Controlling the Runaway Witness

Adapted from their book

Cross-Examination:
Science and Techniques
2nd Edition

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Chapter 19: 
Controlling the Runaway Witness

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§ 19.48 Summary

Sections in Bold are included in the handout in whole or part
§ 19.01 The Fear
(Book page 19-3)

The question calls for a yes or no answer. The witness is entitled to give either answer. Instead, the witness responds with a narrative. The answer may be long or short. The answer may contain words that amount to "yes" or "no," or the answer may entirely evade the question being asked. In all of these events, the cross-examiner is confronted with a "runaway witness."

The chief problem of a "runaway witness" is his effect on the ability of the cross-examiner to paint the precise picture in each chapter goal. The more wordy the answer, the more the picture may be distorted or muddied by the inclusion of unnecessary information. The runaway witness is attempting to take over, if even for a moment, as the guide to the facts. The cross-examiner will ordinarily want to extinguish this behavior as it is the cross-examiner who is best able to communicate the most important facts to the jury.

The runaway witness ranks as one of the greatest fears of the cross-examiner. However, one of the greatest opportunities to the cross-examiner is when the witness is unresponsive. An unresponsive or runaway witness often appears without notice, and sometimes when least expected. That is part of the fear. The fear expands because once the runaway witness surfaces the lawyer is enmeshed in a battle to retain control of the cross-examination. Thoughts of opportunity are not present as the unprepared cross-examiner struggles to regain control.

§ 19.02 Definition of the Runaway Witness
(Book page 19-3)

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

Example:
Q: Professor, you never measured the circumference of the aluminum alloy tube?
A: I didn’t consider it to be relevant. In fact, I don’t consider it relevant now. I am sure that it is not relevant. What I did was . . .
§ 19.04 These Techniques Create Drama in the Courtroom so the Lawyer Does not Have to Speak or Act Loudly
(Book page 19-5)

None of the techniques for controlling a runaway witness 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 movement, 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, though again, there may be occasions when the cross-examiner will change the rhythm as a method of enhancing a particular technique. The important thing to remember is this: The techniques so solidly confront the unresponsive witness, that the cross-examiner need not raise her voice, move with aggressive or confrontational gestures, or speak faster.

§ 19.06 Behavior is Molded by Consequences
(Book page 19-7)

Remember psychology 101 from college? Remember the maze that the little white rats were placed in? The rats learned that if they performed well they were rewarded with a food pellet, but if they performed poorly they received no reward or worse, negative feedback. This was the concept of the Skinner box introduced by psychologist B.F. Skinner. The concept remains true for all thinking organisms.

What is an acceptable means of rewarding the short, direct answer to a leading question? When the witness is responding with simple direct answers (preferably yes), rewards include a gentle encouraging nod of the head, a pleasant teaching voice and most important, efficient movement to the next question, the next subject matter, and the next chapter. Do not create an impediment to the “yes” answer. If the witness has agreed with the fact suggested by the cross-examiner, the witness has earned a reward. A change to a harsher tone of voice, a negative gesture, or a follow-up question that suggests that “yes” is a foolish, illogical, or undesirable answer, all serve to sanction the witness for agreeing with the cross-examiner. The cross-examiner would not punish her coworkers, her children, or her pets for doing what she wanted them to do. For the same reason she cannot afford to punish a witness for answering “yes.”

On the other hand, when the witness becomes a runaway witness by using unresponsive answers, volunteering information, or by a myriad of other evasive devices, sanctions must be applied. The techniques that are discussed in this chapter apply those sanctions. Some of the sanctions are severe by courtroom standards. Some are more gentle and encouraging. With this said, let there be no misunderstanding: They are all negative stimuli. The techniques for controlling the runaway witness all employ
negative feedback as a means of extinguishing unwanted behavior.

§ 19.08 Techniques That Don't Work
(Book page 19-8)

[1] “Just Answer ‘Yes’ or ‘No’”

Television, movies, and, unfortunately, some trial skill programs in law school have encouraged trial lawyers to fall back on the command, “Just answer my question ‘yes’ or ‘no,’” as a method of controlling the runaway witness. 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, a lawyer’s resort to using oratorical blunt force signals to the jury that the cross-examiner is not playing fair. The lack of choice given the witness suggests to the jury that the lawyer is trying to “trick” the witness. Non-lawyers resent this heavy-handed attempt to straitjacket the witness. To them it appears that the lawyer is attempting to “put words in the witness’ mouth.” A lawyer resorting to this method lowers both her personal credibility and the credibility of the leading question as an appropriate teaching device.

