FRIEND OR FOE: RESPONSIBLE THIRD PARTIES AND LEADING QUESTIONS

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I. INTRODUCTION

In 1995, as part of tort reform, the legislature amended the Texas Civil Practice and Remedies Code to create a creature unknown in common law—the responsible third party.\(^1\) By properly joining a responsible third party, a defendant was able to have a factfinder consider the responsibility of the responsible third party when apportioning responsibility for a plaintiff’s damages.\(^2\) Pursuant to the new law, the factfinder had to determine the percentage of responsibility to allocate to each plaintiff, defendant, settling party, and, now, responsible third party.\(^3\)

In 2003, the legislature continued its gusto for tort reform, and it broadened the definition of a responsible third party.\(^4\) Moreover, the legislature transformed the procedural process by eliminating the requirement that a responsible third party be joined to the lawsuit.\(^5\) Instead, a responsible third party is merely designated and is no longer a party to the lawsuit.\(^6\)

The designation of a responsible third party was a fundamental change in Texas proportionate responsibility law that created ripples of uncertainty in trial practice and procedure. Oceans of ink have been spilled explaining and interpreting the procedural process of designating a responsible third

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\(^2\) \textit{TEX. CIV. PRAC. \\& REM. CODE ANN. § 33.003 (Vernon 1997).}

\(^3\) \textit{Id.}

\(^4\) \textit{Act of June 2, 2003, 78th Leg., R.S., ch. 204, §§ 4.05, 23.02(c), 2003 Tex. Gen. Laws 847, 857, 898.}


\(^6\) \textit{See id.}
party, but not one drop has been used to explain how a trial court deals with a responsible third party during trial. The uncertainty is more pronounced after the 2003 amendment, which eliminated the requirement that a responsible third party be joined to the lawsuit. Unfortunately, many questions surrounding how a trial court deals with a responsible third party during trial proceedings are still unanswered.

Consider the following hypothetical. Adam is suing BPL Grocery Store for personal injuries sustained from a slip and fall accident. BPL alleges the cause of the accident was another customer, Cindy, who spilled a container of liquid intentionally on the floor in an aisle of groceries. Subsequently, BPL Grocery Store designates Cindy as a responsible third party. At trial, the plaintiff in its case in chief calls Cindy to the stand to testify. The plaintiff expects Cindy to testify that she did not spill any liquid on the floor and, in fact, she heard the store manager comment about the existence of a leaking pipe above the aisle where the accident occurred. The plaintiff begins to ask leading questions to Cindy on direct examination and the defendant objects to the use of leading questions by the plaintiff. How should the trial court rule on the defendant’s objection?

This comment attempts to shed light on the unsettled issue of which party gets the right to ask leading questions to a responsible third party. In the status quo, the Texas Rules of Evidence establish an outline of when leading questions are allowed or prohibited during trial. Unfortunately, the framework articulated in Rule 611(c) fails to account for the advent of responsible third parties. Specifically, based on strict interpretation of Rule 611(c), a responsible third party is not an adverse party, hostile witness, or witness identified with an adverse party. Thus, whom should the trial court allow—the plaintiff or defendant—to ask leading questions to a responsible third party?

Part II of this comment examines what constitutes a leading questions and when it is permissible to ask a leading question. Part III of this comment provides an overview of the statutory scheme establishing responsible third parties. Finally, Part IV synthesizes responsible third parties and the rules of evidence regarding leading questions. Specifically, Part IV advocates that trial courts should determine which party the responsible third party is antagonistic to in order to determine whether the plaintiff or defendant should be allowed to ask leading questions to a responsible third party. Generally, a responsible third party will be adverse

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7 Tex. R. Evid. 611(c).
to a defendant as a result of the peculiar rules surrounding a responsible third party. Thus, based on the typical relationship between a responsible third party and a defendant, this comment argues defendants should have the ability to ask leading questions to a responsible third party during trial.

II. LEADING QUESTIONS

During trial, evidence can be presented through a variety of mechanisms. Common forms of evidence include documentary, real and demonstrative but the bedrock of most evidence introduced at trial is testimonial. Indeed, the hallmark of a trial revolves around a party calling a witness to the stand, the judge placing the witness under oath, and then the attorney asking the witness questions. On its surface, the entire process of introducing testimonial evidence seems simple. How hard can it be to ask questions? Yet, every trial attorney would agree that eliciting testimonial evidence from a witness is one of the most challenging aspects of trial. No matter if the attorney is asking questions on direct examination or cross-examination, the element of uncertainty is omnipresent whenever an attorney is relying on another person to provide the answer. The unpredictable nature of testimonial evidence provides a challenge to trial attorneys to craft questions that extract the precise information he or she desires from the witness. Accordingly, the art of being a trial attorney is how to ask a question in a way that minimizes the unpredictable human element inherent in testimonial evidence. Consequently, one method utilized by trial attorneys to retain a degree of control over witnesses is to ask leading questions.

A. What Is A Leading Question?

When crafting a question a trial attorney can focus on two elements of the question—content and form. The content of the question allows a trial attorney to target specific information. By focusing the witness to specific topic a trial attorney diminishes the possibility of a witness providing extraneous, useless or harmful responses to a question. For example, if the content of the question limits the inquiry to the night of June 1, 2006, then,

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9 Id.
10 Id.
most probably, the answer will also relate to that specific date. Thus, by narrowing the scope of inquiry to a specific topic a trial attorney can effectively control the subject matter of a witness’ testimony during an examination.

On the other hand, the form of the question relates to how a trial attorney asks a certain question. Unlike the wide spectrum available to choose content for a question, the form of a question is generally limited to two types—leading and non-leading. A leading question is a question that obviously suggests a desired answer. The form of a leading question instructs the witness how to answer or puts words in the witness’ mouth to be echoed back. Moreover, if an interrogator assumes the truth of a fact in question in order to induce the witness to answer, thereby admitting the fact in question, then the questions is leading.

Ordinarily, questions that begin with “Isn’t true that” or “Don’t you agree that” typically suggest a desired answer and are classified as leading questions. Furthermore, asking “Where were you on the night of June 1, 2006?” is not a leading question, but asking “You were home on the night of June 1, 2006, weren’t you?” would be a leading question. Even in dry print, the aforementioned examples are easy to identify as leading or non-leading questions.

However, a black and white dichotomy distinguishing leading from non-leading questions is clouded by shades of gray. For example, questions beginning with the word “Did” may or may not be leading depending on the rest of the question and the context in which the question was asked. Moreover, a question that calls for a “yes” or “no” answer is

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13 See Implement Dealers Mut. Ins. Co., 368 S.W.2d at 254.

