
29.6 Witness Examination

This section discusses the legal principles governing direct and cross examinations. It does not address how to fashion and deliver an effective direct or cross. There are many good practical guides on these advocacy skills. *See, e.g.,* STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE (5th ed. 2015). The website of the N.C. Office of Indigent Defense Services also has a collection of materials on direct and cross-examination by various authors located in the "Training and Reference Materials Index" under the topic "Trial Practice." For additional considerations and recommendations with respect to preparing for direct and cross-examination, see *infra* Appendix A, N.C. COMM'N ON INDIGENT DEFENSE SERVS., PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL, Guideline 7.5 Confronting the Prosecution's Case and Guideline 7.6 Presenting the Defense Case (Nov. 2004) (2d ed. 2012).

A. General Limits

The parties have considerable latitude in examining witnesses, but the trial judge has the ultimate authority to control the examination and cross-examination of witnesses. Pursuant to N.C. Rule of Evidence 611(a), the judge may 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.

See also State v. Fleming, 350 N.C. 109 (1999); *State v. Satterfield*, 300 N.C. 621 (1980); *State v. Arnold*, 284 N.C. 41 (1973).

In North Carolina, the examination of witnesses must be conducted from a seated position behind counsel table. If counsel wishes to approach the witness in order to present, inquire about, or examine him or her about an exhibit, document, or diagram, counsel must request

permission from the trial judge. *See* N.C. GEN. R. PRAC. SUPER. & DIST. CT. 12; *see also State v. Bass*, 5 N.C. App. 429 (1969).

B. Direct Examination

Although sometimes paid less attention by defense counsel than other aspects of the case, direct examination is an important part of the entire trial process. Direct examination can be "a powerful tool . . . to tell the jury a compelling and convincing story, to convey to the jury the utter trustworthiness of the witness and the advocate, and to severely limit and frustrate the ability of the opposing party to cross-examine the witness." H. Mitchell Caldwell et al., *Primacy, Recency, Ethos, and Pathos: Integrating Principles of Communication into the Direct Examination*, 76 NOTRE DAME L. REV. 423, 516 (2001).

Scope and form. The scope of direct examination is limited only by relevancy. The use of open-ended questions is generally advised, and leading questions are usually prohibited. *See* N.C. R. EVID. 611(c) ("Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony."). Leading questions are disapproved on direct examination because the witness usually favors the calling party's case, and he or she "may readily accede to the version of the events stated in the examiner's question rather than describing the [events] as he or she actually remembers" them. WALKER JAMESON BLAKEY, DEAN P. LOVEN & GLEN WEISSENBERGER, NORTH CAROLINA EVIDENCE: 2017 COURTROOM MANUAL Ch. 611, at 476 (2017). For a detailed discussion of the use of leading questions on direct and cross-examination, see *infra* § 29.6F, Leading Questions During Direct or Cross-Examination.

C. Redirect Examination

Purpose and scope. Redirect examination of a witness after cross-examination is much narrower in scope than direct examination. The general purpose of redirect examination is "to clarify testimony which has been cast into doubt upon cross-examination, to clarify new matter brought out on cross-examination or to refute testimony elicited on cross-examination." *State v. Franks*, 300 N.C. 1, 12 (1980); *State v. Davis*, 68 N.C. App. 238, 242 (1984) (quoting *Franks*); *see also State v. Calloway*, 305 N.C. 747, 755 (1982) (noting that "after a witness has been cross-examined the party calling him may reexamine the witness so as to clarify the new matter elicited on cross-examination").

Counsel may not use redirect examination to introduce new matters (*State v. Weeks*, 322 N.C. 152 (1988)), or to have the witness merely repeat testimony from his or her direct examination. *State v. Stitt*, 147 N.C. App. 77 (2001). However, the trial judge has the discretion to expand the scope of redirect examination to allow testimony that exceeds the scope of direct and cross-examination as long as the testimony is relevant and otherwise admissible. *See State v. Barton*, 335 N.C. 696 (1994); *Davis*, 68 N.C. App. 238; *see also* N.C. R. EVID. 611(a).

Practice note: If the State is permitted to introduce new matters during redirect examination of a witness, you are entitled to recross-examine the witness about those matters. *See infra* §

29.6E, Recross Examination. If you are surprised by the new matters and need additional time to prepare for recross-examination, you should request a recess or continuance.

