The Chapter Method of Cross-Examination

Adapted from their book

Cross-Examination: Science and Techniques
2nd Edition


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Chapter 9:
The Chapter Method of Cross-Examination

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Sections in Bold are included in the handout in whole or in part
SELECTED AND EDITED PORTIONS OF CHAPTER 9 – “THE CHAPTER METHOD OF CROSS-EXAMINATION”

§ 9.1 The Chapter Method Defined
(Book page 9-2)

There is a structure to the materials gathered and the questions asked within any cross-examination. The term “chapter method” is meant to reinforce the understanding that the cross-examination of any witness is not a flowing discussion with a single unifying purpose. Instead the advocate must think of the cross-examination of any witness as a series of small discussions (chapters) on individual topics of importance to the cross-examiner. Cross-examination in the chapter method seldom flows. Instead it moves from topic to topic, not necessarily in chronological order. It virtually never covers everything a witness might know about the case. Chapters sometimes relate to each other. Sometimes the transition from one chapter to another chapter amounts to an abrupt jump to a completely separate area of the case. What can be said is that there is a beginning and an end to each chapter. The beginning and the end of each chapter are largely mapped out before the cross-examination begins. The chapters are designed to maximize the good evidence available. As a result, chapters do not trail off. They end crisply. A chapter that has not accomplished its purpose using the best facts available is not likely to get better through additional questions. If the best evidence didn’t work, the second best evidence or the unknown evidence is likely to produce worse results.

A trial is a book of information. The individual witness examinations are themselves large accumulations of information. (Parts of the books.) The individual topics within the cross-examinations are the chapters of the book. Each chapter has a designed purpose or goal. The jurors can understand the purpose of each chapter as the cross-examiner assembles related facts into one logical sequence, designed to paint one picture. The chapter method is the polar opposite of the freewheeling style of cross-examination. The chapter method of cross-examination is designed as the optimum teaching model in an adversary system. An advocate working without benefit of the chapter method of cross-examination can establish many important facts, but does so in no particular order. As a result, the jurors must reassemble the facts in order to understand the points being made by the cross-examiner.

§ 9.2 Chapter Defined
(Book page 9-3)

Cross-examination is a series of goal-oriented exercises. Each of these individual exercises is a cluster of related facts grouped to establish one particular point useful to the questioning party. The chapters of cross-examination are each composed of a series of goal-focused, leading questions. Any one topic of cross-examination will be presented through one or more chapters of cross-examination.
### Chapters

- A group of leading questions.
- Progressing in a logical sequence.
- Starting generally.
- Becoming increasingly specific.
- Establishing a factual goal. (Finish that picture)

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§ 9.3 The Definition of a Chapter Bundle  
(Book page 9-3)

A chapter bundle is a grouping of related chapters that need to be used together in order to create a full picture of a topic. A single topic within a cross-examination may well require several chapters. For instance, in a civil suit alleging that a customized computer software program was defective and therefore need not be paid for, the topic of whether the software was defective may require a great many chapters each focusing on one of the various alleged defects within the program. In addition there would almost certainly be one or more chapters detailing the consequences of each of those defects.

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§ 9.5 The Chapter Method Gives the Cross-Examiner Witness Control  
(Book page 9-5)

Not every part of the opponent’s story is capable or deserving of attack. There are parts of the direct examination that potentially help the cross-examiner, and there are parts that cannot successfully be disputed. There are other parts of the direct examination that simply do not matter. It is critical that the cross-examiner work from a method that ensures only the topics of importance to the cross-examiner will be discusses.

The chapter method is fundamental to the process of witness control. The
witness was called by the opponent. If left to pick his own topics for discussion, the witness is likely to take the jury into areas calculated to help the opponent. On the other hand, far greater witness control would be established by a method of offering leading questions only. By grouping questions into narrow fields of inquiry selected by the cross-examiner, the result is far greater control over matters discussed by the witness.

The chapter method recognizes that the cross-examiner is not going to attack or retell the entire story of the direct examination. The cross-examiner is going to attack, introduce, or highlight only portions of it. She will undoubtedly agree with many facts testified to on direct examination. As to these facts, she may choose to offer no cross-examination. In some instances, some cross-examination will occur as to agreed facts, not to weaken a factual assertion but to highlight these agreeable facts. That is done in order to put those admitted facts into context and show the fact finder that those facts have greater significance than given by the opponent. In such instances, the purpose of cross-examination is not to cast doubt upon such facts, but to make sure that these facts indeed come to the attention of the jurors, so that they can appreciate the significance of those facts in an alternative context—the context created in cross-examination.