14 Goode et al., COURTROOM HANDBOOK ON TEXAS EVIDENCE 520 (2006).

15 See, e.g., Grimm, supra note 8, at 110.

16 See Tinsley v. Carey, Reese & Co., 26 Tex. 350 (1862) (arguing the words “did or did not” were insufficient to transform the question into a leading question, but the question was leading because it was “framed as to suggest to the witness a desired answer.”).
generally not a leading question.\textsuperscript{17} However, if the question is framed so that the witness’ answer—whether “yes” or “no”—will allow the witness to merely echo the words of counsel, then the question is leading.\textsuperscript{18}

The difficulty in drawing a bright line between leading and non-leading questions is highlighted by the courts rationale in Newsome v. State. In Newsome, the court was confronted with the issue of whether questions that called for a “yes” or “no” answer were leading.\textsuperscript{19} The court stated “[a] question is impermissibly leading only when it suggests which answer, yes or no, is desired. . . .”\textsuperscript{20} The court ultimately held the questions asked by the prosecutor were leading questions because the questions merely asked for confirmation of testimony in the form of the prosecutor’s words.\textsuperscript{21} The court’s decision in Newsome stressed the principle that a question is leading only if it suggests a desired answer. Accordingly, the form of the question is not the sole identifier of a leading question because an answer can be suggested to a witness in countless ways. Other factors such as the interrogator’s tone of voice, emphasis on certain words, or body language may suggest the desired answer to a witness.\textsuperscript{22}

\textbf{B. When Can Leading Questions Be Used?}

Trial attorneys embrace the use of leading questions when interrogating a witness because it allows them to dictate the witness’ testimony, thereby eliminating the unpredictable nature of testimonial evidence. In effect, by asking leading questions a trial attorney replaces the witness as the conduit of testimony and essentially argues their client’s case through leading questions.\textsuperscript{23} However, a trial attorneys power to use leading questions is not unfettered. In fact, Texas Rule of Evidence 611(c) circumscribes the use of leading questions to certain circumstances during trial. The rule states:

\textsuperscript{17}See, e.g., Tinlin, 983 S.W.2d at 70 ("A question is not leading simply because it can be answered ‘yes’ or ‘no.’"); Newsome, 829 S.W.2d at 269 ("The mere fact that a question may be answered by a simple ‘yes’ or ‘no’ will not render it an impermissibly leading question.").

\textsuperscript{18}GAB, 829 S.W.2d at 351 ("A question that is framed so that a yes or no answer will enable the witness to merely echo the words of counsel is leading.") (citing Tex. Employers’ Ins. Ass’n v. Hughey, 266 S.W.2d 456, 458 (Tex. Civ. App.—Fort Worth 1954, writ ref’d n.r.e.)).

\textsuperscript{19}829 S.W.2d 260, 269–70 (Tex. App.—Dallas 1992, no pet.).

\textsuperscript{20}Id. at 269.

\textsuperscript{21}Id.


\textsuperscript{23}Stine v. Marathon Oil Co., 976 F.2d 254, 266 (5th Cir. 1992).
“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 questions.”

II. DIRECT EXAMINATION

Rule 611(c) limits the use of leading questions on direct examination of a witness. The rationale for prohibiting leading questions is that it prevents the examining counsel from putting answers in the mouth of witnesses, and encourages witnesses to testify about their own personal knowledge and recollection of the facts. When a party calls a witness to the stand it is presumed his or her testimony will be favorable to the party calling the witness, thus it is not necessary for the attorney to control the witness’ responses with leading questions. However, if the examining counsel were allowed to ask leading questions on direct examination, then functionally the attorney—rather than the witness—would be testifying and arguing on the client’s behalf. Other harmful side effects of permitting leading questions on direct include: (1) causing a witness to develop a false recollection of events; (2) discouraging the witness from trying to relate his or her actual memories in favor of acquiescing to the examiner’s version of events; and (3) distracting the witness from key details and directing his or her attention only to the parts of the story favorable to the examiner’s client.

However, despite the danger, there are situations when asking leading questions during direct examination is permissible. In fact, Rule 611(c) states “leading questions should not be used on the direct examination of a

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24 Tex. R. Evid. 611(c).
25 Id.
26 See United States v. Bryant, 461 F. 2d 912, 918 (6th Cir. 1972).
27 See Erp v. Carroll, 438 So. 2d 31, 36 (Fla. App. 1983); See Grimm, supra note 8, at 110.
28 Stine, 976 F.2d at 266.
29 See, e.g., DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 339, at 459–460 (1979); MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 827, n.4 (1996). Psychology studies have shown suggesting answers to a witness through the use of leading questions permanently alters the witness’ ability to accurately recount what he or she perceived. See Richard C. Wydick, Witness Coaching, 17 CARDOZO L. REV. 1, 9 (1995).
witness,” hence the prohibition is merely suggestive not mandatory.\textsuperscript{30} Moreover, the Rule expressly states that leading questions may be used on the direct examination of a witness when it is “necessary to develop the testimony of the witness.”\textsuperscript{31} The legislative notes to the Rule further clarify that leading questions may, in the court’s discretion, be used on direct examination for: (1) preliminary matters\textsuperscript{32}; (2) refreshing memory; and (3) questioning ignorant or illiterate persons or children.\textsuperscript{33} Consequently, based on a trial court’s inherent power to control the method and mode of interrogation,\textsuperscript{34} it has broad discretion to allow leading questions.\textsuperscript{35}

The black letter of Rule 611 (c) also carves out an exception to the prohibition against leading questions “[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.”\textsuperscript{36} The logic behind the exception is that hostile witnesses, adverse parties, or witnesses identified with an adverse party need to be controlled by the examining attorney through the use of leading questions. For example, an adverse party has an incentive to provide self-serving testimony by sliding away from the question or slanting the answer in his or her favor.\textsuperscript{37} Accordingly, leading questions should be permitted to balance against the bias and interest of the adverse party.

\textsuperscript{30}TEX. R. EVID. 611(c) (emphasis added).
\textsuperscript{31}Id.
\textsuperscript{32}Cecil v. T.M.E. Inv., Inc., 893 S.W.2d 38, 48 (Tex. App.—Corpus Christi 1994, no writ).
\textsuperscript{33}Uhl v State, 479 S.W.2d 55, 57 (Tex. Crim. App. 1972) (child).
\textsuperscript{34}The court shall 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. TEX. R. EVID. 611(a). See St. Clair v. United States, 154 U.S. 134, 150 (1894) (holding that, in deciding whether leading questions may be used on direct examination, “much must be left to the sound discretion of the trial judge, who sees the witness, and can therefore determine, in the interest of truth and justice, whether the circumstances justify leading questions to be propounded to a witness by the party producing him”).
\textsuperscript{36}TEX. R. EVID. 611(c).
\textsuperscript{37}Rodriguez v. Banco Cent. Corp., 990 F.2d 7, 13 (1st Cir. 1993).
A “hostile” witness is not an adverse party but, instead, is a witness who shows himself or herself to be so antagonistic to answering questions that leading questions are permitted to press the questions past the witness’ hostility. 38 A court will not presume a witness to be hostile, and a party is not entitled to examine a witness as hostile just because the examiner expects the witness to give favorable testimony to the opposing party. 39 The party must exhibit hostility while testifying in order to trigger the right to use leading questions. 40 Finally, witnesses identified with an adverse party are subject to leading questions on direct examination because of their underlying relationship to the adverse party. 41 Relationships deemed sufficient by courts to allow leading questions include when the witness is a former employee of the adverse party, a co-worker of the adverse party, a relative of the adverse party, or had a romantic interest with the adverse party. 42

