

## Set ‘Em Up and Knock ‘Em Down – Using Cross to Win at the Depo and Trial

*Presented for S. Scott Haynes  
and the AAML*

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Matt Dodd

“Cross-examination is the hallmark  
of our system of justice  
because it produces truth.”

*State v. Clark*, 1998 MT 221, ¶ 23

## What is the Purpose of our Cross?

Every cross is driven by our **client’s  
narrative**, the **theory of our case**, and  
the **themes** that support our theory

## Deposition vs. Trial

- ❖ **Strict rules of relevance** at trial vs. **expanding relevancy** at the deposition (even if not admissible)
- ❖ **Formal rules of evidence** at trial vs. **free form structure** of the deposition
- ❖ Judge who **rules in real time** vs. **self-policed** guidelines

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## Destructive / Constructive Cross

**Destructive Cross** — the use of cross-examination to **attack our opponent's theory**

- ❖ Focuses on our opponent's theory

**Constructive Cross** — the use of cross-examination chapters to **tell our client's narrative and support our theory of the case**

- ❖ Focuses on our theory

## What is Your Client's Narrative?

**Theory of the case** — a one-sentence version of your narrative; the "elevator pitch"

- ❖ "It is in the kids' best interest to live with mom because she provides for them — physically, emotionally, and financially."

**Theme(s)** — a recurring thought, idea, catch-phrase that supports / sums up your theory

- ❖ "This is a case about a 'runaway mom.'"

## The Three Rules

1. Leading questions only
2. One new fact per question
3. Logical progression to one specific goal

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## The Three Rules at the Depo

1. Leading questions ~~only~~ sometimes
2. One new fact per question
3. Logical progression to a specific goal

The deposition provides **flexibility, freedom, and an environment of controlled risk** to move beyond the three rules, when appropriate.

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## The Chapter Method

- ❖ Stories **imprint information** into memory
- ❖ Cross-examination is a **series of stories**
- ❖ Cross-examination allows you to **continue the narrative** you started with opening
- ❖ Constructive cross-examination **keeps our narrative in the front** of the fact-finder's minds
- ❖ The Chapter Method **gives structure** to our narrative

## What is a Chapter?

A **group** of leading questions...

...that **progress in a logical sequence**,  
**start generally**, and...

...become **increasingly specific**...

to establish a **mental image** in the listener

## Purpose of Your Cross at the Depo

**Before** we cross-examine at a depo,  
we must **establish goals**—

- ❖ Conduct discovery
- ❖ Cement the witness's story
- ❖ Mine for admissions

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## Teaching at the Deposition

**Who** are we teaching?

- ❖ The witness
- ❖ Opposing counsel
- ❖ The folks paying the bills

## Teaching at the Deposition

**What** are we teaching them?

- ❖ How to answer our questions
- ❖ Failure to answer is painful
- ❖ All your witnesses belong to us
- ❖ Our theory is more compelling
- ❖ Trial = more cost / more risk

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## Types of Chapters at the Deposition

Two different ways to categorize your chapters at the deposition:

1. Chapters defined by the **question type**
2. Chapters defined by the **purpose of the chapter**

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## Chapters Based on Question Type

1. **Planned** chapters of **leading** questions
2. **Planned** chapters of **open-ended** questions
3. **Planned hybrid** chapters
4. **Spontaneous** chapters of **leading** questions
5. **Spontaneous** chapters of **open-ended** questions
6. **Spontaneous hybrid** chapters

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## Chapters Based on Purpose

**Constructive Chapters** — chapters that focus on promoting our client's narrative and theory of the case

**Destructive Chapters** — chapters that focus on attacking, destroying, or undermining our opponent's narrative and theory of the case

**Contrast Chapters** — chapters that focus on contrasting the undisputed facts against our opponent's narrative and theory of the case

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## Scripted vs. Spontaneous Chapters

❖ **Scripted chapters** — chapters created before the deposition from **known facts and events**

❖ **Spontaneous chapters** — chapters created in the midst of the deposition **based on the witness's answers**

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## Further Learning

- Techniques applicable to depositions and trials (family / civil / criminal)
- Multiple, real life examples of techniques discussed today

