

# CHAPTER 12

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### **§12.01           The Strategy of Sequencing Cross Chapters**

A great benefit derived from our preparation of cross in the chapter method is our ability to order and reorder the chapters into sequences we believe will be beneficial. The strategy of sequencing our cross is built upon our realization that the same chapters of cross performed in a more thoughtful order produce better results. There are many options on how to sequence our chapters in any particular cross and there is rarely one best sequence.

We have multiple goals in sequencing. The strategy of sequencing a cross is integrally tied to the concept that we can cause a jury to pay greater attention to certain facts. We want to emphasize our most valuable chapters. Next, we want to order our chapters so that we can better control a hostile witness by channeling the witness into many constructive chapters in which they will agree with our leading questions, and fear our potential impeachments. Sequencing strong chapters that clarify to the judge our theory and our ability to impeach also encourages a judge to grant greater leeway in our examinations. This strategy also can keep a hostile witness off balance and more efficiently attack a witness's credibility or demonstrate motive, interest and bias.

In addition, when we intend to use chapters where there is a higher risk that the witness will disagree with our facts, we can surround these chapters with safe material and thereby both encourage the witness to affirm our truthful leading questions without evasion and provide us with safe chapters to which we can transition if the witness begins to fight. We can use sequences to establish greater control of the witness and thereby diminish the risk that the witness will answer non-responsively in more difficult areas of cross.

### **§ 12.03           Integrating New Chapters During Trial**

When a witness offers up a new story on direct or a new fact of importance, we can put one note onto the appropriate chapter page. Then when we rise to perform the cross, the note will be where it is needed: on the page of the chapter to which it relates.

Alternatively, we can bring blank chapter forms to court. When we hear an answer on direct that we believe can be made into a chapter without undue difficulty or risk, we can write the chapter title on the blank form and jot a few notes into the question section of the form. Should we elect to cross on this new material, at least we do so in as organized a form as the very brief time allows.

### **§ 12.07           Do Not Repeat or Follow the Direct Sequences**

When we cross from our notes taken during the direct, we are "chasing the direct." When we chase the direct our cross is largely dictated by both the order and the items developed in direct. But the direct cannot be the best game plan for our cross. While our notes on the direct have utility, their utility is as an addendum to our prepared chapters of cross, not as a substitute for our planned sequence.

### **§ 12.09           Establish the Role of the Witness in Our Theory**

### **§12.10           Begin the Cross with Chapters That Are Predictably Safe**

**§ 12.14            When Developing a Longer Story Utilizing a Chapter Bundle, Develop the Bundle in Chronological Order**

Chapter bundles are groups of chapters that must be done together in order to complete a coherent picture of a single event. It is still important to present each chapter fully, and to prove its factual goal. However, each chapter cannot be understood in isolation, but needs to be performed in a sequence with the other chapters in its bundle. We assist the jury by presenting all chapters of the bundle one after the other. While each chapter may have its own goal, that goal can best be understood in connection with the other goals of the other chapters within the chapter bundle.

**Chronological order is the appropriate way to sequence the chapters of a chapter bundle.** We assembled the chapter bundle in order to bring together several chapters to tell a larger story. That story needs to be told chronologically, though the bundle itself need not be placed in our sequence of cross in its chronological position.

Some topics simply cannot be split up because they will make no sense. This customarily occurs when a series of events in a case can only be understood when the several events are seen in relation to each other. For instance, in a personal injury action, a chapter about the moments before impact, a chapter on the actions and inattention of the driver before impact, a chapter on the first view of the car about to be struck, and a chapter concerning the speed the defendant driver was traveling all fit together. Similarly, in describing how a particular corporate decision was arrived at, how a meeting proceeded, or how a scientific test was done, chronological order is the sensible method.

Chronological order is usually the preferred approach when developing the existence of motive, interest, or bias. Chronological order is also useful in developing a sequence of the chapters concerning the topic of a prior felony conviction or the granting of immunity. In this case, internal chronological order provides a framework of understanding for the jury. That is to say, it may well be best to show how the witness sought immunity in this case or how the witness developed a bias toward your client by telling that individual story in chronological order. However, that chapter bundle need not be performed at the chronological point at which that series of events occurred within the entire sequence of the overall cross.

In a commercial case the development and circulation of a particularly important memo may have great meaning and involve many chapters. In order for the overall topic to make sense and to get the most benefit from the evidence it is necessary that the chapters concerning this one memo be performed one after the other. A great deal of context will be lost if these chapters are separated and spread over the course of the cross. This grouping of chapters is a chapter bundle.

**§12.15            Integrate Our Theme Early and Often**

The importance of developing a theme is discussed in Chapter 3, *Developing, Promoting, and Employing Our Theory of the Case*. Having selected a theme during pretrial preparation, we begin ingraining that theme in the jury's mind as early as possible. One method is to craft chapters of the cross that contain the theme phrase or its variants. If we perform one of these chapters early in our cross, we allow the jurors to see the tie between the theme we established in our opening statement and the facts that generate our theme.

By performing a theme chapter at the very onset of the cross, we lead the jury to more vividly recall that portion of the cross. Our early use of a theme chapter sets a tone for the entire cross to come, which in turn sets a tone for the overall case (see Chapter 30, *Employing Primacy and Recency* (electronic only)).

If we intend to compel a snitch/witness to call himself a liar, it is best to get him to do so as often as possible throughout the cross. We use chapters in which the witness lied. We can also divide a single statement that contains several lies and ask the witness to confirm a fact at a time: “That too was a lie?” If our theme is that the victim could have stopped the fight, but escalated it at every opportunity, chapters containing that theme (“But you didn’t stop . . .”) could be spread throughout our cross.