III. CROSS-EXAMINATION

Cross-examination is so highly regarded as a mechanism to test the truthfulness, competence, and capacity of a witness that it is deemed a fundamental right. 43 In fact, cross-examination has been called “the greatest

38 See United States v. Brown, 603 F.2d 1022, 1025–26 (1st Cir. 1979); Holbert v. State, 457 S.W.2d 286, 289 (Tex. Crim. App. 1970) (“It is within the sound discretion of the trial court to permit the counsel for the state on direct examination to ask leading questions to a hostile witness…”).
40 Id.
41 TEx. R. EVID. 611(c).
42 See, e.g., Haney v. Mizell Mem’l Hosp., 744 F.2d 1467, 1477–78 (11th Cir. 1984) (stating a nurse was a witness identified with the an adverse party because she was an employee of one of the defendants); United States v. Hicks, 748 F.2d 854, 859 (4th Cir. 1984) (allowing plaintiff to lead defendant’s girlfriend); Ellis v. Chicago, 667 F.2d 606, 613 (7th Cir. 1981) (allowing plaintiff to lead police officers who worked closely with defendant police officer); Perkins v. Volkswagen of Am., Inc., 596 F.2d 681, 682 (5th Cir. 1979) (stating that employee of a party is clearly identified with the party); United States v. Brown, 603 F.2d 1022, 1026 (1st Cir. 1979) (allowing prosecutor to lead witness who was close friend of defendant and a participant in crime); Stahl v. Sun Microsystems, Inc., 775 F. Supp. 1397, 1398 (D. Colo. 1991) (allowing plaintiff to ask leading questions of defendant’s former administrative secretary).
The objective of cross-examination is to reveal the truth by uncovering the facts undisclosed on direct examination. Counsel who calls a witness has no incentive to elicit bad facts and the witness on the stand has little incentive to disclose unfavorable facts. Consequently, it has become axiomatic that when a party calls a witness to the stand it subjects that witness to the able cross-examination of the opposing party.

Texas Rule of Evidence 611 (c) states “[o]rdinarily, leading questions should be permitted on cross-examination.” Long-standing tradition supports a party’s right to use leading questions on cross-examination as a matter of right. The purpose behind the tradition is to allow meaningful cross-examination because absent leading questions it is impossible for the cross-examiner to control a witness—especially if they are adverse or hostile—thereby impeding the truth-seeking function of cross-examination. In other words, a witness is uncooperative out of a mere unwillingness to be the instrument of their own discrediting, thus the privilege of leading questions is essential to the adversarial goal of ascertaining the truth. Consequently, leading questions and cross-examination have such a symbiotic relationship that the decree, “Thou shalt use leading questions on cross-examination” is one of the ten commandments of successful trial technique.

However, the right to use leading questions on cross-examination is not absolute. The operative word “ordinarily” grants a trial court the basis to deny a party’s use of leading questions. Most often, the right to employ leading questions is denied when a “friendly witness” is on the stand. A
party does not have a right to cross-examine a witness when the cross-examination is only in form and not in fact, such as when a party is called by its opponent. Consequently, a trial court has discretion on whether to permit leading questions on cross-examination.

The Texas Rules of Evidence enumerate specific exceptions to allow leading questions of certain witnesses but where does a responsible third party fit? Is a responsible third party an adverse party, hostile witness, or witness identified with an adverse party? An examination of a responsible third party statute is essential to understand where such actors fit within the parameters of the Texas Rules of Evidence.

IV. RESPONSIBLE THIRD PARTIES

Chapter 33 of the Texas Civil Practice and Remedies Code governs proportionate responsibility. Chapter 33 permits a factfinder to assign a percentage of responsibility to a responsible third party designated by a defendant. As a result of the designation, the factfinder can allocate responsibility to a responsible third party even though the plaintiff did not join the responsible third party to the lawsuit. A defendant has an incentive to designate a responsible third party because it allows the factfinder to apportion a percentage of responsibility on the responsible third party rather than the defendant, thereby reducing the percentage of responsibility attributed to the defendant.

A. Who Can Be Designated A Responsible Third Party?

Under previous law, a factfinder could only consider the fault of parties friendly with counsel, and leading questions should not have been allowed as a matter of right); see also Ardoin v. J. Ray McDermott & Co., 684 F.2d 335, 336 (5th Cir. 1982) (holding that district court has power to require party cross-examining friendly witness to use non-leading questions; rule 611(c) not intended to be blanket endorsement of leading questions on cross-examination); Alpha Display Paging, Inc. v. Motorola Commc’n & Elecs., Inc., 867 F.2d 1168, 1171 (8th Cir. 1989) (explicitly acknowledging that roles of parties are reversed when witness identified with an adverse party is called, hence making leading questions inappropriate on cross-examination).


55 Id.

56 See id. § 33.003(a).
actually joined to the lawsuit or who had been in the lawsuit but settled before trial. Accordingly, a plaintiff could avoid apportioning responsibility between two parties by simply choosing not to sue one of the parties responsible for its injuries. A defendant had no recourse if they believed another party caused or was at least partly responsible for the plaintiff’s injuries if the plaintiff did not join them to the lawsuit.

In 1995, the legislature amended the statutory scheme to allow the factfinder to consider the responsibility of third parties. Pursuant to the statute, the definition of a responsible third party was restricted to those parties:

“to whom all of the following apply: (1) the court in which the action was filed could exercise jurisdiction over the person; (2) the person could have been, but was not, sued by the claimant; and (3) the person is or may be liable to the plaintiff for all or part of the damages claimed against the named defendant or defendants.”

Based on the statutory definition, the responsibility of third parties could be considered, but only if the party could be joined to the lawsuit. Significantly, parties not subject to joinder, such as parties outside the jurisdiction of the court, parties that could not be located, bankrupt parties, or immune parties could not be considered when the factfinder allocated responsibility to the named and joined defendants.

In 2003, Section 33.011 of the Texas Civil Practice and Remedies Code was amended to broaden the definition of a responsible third party. The amended version applies to actions filed after July 1, 2003. A responsible third party is defined as:

“any person who is alleged to have caused or contributed to causing in

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60 Id.

61 See id.


63 Ch. 204, ß 23.02(c), 2003 Tex. Gen. Laws at 899.
any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these. The term ‘responsible third party’ does not include a seller eligible for indemnity under Section 82.002.”

Therefore, the definition of a responsible third party now includes a party who the court has no jurisdiction over, unknown parties, bankrupt parties or even immune parties. The definition of a responsible third party is so expansive that virtually any party can be designated as a responsible third party under the new definition. Moreover, the 2003 amendment eschewed joinder of a responsible third party and instead allowed the responsible third party to be designated.

