

WORKSHOP SESSION: AN INSIDE LOOK AT HOW GREAT LAWYERS WIN AT DEPOSITION¹

SHANE READ

U.S. Attorney's Office
1100 Commerce St., Third Floor
Dallas, Texas 75242
dshaneread@gmail.com
214-499-0390

¹ The attached materials are excerpts from *Winning at Cross-Examination: A Modern Approach to Depositions and Trials* (Westway 2020) and are provided for one time use only and are subject to copyright.

ACCLAIM FOR SHANE READ'S TEXTBOOKS

Shane Read has tried over 100 trials to verdict and is a bestselling and multiple award-winning author who also teaches highly acclaimed litigation courses throughout the United States. *Turning Points at Trial* is an award-winning and bestselling textbook, and the bestselling *Winning at Deposition* won the highest award from the Association of Continuing Legal Education for a legal textbook. He is the only author to win this prestigious award twice.

In Read's latest textbook, *Winning at Cross-Examination*, he brings you innovative strategies and skills to use at your next deposition or trial.

WINNING AT CROSS-EXAMINATION

"As Shakespeare said, 'If you can't run with the big dogs, stay on the porch.' Not only does Read's *Winning at Cross-Examination* give you the tips you need to run with the pack, he gives you real life examples of cross-examinations by the big dogs."

—Dicky Grigg, Past President, International Academy of Trial Lawyers

"Shane Read has done it again. Building on his model of teaching through great examples, he has assembled the perfect 'how to' guide."

—Tracy W. McCormack, Director of Advocacy,
The University of Texas School of Law

"*Winning at Cross-Examination* is so full of so many wonderful things that it is almost impossible to do justice to it with simple descriptions. It should be an indispensable resource for young, aspiring trial lawyers, but trial lawyers of any age or experience would do well to refer to it regularly to achieve more focused and meaningful cross-examinations."

—Lewis Sifford, Past President, American Board of Trial Advocates

"In this brilliant analysis of spectacular trial successes, Shane Read persuasively focuses on the pivotal role of a unifying theme, a carefully crafted bottom-line message, rooted in virtue and woven creatively into a compelling story. From that indispensable foundation, the trial lawyer's entire house—particularly the all-important role of effective cross-examination—is built. No courtroom 'house builder' of our time is more skilled than Mark Lanier, the living embodiment of the author's 'how to' guidance, who repeatedly strides across the pages of this eminently readable, extraordinarily practical book."

—Ken Starr, Former U.S. Solicitor General

WINNING AT CROSS-EXAMINATION

**A Modern Approach for
Depositions and Trials**

SHANE READ

CONTENTS

INTRODUCTION	1
---------------------------	----------

PART ONE The Principles

CHAPTER 1	DEVELOP A WINNING CASE STRATEGY	5
1.1	THREE QUESTIONS YOU MUST ANSWER TO DEVELOP A CASE STRATEGY	5
1.2	KNOW THE LAW	5
1.3	WHAT IS YOUR BOTTOM-LINE MESSAGE?	8
1.4	HOW ARE YOU GOING TO TELL YOUR STORY? ..	14
1.5	CREATE A TRIAL PLAYBOOK.....	23
1.6	CHAPTER CHECKLIST	24
 CHAPTER 2	 ESSENTIAL TECHNIQUES OF CROSS- EXAMINATION	 27
2.1	DEPOSITION VERSUS TRIAL	27
2.2	MOST CROSS-EXAMINATIONS ARE SUICIDAL AND NOT HOMICIDAL	28
2.3	FOUR MYTHS ABOUT CROSS-EXAMINATION.....	28
2.4	IRVING YOUNGER'S TEN COMMANDMENTS ARE WRONG	31
2.5	HOW TO CHOOSE YOUR TOPICS FOR CROSS	40
2.6	DO YOU NEED TO CROSS?	44
2.7	THE 10 PERCENT VERSUS 65 PERCENT PRINCIPLE.....	48
2.8	HOW TO PREPARE A CROSS-EXAMINATION	49
2.9	HOW TO ASK QUESTIONS	54
2.10	HOW TO AVOID OBJECTIONS	65
2.11	CHAPTER CHECKLIST	66