Opening the door. If a witness is impeached on cross-examination, the witness may be allowed to explain or clarify the matter on redirect examination even though the testimony would not have been admissible during the calling party's case-in-chief. *See, e.g.*, *State v. Johnston*, 344 N.C. 596, 606 (1996) (victim's girlfriend permitted to testify on redirect regarding the victim's character for peacefulness where defendant opened the door to this line of testimony on cross-examination by suggesting that the victim was "looking for a fight" on the night he was killed); *State v. Patterson*, 284 N.C. 190 (1973) (murder victim's daughter properly allowed to testify on redirect that one of the reasons she did not like defendant was that he had raped her; defendant had asked the witness on cross-examination about her dislike of defendant and her ill will against him); *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 171, at 632 n.606 (7th ed. 2011) (collecting cases).

D. Cross-Examination

Generally. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). It has been described as the "'greatest legal engine ever invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158 (1970) (citation omitted). It is also "'[o]ne of the most jealously guarded rights in the administration of justice.'" *State v. Harrill*, 289 N.C. 186, 191 (1976) (quoting 1 STANSBURY'S NORTH CAROLINA EVIDENCE § 35, at 100 (Brandis Rev. 1973)), *vacated in part on other grounds*, 428 U.S. 904 (1976); *Barnes v. N.C. State Highway Comm'n*, 250 N.C. 378, 394 (1959) (citation omitted). "The right to have an opportunity for a fair and full cross-examination of a witness upon every phase of his examination in chief, is an absolute right and not a mere privilege." *Riverview Milling Co. v. State Highway Comm'n*, 190 N.C. 692, 696 (1925).

Constitutional bases. The Sixth Amendment to the U.S. Constitution guarantees the right of an accused in a criminal prosecution "to be confronted with the witnesses against him." *See also Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (the right of cross-examination is not just a desirable rule of trial procedure but "is implicit in the constitutional right of confrontation, and helps assure the 'accuracy of the truth-determining process'" (citation omitted)). This right of confrontation is secured for defendants in state as well as federal criminal proceedings. *Pointer v. Texas*, 380 U.S. 400 (1965); *see also* U.S. CONST. amend. XIV. The right to confront "means more than being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315 (1974). Its main and essential purpose is *"'to secure for the opponent the opportunity of cross-examination.'" Id*. at 315–16 (emphasis in original) (quoting 5 J. WIGMORE, EVIDENCE § 1395, at 123 (3d ed. 1940)). Article I, section 23 of the N.C. Constitution likewise guarantees a defendant the right to cross-examine adverse witnesses. *State v. Thorne*, 173 N.C. App. 393 (2005).

The right of confrontation "'ensure[s] the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding

before the trier of fact.'" *State v. Brewington*, 352 N.C. 489, 507 (2000) (quoting *Maryland v. Craig*, 497 U.S. 836, 845 (1990)). A defendant has the right "to expose to the jury the facts from which jurors, as the sole triers of facts and credibility, could appropriately draw inferences relating to the reliability of the witness." *Davis*, 415 U.S. 308, 318.

Purposes. Cross-examination serves three general purposes:

1. to elicit further details of the story related on direct examination, in the hope of presenting a complete picture that will be less unfavorable to the cross-examiner's case;
2. to bring out new and different facts relevant to the whole case; and
3. to impeach the witness or cast doubt on his or her credibility.

Barnes v. N.C. State Highway Comm'n, 250 N.C. 378, 394 (1959).

Scope. The scope of permissible cross-examination is generally limited only by the trial judge's discretion and the requirement that the questions be asked in good faith. *State v. Locklear*, 349 N.C. 118 (1998); *State v. Bates*, 343 N.C. 564 (1996). Cross-examination ordinarily may extend to any matter relevant to the issues in the case, including credibility. *See* N.C. R. EVID. 611(b); *State v. Stanfield*, 292 N.C. 357 (1977); *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 150, at 542–43 (7th ed. 2011) ("[T]he range of facts that may be inquired into [on cross-examination] is virtually unlimited except by the general requirement of relevancy and the discretionary power of the trial judge to keep the examination within reasonable bounds.").