B. What Role Does A Responsible Third Party Play In A Lawsuit?

Despite being designated, a responsible third party has no stake in the outcome of the lawsuit. In fact, a responsible third party is insulated from liability on any judgment that may be ultimately rendered. Additionally, the finding of fault against the responsible third party cannot be used in any other proceeding, on the basis of res judicata, or other preclusive effects from such a finding. The rationale bolstering the rule is that since responsible third parties are not named parties to the lawsuit, res judicata can only apply to parties actually before the court.

How is a responsible third party “responsible” if it cannot be held accountable for its actions? Critics of the new law argue that if the responsible third party cannot be held liable, then there is no incentive for the responsible third party to procure legal representation or put up a
defense. To compound matters, the lack of adversarial confrontation is exacerbated when the responsible third party is an unknown party or decides not to make an appearance at trial.

C. Why Would A Defendant Designate A Responsible Third Party?

The liberal expansion of the responsible third party definition increases the likelihood defendants will designate a third party in a lawsuit. A defendant has every incentive to designate a responsible third party because there is little to lose. Alternatively, strategically, there is much to gain by designating a responsible third party because the defendant has a possibility of shifting a large percentage of responsibility onto the responsible third party, thereby avoiding joint and several liability.

Furthermore, in the eyes of the defendant, a responsible third party is even better than a contributing defendant. Since contribution defendants are not factored in the percentage of responsibility question, a contributing defendant can never reduce a defendant’s liability to a plaintiff and, more importantly, its presence has no bearing on a defendant’s joint and several liability. Thus, an insolvent contributing defendant has no use to a


71 It is unsettled as to whether a defendant must serve a responsible third party with process, which further increases the likelihood the responsible third party will not make an appearance at trial.

72 The only risk for the defendant is that by designating a responsible third party less percentage of responsibility is allocated to the plaintiff and is instead assigned to the responsible third party. If there is a good chance that the factfinder will allocate more than fifty percent of liability to the plaintiff, then by designating a responsible third party it may reduce the plaintiff’s percentage of responsibility below fifty percent—thereby allowing the plaintiff to recover when previously it would be barred.

73 See Lensing, supra note 70, at 1186 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(d) (Vernon 1997)).

74 If a defendant who is jointly and severally liable under Section 33.013 pays a percentage of the damages for which the defendant is jointly and severally liable greater than his percentage of responsibility, that defendant has a right of contribution for the overpayment against each other liable defendant to the extent that the other liable defendant has not paid the percentage of the damages found by the trier of fact equal to that other defendant’s percentage of responsibility.” TEX. CIV. PRAC. & REM. CODE ANN. § 33.015(a) (Vernon Supp. 2004).

75 See Lensing, supra note 70, at 1186 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(d) (Vernon 1997)).
defendant while, on the other hand, an insolvent responsible third party still has tactical value.

D. What Can The Plaintiff Do In Response?

The plaintiff’s ability to impede the defendant’s designation of a responsible third party is very limited. Once a defendant designates a responsible third party a plaintiff has fifteen days after the motion is served to file an objection. 76 Without an objection, the court is mandated to grant leave to designate the responsible third party. 77 Even if the plaintiff does object, the court must still grant leave to designate the responsible third party unless the plaintiff establishes the defendant did not plead sufficient facts alleging the responsibility of the third party to satisfy the pleading requirements under the rules of civil procedure and the defendant fails to cure the defect after being granted leave to replead. 78 Considering the fact that the rules of civil procedure merely require notice pleading 79, it is unlikely the plaintiff will be able to satisfy its burden in most circumstances where a defendant designates a responsible third party. 80

The only other mechanism to preclude the designation of a responsible third party is to file a motion to strike after an adequate time for discovery. 81 This procedural maneuver is reserved for when “there is no evidence that the designated person is responsible for any portion of the plaintiff’s injury or damages.” 82 “The court shall grant the motion to strike unless the defendant produces sufficient evidence to raise a genuine issue of material fact regarding the designated person’s responsibility.” 83 Clearly, raising a genuine issue of material fact is not an onerous burden on the defendant—diminishing the possibility that the court will strike the responsible third party.

76 TEX. CIV. PRAC. & REM. CODE ANN. § 33.004(f) (Vernon Supp. 2004).
77 Id. (“A court shall grant leave to designate the named person as a responsible third party unless another party files an objection to the motion for leave on or before the 15th day after the date the motion is served.”) (emphasis added).
78 Id. § 33.004(g)(1)–(2) (Vernon Supp. 2004).
79 See Tex. R. Civ. P. 47; see also Horizon/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 897 (Tex. 2000) (“A petition is sufficient if it gives fair and adequate notice of the facts upon which the pleader bases his claim.”) (quoting Roark v. Allen, 633 S.W.2d 804, 810 (Tex. 1982)).
80 Hull et al., supra note 70, at 95.
81 Id. § 33.004(1) (Vernon Supp. 2004).
82 Id.
83 Id.
The significant advantages to designating a responsible third party when weighed against the minimal disadvantages increases the likelihood that defendants will more frequently utilize the responsible third party option. Furthermore, since the procedural deck is stacked in favor of the defendant, the plaintiff is almost powerless to stop the defendant from designating a responsible third party. Therefore, the net effect of the 2003 amendment will lead to an inundation of responsible third party designations that will, as a consequence, change trial practices in many aspects—one being leading questions.

V. LEADING QUESTIONS AND RESPONSIBLE THIRD PARTIES

The rapid evolution of the responsible third party statute, spurred by aggressive tort reform, has outpaced a corresponding development in the Texas Rules of Evidence to account for responsible third parties. In the legislature’s haste, it failed to examine how the designation of a responsible third party fosters confusion for trial courts, especially with regards to the mode and method of interrogation during trial. In the status quo, how does a responsible third party fit into a lawsuit? Is a responsible third party an adverse party, hostile witness, or witness identified with an adverse party? More specifically, who has the right to ask leading questions to a responsible third party? These lingering unanswered questions surrounding a responsible third party clouds the predictable terrain of trial practice.

A. Current Framework Is Inadequate To Account For Responsible Third Parties

According to Rule 611(c), leading questions may be asked on direct examination to an adverse party, hostile witness, or witness identified with an adverse party.\(^{84}\) Unfortunately, a responsible third party fails to fall neatly in any one the categories of witnesses outlined in the rule. Based strictly on its ordinary meaning, a responsible third party cannot be an adverse party because it is not a party to the lawsuit.\(^{85}\) According to the Texas Civil Practice and Remedies Code, a responsible third party is

\(^{84}\) Tex. R. Evid. 611(c).