**§12.16            When Attacking Credibility, Attack Very Early in the Cross**

In general, when attacking credibility, our attack should begin early in the cross so as to weaken the credibility of the witness. If instead, we begin with areas where the witness can easily try to deceive, or repeat their own version of events, the witness has an opportunity to bolster his own credibility. The more time a witness has to develop his credibility, the more effort and material will be required in cross to reverse the jury’s initial favorable impression.

**§12.17            Show Bias, Interest, or Motive Early in the Cross**

When a witness has a pronounced bias or motive for testifying, it is best to reveal it early in the cross. Again, by revealing bias, interest, or motive to the jury in the opening statement, we precondition the jury to disbelieve or withhold judgment about belief during the direct. The jury will factor in the demonstrated bias throughout the cross.

**§12.18            When Numerous Impeaching Chapters Are Available, Take the Cleanest Impeachment First**

**§12.20            Perform the Most Relevant Impeachment Before Using Less Relevant Impeaching Chapters**

When several impeaching chapters are available, it is best to lead with those impeachments that most directly bear on the competing theories of the case.

In applying this guideline, the issue facing us is not “can it come in?” but, among all the things that are admissible, which impeachment most benefits the theory of the case? It is in that special sense that the term “relevant” is used in this guideline.

**§12.21            Regardless of Importance, Use Clearly Admissible Chapters of Impeachment Before Attempting Impeachments That Might Be Ruled Inadmissible**

When numerous impeaching chapters are available, first use those chapters of impeachment that are undeniably admissible. We generate momentum for our cross by leading with evidence that does not provoke an objection. By using clearly admissible chapters of impeachment first, the impeaching evidence rolls in to begin the damage of the witness. By scoring with chapters that crisply and fairly impeach the witness, we make the witness’s credibility subject to further attacks, and thereby

psychologically broaden the bounds of admissibility. The witness who has been successfully impeached on several items is more vulnerable to attack when we reach chapters at the edge of admissibility.

**§12.22 Use the Most Easily Conducted Impeachment Before Attempting Complex Impeachments**

Some impeachments, though relevant and admissible, are cumbersome. The story may be difficult to tell, the significance of the answer may be unclear without further elaboration, or the impeachment may only have meaning when considered in conjunction with testimony not yet introduced. For any of these reasons, some chapters of impeachment are simply more difficult to perform than others. In such instances, it is advantageous to begin with impeachment that can be cleanly performed. In this way, the witness is immediately put on notice that we are able to impeach easily.

**§12.23 Behavior Is Molded by Consequences: Use Safe Chapters and Impeachments to Control the Witness**

A principle of psychology is that behavior is molded by consequences. Every successful impeachment leads the witness to a better understanding that the best way to avoid further embarrassment is to concede the truth. This fear on the part of the witness becomes stronger the more times punishment through impeachment has been administered. We establish greater control and thereby lower risk through preparation for possible impeachment. A witness who has already been impeached based on an inconsistent answer, a witness who has already been hemmed in by a series of tight, leading questions, a witness who has tried to evade answering only to be confronted with their own earlier statement has learned to be more wary of us and less willing to challenge our accurate leading question.

**§12.31 Do Not Give Verbal or Behavioral Cues That a Chapter Has Increased Risk**

In introducing a chapter with increased risk, it is important that we cross in a manner that is consistent with the safe chapters previously performed. We signal weakness when we hesitate or become equivocal in our tone or phraseology. It is especially unwise to abandon the leading question format as we signal we are unsure of our facts.

**§12.34 Never Lead or Conclude a Cross With a Risky Chapter**

No matter how strong a start or finish this risky chapter would be, if successful, it is not worth the risk. If risky material is used to lead our cross, this encounter will set the tone for the entire cross to come. If the witness “wins” on this first encounter, he will discover the benefits of being combative and will, therefore, revert to a combative posture throughout the cross. Worse, the jury immediately decreases their belief in our credibility.

**§12.37 Never Let a Witness Force a Change in Sequence**

Prior to trial, when all our powers of concentration are focused, we have placed the chapters into what is believed to be a useful sequence. Now, in the heat of trial, during direct or cross, the witness has said something that angers us, or something new, or seems to be volunteering testimony that fits very nicely with written chapters that we had intended to perform at some later time. There is a natural tendency to jump from what was planned to what the witness is now saying. If we do this out of a desire to show

the witness that we are prepared in that area, to one-up the witness, we act out of ego not out of need. We must ordinarily resist the temptation and stick to the chapter sequence we prepared, while observing the following guidelines (see Chapter 29, *Recognizing and Controlling Bait*).

**§12.38            Cross-Examining Counsel May, for Good Reason, Change a Sequence**

In the midst of cross, more things can go wrong than go right through a reordering of chapters. Have faith in our pretrial judgments. If our chapters are left in the sequence in which they were planned, we will inevitably get to all of the material eventually and will get to the material in an order that in calmer times made good sense.

**§12.40            Before or During Cross, the Cross-Examiner May Safely Abandon or Add Previously Written Chapters**

Simply because we have written a chapter does not mean that we must perform the chapter. Sometimes the direct settles an issue on which we intended to cross. The chapter written to exploit that issue may no longer be necessary, useful or safe. For any such reason, it is entirely acceptable to set aside our prepared material. Similarly, sometimes we draft chapters that seem to lack vitality. They may have been written with the hope that the witness will change their story, open a door, or otherwise create a circumstance in which the chapter can be pursued. If, within the direct or the cross, Circumstances change and the stored chapters appear to have utility, it is also appropriate to pick them up from the table and add them to the cross being performed.

**§12.43            Consider Ending Cross With a Theme Chapter**

**§12.44            Conclude the Cross Using the Chapter or Chapter Bundle Written as the Closing Sequence**

**§12.45            End With a Safe and Useful Chapter**