Because the scope of inquiry in North Carolina is not confined to matters testified to on direct examination, it is called "wide-open" cross-examination. *See State v. Burgin*, 313 N.C. 404 (1985); *State v. Penley*, 277 N.C. 704 (1971). "Wide-open" cross-examination does not mean, however, "that all decisions on cross-examination are left to the cross-examiner." *Stanfield*, 292 N.C. 357, 362. Rule of Evidence 611(b) allows cross-examination on any relevant matter, but it "neither stands alone nor preempts other rules of evidence." *State v. Lynch*, 334 N.C. 402, 410 (1993). Cross-examination questions remain subject to the limitations of other rules on relevancy and impeachment, including N.C. Rules of Evidence 402 (relevancy), 403 (prejudice, confusion, and waste of time), 404 (character evidence to prove conduct), 608 (character and conduct to impeach), and 609 (prior convictions). *Lynch*, 334 N.C. at 411; *see also State v. Wilson*, 118 N.C. App. 616 (1995). For example, during cross-examination, the trial judge should:

- Rule out immaterial, irrelevant, and incompetent matters. *Lynch*, 334 N.C. 402; *State v. Jones*, 98 N.C. App. 342 (1990);
- Disallow cross-examination on a matter if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence under Rule 403. *State v. Whaley*, 362 N.C. 156, 159–60 (2008);

- "'[B]an unduly repetitious and argumentative questions, as well as inquiry into matters of tenuous relevance.'" *State v. Hatcher*, 136 N.C. App. 524, 526 (2000) (citation omitted).
- Prohibit cross-examination that is intended to harass, annoy, or humiliate a witness. *State v. Mason*, 315 N.C. 724, 730 (1986); *State v. Pharr*, 110 N.C. App. 430 (1993).

A judge's ruling on the cross-examination of a witness will not be reversed unless the verdict was improperly influenced by that ruling. *State v. Woods*, 345 N.C. 294 (1997). However, if the trial judge violates a defendant's constitutional right to confrontation by improperly limiting his or her right to cross-examination, the State must show that the erroneous ruling was harmless beyond a reasonable doubt. *See State v. McNeil*, 350 N.C. 657 (1999); *State v. Hoffman*, 349 N.C. 167 (1998); *see also Delaware v. Van Arsdall*, 475 U.S. 673 (1986).

Practice note: When objecting to a trial judge's ruling on the cross-examination of a witness, be sure to constitutionalize your objection; otherwise, the constitutional issue will be waived on appeal. *See State v. Greene*, 351 N.C. 562 (2000). Also, if the judge limits or prohibits your cross-examination of a witness on a particular subject, you must make an offer of proof to preserve the issue for appellate review. *See State v. Williams*, 355 N.C. 501 (2002) (appellate review of trial judge's rulings sustaining the State's objections to questions propounded by defense counsel during cross-examination was waived because defendant made no offer or proof as to the answers to the questions); *State v. Braxton*, 352 N.C. 158 (2000) (same).

Treatment of cross-examination testimony. Any testimony elicited during cross-examination is generally considered as coming from the party calling the witness, not from the cross-examiner. This is true "'even though its only relevance is its tendency to support the cross-examiner's case.'" *State v. Shuler*, 135 N.C. App. 449, 452 (1999) (quoting 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 170, at 559 (5th ed. 1998)) [now, 7th ed. 2011, § 170 at 626]. Leading questions asked on cross-examination "to which the witness is *expected* to answer 'yes' or 'no,' also become part of the testimony of the witness." *State v. Baize*, 71 N.C. App. 521, 526 (1984) (emphasis in original).

However, in certain situations, it may be determined that the defendant "introduced" evidence during his or her cross-examination of a State's witness. If the defendant is found to have "introduced" evidence within the meaning of Rule 10 of the N.C. General Rules of Practice for the Superior and District Courts, his or her right to final argument may be lost. *See infra* § 33.5B, What Constitutes "Introduction" of Evidence (2d ed. 2012).

Additional resources. For further discussion of cross-examination in general, including the right to confrontation, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 170 (7th ed. 2011).

E. Recross-Examination

General rule. Once a witness has been cross-examined and re-examined (redirect), a party does not have the right to a second cross-examination (recross) unless the redirect examination included new matters. *See State v. Thompson*, 139 N.C. App. 299 (2000); *State v. Moorman*, 82 N.C. App. 594 (1986), *rev'd on other grounds*, 320 N.C. 387 (1987). If no new matter is brought forth during redirect examination, it is within the trial judge's discretion to permit or refuse recross-examination. *Moorman*, 82 N.C. App. 594; *see also* 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 171, at 634 (7th ed. 2011).