CHAPTER 3	ADVANCED TECHNIQUES.....	69
3.1	LESS IS MORE	69
3.2	RULE OF THREE.....	70
3.3	USE INSIGHTS FROM BEHAVIORAL SCIENCE TO PERSUADE JURORS	71
3.4	YOUR DEMEANOR	78
3.5	HIGHLIGHT WHAT WAS NOT ASKED ON DIRECT	79
3.6	IMPEACHMENT WITH PRIOR INCONSISTENT STATEMENTS.....	79
3.7	THE ABCs OF IMPEACHMENT	81
3.8	THE BIGGEST MISTAKE LAWYERS MAKE DURING IMPEACHMENT.....	85
3.9	IMPEACHMENT WITH PRIOR INCONSISTENT OMISSION.....	86
3.10	PROVING UP IMPEACHMENT.....	88
3.11	USE COMMON SENSE TO BUILD YOUR QUESTIONS	88
3.12	MASTER THE WITNESS WHO EVADES THE QUESTION	93
3.13	THE “I DON’T REMEMBER” WITNESS	99
3.14	THE CHARACTER WITNESS.....	100
3.15	THE WITNESS WHO QUIBBLES.....	101
3.16	THE THREE CAMERA DEPOSITION	105
3.17	EXAMPLES FROM THE O.J. SIMPSON CIVIL CASE.....	107
3.18	CHAPTER CHECKLIST	116
 CHAPTER 4	 THE EXPERT WITNESS.....	 121
4.1	REQUIREMENTS OF THE DAUBERT STANDARD	121
4.2	DISCOVERY QUESTIONS TO ASK AT A DEPOSITION	122
4.3	PREPARING FOR CROSS-EXAMINATION.....	123

4.4	KEYS TO ATTACKING AN EXPERT EFFECTIVELY	127
4.5	CROSS OF AN EXPERT IN ZIMMERMAN TRIAL.....	138
4.6	MARK LANIER CROSS-EXAMINES AN EXPERT	141
4.7	CHAPTER CHECKLIST	142

PART TWO

The Masters

CHAPTER 5	TOM GIRARDI CROSS-EXAMINES IN <i>STOW V. DODGERS</i>	147
5.1	TOM GIRARDI.....	147
5.2	GIRARDI'S STRATEGIES FOR CROSS- EXAMINATION	148
5.3	BACKGROUND OF <i>STOW V. LOS ANGELES DODGERS</i>	152
5.4	CROSS-EXAMINATION OF DEFENDANT'S EXPERT	156
5.5	CROSS-EXAMINATION OF THE HEAD OF OPERATIONS OF DODGER STADIUM.....	169
5.6	AFTERMATH	179
5.7	CHAPTER CHECKLIST	180

CHAPTER 6	MARK LANIER CROSS-EXAMINES DEPUY'S HEAD OF CLINICAL RESEARCH	183
6.1	THE PLAINTIFF'S LAWYER, MARK LANIER.....	183
6.2	LANIER'S STRATEGIES	184
6.3	BACKGROUND OF THE DEPUY HIP IMPLANT LITIGATION	190
6.4	CROSS OF DR. PAM PLOUHAR.....	192
6.5	THE POWER OF LANIER'S VISUAL AIDS	216
6.6	CHAPTER CHECKLIST	218

CHAPTER 7	MARK LANIER CROSS-EXAMINES THE PRESIDENT OF DUPUY	221
7.1	CROSS OF ANDREW EKDAHL	221
7.2	USING THE “SIMPLE TRUTH” IN A QUESTION ..	246
7.3	CHAPTER CHECKLIST	246

CHAPTER 8	MARK LANIER CROSS-EXAMINES DR. THOMAS SCHMALZRIED	249
8.1	CROSS-EXAMINATION OF DR. THOMAS SCHMALZRIED	249
8.2	SUMMARY OF MARK LANIER’S CROSS-EXAMINATION STYLE	271
8.3	CHAPTER CHECKLIST	273

PART THREE

Famous Trials

CHAPTER 9	THE PROPOSITION 8 TRIAL <i>PERRY V. SCHWARZENEGGER</i>	277
9.1	SUMMARY OF <i>PERRY V.</i> <i>SCHWARZENEGGER</i>	278
9.2	SUMMARY OF OPENING STATEMENTS	279
9.3	SUMMARY OF DIRECT EXAMINATION OF BLANKENHORN (PART I).....	280
9.4	BOIES CONDUCTS VOIR DIRE OF THE EXPERT	281
9.5	SUMMARY OF BLANKENHORN DIRECT EXAMINATION (PART II).....	287
9.6	BOIES’S CROSS-EXAMINATION OF BLANKENHORN	290
9.7	SUMMARY OF BOIES’S TECHNIQUES	306
9.8	CHAPTER CHECKLIST	307

