6.10. Scope & Manner of Examination of Witnesses

(1) Subject to subdivisions two and three, as well as rule 4.01 (Relevant Evidence) and a defendant's rights to confrontation and to present a defense in a criminal proceeding, the scope and manner of examining witnesses is committed to the sound discretion of the court.

(2) Cross-examination of a witness should ordinarily be limited to the subject matter of the direct examination and matters affecting credibility. The court may in its discretion, however, permit examination into additional matters and may be required to do so in a criminal case.

(3) Redirect and re-cross-examination of a witness is limited to the matters covered on the witness's cross-examination or redirect examination, respectively.

(4) Leading Questions.

(a) A court should not permit leading questions during the direct examination of a witness, except a court may permit leading questions, for example, with respect to introductory matters; examination of a child; expediting a proceeding as to matters that are not in dispute; when necessary to clarify a witness's testimony; when examining a witness about a prior inconsistent statement; or as provided in paragraph (b).

(b) When a party calls (i) an adverse party, (ii) a witness identified with an adverse party, or (iii) a witness who is hostile or becomes hostile during examination, the court may permit leading questions in conducting the direct examination.

(c) A court shall permit leading questions during the cross-examination of a witness.

(d) When on cross-examination, a court permits inquiry into matters that were not covered on direct examination, the cross-examination is subject to the provisions of subdivisions (4) (a) and (b).

Note

Subdivision (1) restates a rule often referred to by the Court of Appeals (*Bernstein v Bodean*, 53 NY2d 520, 529 [1981] ["(W)ith respect to the examination of all witnesses, the scope and manner of interrogation are committed to the Trial Judge in the exercise of his responsibility to supervise and to oversee the conduct of the trial"]; *Matter of Friedel v Board of Regents of Univ. of State of N.Y.*, 296 NY 347, 352 [1947] ["Once the right has been accorded, the extent of cross-examination rests largely in the discretion of the tribunal, whose exercise thereof is not reviewable unless abused"]; *People v Schwartzman*, 24 NY2d 241, 244 [1969] ["The nature and extent of cross-examination is subject to the sound discretion of the Trial Judge"]).

The scope of the trial court's discretion includes the responsibility to protect a witness from harassment, undue embarrassment, or physical danger (*People v Stanard*, 42 NY2d 74, 84 [1977] [There is a duty to protect a witness from questions which "harass, annoy, humiliate or endanger him"]).

In a criminal proceeding, the trial court in its exercise of sound discretion must respect the boundaries drawn by a defendant's constitutional right to present a defense (*e.g. Davis v Alaska*, 415 US 308, 316 [1974] ["Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." Trial court erred in not permitting the defense to cross-examine a witness about possible bias]; *California v Trombetta*, 467 US 479, 485 [1984] ["Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense"]; *Crane v Kentucky*, 476 US 683, 687 [1986] [An evidentiary ruling may not deprive a defendant "of his fundamental constitutional right to a fair opportunity to present a defense." Thus, it was error for the trial court to preclude the jury from considering the credibility of a confession that the trial judge found to be voluntary]; *People v Carroll*, 95 NY2d 375, 385 [2000] ["A court's discretion in evidentiary rulings is circumscribed by

the rules of evidence and the defendant's constitutional right to present a defense"]; *People v Robinson*, 89 NY2d 648, 650 [1997] [Defendant's "constitutional right to due process requires the admission of hearsay evidence consisting of Grand Jury testimony when the declarant has become unavailable to testify at trial," and "the hearsay testimony is material, exculpatory and has sufficient indicia of reliability"]; *People v Hudy*, 73 NY2d 40, 56 [1988] [While the ex post facto part of the decision was abrogated by *Carmell v Texas* (529 US 513 [2000]), the Court "also conclude(d) that defendant was improperly denied the right to present his case by the trial court's ruling foreclosing examination of the two investigating officers about the manner in which the child-witnesses were first questioned"]).

Subdivision (2) in its first sentence restates New York law that cross-examination should ordinarily be limited to an examination into matters affecting the witness's credibility and matters testified to on direct examination (*e.g. People v Chin*, 67 NY2d 22, 28 [1986] ["(C)ross-examiner may delve deep in order to attack credibility and present an alternate view of the facts"]; *People v Giblin*, 115 NY 196, 199 [1889] ["It is an office of cross-examination to exhibit the improbabilities of the witness' story"]; *People ex rel. Phelps v Court of Oyer & Terminer of County of N.Y.*, 83 NY 436, 460 [1881] ["As a general rule the range and extent of such an examination is within the discretion of the trial judge, subject, however, to the limitation that it must relate to matters pertinent to the issue, or to specific facts which tend to discredit the witness or impeach his moral character"]).