\(^{85}\) Id. § 33.004(a); see also Bueno v. Cott Beverages, Inc., No. Civ.A. SA04-CA24XR, 2005 WL 647026, *2 (W.D. Tex. Feb. 8, 2005); Hogan & Hogan, Jr., supra note 5, at 1010 & n.168 (2005).
designated rather than joined to the lawsuit. 86

Additionally, a responsible third party cannot be deemed a hostile witness without exhibiting hostility on the stand. 87 Simply because a responsible third party may give unfavorable testimony does not trigger the right to ask leading questions. 88 Consequently, unless a responsible third party manifests hostility while being examined, leading questions are forbidden. Moreover, it is extremely unlikely that a responsible third party would exhibit hostility during an examination considering it is not liable for any of the plaintiff’s damages or injuries. Ostensibly, since a responsible third party has no stake in the lawsuit there is little incentive for it to demonstrate hostility towards an examining attorney.

Furthermore, a responsible third party is not a witness identified with an adverse party. The operative word “identified” indicates the responsible third party must have some relationship with the adverse party. Indeed, the current body of case law surrounding witnesses identified with an adverse party focuses on the existence of a relationship between the witness and the adverse party. 89 Generally, to be classified as a witness identified with an adverse party the relationship must rise to the threshold of a close relationship. For example, courts have held employees of an adverse party have a sufficient nexus to the adverse party to be deemed a witness identified with an adverse party. 90 Perhaps, if a responsible third party has a close relationship with an adverse party, then it may be categorized as a witness identified with an adverse party. However, in some circumstances,

86 Id. § 33.004 (a).
87 See Suarez Matos v. Ashford Presbyterian Cmty. Hosp., Inc., 4 F.3d 47, 50 (1st Cir. 1993); United States v. Brown, 603 F.2d 1022, 1025-26 (1st Cir. 1979); Holbert v. State, 457 S.W.2d 286, 289 (Tex. Crim. App. 1970) (“It is within the sound discretion of the trial court to permit the counsel for the state on direct examination to ask leading questions to a hostile witness…”).
88 Suarez, 4 F.3d at 50.
89 See, e.g., Haney v. Mizell Mem’l Hosp., 744 F.2d 1467, 1477-78 (11th Cir. 1984) (stating a nurse was a witness identified with the an adverse party because she was an employee of one of the defendants); United States v. Hicks, 748 F.2d 854, 859 (4th Cir. 1984) (allowing plaintiff to lead defendant’s girlfriend); Ellis v. Chicago, 667 F.2d 606, 613 (7th Cir. 1981) (allowing plaintiff to lead police officers who worked closely with defendant police officer); Perkins v. Volkswagen of Am., Inc., 596 F.2d 681, 682 (5th Cir. 1979) (stating that employee of a party is clearly identified with the party); United States v. Brown, 603 F.2d 1022, 1026 (1st Cir. 1979) (allowing prosecutor to lead witness who was close friend of defendant and a participant in crime); Stahl v. Sun Microsystems, Inc., 775 F. Supp. 1397, 1398 (D. Colo. 1991) (allowing plaintiff to ask leading questions of defendant’s former administrative secretary).
90 Haney, 744 F.2d at 1477-78; Perkins, 596 F.2d at 682.
the underlying relationship between a responsible third party and adverse party will be wholly lacking. Therefore, it is imprudent to classify responsible third parties as witness identified with an adverse party because not all responsible third parties will have a relationship to an adverse party or any party in the lawsuit.

Finally, Rule 611(c) permits leading questions during cross-examination. However, a party cannot ask leading questions when the cross-examination is one in form only. Specifically, a party cannot ask leading questions to a friendly witness. Thus, to determine whether a party can ask leading questions to a responsible third party on cross-examination the trial court must determine whether the responsible third party is antagonistic to that party. This begs the question: Who, if anyone, is the responsible third party antagonistic to during trial?

**B. Underlying Justification For Leading Questions—Antagonism**

Ascertaining which party is antagonistic to a responsible third party is essential to determine who should be permitted to ask leading questions to a responsible third party during cross-examination and even direct examination. Indeed, Rule 611(c) is designed to account for the dynamics between parties during trial and it makes provisions to balance the inherent enmity between litigants in an adversarial setting. According to the Rule, on direct examination, leading questions may be asked to an adverse party, hostile witness, or witness identified with an adverse party, and on cross-examination, “ordinarily leading questions should be permitted.” The justification for allowing leading questions during these specified situations

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91 Tex. R. Evid. 611(c) cmt.

92 See Oberlin v. Marline Am. Corp., 596 F.2d 1322, 1328 (7th Cir. 1979); Shultz v. Rice, 809 F.2d 643, 654 (10th Cir. 1986) (holding that mere calling of witness to stand does not “automatically open the door” to use of leading questions on cross-examination when witness is friendly with counsel, and leading questions should not have been allowed as a matter of right); see also Ardoin v. J. Ray McDermott & Co., 684 F.2d 335, 336 (5th Cir. 1982) (holding that district court has power to require party cross-examining friendly witness to use non-leading questions; rule 611(c) not intended to be blanket endorsement of leading questions on cross-examination); Alpha Display Paging, Inc. v. Motorola Comm’c & Elecs., Inc., 867 F.2d 1168, 1171 (8th Cir. 1989) (explicitly acknowledging that roles of parties are reversed when witness identified with an adverse party is called, hence making leading questions inappropriate on cross-examination).

93 Tex. R. Evid. 611(c).

94 Id.
on direct examination and on cross-examination stems from the recognition that a trial attorney may need to ask leading questions in order to control adverse witnesses. Usually, in the aforementioned situations, a witness has an incentive to slant or skew their testimony due to their inherent bias or antagonism to the party examining them. Consequently, to counter the witness’ antagonism, the examining attorney needs to employ leading questions in order to conduct an effective examination.

Thus, the determination of whether a party is allowed to ask leading questions to a witness turns on the degree of antagonism present between the witness and the party: The more antagonism present, the more likely the trial court will allow leading questions. As long as antagonism is present, it is immaterial whether the witness is being examined during direct examination or cross-examination—leading questions should be allowed. Similarly, a party should be permitted to ask leading questions to a responsible third party, whether on direct examination or cross-examination, as long as it demonstrates that antagonism exists between it and the responsible third party.

C. Determining Antagonism

1. Peremptory challenge framework

Fortunately, in Texas, determining whether antagonism exists between litigants is not a foreign concept to trial courts. The issue of antagonism often arises in the context of peremptory challenges allocated to each party during voir dire. According to the Texas Rules of Civil Procedure, each party in a lawsuit is entitled to six peremptory challenges in a case tried in district courts. Accordingly, in a single-party lawsuit in a district court, the plaintiff and defendant would get six peremptory challenges.

However, in a multi-party lawsuit, if multiple litigants exist on the same side of the docket complications can arise. For example, the existence of three defendants opposing one plaintiff could result in gross imbalance of

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95 See, e.g., Rodriguez v. Banco Cent. Corp., 990 F.2d 7, 13 (1st Cir. 1993) (noting an adverse party has an incentive to slant their testimony so leading questions should be permitted to balance against their bias); United States v. Brown, 603 F.2d 1022, 1025-26 (1st Cir. 1979) (stating leading questions should be permitted to counter the antagonism of a hostile witness).

