



# CROSS COUNTRY

BY LARRY POZNER



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## Form Follows Function, Favors Folders

**“Form follows function.”**

— **Louis Sullivan**

Architect of some of the earliest skyscrapers

For years, I have organized my cross-examinations in folders. Each folder contains the chapters on that topic and highlights copies of the exhibits referenced in those chapters. A chapter is a group of leading questions that establishes logically related facts. The facts create a context in which the fact finder can understand the goal of the chapter and its relationship to the competing theories of the case. Folders always worked. So, of course, I decided to try something new.

At my latest trial, I conducted several cross-examinations from individual witness notebooks. Each witness notebook contained my chapters of cross behind a tab showing the general nature of that bundle. The purpose of a chapter is to tell one small story that provides the fact finder with the context necessary to realize how that small story helps the defense team’s theory of the case or undermines the opponent’s theory of the case. A chapter bundle is a group of related chapters. The bundle reveals several aspects of an event through the stories in each individual chapter. For example, in an assault case in which the defense is self-defense, the story of the alleged victim swearing at the defendant is a chapter. A chapter bundle is that chapter, told among several chapters, showing additional aspects of the fight that are all favorable to the defense.

The major impetus for my change to notebooks was that my chapter forms had been three-hole punched. I abandoned a good system so that I might take advantage of pre-drilled holes. (As trial approaches, I frequently adopt time-saving techniques that do not save time.) In separate note-

books I had all the exhibits that I might reference for each witness. These were organized by exhibit number and description.

Result: What was I thinking? Folders worked well. Notebooks proved less flexible and physically cumbersome. No contest. I am going back to folders.

A trial notebook that includes all our chapters for all the witnesses contains too much that is not immediately needed. Moreover, such a notebook is physically unwieldy. Individual witness notebooks — containing all the potential chapters for each witness — are not much better. The very act of three-hole punching the chapters and placing them in a witness notebook tends to lock in a sequence of presentation. In addition, the trial notebook method limits the ability to extract a particular page or entire chapter we either immediately need or want to temporarily or permanently skip.

In organizing cross-examination using the folder method, we name the chapter bundles and drop into that folder all the pages of cross on that area. By placing cross chapters into appropriately titled separate folders, it is easier to rearrange the order of our cross. When we see a chapter bundle we wish to omit or delay, we only need to place the folder aside, secure in the knowledge that if needed it can be easily located. We can take to the podium a Redweld® expandable folder containing the folders of all our prepared chapter bundles. In a long cross-examination, we might elect to take up only the first several chapter bundles. After performing cross-examinations in those areas, we can move the used folders off our workspace and replace them with the next set of folders.

The fat notebook of exhibits we might reference during the cross of that witness is replaced by inserting into the appropriate bundle folder any document referenced in any of the chapters inside that folder. We highlight each document in a folder to show *just the material in that document*

*relevant to the chapters in that folder.* For example, if we need to impeach an identification witness from his written statement, a copy of the statement is included in that folder with highlighting of the potential prior impeaching material on that one area.

In a case alleging driving under the influence, there may be chapter bundles on how the “walk and turn” test was unfairly graded, how the horizontal gaze nystagmus test was conducted out of conformity with the manual, and how the defendant’s driving conduct was generally good. The officer’s report — describing pulling the defendant over and administering the roadside tests — will be inserted into all folders where it may be relevant. Each folder contains the report, but we highlight only what is necessary for that chapter bundle. The highlighted document may be capable of introduction or it may be a document that simply supports the cross-examination, such as a police report, witness statement, or transcript of a 911 call. The simplicity of finding just the necessary highlighted material trumps the effort required to reproduce the same document in multiple folders.

Organizing cross in individual topic folders, including any potentially necessary documents, provides easy form, flexibility, and dependability. None of this pretends to be “gee whiz” thinking. But in trial I am not looking to generate “gee whiz.” I am hoping for “thank goodness.” ■

### About the Author

**NACDL LIFE MEMBER** Larry Pozner is co-author (with Roger Dodd) of *Cross-Examination: Science and Techniques* (3d edition 2018). He lectures throughout the country and is an NACDL Past President.

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