

CHAPTER 11

PAGE PREPARATION OF CROSS

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§11.01 Training Ourselves on the Chapter Method: No More Than One Chapter on One Page

A chapter is a sequence of questions designed to establish a single goal. A chapter bundle is a group of related chapters, each accomplishing a goal that together accomplish a larger goal. We compose each chapter of cross separately from every other chapter. A frequent form of preparation for chapter method cross is to devote one page to each chapter. We will discuss page preparation systems that devote one page to one chapter and systems that allow for a single chapter to spread over more than one page. Page preparation methods are the most individualized part of trial preparation. We search for the page layout that gives us confidence and control of the facts we intend to elicit. Our advice: Listen to your gut and experience. If you already have, or later develop a system that you have learned is comfortable and reliable, that is the chapter preparation system you should use. Throughout this chapter we will primarily discuss the method of drafting one chapter per page.

Each page of cross is a series of leading questions or of intended facts whose introduction will lead to a specific goal. By posing these leading questions to the witness, we seek to introduce facts that logically relate to each other and that combine to tell a small story. Establishing the goal of the chapter in turn enhances our theory of the case or undermines our opponent's theory.

When we draft no more than one chapter per page, we encourage ourselves to fill out the chapter with all the facts necessary to put the goal into its context. If we draft more than one chapter on a single page we invite many potential problems. As our page fills up, we tend to truncate our chapters. The fact that our page is full misleads us into believing we have covered each chapter with all the necessary facts. Next, after we have given a chapter its space and started another chapter, when we realize we have left out a fact, we often write that fact in the margin. This leads to arrows and signals as to where facts go in the chapter. Then we may decide on a better sequence of chapters which leads us to add more arrows and perhaps some numbers. At best our chapter now requires in-court translation. At worst our page is becoming chaotic. On the other end of the spectrum, when a chapter runs more than one page, we often recognize that we really have multiple chapters deserving separate development. Because we have now written a chapter running more than one page we again seduce ourselves into believing that we have fully developed that chapter. But because that one long chapter is probably two or more goals, we may well again fail to recognize that we have left out some beneficial facts.

Very frequently the important events in a cross require explanation through the development of a chapter bundle. It is best we recognize that and write our goals in separate chapters. We write each chapter on its own page. We can now more easily add, delete or rearrange individual chapters.

By developing a routine method of page layout, we make better use of our preparation time and become more confident in trial. We benefit from a system of preparation which provides us a quick and dependable reference to the individual goal of each chapter, the facts we intend to introduce, and the documentation of the statement or exhibit we could use if we need to impeach the witness. Once we find or develop our preferred page layout, our repetitious use of our chapter form in both preparation and trial provides us with comfort. We now enjoy both the enormous advantages of preparation and the additional and very meaningful advantage of reduced anxiety. We know what our pages mean. We understand our codes. We can recognize at a glance where we are in our questioning sequence and where we are going. Another important advantage of the system of one chapter=one page is that we can see at a glance the full script for that chapter. In an instant we can look down and capture the

upcoming questions/facts and make decisions on what can be skipped, or what has already been answered. A chapter requiring more than one page always places some material beyond our immediate sight.

While we will discuss several ways of laying out pages in a chapter format, regardless of the form we elect or develop, we maximize the benefits of our chosen page preparation system by unfailingly following it.

§11.02 Multiple Chapters on One Page: A Recipe for Confusion

When multiple chapters are combined on a single page, we have locked ourselves into that sequence of presentation. When we look down at a page containing more than one chapter, our preparation signals us to use both chapters and to do them in the order they appear on the page.

Chapters need to be separately drafted for another reason: our development of multiple goals on a single page also makes more difficult the possibility of rearranging our sequence of chapters. Individually drafted chapters can be reorganized in infinite combinations to create the most powerful sequence of presentation (see Chapter 12, Sequences of Cross).

When two chapters are placed on one page and we attempt to integrate the direct examination, exhibits, and other “happenings” at trial, the page becomes a series of arrows, scratched-out directions, a list of priorities and stage notes that are indecipherable:

§11.04 Many Ways to Lay Out a Page of Prepared Cross: Each Must Immediately Answer Three Critical Questions

Our prepared pages of cross can be laid out in a myriad of ways. We provide several alternative samples of page layouts. Regardless of the format we adopt or design, it is critical that at a glance our page enables us to answer the three fundamental questions of goal-oriented cross:

1. What is my current goal?
2. What facts and exhibits do I need in order to accomplish the goal of this chapter?
3. Am I finished?