96 See, e.g., Garcia v. Cent. Poer & Light Co., 704 S.W.2d 734 (Tex. 1986); Patterson Dental Co. v. Dunn, 592 S.W.2d 914 (Tex. 1979).

97 TEX. R. CIV. P. 233.
Peremptory strikes in favor of the defendant—eighteen to six. To combat the inequity, the trial court has the authority, upon a motion by any litigant, to equalize the number of peremptory challenges so that no side is given an unfair advantage.\textsuperscript{98} In particular, the trial court has the duty to “decide whether any of the litigants on the same side...are antagonistic with respect to any issue submitted to the jury.”\textsuperscript{99} If no antagonism is present between the litigants on the same side, then those parties do not deserve additional peremptory challenges because they have a common interest, and additional strikes would allow them to skew the jury panel too much in their favor.\textsuperscript{100}

In Garcia v. Central Power & Light Company, the plaintiff sued four defendants for wrongful death resulting from a workplace accident.\textsuperscript{101} Each of the defendants denied they were responsible for the decedent’s death, and some of the defendants filed cross-claims against the other defendants in addition to seeking contribution or indemnity in the event they were found liable.\textsuperscript{102} The trial court allocated six strikes to the plaintiff and ten strikes to the defendant.\textsuperscript{103} Subsequently, the jury returned a verdict against the plaintiff, and the plaintiff appealed on the sole complaint that the trial court failed to equalize the number of peremptory challenges given that there was no antagonism present between the defendants.\textsuperscript{104}

The Texas Supreme Court reversed the trial court and appeals court on the basis that no antagonism existed between the four defendants.\textsuperscript{105} The defendants contended there was antagonism because the comparative liability of each defendant was submitted to the jury.\textsuperscript{106} The court dismissed the defendants’ claims because it found the four defendants were all united in asserting the decedent was one hundred-percent contributorily negligent.\textsuperscript{107} Furthermore, during voir dire, the defendants made affirmative exculpatory representations about each of their co-defendants liability while placing sole fault of the accident on the decedent.\textsuperscript{108}

\textsuperscript{98} Id.
\textsuperscript{99} Id.
\textsuperscript{100} See Garcia, 704 S.W.2d 734; Patterson, 592 S.W.2d 914.
\textsuperscript{101} 704 S.W.2d 734, 735 (Tex. 1986).
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 735–36.
\textsuperscript{105} Id. at 736.
\textsuperscript{106} Id. at 736–37.
\textsuperscript{107} Id. at 736.
\textsuperscript{108} Id.
The court noted that the existence of antagonism is a question of law. In determining whether antagonism existed between the defendants the trial court evaluated the pleadings, information disclosed by pretrial discovery, information and representations made during voir dire of the jury panel, and any other information brought to the attention of the trial court before the exercise of the strikes by the parties.

2. Antagonism with respect to responsible third parties

Similar to when a trial court determines whether parties are antagonistic for the purposes of peremptory challenges, a trial court should also perform a comparable analysis with regards to a responsible third party. A trial court should look to the pleadings, information disclosed in pre-trial discovery, information and representations made during trial, and any other information brought to the attention of the trial court to determine which party the responsible third party is adverse to in the lawsuit. By resolving which party—plaintiff or defendant—the responsible third party is antagonistic to, the trial court can more readily determine which party should be allowed to ask leading questions when examining a responsible third party.

3. Who Is A Responsible Third Party Antagonistic To?

The dynamics of every lawsuit are unique. Accordingly, a trial court should determine which party the responsible third party is antagonistic to on a case-by-case basis. A one-size-fits-all approach fails to accurately represent a responsible third party’s relationship to a lawsuit because in every lawsuit a responsible third party functions differently. In some lawsuits the responsible third party will be adverse to the plaintiff, while in others, the defendant. Rule 611(c) recognizes trial courts need flexibility when deciding whether to allow leading questions or not. Similarly, trial courts should be afforded the same discretion when determining the

\[109\] Id. at 737 (citing Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1986)).

\[110\] Id. (citing Patterson, 592 S.W.2d at 919).

adversity of a responsible third party. Thus, it is myopic to mandate a
general rule that a responsible third party is adverse to the plaintiff or
defendant because in every lawsuit it may be different.

With that caveat aside, a trial court must be aware of the paradoxical
role a responsible third party occupies in a lawsuit. The peculiar rules
surrounding a responsible third party must be taken into account by a trial
court when it determines antagonism. Particularly, a trial court must
recognize that a responsible third party is not liable for any judgment
rendered by the court. Additionally, despite being immune to judgment,
the conduct of a responsible third party is still considered by the factfinder
when it apportions responsibility. Thus, even though a responsible third
party has no stake in the outcome of a lawsuit, the plaintiff and defendant
have significant interests regarding the responsibility assigned to the
responsible third party. Consequently, a trial court must account for the
strategic significance represented by the designation of a responsible third
party when conducting its antagonism analysis.

4. Role reversal

At first glance, it seems like the responsible third party is adverse to the
plaintiff. Indeed, in order to even designate a responsible third party there
must be a genuine issue of material fact regarding the designated person’s
responsibility for the plaintiff’s injury or damage. Since the responsible
third party is responsible for some or all of the plaintiff’s injury or damages,
it seems to follow that the responsible third party is adverse to the plaintiff.

However, pursuant to the Texas Civil Practice and Remedies Code, a
responsible third party cannot be liable to the plaintiff, and more
importantly, a plaintiff cannot collect any damages from a responsible third
party. A responsible third party is, in actuality, not responsible to
anyone. Accordingly, a plaintiff cannot recover any damages from a
responsible third party. In fact, the reason why the defendant chose to
designate the responsible third party was to reduce the percentage of
responsibility assigned to it. Consequently, a plaintiff does not want

\[112\text{TEX. CIV. PRAC. \\& REM. CODE ANN. } \ § 33.004 (i) (Vernon Supp. 2004).\]
\[113\text{Id. } \ § 33.003 (a).\]
\[114\text{Id. } \ § 33.004 (l).\]
\[115\text{Id. } \ § 33.004 (i)(1)–(2).\]
\[116\text{Id.; see also Holman, supra note 69, at 890.}\]
\[117\text{Id. } \ § 33.004 (i)(1)–(2).\]
liability to be apportioned with the responsible third party because any
liability assigned to the responsible third party would lessen the plaintiff’s
recovery from the defendant. Therefore, this peculiar statutory scheme
actually forces the plaintiff to be aligned with the responsible third party’s
“position.”