A trial court's discretion should ordinarily be exercised to preclude examination into matters that were not elicited on direct examination (*see e.g. Goff v Paul*, 8 AD3d 971, 972 [4th Dept 2004]; *Hall v Allemannia Fire Ins. Co. of Pittsburgh*, 175 App Div 289, 292 [4th Dept 1916]). This rule exists primarily "to prevent the cross-examiner from cluttering up the direct examiner's case with unfavorable and extraneous facts when he could make the witness his own" (*People v Hadden*, 95 AD2d 725, 725-726 [1st Dept 1983]). The courts have, however, cautioned that cross-examination is not strictly limited "to the precise details brought out on direct examination" (*Crawford v Nilan*, 264 App Div 46, 51 [3d Dept 1942], *revd on other grounds* 289 NY 444 [1943]). Rather, the examination may seek an explanation and clarification of matters that were not fully disclosed on direct (*People v Ayala*, 194 AD2d 547, 547 [2d Dept 1993]). Thus, cross-examination into inferences, implications, and explanations suggested by or arising from the direct examination is permitted (*see* Barker & Alexander, Evidence in New York State and Federal Courts § 6:72 at 628 [2d ed]).

The second sentence of subdivision (2) restates New York law that nonetheless permits a court in an appropriate case to allow inquiry into matters that were not at all the subject of direct examination (*Neil v Thorn*, 88 NY 270, 275-276 [1882]; *see White v McLean*, 57 NY 670 [1874] [abstract; text at 47 How Prac 193, 198 (1874) ("It makes no difference that the witness under examination

was the opposite party to the action. He is but a witness, and the general rules applicable to adverse witnesses govern the case. Though a broader range of cross-examination than is usual is allowable, it is still subject to the discretion of the court")]).

In a civil proceeding, a court's exercise of discretion to permit a cross-examination to go beyond direct examination may be proper only when it relates to an issue in the case and examination into that issue does not frustrate the orderly presentation of a party's proof (*cf. American Motorists Ins. Co. v Schindler El. Corp.*, 291 AD2d 467, 468-469 [2d Dept 2002]; *Grcic v City of New York*, 139 AD2d 621, 626 [2d Dept 1988]).

In a criminal proceeding, the Appellate Division has indicated that a trial court should exercise its discretion to permit inquiry into a relevant issue, regardless whether the issue was raised on direct (*see People v Casiano*, 148 AD3d 1044, 1046 [2d Dept 2017] [The "defense is permitted to exceed the scope of a direct examination in order to prove a relevant proposition such as the justification defense"]; *People v Joslyn*, 103 AD3d 1254, 1256 [4th Dept 2013] ["(I)n a criminal case, a party may prove through cross-examination any relevant proposition, regardless of the scope of direct examination"]; *People v Kennedy*, 70 AD2d 181, 186 [2d Dept 1979] ["(I)t is well settled that in a criminal case a party may prove through cross-examination any relevant proposition, regardless of the scope of the direct examination"]).

Where cross-examination of the witness on matters not raised on direct is permitted, the court also has the discretion to rule that the cross-examiner has made the witness the cross-examiner's own witness to that extent. In that situation, the rules governing direct examination, including the restriction on leading questions set forth in subdivision (4) (a) and the rule limiting impeachment of one's own witness set forth in rule 6.11 (3) of the Guide to New York Evidence, apply (*see Bennett v Crescent Athletic-Hamilton Club*, 270 NY 456, 458 [1936]; *People ex rel. Phelps*, 83 NY at 459-460).

Subdivision (3) is derived from *People v Buchanan* (145 NY 1, 24 [1895] [A "witness may be re-examined by the party calling him upon all topics on which he has been cross-examined, for the purpose of explaining any new facts which came out; but the re-examination must be confined to the subject-matter of the cross-examination"]; *People v Zigouras*, 163 NY 250, 256 [1900] ["While the range in details to which the re-examination may extend should rest largely in the discretion of the court, to the end that immaterial issues may not arise, enough should be permitted to prevent a part of the truth from conveying a false impression"]; *People v Regina*, 19 NY2d 65, 78 [1966] ["(T)he prosecution's question on redirect examination was properly within the scope of matters gone into on cross-examination and did no more than to explain, clarify and fully elicit a question only partially examined by the defense"]; *accord People v Ochoa*, 14

NY3d 180, 186-187 [2010]; *Feblot v New York Times Co.*, 32 NY2d 486, 498 [1973]).

