

CONTROL DURING CROSS EXAMINATION:
STOPPING THE RUN AWAY WITNESS

By Ben Rubinowitz and Evan Torgan

While witness control is important when cross-examining a lay witness, it is essential when cross examining an expert witness. One of the best methods to control a witness on cross is to pose short, “one fact at a time” questions designed to slowly but surely make your point for summation. While this is easier said than done, there is a straight forward method to accomplish this goal. To reach this goal, however, a firm understanding of different questioning techniques must be understood.

There are three basic methods to questioning a witness: The first is to ask open-ended questions. The second is to ask what most lawyers refer to as leading questions. The third is to tell the witness the answers and merely seek confirmation from the witness. No doubt exists that the third method will, if done properly, put the attorney in the position of maintaining maximum control of the witness while, at the same time, educating the jury.

FORM OF QUESTION

By asking open-ended question on cross, the attorney is relinquishing control of the witness. Such questioning turns the courtroom over to the witness to answer the question any way he sees fit. Questions that begin with the following words call for a narrative response and are clearly open ended: Who, What, When, Where, How, Describe, Explain, Tell us and Why. These are the questions most often used on direct examination. Because these questions allow

the witness to narrate, it is the witness who becomes the center of attention. This in turn allows the witness to develop a rapport with the jury, establish his credibility and teach and explain his position. While there are times when “low-risk” open-ended questions might be an effective way to score points on cross, for the most part open-ended questions are, simply put, dangerous.

Consider the following example to illustrate this point. Imagine the scenario in which a patient who had been hospitalized for one week had his temperature taken only one time during the hospital stay. On cross, the attorney for the plaintiff believes he can score by asking a question designed to elicit this fact by using the open-ended form:

Q: How many times did you take the patient’s temperature during his hospital stay?

A: We took the patient’s temperature as many times as was necessary. Since the patient was afebrile when we took his temperature, there was no reason to take it again. Our goal is not to perform needless tests on a patient. It is to follow up on those issues that matter.

In this example, the attorney lost control of the witness. Because the attorney posed an open-ended question, he allowed the witness to offer far more in his answer than the attorney sought.

While the attorney might seek help from the Court by moving to strike the non-responsive part of the answer, he may or may not win. Either way, unfortunately, the jury has heard the response and even if counsel is successful in his application to the Court, it is difficult to “unring” the bell.

To avoid the potential for long-winded answers, many attorneys believe it best to ask leading questions on cross-examination. A leading question is one which suggests the answer or severely limits the universe of potential answers. By changing the form of the question, the attorney instantly enhances his ability to control the witness. Questions that begin with the following words hurt the potential for a narrative response: Did, Were, Have, Had, Could, Should, Are, and So. Indeed, the opposites of these questions also serve the same goal: Didn't, Weren't, Haven't, Couldn't, etc. If the witness is responsive, this form will work. The witness may give the attorney the desired "yes" or "no" response. If, however, the attorney is dealing with a savvy expert, he or she still may find wiggle room to avoid answering the question. Take the same scenario as above:

Q: Did you only take the patient's temperature one time?

A: We took the patient's temperature as often as was necessary.

Once again, the attorney could make an application to the Court to strike the non-responsive part (in this case the whole answer); however, there are no guarantees with such an application.

The third approach to controlling and questioning the witness is to more forcefully ask a leading question. It is, in effect, pure leading. The method is to tell the witness the answer and at the same time tell the jury the answer. Here, all the attorney seeks is confirmation of the statement he made to the witness:

Q: You took the patient's temperature one time, correct?

Q: You never took his temperature again, true?

Q: You never instructed anyone to take his temperature again, am I right?

The beauty of this type of questioning is that it limits the witness' ability to wriggle out of the desired answer. Of course, there are no guarantees that a witness (especially a professional witness) will not volunteer a longer answer or try and be "cute" by responding "Is that a question?" There are methods to deal with such a witness.

CONTROL TECHNIQUES

One of the easiest ways to deal with a "run-away" witness who refuses to comply with the desired one word answer (yes or no) is to repeat the question and change the tone of your voice:

Q: You never took his temperature again, true?

A: It wasn't necessary.

Q: My question is specific. (In a louder, firmer tone)

You NEVER took his temperature again true?

A: True.

This technique serves two goals: First, it shows the jury you are in control and that you

do not have to rely on the whim of the Court - - by making an application to strike - - which may or may not work. Second, it shows the witness that you, as the questioner, mean business and that you will not tolerate anything but the desired answer.

Another technique to force the witness to answer the question in the desired manner is to use “reverse repetition.” In this technique the attorney merely reverses the question, seeking the exact same answer to the one originally posed:

Q: You never took his temperature again, true?

A: It wasn't necessary.

Q: My question is slightly different than the one you answered.

You NEVER took his temperature again, true?

A: I said it wasn't necessary.

Now, reverse the questioning and change the tone with which the question is asked:

Q: Are you telling this jury right now that you took his temperature MORE THAN ONCE?

A: No.

Q: You NEVER took his temperature again, true?

A: True.

Quite often a true “run-away” witness will volunteer far more than the question ever

called for. For example, you ask the witness for the time and the witness tells you how the watch was made. A straight - forward solution to this problem is to take a lesson from the old school crossing guard who puts her hand up to stop traffic. For some reason, a hand in the air mimicking a school crossing guard elicits a Pavlovian response. Everything stops. By taking advantage of this technique, as soon as the witness goes off-track the attorney should immediately raise his or her hand signaling to the witness to stop talking. As soon as the witness stops talking, a firm fully leading question should be put to the witness.

Other techniques may, at times, be equally effective in controlling the witness. One way is to tell the witness as soon as he gives a non-responsive answer that “All I’m asking for is a ‘yes or no’ response, can you do that?” Another way is the “Let’s make a Deal Technique.” In this method the attorney says directly to the witness, “I’ll tell you what, first you answer my questions and then I’ll let you explain.” Needless to say, the problem with this method is that it eventually turns control over to the witness. However, if the follow up questions are penetrating and effective they may have the desired effect of making meaningless any supposed explanation.

In the event the witness insists on “running-away” with every question asked of him, the attorney can make his point by simply asking the witness:

Q: Are you done yet? or

Q: Have you finished?

A: Yes.

Q: Good, now we can get back to the facts.

My question was:

You never instructed anyone else to take his temperature again, true?

A: True.

Another effective way to control the “run-away” witness is to remind that witness that his attorney will have another chance to question when you are finished but that for now he needs to answer the questions put to him.

By being patient and reasonable, you will impart your message to the jury that the witness is anything but forthcoming. In this instance, your patience may well be rewarded in that the jury may despise the non-responsive “run-away” witness.

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