The techniques of page preparation of cross provide trial-ready answers to each question.

1. **What is my current goal?** We may plan to cover a great many areas in the cross of a witness. Our work is intense, and we cannot expect ourselves to memorize our intended chapters and their sequence. “What is my current goal?” is answered by a glance at the top of any chapter. The title we give a chapter should instantly orient us to the goal of this chapter. Hence, a chapter titled “Height” is insufficient to tell us our goal. If our goal is to develop a picture of a robber taller than the witness, or a robber who was quite tall, we should so label our chapter. Our goal can be our label, but it is the goal of the chapter, not the first question of the chapter. In fact the chapter title could be a concept that we might never express as a question. “Motive: Defendant was your business rival.”
2. **What facts and exhibits do I need in order to accomplish the goal of this chapter?** The facts to be adduced are listed on the page before us. The exhibits we intend to use are referenced in both our questions and in our source column. No matter how stressful the courtroom

environment, we need only look down to remind ourselves of the leading questions to be asked and the exhibits to be used. Of course there is room to add, omit, or rephrase questions, as our trial judgment dictates. Making these decisions becomes much easier because we have an outline of how to conduct this chapter. How much detail we need on our page is a very individual decision. Some chapters might be as little as a topic and a reference to the exhibit we wish to discuss in detail. Often when we glance down at our chapter title, we trigger our memory of the points we want to make and we need little to no reference to the prepared outline or questions. In page preparation, we all work to our individual needs. If you feel that the listing of the chapter topic and a note or two plus the names and numbers of needed exhibits is sufficient, then that is the way to draft your chapters. If you feel that a thorough listing of facts is helpful, then do that. Note, though, if an impeachment is possible within a chapter, we must note our source so that we know both what testimony we plan to impeach and where we will find the inconsistent statement or exhibit. You will know what degree of chapter detail gives you comfort or control. The important aspect of page preparation is that our pages serve as a guide to the areas we intend to cover and the exhibits we will use. Our preparation frees us up to listen to the answers and adjust our questioning as our trial judgment suggests.

3. **Am I finished?** Much of our control of a witness and of our overall case comes from completing individual chapter goals before introducing a new goal. Sometimes we take detours within a chapter. This happens when we receive an answer that we wish to follow-up on immediately. Again, these detours are a matter of trial judgment. An important use of chapter preparation is to remind us of what we intended to establish before we leave that chapter. Our title tells us our goal. Before moving to a new chapter we should consult our existing chapter to see if we have covered the facts we felt necessary and to gauge if we have done what we can to establish our goal. In addition, it is quite common to abbreviate a chapter or skip a chapter based on progress we have already made in an area. We also often intentionally skip a chapter because we have heard something in the direct that signals us that we either want to leave the well-enough alone, or we have sensed that this is a topic that no longer holds promise. Alternatively, we could have a 10 question chapter, hear the direct, and decide that all we need are two questions to clarify or amplify some part of the direct.

When we finish a chapter, we turn the page and see the new title and its new goal. We then work in that chapter. We have now completed the circuit: general questions, more specific questions, complete the picture, move on. Our movement to the next chapter is easy. We turn the page, recognize our new goal, begin establishing the context with leading questions, and move through our script for that chapter. Again, when we have done the chapter, we move on. The chapter worked or it did not work. We lose more than we gain if we try to redo a chapter that did not go as well as planned.

§11.06 Sourcing the Answer

Cross is primarily a series of leading questions in which we ask the witness to verify a fact we assert as true. Many of the facts we will assert are found in discovery or exhibits we possess. When we have a specific document, exhibit, or transcript that substantiates that our factual assertion is accurate, the exact location of our asserted fact within that document, exhibit, or transcript is our “source.” Our

source is the place we will go if we need to impeach the witness. Page preparation of cross requires that we repeatedly and accurately note the source of that fact. We need to adopt or create a page-preparation model that repeatedly employs the identifiable codes so that in trial we can glance at a source code and recognize how to interpret our codes.

