview Bank & Trust Co. v. Flenniken*, 642 S.W. 2d 568, 572 (Tex. App. -- Tyler 1982), rev’d on other grounds 661 S.W. 2d 705 (Tex. 1984).
\textsuperscript{86} *San Antonio River Auth. v. Garrott Bros.*, 528 S.W.2d 266 (Tex. Civ. App. -- San Antonio 1975, writ ref’d n.r.e.).
resulting from the answers to the leading questions, and effectively dodged the question of whether the deponent was an adverse witness.87

While current case law indicates that interrogatory answers to leading questions dealing with preliminary or introductory matters do not give rise to reversible error,88 leading questions cannot be asked in the deposition of a friendly witness. In GAB Business Services, Inc. v. Moore (1992),89 the plaintiff deposed a former employee of the defendant insurance company. When the insurance company’s counsel cross-examined the witness with leading questions, plaintiff’s counsel objected. Because the questions were framed to elicit a “yes” or “no” answer, the trial court limited the use of leading questions during this cross-examination. On review, the appellate court found the trial court did not abuse its discretion when it excluded deposition excerpts of testimony adduced by leading questions of a “friendly” witness.90

A federal case, Oberlin v. Marlin (1979), vividly illustrates the results when, after being called by his opponent at deposition, a party is “cross-examined” by his own counsel.91 If the deposition record does not indicate an objection was made to leading questions at the time of the “cross-examination,” any objections to that testimony will be deemed waived at trial. If a deposition is “taken under the rules,” any objection to the form of question must be preserved on the deposition record.92 Even if the objection was waived at the time of deposition, however, the trial court has discretion to exclude improper leading questions at trial.93

In a controversy over workers’ compensation benefits in 1963, The Eastland Court of Appeals found the employer company and its employees were not adverse witnesses as to the claimant under former Rule 182 of the Texas Rules of Civil Procedure.94 Twenty-one years later, under the new rules of procedure, however, the First Court of Appeals found a trial court erred when it did not allow the claimant to use leading questions when examining the personnel manager of the employer, because the personnel manager was “obviously” both hostile and associated with an adverse witness.95 Unfortunately, we cannot determine whether this error alone would have supported the finding of reversible error because the appellate court sustained three out of appellant’s ten points of error.

Even if opposing counsel does not object to leading questions, the trial court may sua sponte admonish a party not to use leading questions.96 As a final note, improper leading questions in the deposition of a friendly witness may not be harmful if the questions are cumulative of other evidence and/or they lack materiality.97

Use of Leading Questions In Witness Preparation.

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87 San Antonio River Auth., 528 S.W.2d at 278.
90 GAB Business Services, Inc. v. Moore, 829 S.W.2d at 351.
91 Oberlin v. Marlin American Corp., 596 F.2d 1322, 1328 (7th Cir. 1979).
92 Tex. R. Civ. P. 204(a); FED. R. Civ. P. 32(d).
93 Oberlin, 596 F.2d at 1329.
The ethical considerations involved in using leading questions to prepare witnesses have been discussed in many scholarly articles. Using leading questions to interview witnesses may alter recollection, reshape memories, and suggest interpretations of events that might not have otherwise occurred to witnesses. For example, the following inquiries are simplistic examples of overly suggestive questions: “The light was green when you went through the intersection, wasn’t it?”; “When you explored that proposition with Mr. Adams, you did not make him a firm offer, did you?”

Psychologists agree that the use of leading questions to suggest new material to a witness may permanently alter that witness’s ability to recount exactly what they observed at the moment of the occurrence in controversy. Psychologists who study this phenomenon, however, cannot agree as to what actually happens to the witness’s original memory. It is possible that (1) the original memory is lost and new material takes its place; (2) the original memory is still in place but is harder to retrieve; or (3) the witness gets his sources of data confused and believes the new material comes from his own original perception.

If lawyers who utilize leading questions to “woodshed” witnesses create false testimony for use at trial, they may be engaging in a form criminal conduct, or violating the Texas Rules of Disciplinary Conduct. In reality, this conduct occurs every day in law offices all over Texas. However, if a client is inhibited or less than forthcoming, leading questions can be helpful in encouraging a more complete or accurate account of the facts.