Often there are a whole series of questions asked in direct examination that will go unchallenged for a different reason. They simply have no significance to the cross-examiner's theory of the case. The tendency in all direct examinations, both civil and criminal, is to "tell a story." As a result, direct examinations tend to cover much more material than is truly useful or at issue in the case. The skillful cross-examiner will let most of these facts go without comment, as most of these facts assist neither side. But the cross-examiner should still listen for "spontaneous loops" and theme phrases (see chapter 2, Developing a Theory of the Case and chapter 26, Loops, Double Loops, and Spontaneous Loops).

Modern cross-examination uses the chapter method to both attack the opponent's theory of the case and to support the advocate's theory of the case. Too much of the literature of the field has focused on cross-examination as a destructive device whose only purpose is primarily to attack the direct examination testimony. This is an old-fashioned and overly defensive view of cross-examination. Indeed there are chapters of cross-examinations solely destructive in nature. They are intended to harm the credibility of the opponent's case. It is entirely appropriate to build chapters that expose inconsistencies. As always, this is a selective process. The cross-examiner does not invite open-ended testimony of the witness, but requires the witness to admit or discuss particular facts that are selected by the cross-examiner.

§ 9.7 A Chief Advantage of the Chapter Method: Better Use of the Available Facts
(Book page 9-6)

There are distinct advantages to adopting the chapter method of cross-examination. Chief among them is that the chapter method encourages a disciplined approach to the understanding and use of facts. It is a system of organization and presentation that will work in every type of case, every type of personality, and in every trial venue whether it is a jury trial, a court
trial, or arbitration. The chapter method encourages the lawyer to conduct more exhaustive analyses of the available facts. There is a difference between knowledge of the facts and an analysis of the facts. A lawyer can know the facts without ever having completed an analysis of the facts. An analysis suggests that the facts have been compared one to the other, have been reorganized, and have been grouped in logical packages, so that different or stronger conclusions may be drawn from those same, otherwise innocuous, facts.

A more systematic analysis of the available facts will permit the lawyer to sort the facts in support of a particular proposition into bundles or groupings of related facts. These bundles of related facts (chapters) permit the jury to enjoy a real-time understanding of the significance of facts to the cross-examiner's theory of the case. As a bonus, the chapter method of cross-examination gives counsel the freedom to quickly and easily order and reorder the sequences of the cross-examination (see chapter 11, Sequences of Cross-Examination). The chapter method gives topical and emotional control over the cross-examination to the cross-examining party, rather than to the witness. It permits a lawyer to engage in cross-examining hostile witnesses in areas (chapters) of the lawyer's choosing, while avoiding and eliminating opportunities for the witness to maneuver the cross-examination into areas (chapters) of the witness's choosing.

§ 9.8 Purpose of a Chapter
(Book page 9-6)

The purpose of drafting a chapter is to use the best available admissible evidence to push a jury toward the recognition of a well-defined, fact-specific goal. A chapter is performed to establish one goal or complete one picture. In the process of establishing the goal, the lawyer often establishes many subsidiary points. The cross-examiner is trying to communicate an image. A series of leading questions puts before the jury many facts, each one contributing to the intended image or goal. While seeking to establish a goal or paint a picture of an event, the advocate may simultaneously affect the credibility of a witness. For example the process of impeachment by inconsistent statement establishes the goal of demonstrating that the prior statement of the witness was more believable. Simultaneously by establishing that the witness has previously testified in a manner inconsistent with their current testimony, the advocate has scored a subsidiary goal of diminishing the credibility of the witness.

A chapter is composed of a logical sequence of questions designed to reduce the lawyer’s risk while increasing the comprehension and impact of the evidence. A logical sequence of leading questions within a chapter requires that the lawyer move the jury and the witness through a progression of related facts. It is the job of the cross-examiner to compile the facts that relate to each other so that the jury is not burdened with the responsibility of assembling the facts established by the cross-examination chapter. The goal fact is not necessarily the culmination of all the supporting facts but simply the last fact in the logical sequence of facts on a point. The important concept is that each chapter is an organized sequence of leading questions designed to put into a context the significance of the goal of that chapter. The facts of a chapter are its context. They are the details that flesh out the desired picture.
§ 9.9 Breaking Cases into Understandable Parts  
(Book page 9-7)

“Divide each problem into as many parts as possible; that each part being more easily conceived, the whole may be more intelligible.”  
Descartes, Discourse on Method (1637).