“Sourcing” is the process of finding and entering the designation of where, within our materials, a particular answer can be found. Knowing the answer, and knowing where the answer can be documented, greatly assists in establishing witness control. When we document the answer to a leading question, we cross more confidently. We no longer are concerned that the witness will successfully deny the leading question, plead a lack of memory, or substitute a different answer.

We will take up the methods of page preparation by first discussing options on how to lay-out the facts we need. Within this discussion we will make repeated reference to a source column or sourcing a fact. After we have discussed several models of page preparation, we will circle back to a discussion of “sourcing” a fact.

Please note that the subject of source codes is set out in detail in Chapter 6, *Cross Preparation Systems: Sourcing the Facts*.

§11.07 Page Layout Method 1: Two Columns Only, One for Source and One for Facts

Method 1: The more we become accustomed to scripting our crosses, the less we become dependent on our limited ability to write or conceive of crosses during the direct exam. In this first method, we script what we intend to do, and rely on our pretrial preparation almost exclusively. Of course, where a witness offers up information in direct or in our cross that deserves follow-up, we do so. But we begin each cross with the idea that it is our prepared material that will dominate the time and the content of our cross. In this system our courtroom presentations depend heavily on pretrial preparation and we conclude that any notes we might take in direct examination are of minor consequence. We therefore develop our chapter pages using only a column for the facts we wish to assert and the column for the sources, where a source is available. This form is most easily used in civil or criminal cases where most of the most pertinent facts have been exposed through discovery.

(While Method 1, using only two columns, is my preferred method, that statement does not mean I believe this is a superior method. I readily acknowledge that this is simply what is comfortable to me. Larry)

Method 1

Source	Bennett Robber was tall
77:9	You were face-to-face with the robber.

§11.08 Page Layout Methods 2 and 3: Three Columns, With Source Codes and Notes in a Separate Column

We continue our discussion of alternative page layouts by describing systems in which our page is divided into three unequal columns: one wide column for the desired facts or outline of the questions to be asked, a second narrow column for the source of the answer, if known, and a third column for tactical comments, notes on use of exhibits, foundation or arguments for a admissibility, quotes from direct examination, and anything else which gives us guidance, but which is not a question or fact we need in our list of questions

Method 2: Three columns with source code as the left column.

In the method, we divide the page into three columns, reserving the far left column for our source code. Placing the source column to the left allows us to immediately see whether the fact we are about to ask is supported by a transcript or document. **(Full disclosure: In a fit of either genius or laziness, I came on this format by deciding that since legal pads already have a vertical line on the left margin creating a narrow column, I might as well use it as my source column. Larry)** Method 2 below shows the layout with the source column to the left.

Method 2

Source	Bennett Robber was tall	Direct/Tactics
Hrg 9/1/16 77:9	You were face-to-face with the robber.	

Method 3: Three columns with the questions or facts as the left column, the source codes on the far right.

Some lawyers (including Roger) prefer to set up their pages so that the left-side column is devoted to any notes made during the direct. The advantage of this layout is that we read the newest information first, and then see our prepared questions.

Method 3

Direct/Tactics	Bennett Robber was tall	Source
	You were face-to-face with the robber.	Hrg 9/1/16 77:9

§11.09 Page Layout Method 4: Two Columns With Source Code Following Text of Question

In cases where much of the discovery is in the form of transcripts, some lawyers prefer to copy questions and answers out of the transcript and onto the chapter page. We can then drop the source column altogether and simply put the source in parentheses following the leading question or outline of questions. When copying material from a transcript or scanned document, we can capture the words, but we must remember to insert the source.

Method 4

Source	Bennett Robber was tall
	You were face-to-face with the robber.(Hrg 9/1/16 77:9)

§11.10 Page Layout Method 5: Creating an Outline for Use as Cross Chapters

Cases can be outlined, and our outline itself becomes our guide to cross. We can cross from the outline, though our outline will inevitably contain far more facts than we intend to use in our cross. This system works best for more experienced lawyers as it pushes us to perform our crosses with less structure. We must be able to look at our outline, see a fact and envision the questions we need to ask to create the necessary context.

In this system we organize our outline alphabetically by every witness in the case, and as we read discovery, we filter the facts available from that witness into an outline form. Note: we are not filtering the facts by good, bad or immaterial. We are cataloguing all that is available from each witness. Where we have a source, we show that source immediately after the fact. As always, it is essential that we be able to locate the source document when needed. As a result, when using this system it is best if we insure that each page of discovery is Bates labeled so that we can use that simple numerical method as our consistent source code.