Subdivision (4) governs the use of leading questions in examining witnesses. The New York courts have traditionally considered a question to be leading if it suggests to the witness the answer the examiner wants (*see e.g. People v Mather*, 4 Wend 229, 247 [Sup Ct of Judicature 1830] ["A question is leading which puts into a witness' mouth the words that are to be echoed back, or plainly suggests the answer which the party wishes to get from him"]). Whether a leading question may be used in examining a witness is committed to the court's discretion (*see Downs v New York Cent. R.R. Co.*, 47 NY 83, 88 [1871] ["It was within the discretion of the judge at the trial to suffer a question, leading in form, to be put"]).

Subdivision (4) (a) restates New York's rule that leading questions are ordinarily not permitted on direct examination (*see e.g. People v Blauvelt*, 156 AD3d 1333, 1335 [4th Dept 2017]; *People v Cuttler*, 270 AD2d 654, 655 [3d Dept 2000]).

> "The general rule is that leading questions may not be used during the direct examination of a witness. This rule is explained by the likelihood that a witness will be friendly, or at least nonhostile, toward the party who called her and therefore susceptible to mouthing the version of events sought to be proved by that party. Thus, to help ensure that the fact-finder hears the facts as they are known by the witness, not by counsel, leading questions are generally prohibited on direct" (Barker & Alexander § 6:70 at 622).

A court may allow leading questions, however, when appropriate in particular circumstances, e.g., examination on introductory matters (*Mather*, 4 Wend at 247); examination of a child (*People v Martina*, 48 AD3d 1271, 1272 [2008] [sexual abuse case]; *People v Graham*, 171 AD3d 1566, 1570 [4th Dept 2019]); expediting a trial as to matters that are not in dispute (*Cope v Sibley*, 12 Barb 521, 524-525 [Sup Ct General Term 1850]); when necessary to clarify a witness's testimony (*People v Brizen*, 118 AD3d 590, 590-591 [2014]; *People v Williams*, 242 AD2d 469, 469 [1st Dept 1997] [clarify testimony of person who had displayed a difficulty with the language]); and when examining a witness about an inconsistent statement (*Sloan v New York Cent. R.R. Co.*, 45 NY 125, 127 [1871]). A court may also permit leading questions to avoid having the witness testify to matters the court has ruled inadmissible.

Subdivision (4) (b) restates New York law when the witness is an adverse party or closely identified with an adverse party or has demonstrated hostility to the party or the party's attorney. Leading questions may be used during the examination of such witnesses (*Becker v Koch*, 104 NY 394, 401 [1887]; *Jordan*

v Parrinello, 144 AD2d 540, 540 [2d Dept 1988]), but the court may disallow the use of leading questions when the witness shows no sign of hostility (*Matter of Argila v Edelman*, 174 AD3d 521, 524 [2d Dept 2019]; *Matter of Giaquinto*, 164 AD3d 1527, 1530-1531 [3d Dept 2018]; *Jackson v Montefiore Med. Ctr.*, 109 AD3d 762, 763 [1st Dept 2013]). Factors suggestive of hostility include reluctance to testify and evasiveness in answering questions (*e.g. Matter of Ostrander v Ostrander*, 280 AD2d 793, 793-794 [3d Dept 2001]).

Subdivision (4) (c) restates familiar New York law that permits leading questions during the cross-examination of a witness (Barker & Alexander § 6:70 at 622 ["(O)n cross-examination a witness usually is of an uncooperative frame of mind and is more likely to resist the suggestions of the cross-examiner. Therefore, leading questions ordinarily are allowed on cross-examination"]). When in a civil proceeding, however, one party on its direct case calls an adverse party, the court may preclude the attorney for that party-witness from asking leading questions on the "cross-examination" (*id.* § 6:70 at 622 n 6).

Subdivision (4) (d) restates New York law recognizing cross-examination into matters not the subject of direct examination, as permitted under subdivision (2), is in effect direct examination and therefore is subject to the rules governing leading questions on direct examination, as set forth in subdivision (4) (a) and (b) (*see People ex rel. Phelps*, 83 NY at 459).