An entire case contains an enormous amount of information. No judge or jury can learn the entire case at once. Even a simple case is made out of an enormous number of separate parts, which have come together to create the issues and events in dispute. The chapter method allows the trial lawyer to divide even the most complex case into individual parts such that the jury can understand those smaller parts and thereby gain an understanding of the entirety of the case.

§ 9.10 The Development of Chapters: The Process  
(Book page 9-9)

After the lawyer has broken down the major components of a case into smaller parts, the lawyer should be in a position to recognize facts, groups of facts, and parts that may be suitable for examination. These will need to be studied at their chapter level. A quick method of recognizing potential chapters is to use a part process.

1. Divide the case into its important scenarios. A single scenario may be composed of many events.

2. Divide the important scenarios into their component events. A single good event may contain many good issues.

3. Analyze the component events for issues of assistance. A single good issue may require more than one chapter.

§ 9.11 The Most Important Topics Ordinarily Deserve the Most Detailed Presentations  
(Book page 9-10)

The cross-examiner will soon find that the most important topics or areas within a case ordinarily require more than one chapter in order to create the several pictures or establish the several goals within that topic or area. Within each chapter are the leading questions, which minutely form the picture or establish the goal. The most important topics will ordinarily require the most detailed factual presentations.

This may seem like it will take a long time to accomplish, but a chapter could be less than a dozen facts. The facts are put into leading questions so the process of establishing a single chapter may only amount to a minute or two of courtroom time. The pictures created by such a detailed presentation in areas important to the theory of the case are truly quite stunning. Too often the backhanded compliment to a good cross-examiner is: “Sure it went well. You had great facts.” In reality the compliment should be: “Sure it went well. You made excellent use of the facts you had.”
§ 9.13 Possible Chapters of Cross-Examination Deserve Preparation, Even Though They May Later be Dropped (Book page 9-11)

After the lawyer begins developing her potential chapters of cross-examination, she will often reserve judgment on some chapters initially thought to be useful. Perhaps the potential chapters do not bear directly enough on the theory of the case or perhaps they are too tangential to be of assistance. Perhaps further investigation needs to be done to discover facts that, if added to the area under study, would make the chapters in this area useful in cross-examination.

As the lawyer begins a deeper study of the facts, she will inevitably find topics that she originally passed over that she now recognizes as useful. Fear not, as nothing that has been done so far in cross-examination preparation is permanent. The addition or deletion of areas of cross-examination is still easily accomplished.

§ 9.14 Events or Areas Versus Chapters (Book page 9-12)

Bear in mind that identifying the events of a case is not the equivalent of identifying the chapters of cross-examination. Creating a list of the events of a case does not create the chapter for cross-examination, as this broad breakdown is still far too large to be studied carefully. A list of the events of a case may well suggest possible areas for cross-examination but the lawyer must find within these events the chapters that require detailed exploration before the jury.

In surveying the events of a case, the lawyer is looking for facts that can be used to build her theory of the case. Simultaneously the lawyer is looking for weaknesses or in the opponent’s theory of the case, i.e., any suggestion that further inquiry is merited. Such weaknesses represent overall concepts of cross-examination and are not in themselves a cross-examination. For instance, on first reading the narrative of Barbie and Ken, the lawyer may well recognize the implausibility of the central feature of Barbie’s story: Because her child was starving, she decided to turn to prostitution. Yet the mother has family in the city and knows people who live in the multi-unit apartment building. The explanation causes the lawyer to realize she needs to cross-examine in this general area, although the exact form of chapters of the cross-examination is undetermined.

§ 9.19 Chapter Size (Book page 9-16)

How big is a chapter? A chapter is only as big as the number of good facts available to accomplish a single goal. Cross-examiners must train themselves to think in greater detail. In court the lawyer can always back up to a more general presentation, but it is very difficult to start with only a very skeletal notion of a chapter and develop the appropriate leading detailed questions at the podium. Within an event there is often more than one point of importance. When there is more than one goal that can be obtained through discussion of an event or topic, it is likely that there is
more than one chapter that needs to be considered for cross-examination. It is impossible to decide how far to break down a part or topic of the case until the lawyer understands how many favorable facts are contained in that part. In addition, it is impossible to decide how far to break down a topic of the case until she understands the importance of that topic to the competing theories of the case.