Because our factual outline contains far more facts than we need, and includes bad facts as well as useful facts, we need to develop codes within our outline to signal the facts we like best, and the questions we might ask that have no source.

Example: We are defending a homicide case. Our defense is that the victim engaged in a behavior that suddenly caused a dramatic change in the defendant, who suffers from PTSD. The defendant had a flashback to a very painful episode and struck the victim, killing him. We seek a verdict less than first degree murder and we need to highlight that the defendant was behaving normally in a series of interactions with other witnesses shortly before the homicide.

The partial outline below shows portions of two witnesses. Arlan Handler is a minor witness. He sold a pizza to the defendant very shortly before the crime. We seek to cross him on the normalcy of the defendant's mood and behavior at that time.

E. Handler, Arlan (Endorsed)

1. Adams County 09 M2902 DUI
2. March 1, 2016 Pretrial Prep (Narr: 283)(9406)
 - a. Rob Maklee's March 31, 2014 report, confirmed accurate to his memory
 - b. Showed Big Mister Pizza receipts, from 3.14.14
 - (1) Early purchase, last purchase of the day.\
 - (2) Said they were from Big Mister Pizza Store

(3) Process to buy food:

- (a) Place order and then pay
- (b) CC given to employee who would slide card
- (c) No additional information needed to be asked of customer
- (d) Ask if wanted receipt or not
- (e) Printed receipt would be given customer for signature

3. March 31, 2014 Interview (7566–7568)

a. Assistant manager at Big Mister Pizza (106 N Rain Drive, Golden)

(1) Hired August 12, 2013

(2) Promoted to manager beginning of March (one month ago)

b. March 14, 2014

(1) Right before closing time (8:00 pm)

(2) White male, early to mid-20s with dreadlocks, clean shaven around 6' 170 lbs came into store for slices, paid with card

(3) Overly apologetic for coming in last minute when heard store about to close

(a) See also Narrative: #283

(b) Lodini knew what was going on around him, realized ready to close

Latisha Lodini is a far more important witness. She too interacted with the defendant shortly before the crime. In our outline we signal our best facts in bold, and questions we might ask based on those facts. Where we have no source for those questions we signal this to ourselves by italicizing those facts.

Numbers in parentheses are references to Bates page number.

MMM. Mawter, Kristen (Endorsed)

1. Jefferson County 09 T 5240 DUI 9.01.09, 18 months' probation

2. February 16, 2016 (Narr: 278)(9397)

3. March 5, 2016: Pre-Trial Prep (Narr: #290)

4. March 14, 2014 (Narr #112)

- a. Janie and Mawter saw Tim walking with Big Mister Pizza Box, picked him up gave him a ride (5734)
- b. Thought they were coming home from a movie (5734)
- c. Tim came into house for short time (5734)
- d. Mentioned Wayne offered all his money back and a week to find a new place (5734)
- e. That is what he planned on doing (5734)
- f. Seemed excited about it and said it was good of Wayne to offer this (5734)

- g. Did not say any argument about it (5734)
- h. Assumed it was about arguing about the rent (5734)
- i. Tim left around 8:00 (5734)
- j. Super calm that night (5734)
- k. Kind of a tense guy but that night seemed relaxed (5734)
- l. Asked if under the influence of alcohol or other substances when given a ride home, said seemed very calm and at peace compared to any other time she had been around him. (Narr: 290)

A completed case outline will often be quite long. A next step is to simply insert page breaks between each section so that they stand alone, much as will happen if we had written chapters. When crossing we will need to work from our outline of facts and recognize what material we wish to use and what we should omit.

Our unscientific observations tell us this system seems to have been adopted by far fewer lawyers than those who work from conventional chapters. In addition, crossing from a case outline seems to work best for lawyers who have been using the chapter method and are now comfortable working from a highly detailed factual outline. The advantage of this system is the time taken to develop the case outline represents almost all the time of cross preparation. Lawyers using such a system tell us that they have developed their own codes, be it change of typefaces, or arrows, or other methods to cue them in to what parts of the outline are meant for questioning and what parts are not to be used.