Thus, during trial, the role of the plaintiff and defendant become
reversed when a defendant designates a responsible third party. In effect,
the defendant presents a case as to why the responsible third party is
responsible for the plaintiff’s injuries, and it is the plaintiff’s burden to
rebut the defendant’s claims. Perversely, the plaintiff “defends” the conduct
of the responsible third party with the goal of minimizing the percentage of
responsibility assigned to the responsible third party. Conversely, the
defendant attempts to maximize the percentage of responsibility
apportioned to the responsible third party in order to dilute its liability to the
plaintiff. The role reversal of the plaintiff and defendant is encouraged by
the zero-sum relationship both parties have with respect to the responsible
third party—every percentage point of responsibility allocated to a
responsible third party minimizes the defendant’s responsibility to the
plaintiff and correspondingly decreases the amount of the plaintiff’s
recovery.

5. A responsible third party is antagonistic to the defendant

Thus, in the typical situation, a responsible third party is an antagonistic
to the defendant. Even though the defendant was the party who designated
the responsible third party, it did so in order to reduce its liability by
blaming the responsible third party. Simply put, the designating a
responsible third party is a mechanism used by the defendant to shift blame.
Accordingly, the defendant contends that the responsible third party is
responsible for the injuries or damages sustained by the plaintiff.

On the other hand, the plaintiff is aligned with the responsible third
party because it is “defending” the actions of the responsible third party.
The plaintiff wants as little responsibility apportioned to the responsible
third party because it cannot recover from a responsible third party.
Consequently, the plaintiff and the responsible third party have a common
interest with respect to the issue of liability submitted to the jury—both
contend the defendant is responsible. The congruent interest between the
plaintiff and responsible third party preclude a finding of antagonism.

118 See Hull et al., supra note 70, at 97.
Furthermore, the legislature’s purpose for creating a responsible third party is bolstered by finding a responsible third party is antagonistic to the defendant. It is no secret that the legislature invented the responsible third party as a tool to assist defendants in civil lawsuits. In fact, the express function of a responsible third party is to dilute the defendant’s liability for the plaintiff’s injury. Consequently, to preserve the spirit underlying the legislation, defendants should have the opportunity to fully maximize the utility derived from designating a responsible third party. One way to allow the defendant to capitalize on designating a responsible third party is to allow it to ask a responsible third party leading questions.

However, once again, it must be stressed that not in all cases will the responsible third party be antagonistic to the defendant. Needless to say, a trial court determines the existence of antagonism by analyzing the unique facts of an individual case. Undoubtedly, in some cases, a defendant and responsible third party’s position may be aligned. In the scenario where the defendant and the responsible third party are aligned, the trial court should clearly determine that the responsible third party is antagonistic to the plaintiff.

D. Justification For A Party To Ask Leading Questions To A Responsible Third Party Based On Rule 611(C)

By performing an antagonism test on the responsible third party’s position in the lawsuit the trial court determines which party should be allowed to ask leading questions. However, determining antagonism is only one half of the task facing the trial court. Subsequently, the trial court must follow the parameters of Rule 611(c) to allow the antagonistic party the opportunity to ask leading questions. Despite the vast discretion entrusted in trial courts regarding leading questions, the trial court must still find the basis for permitting leading questions within the text of Rule 611(c).

119 The legislative history surrounding the creation of a responsible third party is littered with repeated references that the underlying goal of a responsible third party is to assist defendants. See, e.g., Underwood & Morrison, supra note 58, at 631–34.
120 See Hull et al., supra note 70, at 97.
121 It is not too far-fetched to foresee a situation where a responsible third party takes the blame for a defendant; especially since the responsible third party bears no liability there is no deterrent to it to accepting full responsibility for the plaintiff’s injuries, thereby exonerating the defendant.
1. Cross-examination

Rule 611(c) states “[o]rdinarily leading questions should be permitted on cross-examination.” Accordingly, a trial court should permit a party to ask leading questions to a responsible third party on cross-examination if it determines the party is antagonistic to the responsible third party. The trial court should look to the pleadings, information disclosed in pre-trial discovery, information and representations made during trial, and any other information brought to the attention of the trial court to determine if the party position is adverse to the responsible third party in the lawsuit. The trial court should also take into account the strategic purpose behind the defendant’s designation of a responsible third party. After evaluating all of these factors, if the trial court deems the responsible third party is antagonistic to a party then that party should be allowed to ask leading questions during cross-examination.

Taking the typical situation where a responsible third party is antagonistic to the defendant, a trial court should permit the defendant to ask leading questions to a responsible third party during cross-examination. The defendant needs the right to control the responsible third party with leading questions. Absent the use of leading questions, a defendant would not be able to effectively demonstrate the responsible third party’s responsibility for the plaintiff’s injury or damages. Conversely, since the responsible third party is aligned with the plaintiff position, the trial court should foreclose the use of leading questions during cross-examination by the plaintiff because the responsible third party is a “friendly witness.”

2. Direct Examination

The narrow contours of Rule 611(c) with respect to permitting leading questions on direct examination does not encompass a responsible third party. Based on static interpretations of the rule, a responsible third party fails to fit neatly into the nomenclature of an adverse party, hostile witness, or witness identified with an adverse party. Subsequently, despite being adverse to a party in the lawsuit—usually the defendant—the black letter of Rule 611(c) does not permit leading questions to a responsible third party on direct examination.

122 TEX. R. EVID. 611(c).
3. A responsible third party is an adverse party

Consequently, Rule 611(c) needs to evolve to account for the legislature’s invention—the responsible third party. Although, a responsible third party is not a party in the lawsuit, in practice, the burden to litigate the responsible third party’s liability ultimately rests on the plaintiff and defendant in a lawsuit. According to the Restatement, the “[p]laintiff and defendant have conflicting interests in the responsibility assigned to the nonparty, thereby ensuring an adversarial presentation of the responsibility of the nonparty.” Thus, even if the responsible third party is unknown or fails to appear at trial, it is the burden of the plaintiff and defendant to litigate its responsibility. Functionally, the designation of a responsible third party adds another “party” to the lawsuit despite it not being actually joined as a party to the lawsuit. This is particularly true in light of the fact that the responsible third party will be submitted to the factfinder when it apportions responsibility. Although the plaintiff and defendant remain the only nominal parties to the lawsuit, they still have to account for the responsible third party’s percentage of responsibility.

4. Non-parties can still be considered adverse parties

An adverse party is defined as: “A party whose interest are opposed to the interest of another party to the action.” Although a responsible third party is technically not a party to the lawsuit, it still meets the criteria of an adverse party. Generally, the interest of the responsible third party is opposed to the defendant since it is the defendant who is blaming the responsible third party for the injuries to the plaintiff. Moreover, courts have eschewed hyper-technical classifications of what is a party.