§ 9.20 Draft Chapters Backwards
(Book page 9-17)

A helpful way to approach the development of chapters is to engage in a four-step process designed to efficiently move the advocate from chapter concept to chapter completion. It is easy to think of the process in this way: draft chapters backwards. Below is a diagram of the process followed by a description of the four steps:

One: Identify any one single factual goal to be achieved in the course of the cross-examination that is congruent with the theory of the case.

Two: Review cross-examination preparation materials for all facts that lead toward acceptance of that single factual goal.

Three: Draft a single chapter that covers those facts, leading to the factual goal as set out.

Four: If, while in the course of drafting a chapter an additional worthwhile goal is identified, separate that goal and its supporting material into its own chapter.

§ 9.21 The Building of a Chapter, Step One: Select a Specific Factual Goal
(Book page 9-19)

Select a single factual goal to be achieved in the course of the cross-examination that is within the theory of the line of questioning.

Central to the concept of the chapter method of cross-examination is the recognition that each individual factual goal must be proven separately, even though it may have a very close relationship to similar goals. For
instance, if it is important to show the robber had no facial scars, then that individual topic has its own chapter and is written up separately from all other chapters dealing with other aspects of the robber’s description. In a non-chapter system, the lawyer would be tempted to approach the podium with a piece of paper or note card that says something like:

Description
blue jeans
facial scars
height
body build

Working from such a poorly organized and abbreviated set of notes, the lawyer is likely to cross-examine on these issues generally, but the lawyer would do so with decreased opportunity to clearly establish her goals. Lack of chapter preparation increases the risk that the trial lawyer will not recall all of the preliminary facts that make the goal less objectionable, more persuasive, and more believable. When the lawyer minimally asks the preliminary questions required to set up the goal, she increases the risk that she will fail to include all the useful information available or that the witness will give an unanticipated or unfocused answer that she is unprepared to impeach immediately.

§ 9.26 Give Each Chapter a Title
(Book page 9-27)

Each chapter concerns itself with one factual goal. The materials collected for chapters are not miscellaneous, but facts related to each other. The chapter stands for a logical proposition. That proposition is the title of that chapter. Chapter titles create a very organized method of preparing not only cross-examination, but opening statements and closing arguments as well. Because the cross-examiner has identified all of the chapters that are favorable to her theory of the case, she can use the same topics in closing argument. Chapter headings also assist the cross-examiner in jury voir dire.

§ 9.27 The Building of a Chapter, Step Two
(Book page 9-27)

Review cross-examination preparation materials for all facts that lead toward acceptance of the single factual goal of each chapter.

This stage is dependent upon material discussed in chapters 5, 6, 7, and 8—all of which discuss preparation systems. This may seem to pose a chicken and egg dilemma. Can discovery material be sorted into useful categories before goals of cross-examination have been decided upon or are goals to be determined after preparation materials have been surveyed? The answer is that the first reading of discovery, coupled with a client interview, yields a generalized theory of the case. This initial concept of a theory of the case suggests the most obvious goals and these goals in turn generate the initial search for cross-examination preparation materials. Then, as the attorney begins to sort the discovery into factual groupings in support of identified goals, more potential goals will be recognized. This in turn generates additional groupings of preparation materials.
§ 9.30 The Building of a Chapter, Step Three: Accumulating the Facts in Support of the Goal
(Book page 9-29)

The most efficient way to construct a chapter is to envision the single factual goal or the picture the cross-examiner is to paint and gather the facts to support that goal. In the chapter method of cross-examination, the cross-examiner needs to draft a single chapter that covers those facts leading to each individual factual goal.

Chapter: Publications
Q: You placed everything you published in your resume?
Q: You are particularly proud of your articles?
Q: Publishing and article shows where your interests lie?
Q: From 1996 to 2004, you have published nine articles?
Q: Every one of your articles was about hospital administration?
Q: In fact, all of your articles were about hospital administration in a tax-supported institution?
Q: Your articles are all about this single narrow administrative issue?
Q: None of your articles addressed psychiatric diagnosis?