§11.11 Page Layout Method 6: Cross Chapters Based on a Particular Document Outlined With Minimal Text

A single document may be the source of a chapter bundle. It is likely we have studied that one document for an extended period before trial and well understand the several parts of the document upon which we intend to cross. Some lawyers skip the traditional chapter method of preparation for such a one-document based chapter bundle, and rely instead on an outline keyed to the relevant parts of the document. In such instances, we will develop much of our cross using our preferred page layout, but will rely on our document outline for chapters of cross wholly driven by a particular document. A word of caution: we should draft the chapter necessary to gain admission of the document. So much of our cross hangs in the balance, and knowing exactly what we intend to ask once in the document is not the same as knowing the factual foundation required to gain admission of the document. In this criminal case, defense counsel is defending a charge of embezzlement. This is the outline for a section of the cross of a prosecution witness called to show suspicious circumstances pointing to the guilt of the accused. Part of the cross is designed to show that the victim organization PTSA ignored its own fraud prevention checklist:

Chapter: PTSA ignored its own requirements for fraud prevention.
All items below are found in EXHIBIT 9 (Pg. 47) Fraud Prevention Checklist

- ii. **"Open and review the bank statements - someone independent of the check processing should receive the unopened bank statement and review the activity before passing it on to the person responsible for the reconciliation."**
 - 1. Statements were sent to the school
 - 2. Statements would sit in the PTSA mailbox for months.
 - 3. You and Andi Rose (defendant) went to open 6 months' worth of statements during the BK audit.
- iii. **"Reconcile bank accounts monthly."**

Obviously never done.
- iv. **"Verify cash logs - Verify cash receipts with the cash log and with the bank deposit slips"**

Never bothered to do this.
- v. **"Re-count cash - Have a second person involved in verifying the cash count."**

Never bothered to do it.
- vi. **"Protect checks - Store checks in a secure area, never pre-sign checks, limit the number of check signers and bank accounts, use pre-numbered checks, watch for missing checks or checks used out of sequence, and do not make checks payable to cash."**

Totally disregarded that one.

 - 3. You always pre-signed; always wrote checks for cash; always passed around the checkbook from person to person?
 - a. See Check #1115, EXHIBIT 86
 - i. Shows they were pre-signing checks and passing them along because all three people have handwriting on the check.
 - ii. Witness & Andi Rose signed; Barb Fuller filled it out.
- vii. **"Prepare a budget - use your budget as a control document for comparison to actual expenditures"**

Again, you couldn't be bothered to do this.

 - a. 4/30/13 statement EXHIBIT 82
 - i. (Who wrote notes?)
 - ii. (When written?)
 - iii. Somebody noted that the check for \$1100 exceeded the approved budget?
 - 1. You signed the minutes, but made no allegation of forgery?
 - 4. You saw this discrepancy but made no allegation of wrongdoing, nor asked for any further investigation or explanation?

§ 11.12 Page Layout Method #7: Outline With Detailed Questions

In page layout method 6 we observed how some lawyers use their extensive case outline in place of their chapters. Layout model #7 is a variation of that method. It varies from the outline method by the addition of questions within the outline. In this way we depend partially on the outline for a sense of where we are in our cross, and partially on our prepared questions in that area.

Below, each chapter is laid out with the facts to be adduced, and the source, if available. The source codes are as follows: The first number such as DX 8958.4 references the Bates number of the document. The TR. designation describes where in the deposition of the witness we can find the testimony upon which our leading question is based. The reference to the Tab number is to the lawyer's document notebook which contains copies of the documents that might be needed in cross-examination.

Witness: Len Long

As New Business Manager of BPA, Long proposed that BPA purchase CalCom.

From 2011 through 2013, you were the New Business Manager for BPA?

[DX 8958.4 Tr. 6: 20-22] TAB 1A

Harlan Bettman was Market Manager of BPA.

Bettman was at your management level. (Exhibit 2; Organization Chart)

As the New Business Manager, one of your responsibilities was to evaluate companies that BPA might be interested in buying? [DX 8958.4 Tr. 6: 22-23] TAB 1A

When a company buys another company, it is often referred to in the business as an "acquisition"?