Multiple defendants. In cases involving multiple defendants, a defendant is entitled to recross-examine a witness if new matters are brought out by another party during its cross-examination even if there has technically been no redirect examination by the calling party. In *State v. Hamad*, 92 N.C. App. 282 (1988), *aff'd per curiam*, 325 N.C. 544 (1989), defendant Wells and defendant Hamad were tried together for trafficking in cocaine. Defendant Wells testified and was cross-examined by defendant Hamad's attorney. The State then cross-examined defendant Wells and brought out new matters that incriminated defendant Hamad. Defendant Hamad sought a second cross-examination of defendant Wells to address the new matters brought up by the State. Defendant Wells objected to further cross-examination, and the trial judge sustained the objection. On appeal, the State argued that the trial judge's ruling was correct because defendant Wells' attorney had not tendered any questions on redirect; therefore, defendant Hamad was not entitled to recross-examination.

The court of appeals reversed the judge's ruling and found "that the semantic designation of the examination of defendant Wells by the State as cross-examination and the absence of redirect examination by Wells' counsel should not operate to abridge defendant Hamad's constitutional right to confront witnesses against him." *Hamad*, 92 N.C. App. at 286. Although the label attached to the State's examination of defendant Wells was "cross-examination," it had the "same practical import of a redirect examination" and since new matters were elicited, the trial judge's decision to permit or refuse defendant's recross-examination was not a discretionary one. *Id.* at 287.

F. Leading Questions During Direct or Cross-Examination

Definition. A leading question has been defined as one that suggests a desired answer. Questions that may be answered with a "yes" or a "no" have sometimes been regarded as leading. *State v. Young*, 291 N.C. 562 (1977); *see also State v. Williams*, 304 N.C. 394 (1981). However, that a question may be answered "yes" or "no" does not make it leading—the question also must suggest the answer. *See State v. Thompson*, 306 N.C. 526 (1982). Further, a question is not leading simply because the examiner directs attention to the subject matter at hand without suggesting answers. *See State v. White*, 349 N.C. 535, 557 (1998) ("A question is not leading where it directs the witness toward a specific matter . . . without suggesting an answer."); *State v. Smith*, 135 N.C. App. 649, 655 (1999) (challenged questions "were not so much 'leading' as they were 'bridges'"—that is, they directed the

witness's attention to a certain topic in the long and complicated case). "Whether a question is leading 'depends not only on the form of the question but also on the context in which it is put.'" *State v. Howard*, 320 N.C. 718, 721–22 (1987) (quoting *Thompson*, 306 N.C. at 529).

Use of leading questions on direct or redirect examination. Ordinarily, counsel may not ask leading questions during the direct or redirect examination of his or her own witness. *See State v. Royal*, 300 N.C. 515 (1980); *see also* N.C. R. EVID. 611(c) ("Leading questions should not be used on the direct examination of a witness except as may be necessary to develop his testimony."). The purpose of this general prohibition is to prevent counsel from putting a desired response into the mouth of a witness that he or she has called to testify. *State v. Tate*, 307 N.C. 242, 246 (1982). The rule is not based on a technical distinction between direct and cross-examination, but on the alleged friendliness of the witness to the calling party's case. 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 169, at 611 (7th ed. 2011); *see also State v. Hosey*, 318 N.C. 330, 338 (1986) (noting concerns that this relationship "'would allow the examiner to provide a false memory to the witness by suggesting the desired reply to his [or her] question'" (citation omitted)).

Notwithstanding the general rule precluding the use of leading questions on direct examination, a trial judge has the discretion to allow counsel to ask leading questions of his or her own witness and, in the absence of abuse, the exercise of that discretion will not be disturbed on appeal. *Tate*, 307 N.C. 242, 246; *see also State v. Bass*, 280 N.C. 435 (1972). The trial judge should consider the true relationship between counsel and the witness in ruling on the propriety of leading questions on direct (or cross-examination) of the witness. *Hosey*, 318 N.C. 330 (1986). Where the relationship between the questioner and the witness belies the rationale of the general prohibition against leading questions on direct examination, the trial judge may be more inclined to permit counsel to lead the witness.

The trial judge's discretion to permit leading questions on direct examination is aided by certain guidelines that have evolved over the years. Generally, counsel may be allowed to lead a witness where:

- The witness is hostile, is an adverse party or is identified with an adverse party, or is unwilling to testify. *See* N.C. R. EVID. 611(c); *State v. Dickens*, 346 N.C. 26 (1997); *State v. Maddox*, 159 N.C. App. 127 (2003); *see also State v. Hosey*, 318 N.C. 330 (1986).
- The witness has difficulty in understanding the question because of immaturity, advanced age, infirmity, or ignorance. 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 169, at 613 (7th ed. 2011); *see also State v. Cox*, 344 N.C. 184 (1996) (low mentality); *State v. Riddick*, 315 N.C. 749 (1986) (young age); *State v. Smith*, 307 N.C. 516 (1983) (elderly).
- The inquiry is into a subject of a delicate nature such as sexual matters. *State v. Chandler*, 324 N.C. 172 (1989); *State v. Pearson*, 258 N.C. 188 (1962); *State v. Dalton*, 96 N.C. App. 65 (1989).
- The witness is called to contradict the testimony of prior witnesses. *State v. Greene*, 285 N.C. 482 (1974); *Gunter v. Watson*, 49 N.C. 455 (1857).