§ 9.32 Chapters are About Facts Not About Conclusions
(Book page 9-32)

If the cross-examiner wishes the witness to establish a fact, it is not sufficient just to ask the witness for the goal in the form of a conclusion. If the cross-examiner wishes to show that the defendant owed a fiduciary duty to the plaintiff, it is largely ineffective to merely ask the hostile witness, “Isn’t it true that you owed a fiduciary duty to my client?” Asking conclusions is a poor substitute for proving facts. If a fiduciary duty exists, it exists because factually the elements of a fiduciary duty can be proved through chapters of cross-examination. The proof of fiduciary duty would require a chapter bundle, each chapter designed to factually support one of the legal elements of fiduciary duty. It may be that the witness on the stand can only testify to two of the five elements. That witness would then only be taken through those two chapters. The other chapters designed to factually prove the elements of a fiduciary duty would be reserved for other witnesses who are in a position to respond to those leading questions.

§ 9.33 One Question is Never a Chapter
(Book page 9-32)

Facts must be established in sufficient context so that a jury will accept the goal-fact as having been proved. A single leading question can never fully create a dependable context. A group of facts can create context. A group of facts can create a believable picture.

It is never enough just to receive a favorable answer to a goal fact question. The goal must be supported with the strongest available factual details. The factual details that support the proposition give the jurors the strongest basis to accept the inference suggested by a chapter (see
§ 9.34 Separate Chapter—Separate Development
(Book page 9-33)

In the course of negating, highlighting, or creating a goal-fact, the lawyer must almost always first establish many subsidiary or supporting facts. For instance, a simple goal of establishing that a witness saw a blue car requires not simply the question, “You saw the blue car?” Example:

Q: You were standing on the street corner?
A: Yes.
Q: It was daylight?
A: Yes.
Q: You saw a car?
A: Yes.
Q: It caught your attention at that moment?
A: Yes.
Q: The car was blue?
A: Yes.

This group of leading questions requires the witness to admit all four facts so as to more firmly establish the goal-fact that the witness saw a blue car. This method of questioning is discussed at length in chapter 8, The Only Three Rules of Cross-Examination. The short introductory questions are designed to flesh out the context for the goal fact. Having introduced the supporting material, the lawyer has more firmly established the accuracy of the fact that the car was indeed blue.

§ 9.36 The Building of a Chapter, Step Four: If, While Drafting a Chapter, an Additional Goal is Identified, Separate That Goal and its Supporting Material Into its Own Chapter
(Book page 9-35)

By reading the foregoing material, it is obvious that chapters are developed by breaking events or issues into smaller goals that become identified as chapters. When is any subject sufficiently broken down? The answer is mathematical, but the mathematical equation is an expression of the theory of the case.

Trial Mathematics

• Each fact has a value
• To recognize the value, consider how much the fact helps your theory of the case or how it undermines opponent’s theory
• Spend more time developing the most helpful facts
An example of the application of this formula will undoubtedly assist. In an earlier example the cross-examiner needed to establish that the opposing party was in deep financial trouble in the spring of 2001. If the establishment of that financial crisis would have a great impact on the competing theories of the case, then the available material demonstrating that financial crisis is deserving of a multi-chapter presentation. That portion of the cross-examination is deserving of great time and attention. A bank loan requiring periodic payments would get its own chapter. A missed payment in that time frame would deserve its own chapter. The forced sale of the witness’s assets at distress prices would deserve its own chapter. If there are more individual items or events that can assist the cross-examiner in proving or portraying the financial crisis in the spring of 2001, then the cross-examiner needs to develop more chapters that use those facts.

If a bank loan entered into by the witness years before has some bearing on the financial plight of the witness in 2001, then that bank loan deserves a chapter of cross-examination as well. But if a bank loan entered into years before has no bearing on the financial plight of the witness, then that loan deserves no mention. Even if that loan was defaulted on 10 years ago, if that fact or event has no relevance to an issue in this case, then it is undeserving of time on cross-examination. If, on the other hand, the witness were to testify on direct examination or on cross-examination that he had excellent credit and had never defaulted on a loan, then a “default” chapter would suddenly be of relevance.

§ 9.38 How to Avoid Spending Time on Unproductive Chapters
(Book page 9-36)

Can the lawyer break the evidence down too far and into too much detailed information? Yes the breakdown can become too small. What is deserving of the greatest attention is the evidence that has the greatest impact on the theory of the case. A chapter having no bearing on the opposing theories of the case has no business being done at all. If an event happened on Wednesday, or it happened on December 9, but the day or date have nothing to do with the contrasting theories of the case, there is no reason to discussed those facts and certainly no reason to develop a chapter concerning the day or date.