During 2011 to 2013, you evaluated several companies as possible acquisitions for BPA? [DX 16078.7 Tr. 176: 22-24, 177: 1-4] TAB 2A

You researched 57 companies? [DX 16078.7 Tr. 177: 3-4] TAB 2A

You recommended that BPA enter into negotiations with 12 companies? [DX 16078.7 Tr. 177: 1-2] TAB 2A

Of those 12 companies, BPA ended up buying 2 of them? [DX 16078.7 Tr. 176: 22-24] TAB 2A

One company that you recommended as a possible acquisition for BPA was called CalCom? [DX 16078.8 Tr. 178: 7-19] TAB 3A

The following is another example of this method in which we compose our questions incorporating all necessary source codes. This example is discussed in greater detail in Chapter 31 *The relationship of Opening Statement to Cross*, at §31.06, repurposing our cross chapters to craft our opening statement.

The codes adopted by counsel are as follows:

- TX are trial exhibit numbers
- DX were the Deposition exhibit numbers which the cross-examiner cross referenced to the Trial exhibit number.
- JV references are to the specific video clips that correlate to the witness's deposition testimony if necessary for impeachment.
- AJ are references to page and line within the deposition of the witness.

§ 11.13 Page Layout Method 8: Chapters With Questions Next to Column Showing Quotes From Transcripts or Exhibits

In this method we divide our page into two columns, one for our questions and one for a far more detailed source column. In the left side column we have the facts we intend to discuss, either in outline form or in complete sentences.

In the right side column we can place exact quotes from the transcript of the witness or from an exhibit we could use with the witness. In this method if there is a source, we can view the exact words used by the witness rather than just the citation to a page and line.

Example:

Witness: Nurse Vonn, (called by plaintiff for purposes of cross examination)

Chapter: Morning of Jan 21, Blood pressure very low,

The next time that you had direct involvement with Mr. Ault's care was on the morning of Jan. 21 st	
You were Mr. Ault's primary nurse beginning at 7:00 a.m.	
Take a look at Mr. Ault's BP when Nurse. Mary Delff was caring for him early in her shift (PUT UP BP'S from 1/19 AM ON LEFT AND COMPARE TO 1/21) (MOVE 1-21 TO RIGHT AND PUT UP BP'S FROM 1-19 AM ON LEFT AND COMPARE) Mr. Ault's BP on the 21 st was significantly lower than it was on the 19 th before the Swan Ganz catheter was removed, correct?	(BLOW UP AND HIGHLIGHT EARLY BP'S from 1-21-002)
It was your practice, as nurse manager for the unit, to arrive well before your shift began at 7:00 am	030221jv-J. Vonn, R.N., (Pages 25:18 to 26:4) Q Okay. That's fine. You worked 7:00 to 3:30 on the 21st. Would that be correct? A Because I was the nursing manager for the unit and I never showed up at 7:00 is what I'm trying to say. There were times when I would be there at 6:00 in the morning and there were times when I would be there at 6:40. There were times when, if I didn't sleep well, I might have been there at 5:30, although the time clock said that I worked those hours. I'm a salaried employee so I work when there's work to be done, so.
SHOW FLOW SHEET FROM 1/21 AM Take a look at the Flow Sheet for the morning of 1/21 - do you see a blood pressure recorded at or	

around 6:30 am? Is that your handwriting? (So it is likely that you were at Mr. Ault's bedside not later than 6:30 am?	
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§ 11.14 **Conditioning Ourselves to Make Use of Our Chosen Page Format**

Once we select a format, we can both store that format on our computer and print many blank chapter forms in that format. We should store blank forms in our briefcase, keep some at home, and place many copies in a folder in our desk. By having our blank page forms available, we teach ourselves to write our thoughts concerning a chapter of cross on the form we can build for that purpose. When we think of a chapter we might develop for an upcoming case, we can write our notes in the chapter form and store the form in our file. The advantage of this process is that we are less tempted to write our thoughts on scraps of paper that get ignored or lost in the file. Another advantage is that our photocopied forms have a distinct appearance and stand out from the great many other sheets of legal pad that fill our file.

Note: Throughout the book we will use methods 1 and 2 as our templates. We do this not to signal a preference, but simply for convenience.

§ 11.15 **Leading Questions Format**

Each cross chapter is ideally performed as a series of leading questions. A page of cross questions is, for the most part, a page of answers. Hence, what we are really drafting is not a series of open-ended questions, but factual statements or facts that we wish to establish. We seek the witness's agreement with these factual statements. Below is an example of the questions column in a single chapter in a multi-chapter cross where the general theory of the case is misidentification.

