

IV. QUESTIONING: GENERALLY

§ 4.30 A. General rule: leading questions are prohibited (EC 764)

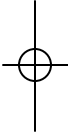
EC §764 defines a leading question as one that suggests the desired answer.

§ 4.31 1. Statutory exceptions to the rule

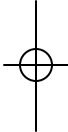
a. EC 767 allows leading questions under special circumstances where the interests of justice may require them.

b. EC 767 allows leading questions of a witness under 10 in a prosecution under PC 273a, 273d, or 288.

§ 4.32 2. Other generally recognized exceptions to the rule



a. Preliminary questioning: Leading questions in connection with preliminary questioning are improper only where there is manifestly an attempt to put answers or material matters in the witness' mouth. P. v. Jones, 160 Cal 358 (1911). Leading questions are proper, and approved, where the purpose is to more quickly reach testimony on material issues. P. v. Mora, 139 CA 2d 266 (1956); P. v. Orona, 79 CA 2d 820 (1947). See also, P. v. Burton, 55 Cal 2d 328 (1961) (Question which can be responded to with "yes" or "no" answer does not improperly lead where it merely directs the witness' attention to the subject matter of the inquiry.)



b. To jog memory: Leading questions are permissible where necessary to stimulate or revive the recollection of a witness. P. v. Jones, 221 CA 2d 619 (1963); P. v. Weaver, 123 CA 347 (1932).

c. To identify exhibits: Leading questions that relate solely to identification of exhibits are freely permitted. P. v. Campbell, 233 CA 2d 38 (1965); P. v. Wilson, 46 CA 2d 218 (1941).

d. Court retains discretion to allow leading questions: In P. v. Williams, 16 Cal4th 635 (1997) the court noted that the trial judge has broad discretion in allowing or disallowing a leading question. The court wrote that virtually any question can be argued to be a leading question, and that the real issue is whether there is present the danger of false suggestion to the witness.

B. Other rules regarding questioning

§ 4.33 1. Court may participate in questioning

“A trial judge may participate in the examination of witnesses whenever he or she believes doing so may fairly aid in eliciting the truth, in preventing misunderstanding, in clarifying the testimony or covering omissions, in allowing a witness his or her right of explanation, and in eliciting facts material to a just determination of the cause.” citing, P. v. Hawkins, 10 CA 4th 920, 948 (1995). P. v. Cortes, 71 CA 4th 62, at 75 Fn 5 (1999).

§ 4.34 2. Questions that assume facts not in evidence

Such questions are improper. See, e.g., Ray v. Borgfeldt, 169 Cal 253 (1915); P. v. Graham 21 Cal 261 (1862).

§ 4.35 3. Argumentative questions

Such questions are improper. See, e.g., P. v. Hatfield, 129 CA 162 (1933).

§§ 4.36-4.39 [RESERVED]

V. FAILURE OF MEMORY: REFRESHING RECOLLECTION

§ 4.40 A. General rule

Where a witness' memory has failed as to a particular detail, he may “refresh” his recollection by referral to a writing.

The general theory is that the witness has suffered a momentary lapse of memory, but upon reference to writings, his memory is stimulated, and he testifies from that point on based on his own memory. It is not required that the witness refer only to writings the witness himself has made. He may refer to any writings that will serve to refresh his memory. See also §6.195.

§ 4.41 1. Statutes

EC 771 requires that, where a witness has referred to a writing to refresh his recollection, the writing must be produced in court at request of the adverse party. The adverse party may cross examine the witness on the basis of the writing.

§ 4.42 2. Procedure

a. Foundation: the record must reflect that the witness has suffered a lapse of memory as to a particular point.

b. Where a witness' memory fails, the proper practice is to allow the witness to refresh his memory by reference to a writing, without first disclosing to the jury the contents of the writing.

See, e.g., P. v. Parks, 4 Cal 3d 955 (1971).

c. Production of the writing referred to by the witness is required.

Where, in a proceeding to extend the mental commitment under PC 1026.5 of an insane defendant, psychiatrist refreshed recollection on basis of a summary of hospital records which contained his and others' thoughts. Held, it was not sufficient to produce only the summary at trial for defendant's attorney to refer to: all the hospital records should have been produced. P. v. Goff, 127 CA 3d 1039 (1981).

To rebut defendant's alibi, prosecution called his landlady who testified that he was at his apartment on the day of the crime. She said she had refreshed her recollection by looking at

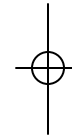
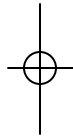
rent receipts. These were not produced in court. Defendant moved to strike the testimony. Trial court denied the motion. Held, error: under 771, the documents referred to by the witness must be produced in court. P. v. Young, 9 CA 3d 106 (1970).

§§ 4.43-4.49 [RESERVED]

VI. FAILURE OF MEMORY: PAST
RECOLLECTION RECORDED

§ 4.50 A. General rule

Under EC 1237, a writing previously made by a witness is admissible if the witness' present memory has failed. Foundation must be laid that the writing was made when the events were still fresh in the witness' memory; that the writing was made by or at the direction of the witness; that the writing was a true statement of fact when made; and that the writing is an accurate record of the statement. The writing may be read into evidence, but the writing itself may not be received unless offered by the adverse party. See also §6.195.



§ 4.51 1. Tape recording of crime does
not qualify

In pandering case where tape was made of conversation between prostitute and defendant, court erred in admitting the tape under past recollection recorded theories, appellate court noting the tape was fully admissible under other theories. The tape was not a recording of a recollection; rather, it was a mechanical rendering of the event itself. P. v. Patton, 63 CA 3d 211 (1976).

§ 4.52 2. Illustrative case

Where witness had given a written statement to the police implicating defendant, but had subsequently suffered an accident resulting in amnesia rendering him unable to properly