For example, in the context of determining antagonism for peremptory challenges, Texas Rule of Civil Procedure 233 mandates “the trial judge to decide whether any of the litigants aligned on the same side of the docket

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123 See Hull et al., supra note 70, at 93.
124 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § D19 cmt e.
126 Although a responsible third party is not liable, it at the very least has a reputational interest in the lawsuit. Clearly, the designation of a responsible third party implicates it is responsible for a plaintiff’s injuries, thereby sullying the responsible third party’s reputation. See Werner v. KPMG LLP, 415 F. Supp. 2d 688, 704 (S.D. Tex. 2006) (citing Lensing, supra note 70, at 1203).
are antagonistic with respect to any issue submitted to the jury.” 127 The Rule further states “the term ‘side’ is not synonymus with ‘party’, ‘litigant’, or ‘person.’ Rather, ‘side’ means one or more litigants who have common interests. . .” 128 Rule 223 clearly instructs the trial judge to ignore the strict confines of what constitutes a “party”, and, instead, directs its focus to the interest between the litigants. 129 Thus, in the context of peremptory challenges, courts have elevated function over form by recognizing the term “party” is inadequate when determining the interests inherent in a lawsuit.

Additionally, in Degelos v. Fidelity and Casualty Company of New York, 130 the court held that an adverse party is not limited to the named parties in the lawsuit. 131 In Degelos, the plaintiffs sued Fidelity and United Services insurance companies to recover damages for the death of Adolph Degelos who was killed in a motor vehicle accident. 132 The plaintiffs were the wife and minor daughter of the deceased. 133 The deceased was a passenger in a automobile that was owned by the corporation in which the deceased was a substantial stockholder. 134 The driver of the automobile was the son of the deceased, Lyle Degelos, who was an officer of the

127 TEX. R. CIV. P. 233.
128 Id.
129 See, e.g., Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 917 (Tex. 1979).
130 313 F.2d 809 (5th Cir. 1963). The Degelos case preceded the creation of the responsible third party doctrine by thirty plus years, but the facts are similar to a situation where a responsible third party would be designated under today’s rules. The case presented the question of whether in a suit nominally against a liability insurer under the Louisiana Direct Action Statute, the plaintiff may call an assured as an adverse witness. The trial court was governed by the Federal Rules of Evidence which stated at that time:

Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

FED. R. EVID. 42(b). The Texas Rules of Evidence were modeled on the Federal Rules of Evidence. See Potier v. State, 68 S.W.3d 657, 662 n. 28 (Tex. Crim. App.2002). Moreover, the Rule that existed in 1963 is substantively similar with the Rule that exists today.

131 Degelos, 313 F.2d at 815.
132 Id. at 812.
133 Id.
134 Id.
corporation. It was undisputed that the son was covered by the insurance policy.

The plaintiffs chose not to sue Lyle, individually, because his presence would have destroyed diversity jurisdiction. Even though Lyle was not a party to the lawsuit, the plaintiffs’ claims centered on his conduct as a driver, and their recovery depended on his negligence being proved because the liability of the defendants were imputed from his conduct. Pre-trial, the trial court ruled that if the plaintiff wanted to call Lyle as a witness he would not be categorized as an adverse party or witness identified with an adverse party. Consequently, they were denied the right to ask leading questions while Lyle was on the stand.

The appeals court reversed the trial court’s decision and remanded the case. The court stated the instrument of cross-examination is an integral part of the system of justice that lays bare the whole truth. Only by effectively cross-examining Lyle with leading questions could the truth concerning whether he was negligent be discovered. Unfortunately, the plaintiff was denied the right to cross-examine the witness with leading questions, and, for strategic reasons, the defendants chose not to cross-examine the witness. By prohibiting the use of leading questions, the trial court denied the plaintiff an important weapon in the arsenal of advocacy since they had the right to put the witness under a “sharp, relentless, pressing, vigorous cross-examination.”

The Fifth Circuit held the right to ask leading questions is extended.
when a party calls an adverse witness.\textsuperscript{146} Furthermore, an adverse party is not limited to the named parties in a lawsuit.\textsuperscript{147} The plaintiffs’ entire case centered on the question of whether Lyle was negligent and, if so, was his negligence the proximate cause of the plaintiffs’ injuries.\textsuperscript{148} It is clear that if he had been sued as a sole defendant or joined with the insurers as a co-defendant he would have been an adverse party to the plaintiff.\textsuperscript{149} By the trial court’s failure to look beyond the label placed on the witness, rather than his role or function in the case, the plaintiffs were deprived of cross-examination.

In Degelos, the court extended the definition of an adverse party beyond the four corners of the complaint by establishing a party not joined to the lawsuit could be an adverse party.\textsuperscript{150} The court looked to substance over form—the witness was an adverse party regardless of whether he was a party to the lawsuit. According to Degelos, the decision by the plaintiff of whom to sue is not controlling of whether a party is adverse.

Similarly, since a responsible third party is not joined to a lawsuit, the trial court should look past the named parties to determine adverse parties. Just because the plaintiff chose not to sue or join the responsible third party does not mean it is not a party to the lawsuit. The notion that a lawsuit is a binary confrontation between plaintiff and defendant is outdated with the advent of a responsible third party statute. Despite not being joined to the lawsuit, the plaintiff and defendant still have to account for the responsible third party, especially considering the factfinder has the potential to apportion responsibility on the responsible third party. Therefore, the procedural mechanism that permits the responsible third party to be submitted to the factfinder lays the foundation to treat the responsible third party as an adverse party.

Thus, a trial court should elevate function over form and consider a responsible third party a “party” to the lawsuit. Accordingly, after determining which party the responsible third party is antagonistic to, the

\textsuperscript{146} Id. at 815.

\textsuperscript{147} Id. “We do not think it was the intent of the Rule to provide that its application should be dependent upon the manner of the exercise by the injured person of his option to sue insured, insurer, or both. We think that the insured, the alleged tort-feasor, occupied an adverse position toward the injured party plaintiff and as such was an ‘adverse party’ within the meaning of Rule 43(b).” Id. (quoting Maryland Cas. Co. v. Kador 225 F.2d 120, 123 (5th Cir. 1955)).

\textsuperscript{148} Degelos, 313 F.2d at 815.

\textsuperscript{149} Id.

\textsuperscript{150} Id.
trial court should permit leading questions to the responsible third party on direct examination on the basis of it being an adverse party. Rule 611(c) permits a trial court, in its discretion, to allow leading questions to an adverse party.

VI. CONCLUSION

The designation of a responsible third party blurs the static relationship between a plaintiff and defendant during trial by reversing their responsibilities. The Texas Rules of Evidence do not account for inverted trial situation presented when a defendant designates a responsible third party. Thus, currently, trial courts have no guidance on how to handle the mode and method of interrogation of a responsible third party. Additionally, no case law exists directing a trial court on the issue of who is allowed to use leading questions during an examination of a responsible third party.

Despite not being joined to the lawsuit, a responsible third party is a party to a lawsuit. The trial court should determine which party—the plaintiff or defendant—the responsible third party is adverse to. In most situations, the responsible third party will be adverse to the defendant. Thus, the defendant should have the ability to ask leading questions to a responsible third party. Accordingly, a plaintiff should not have the right to ask leading questions to a responsible third party.