This chapter concerns itself only with the witness's (victim's) version of the height of the robber:

Source	Robber was tall
	You were face-to-face with the robber?
	You were standing directly across the counter from him?
	The robbery took several minutes?
	You looked the man up and down?
	And you noticed you had to look up at him?
	You are 6' tall yourself?
	You found yourself looking up at a man taller than you?

Example: In a driving under the influence case, the next example shows the question column of a single chapter on *one* of the inaccuracies of the Breathalyzer:

Source	<i>The 2100: 1 Ratio is only an Average</i>
	You are certified as an Intoxilyzer operator?
	You must take a course to get that certification?
	Requirements of that course are set out by the Health Department?
	Their rules determine what's in the course?
	Principles of breath testing and physiology of breathing are taught in that course?
	You know that it is the alcohol in blood that affects you?
	Breath testing is a way of trying to find out how much alcohol is in the blood?
	The reason it assumes that is because there is an average relationship of breath to blood in people's bodies?
	But of course people's bodies are all different?
	If you took the average height of everybody in this room you might come up with 5'6"?
	That doesn't mean everyone is 5'6"?
	In fact, most people aren't 5'6"?
	They're either more or less?
	Same with breath-to-blood ratio?
	The Intoxilyzer assumes everybody's breath-to-blood ratio is 2100 to 1?
	But 2100: 1 is just an average?
	Most people are either higher or lower?
	But Intoxilyzer assumes everybody is 2100 to 1?
	If a particular person's breath-to-blood ratio is less than 2100 to 1, the Intoxilyzer will give an inflated reading of the BAC?
	You have no idea if the defendant's breath-to-blood ratio is 2100 to 1?

Example: The next example is drawn from a sexual assault case. The complaining witness is a 16-year-old female who alleges that her schoolteacher had sex with her on numerous occasions. The defense theory is that the complaining witness is psychologically disturbed and seeking attention. She is seeking revenge on a teacher who was friendly to her, but now is no longer friendly.

This chapter immediately follows a chapter in which the prosecution's expert witness has described the

victim as complaining about a previous (claimed) rape while the victim was in the hospital. This previous claimed rape is now conceded by the victim never to have occurred.

The goal of this chapter is to show that the complaining witness suffers inadequately treated victimization fantasy. In order to set up this chapter, we will have performed a chapter devoted to defining and explaining the psychological term “victimization fantasy.”

Source	<i>Victimization Fantasy Defined</i>
	Fair to call this (falsely alleged hospital rape) a victimization fantasy?
	A very intense and very real one?
	A psychological name for it is a dissociate episode?
	Certainly possible that this is not the only time in Elizabeth’s life when she has had one of these?
	In fact, you know about other times that it has happened to her?
	One of the reasons you had for keeping her in the hospital when you evaluated her progress on August 16 was that she might have more of them?
	If she’s going to have problems perceiving reality, you would rather have her in the hospital?
	But you had to let E out of the hospital on September 6, 2015?
	The reason for that was her insurance coverage had run out?
	You really would have liked for her to stay in the hospital longer?
	Patients suffering from borderline features and problems with reality cannot be cured in just three weeks?
	When the patient is suffering from these fantasies is in the hospital, a trained psychologist can help that person understand that what they are describing did not actually take place?
	But once not in the hospital, someone who has one of these episodes of blurring fantasy and reality won’t have a psychologist around to discuss with the patient that what they are describing was really a fantasy?
	You agree that if a person had a fantasy that she believed was true and rather than anyone telling her it was unreal, people told her it was true, her belief that it was true could solidify?

§ 11.16 Sourcing the Facts Makes a Chapter More Reliable

We teach best when we roll out facts in an organized way that allows jurors to immediately see how those facts assist our theory. We make it easier for jurors to recognize how we are proving our theory by grouping together facts that tell one small story. We source facts where possible in order to build

chapters that we can judge to be reliable. **As we turn the page to a new chapter and see that many of our leading questions are sourced, we know that we should easily be able to accomplish the goals of that chapter.** A set of sourced questions signals that as to this chapter we should have great witness control. When we turn the page and see a chapter with little or nothing sourced, we may still be looking at a chapter that should go smoothly. We often know or can be reasonably certain of facts even though we lack a source. For instance, experts will agree they should be unbiased, and should consider all the relevant facts. Law enforcement agents should admit that they were trained and that there are specific duties or proper procedures called into play by a particular situation. Victim/witnesses will almost always be willing to say that they wanted to get a good description of the person committing the crime, and that they honestly and completely described that person as best they could. These are but a tiny sample of the enormous number of facts we can ask witnesses under the right circumstances, confident that even though we lack a source, our leading question should be safe. The point of this discussion is to shed the stifling thought that in cross we only ask questions that we can source.