**Interrogating Children.**

The Family Code

Much has been written about the use of suggestive or leading questions in pre-trial interviews of children and its impact on their subsequent testimony, particularly in sexual abuse cases. While studies show that children are no more susceptible to suggestions from leading questions than adults, erroneous testimony from false memories may be caused by distorted mental processes; social and environmental influences and pressures; miscommunication; and/or misinterpretation magnified by a child’s “suggestibility.” One researcher noted that, what is not clear is whether these subjects merely believe the information to be true because it was provided by a credible source, or whether they in fact now remember the misleading information as part of the original witnessed experience. It is entirely

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100 Wydick, 17 CARDOZO L. REV. at 9.
101 See TEX. DISCIPLINARY R. PROF. CONDUCT 1.02(c) (1989), reprinted in TEX. GOV’T CODE ANN., tit.2, subtit. G app. (Vernon Supp. 1992) (STATE BAR RULES art. X, §9) (concerning assisting a client in criminal conduct); TEX. DISCIPLINARY R. PROF. CONDUCT 3.03(a)(5) (1989) (concerning use of false evidence) (see comment 5 on “Anticipated False Evidence” and comment 15 “Refusing to Offer Proof Believed to be False”); TEX. DISCIPLINARY R. PROF. CONDUCT 3.04(b) (1989) (concerning assisting a witness to testify falsely); and TEX. DISCIPLINARY R. PROF. CONDUCT 8.04(a)(3) (1989) (concerning misconduct by fraud or deceit). See also 18 U.S.C.A. §1622. “Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.”
103 See, e.g., Jennifer A. Petrilli, People v. Michael M.: New York Supreme Court allows suppression hearing in child abuse case to determine whether a child’s testimony has been rendered unreliable by a suggestive interview 69 ST. JOHN’S L. REV. 663 (1995).
possible that some subjects believe the suggestion was part of the original event, even though they know full well they do not remember seeing it.106

When the 1983 Texas Legislature enacted section 104.002 of the Texas Family Code to allow videotaping of a child’s testimony, it prohibited the use of leading questions. Specifically, it excluded from evidence statements or testimony from children 12 years of age under made in response to a suggestive or leading question.107

The Code of Criminal Procedure

Article 38.071 of the Texas Code of Criminal Procedure contains virtually the same language as that in the Family Code prohibiting the use of leading questions when questioning child witnesses on videotape.108 In Ochs v. Martinez (1990),109 the San Antonio court of appeals pointed out that, in 1987, the Texas Court of Criminal Appeals found Article 38.071 to be unconstitutional because it violated a defendant’s Sixth Amendment right to confront witnesses against him, but was silent as to the admissibility of leading questions.110 In 1995, the Fort Worth court of appeals revisited the Ochs opinion and determined that, in enacting section 11.21 of the Family Code, the Legislature had, in the case of “uncross-examined [sic] videotaped testimony of children under the age of 12,” abrogated the common law rule allowing the use of leading questions when examining children.111

To avoid the leading question trap of “yes” and “no” responses, the court recommended use of “open ended questions” that did not suggest a response. To frame a neutral, open ended question, the court suggested the technique of prefacing questions with “where,” “what,” and “who” to elicit substantive responses from the child witness.112

Why Is There No Reversible Error?

When Leading Questions Are Allowed By the Court

To provide practical assistance in identifying permissible leading questions, we have complied the top ten reasons appellate courts have given when the alleged improper use of leading questions was held not to constitute reversible error.

1. The appealing party failed to object at trial.113

2. The points of error complaining of the use of leading questions were too general to be considered on appeal.114

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106 Manshel, SETON HALL L. REV. 685, quoting from Maria S. Zaragonza, Memory, Suggestibility, and Eyewitness Testimony in Children and Adults, in Steven J. Ceci et al. eds., 1987, CHILDREN’S EYEWITNESS MEMORY, 74.

107 Formerly TEX. FAM. CODE ANN. § 11.21, et seq. The statute applies only to a proceeding affecting the parent-child relationship . . . in which a child 12 years of age or younger is alleged to have been abused. A child’s pre-recorded oral statement is admissible into evidence if “the statement was not made in response to questioning calculated to lead the child to make a particular statement.”