- The examiner seeks to aid the witness's recollection or refresh his or her memory when the witness has exhausted his or her memory without stating the particular matters required. *State v. Young*, 291 N.C. 562 (1977); *State v. Lesane*, 137 N.C. App. 234 (2000).
- The questions are asked for securing preliminary or introductory testimony. *State v. Corbett*, 307 N.C. 169 (1982); *State v. Williams*, 304 N.C. 394 (1981); *see also* WALKER JAMESON BLAKEY, DEAN P. LOVEN & GLEN WEISSENBERGER, NORTH CAROLINA EVIDENCE: 2017 COURTROOM MANUAL Ch. 611, at 477 (2017) (leading questions may be allowed on direct examination when used to elicit preliminary matters that are usually undisputed).
- "[T]he mode of questioning is best calculated to elicit the truth." *State v. Greene*, 285 N.C. 482, 492–93 (1974); *see also State v. Hood*, 294 N.C. 30 (1978).

Practice note: If the prosecutor improperly uses leading questions during direct or redirect examination of his or her witness, you must object to preserve the issue for appellate review. *See State v. Williams*, 304 N.C. 394 (1981). If the answer the witness gives is objectionable on additional grounds, counsel must move to strike the answer on those additional grounds to preserve the issue for review. *See State v. Proctor*, 62 N.C. App. 233 (1983); *State v. Wooten*, 20 N.C. App. 499 (1974).

Use of leading questions during cross or recross-examination. Rule 611(c) provides that leading questions ordinarily should be allowed on cross-examination. This rule follows the traditional view that counsel may use leading questions as a matter of right during cross-examination. *State v. Mitchell*, 317 N.C. 661 (1986). However, use of the qualifier "ordinarily" means that this right is not absolute. *See State v. Hosey*, 318 N.C. 330 (1986). As stated in the above discussion on leading questions on direct and redirect, the trial judge should consider the true relationship between counsel and the witness in ruling on the propriety of leading questions during cross-examination.

If the witness is "friendly" to the non-calling party and cross-examination is cross-examination in form only and not in fact, the trial judge has the discretionary power to deny the use of leading questions. *Id.* The denial is justified in a "friendly witness" situation to prevent counsel "from providing 'a false memory to the witness by suggesting the desired reply to his question' inadvertently or otherwise." *Id.* at 339 (citation omitted).

No formal requirements for finding a witness to be "hostile" or "friendly." A trial judge may make a determination that a witness is friendly or hostile without conducting a voir dire hearing. Although not required, the better practice is for the judge first to make findings of fact and conclusions of law and then formally declare that the witness is friendly or hostile before allowing or disallowing leading questions. *State v. Hosey*, 318 N.C. 330 (1986).

General limitations on the use of leading questions. When examining a witness, counsel may not use leading questions to:

- Inject his or her own knowledge, beliefs, and personal opinions that are not supported by the evidence. *State v. Sanderson*, 336 N.C. 1 (1994); *State v. Britt*, 288 N.C. 699 (1975); *State v. Phillips*, 240 N.C. 516 (1954).
- "[D]istort the witness' testimony by purposely misconstruing answers and cross-examining the witness on the basis of the misconstruction." *Sanderson*, 336 N.C. 1, 14; *see also Berger v. United States*, 295 U.S. 78 (1935); N.C. GEN. R. PRAC. SUPER. & DIST. CT. 12 ("Counsel shall not knowingly misinterpret . . . the testimony of a witness . . . .").
- Testify himself or herself. *See State v. Walls*, 342 N.C. 1 (1995) (counsel asked the witness whether she had told counsel that she did not remember making a particular statement to the sheriff; trial judge permitted counsel to rephrase the question and ask about the same matter). [Although generally disfavored, testimony by counsel may be unavoidable in some instances. *See* N.C. STATE BAR REV'D RULES OF PROF'L CONDUCT R. 3.7(a) (2003) (prohibiting counsel from acting as witness in a case in which he or she is an advocate but recognizing limited exceptions); *State v. Elam*, 56 N.C. App. 590 (1982) (the parties stipulated for the jury to what counsel would have testified if called as a witness; whether to allow defense counsel to testify on a collateral matter, impeachment of a witness, was within the trial judge's discretion); *Town of Mebane v. Iowa Mut. Ins. Co.*, 28 N.C. App. 27 (1975) (observing that in most instances counsel who acts as a witness has surrendered the right to participate in the litigation but that counsel is not incompetent to testify). To avoid this dilemma, counsel should have an investigator or other person present when interviewing a witness so, if necessary, counsel may cross-examine the witness about statements to the other person as well as call the other person to testify to those statements.]