CHAPTER 10	THE O.J. SIMPSON AND GEORGE ZIMMERMAN TRIALS.....	309
10.1	BACKGROUND OF <i>PEOPLE V. O.J. SIMPSON</i> ...	309
10.2	CROSS-EXAMINATION OF MARK FUHRMAN	310
10.3	CROSS-EXAMINATION OF OFFICER DENNIS FUNG	315
10.4	BACKGROUND FOR <i>STATE V. ZIMMERMAN</i>	322
10.5	CROSS OF JOHN GOOD	325
10.6	CHAPTER CHECKLIST	333
ENDNOTES		337
ACKNOWLEDGMENTS		339
ABOUT THE AUTHOR.....		341
INDEX		343

CHAPTER SEVEN

Mark Lanier Cross-Examines the President of DePuy

“Let’s see if this document bears out your view of it or mine.”
—Mark Lanier

Andrew Ekdahl, who was president of DePuy during the relevant time of this litigation, is the second witness whose testimony we will study from the DePuy hip implant trials. This witness presented many different challenges for Lanier than the ones we saw in the previous chapter. Ekdahl was obviously ranked higher in the company than Plouhar, which made the stakes very high. He also resisted answering Lanier’s questions in a different manner than Plouhar. As a result, you will learn from the different techniques that Lanier used with Ekdahl. You will also see the different demonstrative exhibits that Lanier used, which highlight Lanier’s versatility and effectiveness.

7.1 CROSS OF ANDREW EKDAHL

Andrew Ekdahl appeared at the trial via satellite. After he was sworn in and stated his name and where he worked, Lanier began his cross as follows:

Lanier Announces His Theme for Cross

*Q. I want to get right into things with you, and we will explore a little bit more about your qualifications as we go along, but let’s start out with a general premise. And **this is my theme for my cross-examination** of you—and so the jury is clear, you are what we call an adverse witness. You work for the other side, don’t you?*

A. Yes.

Q. We served you with a subpoena to force your testimony today?

A. I believe you served my attorneys with a subpoena.

CHAPTER ROAD MAP

- Draw pictures of your themes to give them more impact.
- Learn several phrases you can use when a witness does not answer a simple question.
- Learn how to make the complicated simple.

Q. They accepted it on your behalf, but it was a subpoena; — you are here under a court order to testify, aren't you?

A. Yes.

Lanier makes it very clear to the jury that Ekdahl is not a neutral witness. Ekdahl's motives are not aligned with Lanier's. Use this technique at your next trial. Imagine how happy the jury was to hear Lanier's words, "I want to get right into things with you," rather than the lengthy preambles that they hear from most other lawyers.

*Q. All right. Here's my theme for you, sir: **I want the jury to hear from you how marketing and sales ran the company during the relevant time periods, not science.** You understand what I mean when I say that?*

A. I disagree with it, but, OK.

As briefly discussed in chapter 3, Lanier does not make such subtle points on cross-examination with the hope that he can argue them more strongly in closing—as Irving Younger suggests you should do in his ten commandments. Instead, Lanier does just the opposite, and with great effect. He boldly tells the jury—as he did earlier when questioning Plouhar and as we will see him do later with Dr. Schmalzried—what his theme is for the cross.

Why will Lanier win this cross? You should know the answer to this question by now. But if not, here's the answer: He has chosen topics that he can win on because the documents (e.g., trial exhibits, such as prior statements by the witness) and common-sense reasoning will back him up. Cross-examination is really that simple. But Lanier executes these strategies very effectively.

In your next cross—whether it is in deposition or at trial—start it just the way Lanier did: "I want the jury to hear from you. . . ."

Q. I know you disagree with it, but you at least understand what I mean, right?

A. Believe so.

*Q. All right. **So let's put it to the test. . . . Have you ever heard the expression "Put your money where your mouth is"?***

Lanier links this line of questioning about budgets, a topic that tends to be rather dry, to a famous everyday saying, so that the jury can understand his theme and remember it during deliberations. The phrase also aligns him with the jury. That is, Lanier is going to ask common-sense questions, the jury is going to apply its common-sense reasoning, and the witness will need to answer using common sense or suffer the consequences.

A. Yes.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Workshop Session: An Inside Look at How Great Lawyers Win at Deposition

Also available as part of the eCourse

[2019 Winning at Deposition eConference](#)

First appeared as part of the conference materials for the
2019 Winning at Deposition: Skills and Strategy session

"Workshop: An Inside Look at How Great Lawyers Win at Deposition"