[2] Asking the Judge for Help

[a] Court-Offered 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. The judge figures, correctly, that since the lawyer was the one who lost control, the lawyer should be the one to suffer the consequences. If the cross-examiner asks for help, the judge is likely to say something to make a bad situation worse. At best the cross-examiner will get, “I will permit the witness to give a full and complete explanation if the witness thinks that explanation is necessary for a complete answer.” Who needs that help?

Of course, if the court offers help, the lawyer should certainly accept it. Should the court spontaneously instruct the witness to answer, the cross-examiner should accept the power of the bench. When the court volunteraly gets involved in the effort to control the runaway witness, the witness has hurt his credibility, which tells the jury that this lawyer is being fair in her questioning. Permit the court to volunteer; do not seek its assistance. The best way to accept the help of the power of the bench is to remain silent (see chapter 21, Creation and Uses of Silence). Do not restate the question unless prompted by the judge to do so, or the witness must admit that he does not know the question by asking for the question again. If the witness has to admit that he does not know the question, the witness admits to all (judge, jury, opposing counsel, and to the cross-examiner) that the witness was not listening to the question and was going to answer whatever question the witness chose to answer.
[b] “The Deal”

The Deal originates when the cross-examiner, early in the examination, suggesting to the witness that the cross-examiner will ask fair questions that need only a “yes” or “no” answer. In exchange for this type of questioning the cross-examiner advises 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. The Deal sends all the wrong messages to the fact finders in the trial and to the opponent, who is made aware that the lawyer believes she will have trouble with the examination. Most importantly, the signal is sent to the witness that the lawyer fears this kind of conduct. If the witness is not friendly to the cross-examiner’s cause, wouldn’t the witness cause as much difficulty as possible by using this request against the lawyer?

§ 19.09 A General Technique That Assists all Other Techniques: Keep Eye Contact
(Book page 19-11)

When cross-examining a difficult witness, always maintain eye contact. Avoiding eye contact is interpreted as weakness. Life experiences verify this both in and out of the courtroom. People who will not make eye contact are uncomfortable and less than forthright. People who will not make eye contact are often afraid. If the cross-examining lawyer suspects the witness will become non-responsive or runaway in their answers, the lawyer must keep her eyes fixed on the witness when asking questions and when receiving answers. By directing the lawyer’s full attention to the witness’s eyes, she serves nonverbal notice that she will not put up with any nonsense or permit deviation from the question-and-answer approach she has been following. Control the runaway witness’s eyes until the witness is off the stand.

Of course, the trial lawyer must sometimes divert her eyes from the witness to look at notes and observe exhibits, charts, overheads, or other demonstrative aids. There techniques enable the cross-examiner to divert her attention while maintaining psychological control of the witness. The cross-examiner may take her eyes off of the witness after the answer has been given and before the next question is asked, or in limited circumstances even while the next question is being asked. In other words, the cross-examiner may put a question to the witness, receive an answer to that question, and then divert attention to a new task such as putting up an exhibit, or consulting notes. Because there is no question pending, there is no permission for the witness to speak. Eye contact should be maintained from the conclusion of the cross-examiner’s question through the entire answer of the witness. When there is an interruption of eye contact between questions, cross-examiner should reestablish eye contact before posing the next question.
§ 19.13 Pre-trial Motion In Limine
(Book page 19-13)

There are witnesses (particularly expert and professional witnesses) who become so schooled in trial work that every answer is unresponsive. Every unresponsive answer is intentional and malicious. The ability to evade, and to insert harmful material is one of the reasons opposing counsel has hired them.

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

§ 19.16 Ask, Repeat, Repeat
(Book page 19-15)

The lawyer has 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 has sidestepped with a non-answer.

Without taking her from the witness, the lawyer simply asks the question again, in exactly the same words and tone of voice and articulating each word. The pace of the question is slightly slower. If the witness is foolish as to again ignore the obvious “yes,” the trial lawyer can slowly lean slightly forward without taking her eyes off the witness. The next step is to repeat the identical brief, simply constructed question, but even more slowly.

The successively slower repetition of the identical words and tone emphasizes to the witness, the court, and, most importantly, the jury that the witness is refusing to answer a short, straightforward, easily answered question. The forward body motion emphasizes that all are waiting for a response. Even the most evasive witness has great difficulty in evading the third posing of the question.

§ 19.17 Reversal, or Ask, Repeat, Reverse
(Book page 19-16)

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

The technique of ask, repeat, reverse, is one of the most effective methods of controlling an expert witness. This is particularly true when the expert has reports, operative notes, letters, or any other type of documents. Because the document or fact, whatever it may be, will not go away, this technique is particularly effective.
§ 19.20 Full Formal Name  
(Book page 19-18)

A previously compliant witness has for the first time run away with an answer. This witness has thus far appeared to be trying to answer fairly. Jurors can sense the witness’s apparent candor, so the lawyer has to rein in the witness without incurring the jury’s hostility. Anything that changes the customary tone of questioning serves as a mild rebuke to the witness. The cross-examiner need not use a harsh tone or angry gesture to remind a witness of their obligation to answer the question. The use of the witness’s full formal name represents a change in the style of the questioning and thereby provides a sanction.

