Set 'Em Up and Knock 'Em Down – Using Cross to Win at the Depo and Trial  Presented for S. Scott Haynes and the AAML October 9, 2023	
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"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 <b>client's narrative</b> , the <b>theory of our case</b> , and	
the <b>themes</b> 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

# 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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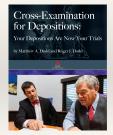
# Scripted vs. Spontaneous Chapters

- \* Scripted chapters chapters created before the deposition from known facts and events
- \* Spontaneous chapters chapters created int 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



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