Additional resources. For additional discussion of leading questions, see 1 KENNETH S. BROUN, BRANDIS & BROUN ON NORTH CAROLINA EVIDENCE § 169 (7th ed. 2011), and WALKER JAMESON BLAKEY, DEAN P. LOVEN & GLEN WEISSENBERGER, NORTH CAROLINA EVIDENCE: 2017 COURTROOM MANUAL Ch. 611, at 475–98 (2017).

G. Witness Examination in Joint Representation Cases

Rule 11 of the General Rules of Practice for the Superior and District Courts states:

> When several counsel are employed by the same party, the examination or cross-examination of each witness for such party shall be conducted by one counsel, but the counsel may change with each successive witness or, with leave of the court, in a prolonged examination of a single witness.

Under this rule, it is within the trial judge's discretion whether to allow a change of counsel if an examination is to be lengthy. *State v. Houston*, 19 N.C. App. 542 (1973) (defendant failed to show he was prejudiced where trial judge permitted a second prosecutor to conduct a voir dire examination of a witness when another prosecutor had begun the examination of that witness).

H. Examination of Witness by Trial Judge

A trial judge may direct questions to a witness in order to clarify the witness's testimony, to enable the judge "to rule on the admissibility of certain evidence and exhibits, and to promote a better understanding of the testimony." *State v. Rios*, 169 N.C. App. 270, 281-82 (2005) (citing Evidence Rule 614(b)); *see also State v. Fleming*, 350 N.C. 109, 126 (1999) (stating that "it is well recognized that a trial judge has a duty to question a witness in order to clarify his testimony or to elicit overlooked pertinent facts.") (citations omitted). A judge may ask questions of a witness "when necessary to clarify even a critical element of the case." *See Rios*, 169 N.C. App. 270, 282 (citing *State v. Shepherd*, 163 N.C. App. 646 (2004)); *see also State v. Lowe*, 60 N.C. App. 549 (1983) (stating that a judge may ask questions that elicit testimony that proves an element of the State's case so long as he or she does not comment on the strength of the evidence or the credibility of the witness). N.C. Rule of Evidence 614(b) specifically allows the trial judge to "interrogate witnesses, whether called by itself or by a party." If the trial judge chooses to call a witness on his or her own motion or at the suggestion of a party, each party is entitled to cross-examine that witness. N.C. R. EV. 614(a).

While a trial judge may question a witness, the judge may not, by his or her questions, intimate an opinion regarding the guilt of the defendant, the witness's credibility, or whether any fact essential to the State's case has been proved. *See State v. Yellorday*, 297 N.C. 574 (1979); *State v. Lowe*, 60 N.C. App. 549 (1983). A judge must conduct his or her questioning carefully and in a manner that avoids prejudice to the parties. If the judge expresses an opinion by the tenor, frequency, or persistence of his or her questions, error has occurred in violation of G.S. 15A-1222. *State v. Rinck*, 303 N.C. 551 (1981); *State v. Currie*, 293 N.C. 523 (1977). If the expression of opinion might reasonably have had a prejudicial effect on the defendant's trial, the error will not be considered harmless and a new trial will be awarded. *See, e.g., State v. McEachern*, 283 N.C. 57 (1973); *State v. Oakley*, 210 N.C. 206 (1936); *see also supra* § 22.1B, Expression of Opinion Prohibited.

As with other remarks and conduct prohibited by G.S. 15A-1222, the prohibition against the trial judge expressing an opinion when questioning a witness applies only when the jury is present. *State v. Rogers*, 316 N.C. 203 (1986).

Practice note: N.C. Rule of Evidence 614(c) provides that no objection is necessary "to questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled." Counsel must still specifically object to prejudicial questioning by the trial judge on *constitutional* grounds to preserve the issue on those grounds.