§ 19.22 “Sir” or “Ma’am”  
(Book page 19-20)

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 nonmalicious witness. Just as there is no down side risk for using the “full formal name” technique, there is no down side risk of objection or proper interruption to this technique. What would the objection be? “Objection, the cross-examiner is being polite.” Use the “sir” or ma’am” at the beginning of the question for maximum effect.

§ 19.23 Shorten the Question  
(Book page 19-20)

Even when the cross-examiner is properly implementing the three rules of cross-examination (see chapter 8, The Only Three Rules of Cross-Examination), questions can be shortened to highlight the malicious non-responsive nature of the witness. The cross-examiner is using a leading question. She only has one fact in the question and the question is in logical order. Nonetheless, the witness refuses to responsively answer the question. In this circumstance, continue to eliminate words from the question until the witness is left with only the key word of the question.

§ 19.26 Polite Interruption  
(Book page 19-21)

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

While ordinarily the cross-examiner should never verbally interrupt a witness, this is the exception to the rule. The cross-examiner must weigh the damage of a possible mistrial against an objection by the opponent.

Once the cross-examiner has decided 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. The cross-examiner would 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.
§ 19.28 The Hand  
(Book page 19-22)

A witness begins to answer the question with a long unresponsive answer. The lawyer simply holds up her hand like a traffic officer’s stop signal. It sounds odd, but it works. Try it at a cocktail party on someone you don’t like. (While it will stop the conversation, it will not improve the relationship.)

§ 19.29 The Shaken Finger: Child Witnesses  
(Book page 19-23)

When the witness begins to answer the question unresponsively and at length, the lawyer simply slowly shakes her index finger back and forth as she would at a naughty child. That simple gesture, with other appropriate body language to support it, makes the witness feel guilty. This technique works most appropriately when other techniques (particularly, the hand) have been employed earlier in the cross-examination. Now, when the witness continues to demonstrate that they have not learned the lesson of responding to the question asked, the shaken finger (naughty witness!) is appropriate.

§ 19.34 Objection: Non-Responsive Answer  
(Book page 19-25)

The cross-examining lawyer has only one legal objection that can be used as a technique to control the runaway witness. The objection is stated as follows: “Objection, non-responsive answer.” The objection that the witness is being non-responsive in her answer calls upon the court to become involved in enforcing the rules of witness examination.

It is, in a sense, inviting the court to assist in controlling the witness. Therefore, the cross-examiner should only use this objection when many other techniques have been used but have been unsuccessful in controlling the witness.

There are two substantial risks to this technique. First, once invited to participate in the cross-examination, the court may continue to be actively involved in the cross-examination. This is never a good thing. Too often the judge may see this objection as an invitation to referee the cross-examination on a question-by-question basis. The risk is that all continuity will be lost. This risk is substantial and must be weighed heavily by the cross-examiner when considering using this technique.

The second down side risk that the trial lawyer must weigh before using this technique is the likely response by the court. For this technique to work, the judge: (a) must be listening; (b) must know the rule of evidence; (c) must know that the objection belongs to the cross-examiner; and, (d) must be willing to enforce the rule. Weigh these factors carefully before the use of this technique.

§ 19.35 The Court Reporter  
(Book page 19-26)

While the judge is certainly the highest-ranking member of the courtroom staff, the jury views all court personnel as holding power. All members of
the judge’s staff are seen as “official” and are treated by the jury with special respect. Most importantly, the courtroom staff is seen as neutral. It is significant when it is perceived by the jury that they are using their power to aid one side or the other.

The technique: Having asked the witness a leading question and having received a rambling monologue, the lawyer 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.

§ 19.37 Use of a Blackboard
(Book page 19-27)

Quite often the courtroom is equipped with a blackboard, white board, or other large writing surface. 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 and to the point (see chapter 8, The Only Three Rules of Cross-Examination), the cross-examiner may simply write the question on the board during or after hearing the unresponsive answer. When faced with the written question, the witness often will 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.

§ 19.39 Use of a Poster
(Book page 19-28)

If a blackboard is effective, the poster is not only effective but also intimidating to the witness and the opponent. The poster further demonstrates to the jury and the judge the cross-examiner’s thorough and complete preparation for the trial.

