

CHAPTER 15

CONTROLLING THE RUNAWAY WITNESS

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§15.02 Definition of the Runaway Witness

A runaway witness is any witness who is unresponsive to the question put on cross. This unresponsiveness can take many forms. The witness may answer the question on cross, but in such a way as to make the answer unintelligible. The witness may refuse to answer the question put on cross and answer a different question. The witness may answer generally the question on cross, but include many other answers to questions not asked. The witness may volunteer prejudicial information to dramatic effect. The witness may object to the question posed and in some instances rule on his own objection, without ever answering the question.

§ 15.04 These Techniques Create Drama in the Courtroom So the Lawyer Does Not Have to Speak or Act Loudly

None of the techniques require or encourage the use of loud, argumentative, or offensive language. Grandiose gestures are discouraged. These techniques are designed to eliminate the feeling that such conduct is necessary.

Though some of these techniques allow for a voice that is different than the tone used in previous questions, each of the techniques can be delivered in any conversational voice. The techniques may be accompanied by a change of position in the courtroom, or a gesture, but such physical components of a particular technique rely less on confrontational body language and move-ment, and more on the change of tone or posture itself. All these techniques can be accomplished with a slower rather than faster rhythm in the questioning. The important thing to remember is this: the techniques so solidly confront the unresponsive witness, that we need not raise our voice, move with aggressive or confrontational gestures, or speak faster.

Because we are functioning as a teacher, rather than as an advocate, jurors are more inclined to view the runaway witness as an impediment to the orderly process of trial. The behavior of the witness is more akin to an interruption than an exploration of the facts.

§ 15.06 Behavior Is Molded by Consequences

Many witnesses do not understand what is expected of them as a witness. They need cues as to what is acceptable behavior in answering a leading question. Some witnesses know what is expected of them, but for their own purposes seek to ignore the rules of conduct implicit in a leading question format. As to both types of witness we use these techniques to reward good conduct by giving positive reinforcement to the witness who answers “yes” or “no.” Likewise, if the runaway witness is engaging in a form of conduct we wish to discourage, we apply negative consequences to the runaway answer.

§ 15.08 Techniques That Don’t Work

[1] “Just Answer ‘Yes’ or ‘No’ ”

This is not a valid controlling technique. First, most judges will not permit the lawyer to do that. They will inform the witness that they may explain their answer, even at length, if necessary. More importantly, our resort to using oratorical blunt force signals to the jury that we are not playing fair.

[2] Asking the Judge for Help

In frustration, some cross-examiners will ask the judge to order the witness to “just answer ‘yes’ or ‘no.’” Asking the judge to help in this way is an impractical way to control a runaway witness. Few judges are predisposed to favor trial lawyers over witnesses.

[3] “The Deal”

The Deal originates when we, early in the examination, suggest to the witness that we will ask fair questions that need only a “yes” or “no” answer. In exchange for this type of questioning we advise the witness that yes or no answers will prove sufficient. “I am going to ask you a series of questions, each of which can be answered with a yes or no answer. If I do that, will you please provide me with a yes or no answer?”

The Deal is not a suggested method of controlling the witness. It is offered up by a lawyer who fears that somewhere down the road she will lose control of the witness. It is an attempt to control the runaway witness before the witness has run.

§15.09 A General Technique That Assists All Other Techniques: Keep Eye Contact

When cross-examining a difficult witness, always maintain eye contact. Avoiding eye contact is interpreted as weakness.

If we suspect the witness will become non-responsive or runaway in their answers, we must keep our eyes fixed on the witness when asking questions and when receiving answers.

§ 15.13 Pretrial Motion in Limine

After confronting this type of witness at a deposition (and preferably a videotaped deposition), we may file a pretrial motion in limine requesting the court to rule prior to trial that the witness shall not volunteer non-responsive information in answer. This motion is best made using specific excerpts from transcripts and excerpts from videotaped depositions to illustrate the misconduct.

§15.16 Ask, Repeat, Repeat

We have asked a fair, clear question, in its simplest form, using commonly-understood words. The answer can only be “yes.” In order to avoid giving the cross-examiner an answer, the witness sidesteps with a non-answer.

Without taking your eyes from the witness, we simply ask the question again, in exactly the same words and tone of voice and articulating each word.

