

**STATE OF VERMONT
BOARD OF MEDICAL PRACTICE**

In Re:	)	MPC 15-0203	MPC 110-0803
	)	MPC 208-1003	MPC 163-0803
	)	MPC 148-0803	MPC 126-0803
	)	MPC 106-0803	MPC 209-1003
David S. Chase	)	MPC 122-0803	MPC 89-0703
	)		MPC 90-0703
Respondent	)		MPC 87-0703

**STATE OF VERMONT’S SECOND MOTION IN LIMINE AND
MEMORANDUM**

Now comes the State of Vermont (“State”) and, by and through undersigned counsel, moves the Hearing Committee (“Committee”) appointed by the Vermont Board of Medical Practice (“Board”) to prohibit Respondent’s counsel from asking leading questions in his cross-examination of his own client.

MEMORANDUM

At hearing in the above-captioned matters on September 12, 2006, The Committee decided that Respondent’s counsel would be allowed to cross examine Respondent as to each patient charged when the State had indicates that it is ready to examine the Respondent on another. The cross-examination of Respondent by his counsel consisted primarily of leading questions. A leading question “suggests to the witness the answer desired by the questioner.” *Wakefield v. Tygate Motel Corporation*, 161 Vt. 395, 399-400 (1994)(*internal quotations and citations omitted*). The State moves the Committee to prohibit Respondent’s counsel from asking leading questions on cross-examination of the Respondent, whenever such cross-examination resumes.

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The Vermont Rules of Evidence apply to these proceedings as a contested case under the Vermont Administrative Procedures Act. 3 V.S.A. §810(c). The mode and order of interrogation of witnesses is set forth in V.R.E. 611(c), which states that:

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.

Vermont Rule of Evidence V.R.E. 611(c) is “identical to the Federal and Uniform Rules” of evidence. Reporter’s Notes, V.R.E. 611. The advisory note to F.R.E. 611(c) explains why the rule contains the qualification “ordinarily” to the general rule allowing leading questions on cross-examination stating that:

The purpose of the qualification ‘ordinarily’ is 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 his own counsel after being called by the opponent . . .*

(emphasis added). The cross-examination of Respondent with leading questions by his own counsel is cross-examination in form only and should be prohibited by the Committee.

In *Schultz v. Rice*, 809 F.2d 643 (10th Cir. 1986) the Tenth Circuit Court of Appeals relied on the federal advisory note when addressing the issue of cross-examination with leading questions by a party’s attorney. At trial, plaintiff had called the defendant doctor in her case-in-chief. When the doctor’s attorney began cross-examination with leading questions, plaintiff’s attorney objected. The trial judge overruled the objection stating to plaintiff’s counsel “ you have a right to call him as an adverse witness and ask leading questions. Now, that opens it up to counsel, too.” *Schultz v. Rice*, 809 F.2d, at 654. The Tenth Circuit Court of Appeals ruled that

the trial judge's statement was error. *Id.* Citing to F.R.E. 611(c) and the advisory note, the appellate court stated:

The instant scenario involving the questioning of Dr. Rice by his own counsel is precisely the that characterized in the note as 'cross-examination in form only and not in fact' and, therefore, should not have been allowed as a matter of right.

Schultz v. Rice, at 654. The reasoning of the Tenth Circuit in *Schultz* should be controlling in these proceedings.

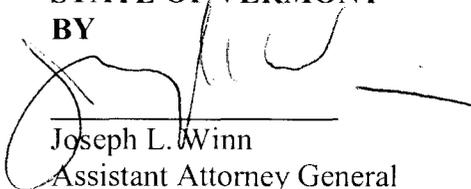
The concerns in allowing counsel to cross-examine his own client with leading questions is self-evident. Allowing Respondent's counsel to cross-examine his own counsel with leading questions is that the Respondent will follow the suggestion of his counsel as to the desired answer. *Rine v. Irisari*, 420 S.E. 2d 541, 559 (W. Va. 1992)(*citations omitted*). Further, there is " 'justifiable concern . . . expressed that to allow . . . leading questions of a friendly witness would allow the examiner to provide a false memory to the witness by suggesting the desired reply to his question.' " *Id.* (quoting *State v. Hosey*, 348 S.E.2d 805, 810 (N. Car. 1986)). These concerns should be especially important to the Committee in performing its fact-finding mission. The Committee should be hearing the direct testimony from Respondent—not Respondent's testimony as filtered through his attorney's leading questions.

CONCLUSION

For the reasons argued above, the State's Second Motion in Limine should be **GRANTED.**

Dated at Burlington, Vermont this 18th day of September, 2006.

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BY**



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