When we source a fact to a witness, either through a transcript or an exhibit, we are crossing on matters where the witness should agree with our leading question. Many times the answer is not in dispute and we have sourced simply because we need to pull up that document as part of our chapter. We are more effective when we lay out facts that we ask the jurors to believe, rather than telling them what they should not believe. Teaching facts creates a stronger impression than impeaching an answer.

§ 11.17 Sourcing to Transcripts

§ 11.18 Documenting Exhibits as Sources

§ 11.22 Chapters Using Exhibits as the Source.

§ 11.23 Page Preparation Designed to Admit an Exhibit

§ 11.24 Planning Chapter Bundles

It may take several chapters to explain one event. When several chapters are required to tell a full story (see Chapter 12, *Sequences of Cross*), each chapter within the bundle should be built using the same inverted triangle form in which the chapter is headlined with the general proposition or statement of fact and progress toward increasingly specific questions until the goal is established or the picture painted.

§ 11.26 Tracking the Witness's Direct Examination.

Many of us take notes on the opponent's direct examination. We seem to be employing years of classroom habits. We can't say that taking notes on direct is a bad idea, but we pay a price for taking notes. We listen and see less when we are absorbed in note-taking. We should consider why we are taking notes, what system we have for taking notes, whether the notes we take are of use, and how we integrate our notes in our subsequent cross.

By habit we often take notes on a separate legal pad. This often causes us to cross from the notes we took on direct. This in turn causes us to cross in the order of our opponent's direct exam and to cross on the chapters they liked best. This usually produces a defensive cross more than a cross designed to use their witness to admit facts that help our theory. In many instances what we are hearing in direct is exactly what we anticipated. It is therefore not necessary to take notes over the entire course of a witness's direct examination.

Once we convert to the chapter method of cross we have options for where and how to take notes of a direct, and how to employ our notes. Now let us admit, none of these methods is great. Every method has defects, and in fact, the process of note-taking comes at a cost: we pay less attention to visual cues.

Method 1: Take notes in the Tactics column of the appropriate chapter of cross.

Advantages:

- Our notes end up in the area to which they relate. This allows us to better move from a note to a cross on that note.

Disadvantages:

- We must leaf through our chapters to find the corresponding or closet chapter to the subject of the note.
- There might be no chapter on this subject.
- We may have so many chapters that we cannot quickly find the right chapter.
- The Tactics column may be too small to allow legible notes.

Method 2: Take notes in the customary way on a legal pad. Write the chapter name to which the thought attaches. When we get to that chapter in cross, refer to our note pad.

Advantages:

- Theoretically this would allow us to look at a chapter, recall we have a note on something said by the witness, and use that note during cross on that chapter.

Disadvantages:

- See how we began the advantages statement with the word "theoretically?"

Method 3: Start with a legal pad of empty pages. Envision direct as a series of chapters. Listen to an opponent's direct as if it were written in the chapter method. Write at the top of a page the name we would give the chapter. Take notes on that page that relate to that chapter. When opposing counsel moves to that we recognize is a new chapter, start a new page of notes titled with the name of that chapter. Then, before cross, separate the notes and attach them to the chapters we have written on that topic.

Advantages:

- Separates our notes into useable chapters.

Disadvantages:

- Pushes us toward more note-taking and less listening.

Method 4: Bring to court many blank chapter pages in the form we have adopted for our prewritten chapters. When in direct we hear something on which we might wish to cross, write the name of the chapter at the top of a blank form and write a few questions that we might use in cross.

Advantages:

- Our notes are in a form we recognize and are organized by chapter. If we write facts that tie to the proposed chapter, we can quickly create chapters of use.

Disadvantages:

- Encourages us to think we can safely and skillfully create cross while in trial.
- Our spontaneous building of chapters can lead to more open-ended questions on the new material.

Well, there you have it. Our best shot on a difficult aspect of trial work. Pick one of these methods or develop your own. If you find one that works well for you, let us know.