§15.17 Reversal, or Ask, Repeat, Reverse

This technique of repeat and reverse is a variant of the first technique. We ask the question. We then ask the identical question, but slightly slower and leaning forward. This gives the witness two opportunities to tell the truth before we reverse the question in the third asking.

§15.21 Embarrassment of Humiliation

Always keep in mind that no witness wants to be embarrassed or humiliated. By calling the witness by his or her formal name and title, if there is a title (such as Doctor, Professor, Captain, etc.), the witness senses that humiliation and embarrassment are not far away.

§15.22 “Sir” or “Ma’am”

Once the formal name has been used, it is seldom necessary to use it again, even if the examination is a quite lengthy one. Simply starting the question with “sir” or “ma’am,” as the case may be, will immediately bring back in line the unresponsive, but non-malicious witness.

§15.26 Polite Interruption

The question is put to the witness. The witness becomes unresponsive. The witness’s unresponsive answer would lead to a mistrial.

While ordinarily we would never verbally interrupt a witness, this is the exception to the rule. We must weigh the damage of a possible mistrial against an objection by the opponent.

Once we decide that a polite interruption must be made, the interruption must be made quickly and before the harm that would result in a mistrial can be accomplished by the witness. We then immediately address the court (preferably before the objection is even made) and ask to approach the bench with opposing counsel to explain the reason for the interruption.

§15.34 Objection: Non-Responsive Answer

The objection is stated as follows: “Objection, non-responsive answer.” The objection that the witness is being non-responsive in his answer calls upon the court to become involved in enforcing the rules of witness examination.

When the technique is properly employed and the objection is sustained, the result is effective and lasting:

Cross-Examiner: Objection, non-responsive answer.

Court: Sustained

Cross-Examiner: I ask that the non-responsive answer be stricken from the record.

Court: The answer will be stricken.

Cross-Examiner: I ask that the jury be admonished to disregard the answer.

Court: Jury is instructed to disregard the last answer.

§15.35 The Court Reporter

The technique: Having asked the witness a leading question and having received a rambling monologue, we may turn to the court reporter and ask, "Please may I have my question read back to the witness?" All action in the courtroom will halt as the reporter slowly articulates each word of the stenographic record.

Having the question repeated word for word by a court official and read back with great clarity intimidates the runaway witness and immediately brings a short, responsive answer.

§15.37 Use of a Blackboard

The blackboard can serve in much the same way as having the court reporter read the question back. If a witness is consistently unresponsive, and the question is short (see Chapter 10, The Only Three Rules of Cross), we may simply write the question on the board during or after hearing the unresponsive answer. When faced with the written question, the witness may stop the unresponsive answer. Even if the witness does not stop the unresponsive answer, he will recognize that he must eventually respond to the question.

§15.39 Use of a Poster

If the big question can be predicted, and the non-responsive answer is foreshadowed through discovery or pretrial hearings, then an appropriate poster can be developed before trial.

§15.40 "That Didn't Answer My Question, Did It?"

§15.41 "My Question Was . . ."

The jury is reminded that the question was not answered. They are reminded of the very specific wording of your question. In that sense, this technique is much like a verbal blackboard and to the same effect. If analyzed, this technique is the "repeat" technique with a point on it. It is not as aggressive as "that does not answer my question, does it?" technique, but more aggressive than the simple "repeat" technique.

An additional benefit of this technique is that it points out to the jury the precise question that the witness is evading.

§15.42 "Then Your Answer Is Yes"

At the heart of this technique is our ability to hear what amounts to "yes" hidden within a longer answer.

§15.43 If the Truthful Answer Is "Yes," Will You Say "Yes"?

This is a variation of the technique just described. It should be reserved for the obstinate witness, particularly one being discredited. This technique should be employed when non-responsive answers are repeatedly given to very short, simple questions to which no witness contests that the fair answer is

“yes.” After a series of long, non-responsive answers, we can ask, “If the truthful answer is ‘yes,’ will you say ‘yes’ ”? Obviously, the witness has to answer “yes” to the question.

§15.46 Spontaneous Loops

A loop is the repetition of a key phrase (see Chapter 26, Loops, Double Loops, and Spontaneous Loops). A spontaneous loop is a repetition of all or part of an unexpectedly good but unresponsive answer.