Trial counsel knows the heart of her cross-examination. Trial lawyers are often quite able to predict at which point in certain cross-examinations certain witnesses will rebel or try to evade answering the critical questions. This is particularly true when dealing with expert witnesses. If the big question can be predicted, and the non-responsive answer is foreshadowed through discovery or pre-trial hearings, then an appropriate poster can be developed before trial. If there is no discovery, careful listening to direct examination questions can develop the material for the poster. The poster can be drawn during a recess. Then, when the predicted evasion comes to the big, critical question, cross-examining counsel can prop the poster on the desk. The critical leading question is already written on the poster in the identical language. This becomes a written form of the repeat technique.

§ 19.40 “That Didn’t Answer My Question, Did It?”
(Book page 19-29)

This technique is confrontational. It is best reserved for use against an expert or professional witness. The jury must sanction this confrontation before it is used. The witness must have repeatedly refused, deliberately and maliciously, to answer straightforward questions.
Under any of the scenarios, the witness is taught to respond to the precise question asked.

§ 19.41 “My Question Was . . .”  
(Book page 19-29)

This manner of controlling is less confrontational than the preceding technique. It has the same effect, particularly when used after the prior technique that is so confrontational.

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. Because of this, it is best to use this technique in situations where the cross-examiner is to draw additional attention to the factual assertion contained within the question. The jury receives a better understanding of the importance of the fact at issue, while the witness is sanctioned for the non-responsive or runaway answer.

§ 19.42 “Then Your Answer Is Yes”  
(Book page 19-30)

This technique is easily understood by jurors. It can be used with any witness, whether that witness is a willfully non-responsive witness or just cannot help answering at length. The cross-examiner's tone can be adjusted depending on the circumstances. At the heart of this technique is the cross-examiner's ability to hear what amounts to “yes” hidden within a longer answer.

This is best delivered after a long answer, without moving or taking your eyes from the witness's eyes and with a slight, helpful smile. Usually the affirmative response is quickly forthcoming.

§ 19.43 If the Truthful Answer Is “Yes,” Will You Say “Yes?”  
(Book page 19-31)

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, the cross-examiner can ask, “If the truthful answer is ‘yes,’ will you say ‘yes’?” Obviously, the witness has to answer “yes” to the question.

Immediately follow by repeating the identical question that received the non-responsive answer. The witness will answer with a simple “yes.”
§ 19.44 Story Times Three  
(Book page 19-32)

Some witnesses seem unstoppable. They have been coached to tell a story, and they are going to tell their stories—usually dramatic and harmful stories calculated to destroy the advocate’s case. This sort of witness will tell this story as often as possible and seems to have the uncanny ability to recognize the worst possible moments. Only in these dire circumstances is the following technique appropriate. Try multiple techniques first before reverting to this technique, because this is a technique of last resort at trial.

This technique is best used at deposition. There is no jury to be poisoned. No judge to interrupt. By requesting repeated recitations of the “story”, all the emotion of the witness and the “story” is drained away. Control for individual questions that follow become much better.

§ 19.45 Elimination: Use of This Technique at Trial  
(Book page 19-33)

This technique is particularly valuable to teach the witness before trial that it is painful, embarrassing, and even humiliating to be a runaway witness. It signals the axiom: “We can do this the easy way or the hard way, but we will do it.” The technique comes in two forms. When used at a deposition the technique of elimination is longer and more time-consuming. When used in trial, the technique requires questioning that is more to the point. After experiencing the form at a deposition, few witnesses look forward to the trial form.

The question is asked, and the witness gives a non-responsive answer. The cross-examiner begins eliminating other possible factual variations. At some point during the process, the witness will offer to give the “yes” that was warranted by the original question asked. Do not let the witness off the hook. Continue with this technique until the witness insists on giving the response that you first requested.

Deposition Training
This is an excellent technique to train the witness in depositions (where objections do not stop the technique) not to be unresponsive. With the latitude given at depositions, the painful technique of elimination can be used to its full extent, and the witness recognizes that it is an unpleasant experience to be avoided in front of twelve perfect strangers at a jury trial.

§ 19.46 Spontaneous Loops  
(Book page 19-35)

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. This type of loop is called spontaneous because it happened without the trial lawyer expecting it. More often than not the cross-examiner will use a simple word or phrase from a long answer that the witness has volunteered (see chapter 26, Loops, Double Loops, and Spontaneous Loops).
Whether the witness is a college professor with a doctorate in microbiology or a ruthless government informant trained in the art of lying, her non-responsive answer is likely to include words or phrases that the cross-examiner can use to discredit her. This is why the cross-examiner must listen to the entire answer carefully. Within it are often nuggets of golden opportunities.