108 TEX. CODE CRIM. PROC. ANN. Art. 38.071. The statute allows a child’s pre-recorded statement into evidence if “the statement was not made in response to questioning calculated to lead the child to make a particular statement.”


110 Ochs, 789 S.W.2d at 951 (citing to Long v. State, 742 S.W.2d 302, 318-19 (Tex. Crim. App. 1987)). (However, Ochs explained that the Sixth Amendment does not apply to civil cases, 789 S.W.2d at 951.)

111 In The Interest Of W.S., 899 S.W.2d 772, 779 (Tex. App. - Fort Worth 1995, no writ).

112 Id.


3. The leading question was used merely to “develop” testimony of the witness on uncontested preliminary matters.\(^{115}\)

4. The leading question merely clarified previous testimony of the same witness,\(^{116}\) or was cumulative of previous witnesses’ testimony,\(^{117}\) or was related to facts established by other evidence.\(^{118}\)

5. All objections to leading questions were sustained and instructions to disregard were given to the jury, curing any resulting prejudice.\(^{119}\)

6. Because the trial was to the bench instead of to a jury, more latitude was allowed in questioning.\(^{120}\)

7. Other sufficient probative evidence was admitted without any objection at the bench trial.\(^{121}\)

8. Considering the record as a whole, the leading question had no material effect on the outcome of the case.\(^{122}\)

9. The party complaining of improper leading questions obtained a favorable jury finding on the submitted issue.\(^{123}\)

10. When the trial was lengthy and complex and the leading questions merely stated undisputed facts, the parties were actually assisted by the use of leading questions up to the point of controversy.\(^{124}\)

**When Leading Questions Are Not Allowed**

The top three reasons appellant courts have refused to find reversal error when a party is improperly prohibited from using leading questions are as follows:

1. Because no related jury question was ever developed, the testimony that would have been elicited by the leading questions would have been of no benefit to the complaining party.\(^{125}\)

2. The evidence excluded by the trial court’s failure to allow the leading questions did not control the outcome of the case.\(^{126}\)

3. Appellant did not build a record to demonstrate what answers the leading questions would have elicited.\(^{127}\)

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116 *Cecil*, 893 S.W.2d at 47.

117 *McDonough Bros, Inc. v. Lewis*, 464 S.W.2d 457, 466 (Tex. Civ. App. -- San Antonio 1971, writ ref’d n.r.e.).


120 *American Surety Co. v. McCarty*, 395 S.W.2d 665, 669 (Tex. Civ. App. -- Austin 1965, writ ref’d n.r.e.).


122 *Ely v. Reiche*, 357 S.W.2d 461, 462 (Tex. Civ. App. -- Texarkana 1962, writ ref’d n.r.e.).


124 *Roberts v. Capitol Steel Co.*, 376 S.W.2d 771 (Tex. Civ. App. -- Austin 1964, writ ref’d n.r.e.).

125 *McCarthy v. City of Houston*, 389 S.W.2d 159, 162 (Tex. Civ. App. -- Houston 1965, writ ref’d n.r.e.).


127 *Cruse v. Daniels*, 293 S.W.2d 616 (Tex. Civ. App. - Amarillo 1956, writ ref’d n.r.e.).
Conclusions.

An objection to a leading question is actually a challenge to the form of the question.\textsuperscript{128} If the trial court sustains an objection to a leading question, counsel will often rephrase the question so that the witness will be permitted to subsequently parrot the answer suggested by the earlier leading question.\textsuperscript{129} Under the rules you must object and obtain a ruling to preserve error. As a matter of strategy, it is often best to save your objections to leading questions until (1) the pattern of leading questions during live testimony at trial is so blatantly offensive and prejudicial that it may be developing into reversible error; or (2) you are at the deposition of a “non-adverse” or “non-hostile” witness and your opponent is using leading questions to elicit prejudicial testimony that may be either read to the jury or presented on videotape in your opponent’s case in chief or as rebuttal.

\textsuperscript{128} Myron H. Bright, Ronald L. Carlson, OBJECTIONS AT TRIAL 87 (1990).